February 1981

Commission Decisions

2-09-81	Cleveland Cliffs Iron Co., Inc.	VINC 79-68-M	Pg. 291
2-09-81	Burgess Mining & Construction Corp.	SE 79-42-R	Pg. 296
2-20-81	The Anaconda Co.	WEST 79-128-M	Pg. 299
2-24-81	Everett Propst & Robert Stemple	MORG 76-28-P	Pg. 304
2-27-81	Easton Construction Co., Inc.	KENT 80-219	Pg. 314

Administrative Law Judge Decisions

2-02-81	Consolidation Coal Co.	WEVA 80-360-R	Pg. 318
2-02-81	Maben Energy Corp.	WEVA 80-674-R	Pg. 327
2-03-81	Gold Seekers (East Fork Creek Mining, Tom Williams)	WEST 80-216-M	Pg. 342
2-04-81	Magma Copper Co.	WEST 79-79-M	Pg. 345
2-05-81	Allied Chemical Corp.	HOPE 78-722-P	Pg. 360
2-05-81	Peabody Coal Co.	CENT 80-298	Pg. 392
2-05-81	Island Creek Coal Co.	KENT 79-113	Pg. 396
2-05-81	Westmoreland Coal Co.	VA 81-4-R	Pg. 402
2-09-81	Consolidation Coal Co.	PENN 79-38-R	Pg. 405
2-10-81	Pioneer Uravan, Inc.	WEST 80-63-M	Pg. 422
2-10-81	B & N Construction, Inc.	WEST 80-226-M	Pg. 427
2-11-81	Belva Coal Co.	WEVA 80-708-D	Pg. 433
2-11-81	Monterey Coal Co.	WEVA 81-203-R	Pg. 439
2-12-81	Wayne Boich, d.b.a., W B Coal Co.	LAKE 80-105-D	Pg. 443
2-12-81	Clinchfield Coal Co.	VA 80-7	Pg. 457
2-13-81	United States Steel Corp.	PENN 79-122	Pg. 463
2-19-81	Local Union No. 5899 (UMWA) v. Tansy Beth Mining Co.	KENT 79-223-C	Pg. 466
2-19-81	Kentucky May Coal Co.	KENT 80-166	Pg. 474
2-19-81	White Pine Copper Div., Copper Range Co., Local 5024, United Steel Workers of America	LAKE 79-202-M	Pg. 481
2-19-81	Consolidation Coal Co.	WEVA 80-677	Pg. 487
2-20-81	Wright Coal Co.	KENT 80-297	Pg. 496
2-20-81	South East Coal Co.	KENT 80-327-R	Pg. 503
2-23-81	Island Creek Coal Co.	KENT 79-336	Pg. 509
2-23-81	Martin County Coal Corp.	KENT 80-222-D	Pg. 526
2-23-81	United Castle Coal Co.	VA 80-99-D	Pg. 560
2-23-81	Magma Copper Co.	WEST 80-314-M	Pg. 584
2-25-81	Scotia Coal Co.	KENT 80-235	Pg. 589
2-26-81	J & R Coal Co.	LAKE 80-302	Pg. 591
2-27-81	W. R. Grace & Co.	SE 80-98-RM	Pg. 601
	(attachment to SE 80-98-RM)		
1-21-81	W. R. Grace & Co.	SE 80-98-RM	Pg. 602

Commission Decisions

FEBRUARY

The following cases were Directed for Review during the month of FEBRUARY:

Secretary of Labor, MSHA v. Quarto Mining Company, LAKE 80-311, 360, 384. (Judge Merlin, January 5, 1981)

Secretary of Labor, MSHA v. Oliver M. Elam, Jr., Co., Inc., VINC 78-447-P, etc. (Judge Lasher, January 9, 1981)

Secretary of Labor, MSHA v. Callanan Industries, Inc., YORK 79-99-M. (Judge Melick, January 12, 1981)

Secretary of Labor, MSHA v. Quarto Mining Company, LAKE 80-385. (Judge Merlin, January 21, 1981)

Secretary of Labor, MSHA v. Easton Construction Co., Inc., KENT 80-219. (Judge Melick, January 28, 1981)

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

Secretary of Labor, MSHA v. Harman Mining Corporation, VA 80-94-M, etc. (Judge Koutras, January 2, 1981)

U.S. Steel Corporation v. Secretary of Labor, MSHA, WEVA 81-33-R. (Judge Broderick, January 8, 1981)

Secretary of Labor, MSHA v. Lone Star Steel Company, CENT 79-403-M. (Judge Stewart, January 16, 1981)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. VINC 79-68- M
v.	:	VINC 79-240-PM
CLEVELAND CLIFFS IRON CO., INC.	:	

DECISION

This proceeding involves the interpretation of the metal and non-metallic safety standard, 30 CFR §55.9-22. In his decision, the administrative law judge concluded that Cleveland Cliffs Iron Co., Inc. (CCI) had violated the standard and assessed a penalty of $880. For the reasons stated below, we affirm the judge's decision.

The facts in this case are undisputed. On August 23, 1978, an MSHA inspector issued a citation alleging a violation of 30 CFR §55.9-22. That standard provides:

> §55.9 Loading, hauling, dumping
> * * *
> §55.9-22 Mandatory
> Berms or guards shall be provided on the outer bank of elevated roadways.

The citation stated that the operator had failed to provide berms for 1500 feet on the western side of a road to a lift station, and for 35 feet on one side of another road leading to a pit pump station. After a reinspection, the citation was modified to include an additional area of 200 feet on the eastern side of the lift station road. When the operator failed to abate the condition cited, a section 104(b) closure order was issued.

CCI filed a notice contesting the withdrawal order, and thereafter the Secretary filed a petition for assessment of a penalty for the alleged violation. The two proceedings were consolidated for hearing and decision. In his decision the judge concluded that the berm standard applies only to roadways used for loading, hauling and dumping. He noted that 30 CFR §55.9, which reads, "Loading, hauling, dumping," is a heading for the entire section. Thus he held that it defines the purpose and scope of the section, and limits the applicability of the standards contained within the subsections. He concluded, however, that the standard was applicable to the elevated roadways in question because

"the routine, systematic usage of the roadways shown by this record constitutes hauling." The judge then concluded that the standard requires berms for both banks of the elevated roadways in question. He reasoned that because the standard is intended to prevent injuries to drivers whose vehicles go over embankments, "[i]t would be anomalous if the standard were limited to one side of the road when the hazard is on the other side or on both sides." He refused to accept a construction based solely on the singular term "outer bank," explaining his usage by reference to the direction of travel: "The outer bank may be interpreted as the bank on the right side of the driver. Therefore, on roads carrying traffic both ways, both banks are the 'outer bank.'" Consequently, the judge held that a violation occurred, affirmed the withdrawal order, and assessed an $880 penalty.

CCI then filed a petition for discretionary review, which we granted. CCI, the Secretary and the United Steelworkers of America filed briefs with the Commission, and we heard oral argument. For the reasons that follow, we affirm the judge.

Two issues are before us:

(1) Did the judge err in concluding that CCI's use of the cited roads constituted "hauling" within the meaning of 30 CFR §55.9? 1/

(2) Did the judge err in refusing to limit application of 30 CFR §55.9-22 to a single outer bank of an elevated haulage roadway?

The judge found that although the roadways were not used for hauling ore and mine products, they were used regularly, usually three times a day and occasionally more often, for access to the pump stations and to transport replacement pumps to and from the stations. At times pick-up trucks and 1-ton flatbed trucks were driven on the roads. The drivers were usually alone, but occasionally men were transported. The judge concluded: "Thus, men, equipment and tools are transported along these roads on a regular though limited basis."

In the absence of a definition of "hauling" in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), or in the mandatory safety standards, the judge turned to a commonly accepted technical dictionary. He found the technical definition of "hauling" inapplicable because it was limited to activities in underground mining, 2/ and the standards in question clearly are not intended

1/ In support of the judge's result in this case, the Secretary alternatively argued that the berm standard applies even if the road was not used for loading, hauling or dumping, contending that the section heading does not limit the scope of the §55.9 standards. Because we conclude that the judge was correct in finding that the road here was used for hauling, we need not reach the Secretary's alternative argument in this case.

2/ "Hauling" is defined as the "drawing or conveying of the product of the mine from the working places to the bottom of the hoisting shaft or slope." A Dictionary of Mining, Mineral and Related Terms (Bureau of Mines, Department of Interior, 1968) at 531.

to be so limited. He found pertinent, however, the technical definition of "haulage", i.e., "the drawing or conveying in cars or otherwise, or movement of men, supplies, ore and waste both underground and on the surface." Dictionary of Mining at 531. This definition, he believed, "seem[ed] to include the activities on the road in question." We find no error. It is undisputed that the roads were used to haul men and replacement parts. We believe the term "hauling" should be broadly construed, and includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the normal mining routine. We agree with the judge that the roads to the lift and pump stations were used in that way.

We now turn to the question of whether the judge erred by not limiting application of the standard to a single outer bank of each elevated roadway. The standard states that "berms or guards shall be provided on the outer bank of elevated roadways." The judge found--and CCI does not dispute--that the roadways were elevated, in that one side of the road to the lift station was 35 to 40 feet above the adjacent terrain, sloping at a 45-degree angle. The other side was 5 to 8 feet above the adjacent terrain. The road to the pit pump station dropped 10 to 12 feet to a ledge on one side and 12 feet to a water-filled area on the other side. CCI contends, however, that the standard should be narrowly limited to elevated roadways having but a single exposed bank. The company argues that the drafters of the standard intended to limit its application to "typical" pit haulage roads having only one bank, as evidenced by the use of the singular form.

We are not persuaded by this argument. As noted by the judge, if protection were extended only to those elevated roads with one open bank, while elevated roadways with two open banks were not required to be bermed or guarded, miner safety would certainly be adversely affected. We note that the language of the standard does not clearly and unequivocally mandate that only elevated roads with one exposed bank be bermed or guarded. Absent clear language to the contrary, we are not prepared to adopt a construction of this standard, leading to an anomalous result that is inconsistent with promoting miner safety. We agree with the judge, therefore, that the standard applies to all elevated banks. Our interpretation of the term is supported by the rules of construction at 1 U.S.C. §1, which provides that words

imparting the singular may include the plural. See Barr v. U.S., 324 U.S. 83, 91 (1945) and 1 U.S.C.A. §1, Note 1 (1976 ed.). We find nothing in the context of the statute nor the language of the standard to preclude application of this rule. Our result is also consistent with the rule that remedial legislation and its implementing regulations are to be construed liberally. Consolidation Coal Co., 1 FMSHRC 1300, 1309 (1979).

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Distribution List

Ronald E. Greenlee, Esq.
Penisula Bank Building
Ishpeming, MI 49849

William Moran, Esq.
Trial Attorney
Mine Safety & Health Administration
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Arlington, VA 22203

Harry Tuggle
Safety & Health Department
United Steelworkers of America
5 Gateway Center
Pittsburgh, PA 15222

Ernest Ronn
United Steelworkers of America
706 Chippewa Square
Marquette, MI 49855

Honorable James A. Broderick
FMSHRC
Chief Administrative Law Judge
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 79-42-R
BURGESS MINING AND CONSTRUCTION CORPORATION	:	

DECISION

This proceeding involves the interpretation of 30 CFR §77.1605(k), a mandatory safety standard applicable to surface coal mines and surface work areas of underground coal mines. The standard provides:

§77.1605 Loading and haulage equipment; installations.

* * * *

(k) Berms or guards shall be provided on the outer bank of elevated roadways.

The Mine Safety and Health Administation (MSHA) cited Burgess Mining and Construction Company (Burgess) for failing to place guards along the sides of a vehicular road on a bridge crossing a river. Burgess contested the citation. The administrative law judge concluded that the standard did not apply to the road in question and vacated the citation. The Secretary filed a petition for discretionary review, which we granted. The Secretary and Burgess filed briefs, and we heard oral argument. For the reasons that follow, we reverse.

The facts are not in dispute. On May 9, 1979, an MSHA inspector issued a citation pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), alleging a violation of 30 CFR §77.1605(k). The citation stated that the operator had not provided guards on either side of a concrete bridge crossing the Cahaba River. The bridge was constructed by Burgess as part of its haulage road system from the mine site to its preparation plant.

The judge found that five to seven coal haulage trucks normally operate between the pit and preparation plant, with each truck making six to seven daily crossings of the bridge. Thus, the roadway on the bridge was used during the normal mining routine by vehicles conveying coal. The judge concluded, however, that the berm standard was not applicable to Burgess' bridge. Although he stated that the bridge could reasonably be found to be an elevated roadway, he held that the standard is limited to "roads cut along the side of a mountain, hill, pit wall, or earth bank, and not...to a bridge crossing a river."

The Secretary asserts that the judge incorrectly limited the application of the standard. We agree. In Cleveland Cliffs Iron Co., VINC 79-68-PM (February 9, 1981), we held that under the identically worded metal and non-metal berm safety standard, 30 CFR §55.9-22, berms or guards are required, whether the road has one exposed elevated bank or two. We find the same purpose and the same principles underlie 30 CFR §77.1605(k).

Burgess argues in further support of the judge's result in this case, that even if the standard is not limited to roads cut along the side of a mountain, pit wall, or the like, it nevertheless does not apply to a bridge crossing a body of water. It asserts, first, that a bridge is not a roadway and does not have "banks." We disagree. Nothing logically suggests why a roadway ceases being such when it crosses a bridge. "A bridge is nothing more than that part of a road which crosses a stream." Oregon Transfer Co. v. Tyee Construction Co., 188 F. Supp. 647, 649 (D. Ore. 1960). Further, the hazards addressed by the standard are certainly no less serious and in need of prevention when a vehicle is elevated over a body of water than when it runs along elevated ground. 1/ Burgess also asserts that MSHA's and its predecessor's longstanding failure to require guards on the bridge, at the same time the government enforced the standard as to other portions of this roadway, shows that the enforcing agency likewise interpreted the standard as not applicable to bridges. We do not agree that lack of enforcement alone 2/ constitutes an authoritative interpretation by MSHA of its standards, particularly where such an interpretation would lead to illogical results not suggested by the language of the standard.

Accordingly, we conclude that the judge erred in refusing to apply 30 CFR §77.1605(k) to the roadway crossing the bridge, and in vacating the citation. The citation is reinstated and affirmed, and the review proceeding is dismissed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ The judge noted that the water level of the river varies depending upon the amount of rainfall with the river overflowing the bridge surface several times each year, and, at various times, operator's trucks have crossed the bridge when the water was above the driving surface.
2/ Burgess agrees that the Secretary's lack of enforcement does not estop later enforcement if the standard is applicable.

Distribution

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

Fred M. Bainbridge, Esq.
1010 Massey Building
Birmingham, Alabama 35203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 20, 1981

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 79-128-M WEST 79-130-M
v.	:	WEST 79-137-M
THE ANACONDA COMPANY	:	

DECISION

We granted review of these three cases to determine whether the judge's decisions satisfied the requirements of section 8(b) of the APA, 5 U.S.C. §557(c), and our Procedural Rule 65, 29 C.F.R. §2700.65, and, if so, whether they are supported by substantial evidence. 1/ We find that they do not satisfy the APA and our rule and remand for findings of fact, conclusions of law, and the reasons for them.

The APA and our rule require findings of fact, conclusions of law, and supporting reasons in order to prevent arbitrary decisions and to permit meaningful review. As the D.C. Circuit has emphasized, these requirements "are not mere procedural niceties; they are essential to the effective review of administrative decisions." U.S.V. Pharmaceutical Corp. v. Sec'y of HEW, 466 F.2d 455, 462 (1972). Our function is

1/ 5 U.S.C. §557(c)(3) provides in part:

> All decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of--
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof. (Emphasis added.)

5 U.S.C. §557(c)(3) is applicable through §105(d) of the 1977 Mine Act, 30 U.S.C. §815(e)(Supp. III 1979), which provides for hearings in accordance with 5 U.S.C. §554.

Procedural Rule 65 provides in part:

> (a) Form and content of the judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of facts, conclusions of law, and the reasons or bases for them, on all material issues of fact, law or discretion presented by the record, and an order. (Emphasis added.)

essentially one of review. See 30 U.S.C. §823(d)(Supp. III 1979). Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively. See Duane Smelser Roofing Co. v. Marshall, 617 F.2d 448, 449-450 (6th Cir. 1980); U.S.V. Pharmaceutical Corp., supra; UAW v. NLRB, 455 F.2d 1357, 1369-1370 (D.C. Cir. 1971); Anglo-Canadian Supply Co. v. FMC, 310 F.2d 606, 615-617 (9th Cir. 1962); R.W. Service Systems, Inc., 235 N.L.R.B. No. 144, 99 L.R.R.M. 1281, 1282 (1978).

In the very brief decisions under review, the judge determined that the Secretary had not met his burden of proof to demonstrate violations of 30 C.F.R. §55.16-9. 2/ The three cases were heard at one time with several witnesses testifying on all three alleged violations. Each decision contained a few sentences summarizing the evidence and then a section labeled "discussion." Those discussions were virtually identical and stated:

> The burden of proving all elements of an alleged violation rests with MSHA, 5 U.S.C. §556(d). Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975), Olin Construction Company v. OSHRC, 575 F.2d 464 (2nd Cir. 1975).
>
> Where witnesses stand before the Court, equal in character, equal in interest, and equal in opportunity to know the facts, and they have made irreconcilable contradictory statements and neither is corroborated, there is no "preponderance". The party who has the burden to go forward has failed to sustain that burden. Bishop v. Nikolas, 51 N.E. 2d 828 (1943), and see Aluminum Co. of America v. Preferred Metals Products, 37 F.R.D. 218 (1965), aff'd 354 F.2d 658.

The judge then vacated the citations and dismissed the petitions for assessment of penalties.

The facts in these cases are neither as similar nor as simple as the decisions would lead one to believe. The first case, WEST 79-128-M, involved relocation of a large metal cabinet on the ground floor of Anaconda's weed concentrator facility. Two MSHA inspectors testified for the Secretary that the cabinet was lifted six feet and an employee walked with it as it was moved 20 feet. One inspector testified that the employee "with both palms, was underneath the cabinet steadying and again guiding it as it moved laterally." Tr. 12-13. The other inspector testified that the employee walked beside the cabinet with both hands underneath it. Tr. 194. Two witnesses testified for Anaconda that the cabinet was about 10 inches off the floor and no part of an employee's body was underneath it. Tr. 108, 187-188. They indicated that the employee walked beside the cabinet and guided it with outstretched arms. Tr. 109, 187.

2/ 30 C.F.R. §55.16-9 provides:
Mandatory. Men shall stay clear of suspended loads.

The judge's summary reflects the foregoing testimony. The judge found the witnesses to be "equal in character, equal in interest, and equal in opportunity to know the facts" and not to have been corroborated. He made no findings of fact as to any of the events in this case and provided no reason or basis for describing the witnesses as "equally credible." In addition, the judge made no attempt to apply to the facts of this case the standard allegedly violated. Anaconda's evidence shows that the cabinet was suspended about 10 inches above the floor while an employee alongside guided it with his hands. The judge's result shows he did not believe this proved a violation of the standard. Nevertheless, we note that the standard broadly requires employees to stay "clear of," not merely out from underneath, suspended loads. Yet the judge did not discuss the elements of a violation of 30 C.F.R. §55.16-9, nor did he explain whether even Anaconda's version of events might make out a violation. In sum, without findings of fact and supporting reasons, we cannot effectively review this decision. We express no view on the correctness of the judge's conclusions; we wish to see the basis for them.

The second case, WEST 79-130-M, involved the moving of a cart containing oxygen and acetylene tanks from the second level of the weed concentrator building to the ground floor. Again the judge found the evidence to be equally balanced. The two MSHA inspectors stated that two Anaconda employees were directly beneath the cart as it was lowered and they reached up, each grabbing a wheel, to guide the cart. Tr. 23-24, 195-196. Anaconda presented one witness who stated that no employee was ever under the load and two men remained on the second level and used a tag line to guide the cart to the lower floor. Tr. 114-116. The judge's brief recitation of the evidence mentions only one federal inspector. His "discussion" again states, "Where witnesses stand before the Court, equal in character, equal in interest, and equal in opportunity to know the facts, and they have made irreconcilable contradictory statements and neither is corroborated, there is no 'preponderance.'" This reference to the Secretary's evidence as uncorroborated is not explained. Again the judge made no findings of fact and supplied no reasons for characterizing the witnesses as equal in credibility. We express no view on the result in this case, but remand for findings of fact, conclusions of law, and supporting reasons.

The remaining case, WEST 79-137-M, concerned the lifting and moving of a rod mill guard to its base on top of the mill. One MSHA inspector testified that an employee guiding the guard with his palms walked directly under as it was laterally moved 12 feet. Tr. 44-45, 79. The judge described this inspector's testimony, but not that of the other inspector. The second inspector indicated that a violation of the safety standard occurred after the lateral movement when the guard was hoisted over a trauma screen to be positioned on top of the mill. Tr. 199. He testified that the guard was lifted six feet and then an employee "grabbed a hold of it and swung it around." Id. He stated that a second worker stood on the opposite side of the guard within one or two feet of it. Id. Anaconda's two witnesses corroborated the second inspector's testimony regarding the final placement of the rod mill

guard on top of the mill. They both stated that an employee walked over to the guard and straightened it with outstretched arms when it was hoisted about four feet off the floor. Tr. 121-122, 180-181. The employees aligned the rod mill guard both before and after it was lifted six or seven feet to clear a trauma screen. Tr. 123, 166, 180-182. Again the judge did not make factual findings or explain why he found the testimony to be uncorroborated and equally credible. Nor did he consider whether the facts on which two Anaconda witnesses and one MSHA inspector agreed--i.e. a worker used his hands to straighten a rod mill cover that was suspended four feet off the floor--described a violation of 30 C.F.R. §55.16-9. As in the other cases, the judge's conclusory decision is not sufficient, and we remand this case as well.

Finally, we note that the judge found that the Secretary failed to carry his burden because the evidence was equally balanced in each of these cases. We acknowledge that equipoise is possible. We believe, however, that such situations are exceedingly rare because proper control of the hearing and careful analysis of the evidence will ordinarily permit findings of fact and resolutions of contested matters. These decisions do not adequately explain how this phenomenon occurred in three cases with different circumstances.

For the foregoing reasons, we find that these decisions have "cross[ed] the line from the tolerably terse to the intolerably mute." Greater Boston Television Corp. v. FCC, 444 F.2d 841,852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), citing WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Accordingly, the three decisions are reversed and the cases are remanded for further proceedings.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Distribution

Michael McCord, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard, Suite 400
Arlington, VA 22203

Edward F. Bartlett, Esq.
Karla M. Gray, Esq.
Anaconda Copper Company
P.O. Box 689
Butte, Montana 59701

The Honorable John J. Morris
Federal Mine Safety and Health
Review Commission
333 W. Colfax Avenue
Denver, Colorado 80204

Phyllis K. Caldwell, Esq.
Office of the Solicitor
U.S. Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 24, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. MORG 76-28-P
v.	:	
EVERETT PROPST AND ROBERT STEMPLE	:	

DECISION

In this case, Everett Propst, a preparation plant supervisor, and Robert Stemple, a foreman, are charged with violating section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)("the Coal Act" or "the Act"). For the reasons that follow, we affirm the administrative law judge's decision finding respondents in violation of section 109(c). 1/

On October 2, 1974, an employee of Badger Coal Company was killed when the payloader he was driving rolled backwards down a hill, turned over, and crushed him. 2/ On that day, inspectors from the Mining Enforcement and Safety Administration (MESA) went to the accident site and inspected the payloader. 3/ Shortly after the accident the payloader was moved to an equipment retailer's shop for complete teardown and repair in the presence of the MESA inspectors.

On October 4, 1974, a notice was issued to Badger Coal Company alleging a violation of 30 CFR §77.404(a). 4/ The notice stated:

1/ The Coal Act was amended by the Federal Mine Safety and Health Amendments Act of 1977. 30 U.S.C. §801 et seq. (Supp. III 1979). Section 109(c) of the Coal Act and section 110(c) of the 1977 Mine Act are identical except for the redesignation of other affected sections. Although our analysis would be the same under either Act, this decision discusses the violations in terms of the statute in effect at the time the alleged violation occurred, the Coal Act.

2/ A payloader or highlift is a large tractor having a hydraulically operated shovel at the front.

3/ Section 301(a) of the 1977 Amendments Act transferred enforcement functions from MESA in the Department of Interior to the Mine Safety and Health Administration in the Department of Labor. 30 U.S.C. 961(a).

4/ 30 CFR §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.

Badger Coal Company apparently entered into a settlement regarding the notice of violation issued to it and paid a $450 penalty.

> The International H-70-F payloader serial No. 21-FH-3037 which was being operated in the area of the stock pile on the surface was not being maintained in a safe operating condition. It was evident during an inspection of the above equipment that the following violations existed: The left rear brake shoe linings were covered with oil and dirt. The rivets of the left brake shoe were flush with the brake lining, the brake line was finger loose where it connected to the rear brake tee block, the park brake was not connected to the drive shaft. Sworn testimony by members of the work crew who were present during a fatal accident involving this payloader and by management revealed that the brakes were totally ineffective in stopping the payloader and had been in such condition for approximately 11 days. Management, as well as the operators of the machine were aware of this condition.

On October 2, 1974, during MESA's investigation, witnesses to the accident, as well as Propst and Stemple, the supervisory personnel assigned to the shift, were questioned and their statements taken. MESA again interviewed Propst and Stemple on February 14, 1975, and recorded their statements. Transcripts of both interviews with Propst and Stemple were entered into evidence at the hearing before the administrative law judge.

On September 15, 1975, MESA filed a petition for assessment of civil penalty under section 109(c) of the Coal Act against Propst and Stemple. 5/ Propst and Stemple filed an answer and motion to dismiss arguing, among other things, that section 109(c) of the Coal Act is unconstitutional as applied to them. The administrative law judge denied the motion, stating that he lacked authority "to declare any portion of an Act of Congress invalid." 6/

A hearing was held before the administrative law judge who issued his decision on August 21, 1978. The judge found Propst and Stemple in violation of section 109(c) of the Coal Act because they knew that the payloader was in an unsafe condition and failed to remove it from service as required by 30 CFR §77.404(a). He imposed penalties of $2,000 and $1,500 against Propst and Stemple, respectively. Propst and Stemple filed a petition for discretionary review which was granted by the Commission and oral argument was heard.

5/ Section 109(c) 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 final decision issued under this Act, except an order incorporated in a decision under subsection (a) of this section or section 110(b)(2) of this title, 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 (b) of this section.

6/ The judge granted a continuance pending disposition of a suit by Propst and Stemple in the District Court for the Northern District of West Virginia. The court issued a per curiam decision on December 2, 1976, dismissing the complaint for failure to exhaust administrative remedies. Propst and Stemple v. Kleppe, Civil Action 76-91-E. (D.C.N.D. W. Va., December 2, 1976).

On review Propst and Stemple challenge a number of the judge's factual findings. They argue first that the administrative law judge's finding that the payloader was in an unsafe condition is not supported by substantial evidence. The judge found that at the time of the accident "everyone concerned knew that the highlift had defective brakes, and, that in the event of an engine failure it would be virtually impossible to steer or stop the highlift or slow it down on the grades where it was being operated." The judge explained that the highlift was slowed or stopped "by using the reverse gear or lowering the bucket." The judge concluded that "the brakes were defective, [and] the piece of equipment was unsafe to operate on the terrain at the preparation plant...."

Propst and Stemple's argument that substantial evidence does not support the judge's finding that the payloader was unsafe is premised on a distinction between defective and unsafe equipment. They submit that "[t]he brakes on the payloader unquestionably were defective, but given the totality of the circumstances, the payloader was not so unsafe that it necessarily had to be removed from service."

We reject the attempt here to distinguish between defective and unsafe equipment. Even assuming that there might be some situation in which a defect in equipment would not necessarily render the equipment "unsafe" within the meaning of 30 CFR §77.404(a), we find that the record establishes beyond doubt that the defects in the braking system of the payloader rendered it unsafe under any meaning of that term. The record demonstrates that the brakes were so deficient that the accepted procedure at the mine for stopping or slowing the payloader was to drop the hydraulic shovel or shift into reverse gear. It also establishes that during the teardown of the payloader after the accident, the inspectors found the brakes caked with dirt and mud, the shoe linings smooth, the rivets flush with the surface of the shoes, the brake linings finger loose, new cylinders were needed and the hydraulic system controlling the brakes was leaking. Also, the parking brake was rusted and disconnected. The inspectors testified that the entire braking system was ineffective and that none of these conditions were caused by the accident; rather, they existed at the time of the accident. In light of the above, we view the assertion that the payloader was not in an unsafe condition as incredible. Accordingly, we conclude that the judge's finding that the payloader was unsafe to operate is supported by substantial evidence. 30 U.S.C. §823(d)(2).

Propst and Stemple next argue that the judge's finding that they knowingly permitted the payloader to remain in service in an unsafe condition also is not supported by substantial evidence. Propst and Stemple state that the leak in the brakes' hydraulic system was unknown until after the accident. They assert that "although they each knew the brakes were in defective condition, they did not know the machine was totally without brakes," and that "they thought the brakes worked on one wheel." (Emphasis in brief.) They submit the record reflects that, as supervisors, they had to rely on information provided them by the mechanic, who testified that he had not known about the leak. They assert that parts on order for repair of the brakes were unrelated to the hydraulic system. Accordingly, they argue that they did not knowingly order, authorize or permit an unsafe piece of equipment to remain in service.

Section 109(c) requires that, in order for a corporate agent to be personally liable for a violation of the Act, he must "knowingly authorize, order or carry out such violation." (Emphasis added.) In our decision in Kenny Richardson, No. BARB 78-600-P (January 19, 1981), petition for review filed, No. 81-3060, 6th Cir., Feb. 6, 1981, we held that the term "knowingly" as used in section 109(c) means "knowing or having reason to know", and stated:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Id., slip. op. at 9.

Applying this test, we find that the judge's conclusion that Propst and Stemple knowingly permitted the operation of the unsafe payloader is supported by substantial evidence. Although respondents may not have been aware of the precise nature of all the particular defects in the braking system, the record establishes beyond peradventure that they knew that the problems were so extensive that operators of the payloader were required to resort to dropping the shovel or shifting gears to stop or slow the equipment. Because both Propst and Stemple knew or had reason to know that the payloader was in an unsafe condition and failed to remove it from service immediately, we affirm the judge's finding that they knowingly allowed unsafe equipment to remain in service in violation of the 30 CFR §77.404(a) and section 109(c) of the Act. 7/

Another issue raised by Propst and Stemple concerns their inability to control the company's choice of equipment. The judge found that "the evidence establishes beyond question that this particular highlift with exposed brakes should not have been used in the wet muddy type of operation being conducted at the preparation plant, and that other more suitable equipment was available." Propst and Stemple assert that "the evidence does not demonstrate [they] had control over what type of payloader could be bought", and that "[r]eplacement of a machine with a design defect was beyond their control."

This argument misses the mark. The amount of control Propst and Stemple had over the choice of equipment purchased by their employer is not at issue. Respondents are charged with failing to perform a duty imposed by the standard that was within their authority as supervisors: the repair or removal from service of unsafe equipment.

7/ Propst and Stemple also argue that the judge erroneously applied a negligence test in determining their liability. The basis for this contention is the judge's reference to the "degree of negligence involved" in determining the amount of the penalty to be assessed for the violation. This argument is rejected. It is clear that the judge did not use a negligence test in determining respondents' liability. Rather, as discussed above, the judge found that Propst and Stemple knowingly allowed unsafe equipment to remain in service. The judge appropriately limited his consideration of negligence to the determination of the penalty. See section 109(a)(1).

Propst and Stemple next argue that they were denied due process because of the failure of MESA investigators to provide full "Miranda-type" warnings prior to conducting interviews during the investigation of the fatal accident. Propst and Stemple were interviewed twice by MESA investigators and their statements recorded. The first interview, conducted on the date of the accident, was not preceded by any warnings concerning the giving of statements. Prior to the second interview conducted on February 14, 1975, the following warning was given:

> Now Everett [Propst], before we go on there is a few questions I'd like to ask you in regard to the accident to John McMurdo which resulted in his death on October 2, 1974. Before we start, you ought to know that section 109(b) and (c) does carry criminal penalties and, while I am not formally accusing you of anything (at this time) and I have no authority to arrest or detain you, you should be aware that at some point you could be charged with a crime and you have a right not to answer any or all of my questions. If you do answer, your answers may be used against you in a subsequent court case. You may stop answering these questions at any time you wish. Do you understand what I have just told you? 8/

The transcripts from both interviews were admitted into evidence, over objection, at the hearing.

Propst and Stemple argue that admission of these statements into evidence violated their Fifth Amendment right to due process of law. Their argument is based on Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, the Supreme Court held that the Fifth Amendment requires that the following warnings be given prior to "custodial interrogation":

> "[t]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed."

384 U.S. at 444. In his decision the judge discussed whether full Miranda warnings were required before MESA interviewed Propst and Stemple. He relied on Beckwith v. United States, 425 U.S. 341 (1976), and Oregon v. Mathiason, 429 U.S. 492 (1977), and concluded that warnings were not required because the statements were not made while Propst and Stemple were in custody.

In Beckwith, a taxpayer was interviewed by IRS investigators on two separate occasions. The first interview, in the taxpayer's home, was preceded by Miranda warnings. The second interview, which took place at the taxpayer's office later in the day, was preceded only by a warning

8/ Essentially the same warning was given to Stemple at the time of his second interview.

that he did not have to furnish any documents. The taxpayer furnished the documents and was subsequently prosecuted for tax fraud. The Supreme Court held that, in these circumstances, the defendant was not in custody during the interview and that Miranda warnings therefore were not required.

In Oregon, the Court held that Miranda warnings were not required until there had been sufficient restriction on a person's freedom to render him in custody. A parolee who voluntarily came to the police station at the request of a police officer confessed to a crime after the officer falsely told him that his fingerprints had been found at the scene of the crime. After the confession, Miranda warnings were given and a complete statement was taped. He was not arrested at the time and was allowed to leave the police station. The Supreme Court noted:

> [T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a half hour interview, respondent did in fact leave the police station without hinderance.

429 U.S. at 495. We agree with the administrative law judge's conclusion that Beckwith and Oregon limit the need to give Miranda warnings "to situations where there is an interrogation subsequent to an actual arrest or where there is a physically coercive method of detainment." The judge further found that no such situation existed in the instant case, that Propst and Stemple's statements were taken under non-custodial, non-coercive circumstances, and, therefore, that "Miranda warnings were not required and that the statements made by respondents may properly be used against them."

Propst and Stemple contest the judge's conclusion that their interviews were not taken in custodial or coercive circumstances. They contend that they were required to testify at an inquest initiated by "law enforcement personnel," and that, although they were never arrested, their freedom of action was significantly restrained. In their view, the coercion which concerned the Supreme Court in Miranda is present in this case; they believe that the government's conduct was inherently coercive.

We agree with the judge's conclusion that, despite the fact that Propst and Stemple were subject to extensive questioning, Miranda warnings were not required. We do not believe that the record supports respondents' characterization of the interviews conducted on the evening of the accident. The record does not reflect that Propst and Stemple were not free to come and go at will. Nor is there evidence that Propst and Stemple were in any way restrained or that their presence and statements during the interview were involuntary. Thus, we affirm the judge's conclusion that the questioning on the evening of the accident was non-custodial and non-coercive in nature, and, consequently, that Miranda warnings were not required.

Propst and Stemple were again interviewed on February 14, 1975. That interview was preceded by the partial warning quoted above. Propst

and Stemple argue that the warning was insufficient because it failed to advise them of their right to counsel. The failure to give full Miranda warnings is not controlling here. The warning given to Propst and Stemple specifically included the statement that the inspector had "no authority to arrest or detain you ... and you have a right not to answer any or all of my questions." Respondents both stated that they understood the warning. In view of the language of the warning, we cannot conclude that the second interviews were either coercive or custodial. 9/

Accordingly, we hold that Miranda warnings were not required and that Propst and Stemple were not denied due process by the admission of their interview statements into evidence. 10/

Propst and Stemple further argue that the judge erred by admitting into evidence the transcripts of their interviews and relying on them in his decision because "[t]he result of treating such statements as primary evidence is trial and adjudication by statements rather than by hearing...." We find no error in the admission of and reliance on the interview transcripts as primary evidence. The statements were respondents' own and respondents testified at the hearing. Therefore, the use of the statements as primary evidence was entirely proper. McCormick on Evidence, at 629-630 (2d ed. 1972). Cf. Fed. R. Evid. 801(d)(2). 11/

9/ We note that the administration of Miranda warnings does not convert "a non-custodial interview into a custodial interrogation for Miranda purposes." United States v. Lewis, 556 F.2d 446, 449 (6th Cir. 1977), cert. denied, 434 U.S. 863 (1977).

10/ Based on our finding that the questioning in this case was non-custodial, we find it unnecessary to reach the broader questions of whether the administration of Miranda warnings would ever be required in connection with civil proceedings brought under section 109(c) of the Act, and, if so, what effect the failure to administer such warnings would have on the admissibility of evidence in administrative proceedings before the Commission.

11/ We note that the judge admitted only the transcripts of statements made by Propst and Stemple. The judge excluded the transcripts of statements made by others. We also note that the parties were afforded the opportunity to correct discrepancies between the tapes of the interviews and the transcripts. Counsel for Propst and Stemple did so in a letter to the administrative law judge dated April 28, 1978. In that letter counsel also stated: "If counsel for the government would be agreeable to correcting the foregoing discrepancies contained in Petitioner's Exhibits 14, 15, 16, 17 ... I would have no continuing objection on the basis of inaccuracy of the exhibits." In a letter dated May 23, 1978, the Secretary agreed with counsel's corrections.

Propst and Stemple futher argue that section 109(c) of the 1969 Act violates their constitutional right to equal protection of law "because the statute irrationally and discriminately applies only to agents of corporate coal mines as opposed to agents of partnership mines or sole proprietorships engaged in mining." 12/

In our recent decision in Kenny Richardson, supra, we addressed this argument in depth and concluded that "Congress' imposition of liability on corporate agents is not totally arbitrary but has a rational basis, and therefore ... the classification in section 109(c) does not offend the Constitution." Id., slip. op. at 21. For the reasons stated in our decision in Richardson, the equal protection challenge to section 109(c) of the Act raised by Propst and Stemple is rejected.

Propst and Stemple also assert that "section 109(c) of the Act is unconstitutional in that it chills the exercise of the First Amendment right to pursue an open, honest and legitimate career by exposing supervisory personnel to substantial personal liability for technical rule violations which may be totally unintentional and beyond the supervisor's authority and power to correct." They admit that the statute "does not directly prohibit respondents from pursuing a career as supervisors for a corporate operator", but suggest that it has an impermissible chilling effect on the exercise of that choice.

Even assuming that the right to pursue a particular legitimate career is a constitutionally protected right, see Meyer v. Nebraska, 262 U.S. 390 (1923), we believe that respondents have failed to establish that section 109(c) impermissibly chills this right. Certainly, it cannot be argued that regulation of occupational or economic pursuits is beyond governmental authority. Statutory and regulatory restrictions affecting a citizen's pursuit of a particular career are commonplace in our society. See, e.g., United States v. Dotterweich, 320 U.S. 277, 280-281 (1943). Therefore the mere imposition of a statutory duty attendant to the pursuit of a career and the imposition of civil or criminal penalties for the breach of that duty do not, in and of themselves, result in any deprivation of a constitutional right. Furthermore, as discussed in our decision in Richardson, the personal liability imposed on corporate agents by section 109(c) is a rational means of achieving safety and health in our nation's mines. Finally, contrary to respondents' assertion, they have not been penalized for an "unintentional" "technical rule violation" "beyond ... their authority and power to correct." Rather, their liability arises from a knowing violation of a safety standard, compliance with which was within their authority as supervisors. Accordingly, this challenge to section 109(c) of the Act is also rejected.

12/ Although there is no equal protection clause in the Fifth Amendment, equal protection is implicitly guaranteed by the Fifth Amendment's due process clause. Weinberger v. Wisenfeld, 420 U.S. 636 (1975).

Propst and Stemple's final argument is that the respective penalties of $2,000 and $1,500 assessed against them are excessive. To support their position they refer to their attempts to improve safety in the "few weeks" they had acted as supervisors, and the fact that their employer paid a penalty of only $450 for the violation charged against it following the fatal accident. The administrative law judge stated that in determining the penalties assessed he considered the financial condition of Propst and Stemple, the seriousness of the violation, and the degree of negligence involved. See section 109(a)(1) of the Act. We find that the judge adequately considered the relevant statutory criteria, that the record supports his findings, and that the penalties assessed against respondents are appropriate. 13/

Accordingly, the decision of the administrative law judge finding respondents in violation of section 109(c) of the Coal Act is affirmed.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Richard V. Backley, Chairman, Concurring in part and Dissenting in part:

For the reasons set forth in my separate opinion in Kenny Richardson, No. BARB 78-600-P (January 19, 1981), I dissent from that part of the opinion that upholds the constitutionality of section 109(c) of the Coal Act.

Richard V. Backley, Chairman

13/ The appropriateness of the penalty paid by the corporate operator in settlement of the enforcement proceeding brought against it is not before us.

Distribution

Cynthia L. Attwood, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Rees Kinney, Esq.
Jarvis, Payton & Kinney
O'Bryan Court Building
P.O. Box 569
Greenville, KY 42345

Robert M. Steptoe, Jr., Esq.
Steptoe and Johnson
P.O. Box 2190
Clarksburg, West Va. 26301

Administrative Law Judge Charles Moore, Jr.
FMSHRC
5203 Leesburg Pike, 10th Floor
Skyline Center #2
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 27, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	
v.	:	Docket No. KENT 80-219
EASTON CONSTRUCTION CO., INC. Respondent	:	

DIRECTION FOR REVIEW AND ORDER

The administrative law judge's decision of January 28, 1981, is directed for review. The Commission finds that the judge's disposition of this case may be contrary to law or Commission policy. 30 U.S.C. § 823(d)(2)(B). The issue is whether the judge's finding that Respondent failed to file a responsive answer to a show cause order and waived its right to a hearing is appropriate under the circumstances presented.

On May 27, 1980, the Secretary of Labor filed a proposal for assessment of civil penalty against Easton Construction Co., Inc., seeking penalties totaling $915.00 for three alleged violations of the Act. No answer was filed. On October 24, 1980, the acting chief administrative law judge issued an order to Respondent to show cause, within 15 days, why it should not be deemed to have waived its right to a hearing and contest of the proposed penalty and why the proposed penalty should not be summarily entered as a final order of the Commission and collection procedures initiated. By letter dated November 7, 1980, and received by the Commission on November 12, 1980, Easton pro se advised the judge that it had forwarded a check in the amount of $26.00 for a penalty to the Bristol, Virginia, MSHA office of assessments and offered additional information if "needed by your office." On December 19, 1980, the administrative law judge assigned to the case issued a prehearing order with response due by January 12, 1981. On January 19, 1981, an attorney for Respondent advised the judge that the December 19, 1980 prehearing order had not been received by Easton until January 15, 1981 and requested a 30-day extension from January 12, 1981 to comply with the order. On January 28, 1981, the judge issued a decision finding Respondent had failed to file a responsive answer to the show cause order of October 24, 1980, holding that Respondent had waived its right to a hearing, assessing the proposed penalties of $915.00 as the final order of the Commission and ordering payment within 30 days.

After review of the complete record in this matter, we find that the judge's action fails to comport with Commission policy. As we recently stated, "a default judgment is a harsh remedy not suitable when a party has substantially complied with a show cause order, and has not demonstrated bad faith." Sigler Mining Co., WEVA 80-519 (January 27, 1981). See also, Coaltrain Corp., 1 FMSHRC 1831 (1979); BB & W Coal Co., 1 FMSHRC 46 (1979). We find this reasoning applicable to the facts of the present case.

Accordingly, the judge's decision is vacated and the case is remanded for further proceedings.

Richard V. Backley, Chairman

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Distribution

Robert Easton, President
Easton Construction Co., Inc.
Rt. 1, Box H-1
Pikeville, KY 41501

George Drumming, Jr., Esq.
Office of the Solicitor
U.S. Department of Labor
801 Broadway, Rm. 280
Nashville, TN 37203

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

Administrative Law Judge Gary Melick
FMSHRC
Skyline Center #2
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 1981

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEVA 80-360-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Ireland Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-694
	:	A.C. No. 46-01438-03084H
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge James A. Laurenson

Jurisdiction and Procedural History

This proceeding arises out of the consolidation of an application for review of an order of withdrawal and a civil penalty proceeding based on that order. On May 5, 1980, Consolidation Coal Company (hereinafter Consol) filed an application for review of an order of withdrawal issued under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(a) (hereinafter the Act). A hearing was held in Pittsburgh, Pennsylvania, on October 9, 1980. Jack P. Skwortz, Donald L. Moffitt, Jr., Billy O. Wise, and Harold E. Wayt testified on behalf of the Secretary of Labor (hereinafter MSHA). Raymond McCool, Floyd H. Capehart, and Leon E. Heck testified on behalf of Consol.

At the hearing, I directed the parties to introduce whatever evidence they believed necessary for the assessment of a civil penalty based upon the order being reviewed. On October 31, 1980, MSHA filed a proposal for assessment of a civil penalty against Consol for violation of 30 C.F.R. § 77.202. On November 28, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12, and directed the parties to file any additional evidence which they wished to be considered on the amount of the civil penalty. Following the hearing, Consol and MSHA submitted briefs.

ISSUES

The issues are whether the order due to imminent danger was properly issued, and whether Consol violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

STIPULATIONS

The parties stipulated the following:

1. Ireland Mine is owned and operated by Consol.

2. Consol and the Ireland Mine are subject to the jurisdiction of the Act.

3. The inspector who issued the subject order was a duly authorized representative of the Secretary of Labor.

4. A true and correct copy of the subject order was properly served upon the operator in accordance with section 104(a) of the Act.

5. Copies of the subject order and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which cause such imminent danger no

longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 110(a) of the Act, 30 U.S.C. § 820(a), provides:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

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

Section 4 of the Act, 30 U.S.C. § 803, provides: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

Section 3(d) of the Act, 30 U.S.C. § 802(d), provides: "'Operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), provides:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or

other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Section 3(i) of the Act, 30 U.S.C. § 802(i), provides: "'Work of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

Section 3(j) of the Act, 30 U.S.C. § 802(j), provides: "'Imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

30 C.F.R. § 77.202 provides: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

Summary of Facts

On April 2, 1980, in response to a safety complaint, MSHA inspectors Jack P. Skwortz and Donald L. Moffitt made a spot inspection of the No. 58 belt and belt drive at the Ireland Mine. The No. 58 belt line extended for 1,300 feet from a transfer building owned by Consol to a fourth floor room of station No. 2 owned by Ohio Power Company (hereinafter Ohio Power). The head roller, drive belt, motor and electrical equipment for the belt were located in the fourth floor room of station No. 2. Station No. 2 is owned by Ohio Power. Consol owned the belt line. Ohio Power was responsible for the maintenance of station No. 2. Consol was responsible for maintenance of the belt line. Consol regularly sent its employees into the fourth floor room of station No. 2 to perform maintenance work on the belt line equipment located there.

When the inspectors entered the fourth floor room of station No. 2, they observed float coal dust of a depth of 1 to 5 inches covering the entire area. They also observed several possible ignition sources: an unprotected, energized light bulb in a hopper beneath the belt, a high-voltage disconnect switch located within 17 inches of the hang line which was covered with float coal dust, and the belt rollers. The inspectors testified that the light bulb could have been broken by a piece of coal resulting in a spark and a subsequent explosion; that if the switch had been thrown, an arc could have been created which could ignite the nearby float coal dust; and that an improperly maintained roller could go bad causing a spark which would ignite float coal dust.

The inspectors believed that the combination of float coal dust, possible ignition sources, hazards caused by maintenance of the belt, and a possible suspension of the dust when the belt was running, could cause an explosion in the room. They also testified that such an explosion could travel up the belt line to the Consol transfer station. The inspectors testified that these conditions constituted an imminent danger. They therefore issued Order of Withdrawal No. 631153 which stated:

> Dangerous amounts of coal and coal dust was allowed to accumulate on the drive motor and equipment for the #58 belt drive for the headroller. Float coal dust ranging from 1 inch to 5 inches was allowed to accumulate on all the beams and channels on the 4th floor of the Power plant station #2 building. Coal float dust was also present around the head roller and on the beam located 17 inches from the enclosure for knife blade switches for the 150 HP motor. The voltage on this motor was 4160 volts AC 3 phase. 1/10 of 1 per cent methane was also detected in the building with the belt stopped.

Consol management had been previously informed by its miners that float coal dust was present in the room. Ohio Power "cleaned" the room by blowing the dust off surfaces with compressed air. This method did not completely dispose of the dust. Ohio Power began cleaning the area with water after the order was issued. On April 2, 1980, after the float coal dust had been cleaned, Inspector Moffitt modified the order so that operations could continue in the area. On April 10, 1980, Inspector Skwortz terminated the order because a program to prevent float coal dust accumulations had been instituted.

Discussion of the Evidence

The first issue raised by these facts is whether the fourth floor room of station No. 2 was a "mine" subject to the Act. In determining the limits of the Act, the intent of the legislators is of primary importance.

The Act is a remedial statute, the "primary objective [of which] is to assure the maximum safety and health of miners." U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). Cf. Freeman Coal Mining Company v. IBMOA, 504 F.2d 741, 744 (7th Cir. 1974). In interpreting remedial safety and health legislation, "[it] is so obvious as to be beyond dispute that * * * narrow or limited construction is to be eschewed * * * [L]iberal construction in light of the prime purpose of the legislation is to be employed." St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). Concerning the definition of "mine," the Senate Committee stated:

> [T]he structures on the surface or underground, which are used or are to be used in or resulting from the preparation

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

U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong. 2d Sess. at 14 (1978).

Section 4 of the Act states that: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Several sections of the Act must be examined to determine the meaning of the term "mine." "Mine" is defined in section 3(h)(1) of the Act as: "Structures, facilities, equipment, machines, tools or other property * * * on the surface * * * used in, the milling of such minerals, or the work of preparing coal or other minerals." The "work of preparing the coal" referred to in section 3(h)(1) of the Act is defined in section 3(i) as follows: "'Work of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

I find that the fourth floor of station No. 2 is a "mine" as defined by the Act. Upon considering the function of the station and the room housing the belt line, I find that the fourth floor room of station No. 2 is a structure used in the preparation of coal in that it is used in the loading of coal. The station room cannot be separated from the belt line. It is therefore a "mine" subject to the provisions of the Act.

The second issue raised by these facts is whether Consol was the operator of this "mine". "Operator" is defined in section 3(d) of the Act as: "Any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

The facts indicate that neither Consol nor Ohio Power had exclusive control over the fourth floor room of station No. 2 which housed belt No. 58. Station No. 2 is located on Ohio Power's property. Ohio Power was responsible for the maintenance of the building. However, Consol was responsible for the maintenance of the belt itself and regularly sent miners into the building to work on the belt. I find that under these circumstances, the station and room housing the belt cannot be separated from the belt itself in deciding the Act's applicability to it. I therefore find that both Consol and Ohio Power had a degree of control over the area. Consol can, therefore,

be considered the "operator" of the "mine" as those terms are defined under the Act. See, Republic Steel Corporation, Docket Nos. IBMA 76-28 et al. (April 11, 1979).

The next issue is whether the condition described constitutes an imminent danger. An "imminent danger" is described in section 3(j) of the Act, 30 U.S.C. § 802(j), as follows: "Imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Consol contends that the test for the existence of an imminent danger was set forth in Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974), which held that the test was whether "it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Id. at 743. However, the "just as probable as not" test has been rejected by the drafters of the Act, Legislative History of the Federal Mine Safety and Health Act of 1977, (95th Cong., 1st Sess.), and by the Commission in Pittsburg & Midway Coal Mining Co. v. MSHA, IBMA 76-51 (April 21, 1980). As I stated in Helvetia Coal Company, PENN 80-143-R (November 20, 1980):

> In cases involving imminent danger orders under the 1977 Act, there is no longer a requirement that MSHA prove that "it is just as probable as not" that the accident or disaster would occur. In light of the legislative history of the 1977 Act, it is doubtful that any quantitative test can be applied to determine whether an imminent danger existed. Rather, each case must be evaluated in the light of the risk of serious physical harm or death to which the affected miners are exposed under the conditions existing at the time the order was issued.

In determining whether an imminent danger exists, the test is whether the condition could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition was eliminated. Here, the evidence of record establishes that there were accumulations of float coal dust in a room where miners were regularly sent to perform maintenance work and that several possible ignition sources were present. If normal operations were permitted to proceed, one of those ignition sources could ignite the float coal dust which could reasonably be expected to cause death or serious physical harm to any miner in the room. I therefore find that the preponderance of the evidence establishes that an imminent danger was present.

MSHA also attempted to prove that if an explosion had occurred in the fourth floor of station No. 2, it would continue along the 1,300-foot belt line into the transfer station. I do not find that MSHA proved this assertion.

Civil Penalty

In the civil penalty proceeding, MSHA asserts that Consol violated 30 C.F.R § 77.202 which prohibits accumulations of coal dust. I have found that there was 1 to 5 inches of float coal dust throughout the fourth floor of station No. 2. I find this to be an accumulation within the meaning of 30 C.F.R. § 77.202. Consol has therefore violated 30 C.F.R. § 77.202.

MSHA proposed that a civil penalty in the amount of $6,000 be assessed for this violation. Consol is a large company and the assessment of a penalty will have no effect on its ability to remain in business. Its prior history of violations shows six previous violations of 30 C.F.R. § 77.202. The testimony at trial indicates that Consol knew or should have known of this problem. Consol is, therefore, chargeable with ordinary negligence. I have found that this violation could result in an explosion which could kill or severely injure any miners in the area. Ohio Power has corrected the condition and has taken steps to insure that the condition will not reoccur. The only mitigating factors in assessing a penalty are Consol's assertion that Ohio Power was solely responsible for keeping the area clean and that Consol frequently complained to Ohio Power about this problem. Ohio Power was contractually obligated to keep the area clean. The contract, however, does not relieve Consol from its responsibility under the Act.

However, it should be noted that Inspector Skwortz had not previously inspected the fourth floor room of station No. 2 because when he got as far as the outside door to this building, he "was informed that my jurisdiction ended there and that the rest of it belonged to the power company." Hence, until the issuance of this order, MSHA had never claimed jurisdiction over the area in controversy. This fact as well as Consol's assertion that Ohio Power had sole responsbility for cleaning the area and that Consol had made prior complaints to Ohio Power about this problem, indicate that the penalty proposed by MSHA is excessive.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $1,000 should be imposed for the violation found to have occurred.

Conclusions of Law

1. The Administrative Law Judge has jurisdiction over these proceedings pursuant to sections 105 and 107 of the Act.

2. The fourth floor room of station No. 2 is a "mine" subject to the Act.

3. Consol was the operator of the "mine."

4. An imminent danger existed in the fourth floor room of station No. 2 because accumulations of float coal dust and several possible ignition sources were present which could reasonably be expected to cause death or serious physical harm to miners if normal mining operations were permitted to continue.

5. Consol violated 30 C.F.R. § 77.202 by permitting accumulations of dangerous amounts of coal dust in the fourth floor of station No. 2.

6. Consol's application for review of Order No. 631153 is denied.

7. Under the criteria set forth in section 110(a) of the Act, a civil penalty in the amount of $1,000 shall be imposed for a violation of 30 C.F.R. § 77.202.

ORDER

WHEREFORE IT IS ORDERED that the application for review of Order No. 631153 is DENIED.

IT IS FURTHER ORDERED that Consol pay the sum of $1,000 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 77.202.

James A. Laurenson, Judge

Issued:

Distribution by Certified Mail:

William H. Dickey, Esq., 1800 Washington Road, Pittsburgh, PA 15241

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Gateway Building, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 1981

MABEN ENERGY CORPORATION, Contestant	:	Contest of Order
v.	:	Docket No. WEVA 80-674-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 0654036 August 26, 1980 Maben No. 3 Mine

DECISION

Appearances: Robert A. Burnside, Jr., Esquire, Beckley, West Virginia, for contestant, Maben Energy Corporation; Stephen P. Kramer, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for respondent.

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the contestant pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., to review the validity of a section 104(d)(2) unwarrantable failure withdrawal order issued by a Federal mine inspector on August 26, 1980. Respondent filed a timely response to the notice of contest and a hearing was convened at Beckley, West Virginia, November 6, 1980, and contestant and respondent participated fully therein. Respondent UMWA failed to appear and was dismissed as a party. Although given an opportunity to file posthearing proposed findings and conclusions, contestant and respondent declined to do so and opted to stand on the record made at the hearing.

Issue

The principal issue presented in this proceeding is whether the withdrawal order was properly issued in accordance with the Act, and any additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, effective March 9, 1978, 30 U.S.C. § 801 et seq.

2. Section 104(d) of the Act provides as follows:

> (d)(1) 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 standards, 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.
>
> (2) 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. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Discussion

Upon inspection of the mine on August 26, 1980, MSHA mine inspector William L. Ross issued section 104(d)(2) Withdrawal Order No. 0654036, citing a violation of 30 C.F.R. § 75.400. Mr. Ross also found that the citation was "significant and substantial," marked the appropriate box on the citation form to that effect, and also made reference to an "initial action" which he

identified on the face of the form as Order No. 0651213, dated July 24, 1980. The condition or practice described by Mr. Ross on the face of the order which he issued is as follows:

> Loose coal, coal dust and float coal dust was present in the No. 2 entry and cross-cuts right off No. 2 entry and in the No. 3 entry (chain line conveyor entry) starting at survey station No. 2639 in the No. 2 entry and extending inby for a distance of about 120 feet; and starting at the tail piece of the 4 Right section belt No. 3 entry and extending inby No. 3 entry chain line conveyor entry; 100 feet inby 4 right 012 section belt tail piece and No. 2 entry from spad 2639 + 120 feet for a distance of about 100 feet. Subject loose coal, coal dust and float coal dust ranged in depth from 3 to 16 inches throughout the affected areas in the 4 right 012 0 section. This accumulation was in the active workings of the No. 2 and No. 3 entries. Section supervised by Jim Brown.

Respondent MSHA's Testimony and Evidence

MSHA inspector William L. Ross testified as to his training and experience in the mining industry, and he confirmed that he visited the No. 3 Mine on August 26, 1980, for the purpose of conducting a complete inspection. He reviewed the onshift and preshift records for the 4 Right and 7 Left sections for August 25 and 26, and the notations he found reflected that the sections needed to be cleaned and rock dusted. The mine has one production shift, and the evening shift is usually a combined cleanup and maintenance crew and no production takes place (Tr. 7-11).

Inspector Ross stated that he went underground at 7 a.m. on August 26, and proceeded to the 4 Right section, and arrived there at approximately 8 a.m. He identified Exhibits G-1, G-2, and G-3 as the order he issued on the 4 Right section, the abatement of that order, and a sketch or map of the area which he inspected (Tr. 11-16). Mining was taking place in an area to the right of the rooms shown on the sketch and he recalled a scoop traveling from the No. 2 room to the right of the areas shown on the sketch. The section was a conventional mining section where blasting, cutting, and drilling take place before the coal is hauled out by scoops. He could not recall the exact route followed by the scoops but he did state that the mined coal was dumped at the tailpiece of the left conveyor located in the No. 3 entry and he marked the sketch with a dark triangle to indicate the dumping location. He also indicated the location of a chain line conveyor in the No. 3 entry as an "x" on the sketch (Tr. 16-20).

Inspector Ross indicated that when he arrived at the crosscut off the No. 2 entry at the chain line conveyor and one crosscut inby the tailpiece, he observed loose coal and coal dust along the ribs and on the mine floor and along the chain line conveyor, and float coal dust was deposited on the ribs along the chain line conveyor. Upon traveling to the conveyor tailpiece, he

observed loose coal and coal dust and spillage along the chain line and tailpiece. He also observed coal spillage between the two blocks separating the crosscuts off the No. 3 entry where the scoops were dumping coal, and he observed loose coal and coal dust spillage along the ribs and mine floor in these areas (Tr. 20-21).

Inspector Ross confirmed that he took measurements of the depth of the coal spillages he observed and stated that the maximum depth was 16 inches, and the smallest was 3 inches. He detailed the specific locations and measurements which he made, including a hole in the mine floor filled with coal, and he indicated that none of the accumulations which he observed appeared to be rib sloughage. He concluded that it had not sloughed off the ribs because of the amount and location of the accumulations. He attributed some of the accumulations along the chain conveyor to material falling off the conveyor, and some of the spillage along the No. 2 roadway to spillage from the scoops (Tr. 21-26).

Inspector Ross stated that he discussed the conditions with section foreman Jim Brown and Mr. Brown advised him that he "would get somebody on it right away." Mr. Ross also stated that he observed no one cleaning the area when he arrived on the section and he observed a scoop dumping coal on the end of the chain line conveyor (Tr. 26-27). Mr. Brown assigned men to clean up the accumulations after he was informed about the violation (Tr. 28). Mr. Brown stated that the conditions were normal but would not respond to Mr. Ross' inquiry as to how long the accumulations had existed, but mine foreman Donald Hughes told him that he had visited the section on August 25 and told Mr. Brown that "this condition was the worst that he had ever seen and that it should be cleaned up" (Tr. 28-29, 31). Mr. Brown later admitted that the accumulations "stay like this" and that "I've been so short of men and can't produce and clean up like I should" (Tr. 31). Mr. Brown also admitted tht the accumulations were present since the prior Friday, August 22, and Mr. Ross indicated that his notes confirm the conversations with Mr. Brown and Mr. Hughes (Tr. 32).

Mr. Ross stated that he issued the order because of the statements received from the mine foreman and section foreman indicating prior knowledge of the existence of the accumulations and the fact that the amounts which he observed could not have occurred within the 40-45-minute time frame prior to his arrival on the section (Tr. 34). He also believed that the accumulative conditions which he found were dangerous and could contribute to an explosion or fire if an ignition source were present, but he observed no such ignition sources in the areas where the accumulations were present (Tr. 38). However, permissible battery-powered electric scoops operated in the section hauling coal from the face area and he found a permissibility violation on the CX-492 scoop, Serial No. 492013 in that it had openings in excess of four-thousandths of an inch present in the covers of the methane monitor control box, the tram motor inspection cover, and the insulation and conduit were damaged in the trail leads serving the right battery tray (Tr. 40, 43-44). Mr. Ross conducted a test for methane, but found none present (Tr. 44). He also observed electrical wires on the chain line conveyor control line and a telephone wire which provided communication for the section, but found no

defects in either of these (Tr. 45). He did not consider the conditions he observed to be an imminent danger (Tr. 45). Although the conveyor tail and head roller bearings could create heat if they were worn, he found nothing wrong with the conveyor (Tr. 45).

Regarding the abatement, Mr. Ross stated that some of the accumulations were scooped up and some were shoveled onto the chain line conveyor, but he did not know how much material was removed from the section during the cleanup process (Tr. 47). The scoop permissibility violation was issued after the order was issued and he did not know about the scoop condition at the time his order was issued (Tr. 48).

Mr. Ross stated that he went to the face areas on the 4 Right section at 8:45 and observed the scoop loading coal from the face and traveling to the dump area. He also observed a roof bolter operating in the last room to the right off the No. 5 entry, and he believed that six men and a foreman were on the section at that time (Tr. 84-86). He also indicated that he observed no rock dust applied to the ribs, roof, or floor of the areas where he observed the accumulations which he cited (Tr. 91).

On cross-examination, Inspector Ross confirmed that he observed one scoop of coal being dumped on the chain line conveyor when he arrived on the section and that the belt was running. He assumed that the coal came from the face (Tr. 57-79). Aside from the potential ignition source from the scoop, he observed no other defects, hazards, or problems on the section (Tr. 60). He observed no moisture or rock dust among the accumulations which he found and the accumulations were loosely compacted and he observed tracks over the loose coal (Tr. 61). He confirmed that the application of rock dust is an acceptable means of abating an accumulation citation in lieu of cleaning up the coal (Tr. 62). He took no samples of the materials which he visually observed and indicated that none are required to support the violation he cited (Tr. 63).

Mr. Ross confirmed that he based his unwarrantable failure order on the fact that he observed quantities of accumulated coal and coal dust, the notations made in the preshift book, and the statements made to him by Mr. Brown and Mr. Hughes (Tr. 64). Mr. Ross concluded that the accumulations had been present since the previous Friday, and these conclusions were based on the statements made by Mr. Hughes and Mr. Brown (Tr. 65). He discussed the cleanup program with Mine Superintendent Ferguson and Mr. Ross did not believe compliance with that plan had been achieved even though the preshift books noted "cleaned on cycle" (Tr. 66-67).

In response to questions concerning the guidelines he applies in citing an unwarrantable failure violation, Mr. Ross stated that he would not cite a spillage per se, and would consider whether the spillage grew in quantity over a period of time and was neglected and failed to be cleaned up. Although Mr. Brown advised him that a belt broke on Monday and gave this as an excuse for failure to clean up the accumulations, he still indicated that he knew of the accumulations as early as the previous Friday, and any broken belt would

be irrelevant to the accumulations in the other areas on the section (Tr. 82-83). The fact that a belt may have broken on Monday was no excuse for failing to clean up the accumulations on the shifts prior to his inspection (Tr. 84).

Mr. Ross stated that he issued the closure order verbally at 11:50 a.m. when he advised Mr. Brown and Mr. Hughes that the No. 2 and No. 3 entries on their section were closed, and the 8 a.m. notation on the order indicates the time when he advised Mr. Brown that there was a violation (Tr. 96).

In response to bench questions, Mr. Ross stated that he did not cite the contestant for failure to adequately rock dust because he did not take samples to determine whether the rock dust was inadequate (Tr. 99). During the period from 8 a.m. to approximately 11:50 a.m., he was attempting to ascertain all of the circumstances surrounding the accumulations and production stopped and abatement began as soon as the closure order issued. Abatement was completed at 12:55 p.m., but it actually began at 8 a.m. when he advised the section foreman that he was in violation because of the accumulations. He conceded that it was reasonable for the foreman to assume that the citation was a section 104(a) citation at that time because he did not advise him that he was going to issue an unwarrantable citation (Tr. 107-109).

Contestant's Testimony and Evidence

James E. Brown, section foreman, testified as to his general duties, and he confirmed the inspection conducted by Inspector Ross on August 26, and that he was with the inspector. Mr. Brown stated that excessive coal spillage was in fact present on the pan line and he attributed the spillage to a break in the pan line chain which had occurred the day before the inspection. He indicated that he was not at the mine the previous Thursday or Friday, and he denied telling Mr. Ross that the coal had been present since the previous week, and he indicated that he told him that it had been there "this week," meaning the Monday before the inspection. Due to a misunderstanding between the scoop operator and the pan line operator, coal continued to be dumped on the belt after the chain broke and that accounted for the excess spillage. Cleaning of the spillage began at approximately 10 a.m., Monday, after the mine foreman came on the section and advised him to start cleaning up. He assigned one man to begin cleaning up, but when the belt broke at 10 a.m., the foreman called him for additional men and he dispatched all but one crew member to assist in the cleanup and the belt as down the rest of the day on Monday. Cleanup could not be finished on Monday because of the broken pan line and that was the only way to remove the coal from underground. The belt was down until it was repaired within the hour of the second shift on Monday, and when he reprorted to work on Tuesday, the belt had been repaired. The second Monday shift is a cleanup and maintenance shift and no coal is mined (Tr. 119-126).

Mr. Brown stated that when Mr. Ross arrived on the section on Tuesday morning no coal was being taken from the face area but a scoop was dumping coal on the pan line and that coal had been scraped up from the roadway in the No. 2 entry. When Mr. Ross informed him of the violation at 8 o'clock he assigned a man to begin cleaning up and then proceeded to mine coal from

the face area. He did not inform Mr. Ross about the broken pan line, nor did he know whether any of the coal spillage had been present since the previous week because he left the mine on the previous Wednesday and there was a rock fall on the No. 2 belt on Thursday and the section was down (Tr. 126-128). Mr. Brown did not believe that the cited spillage resulted from a lack of care for safety and he has never believed that mine management has no concern for the safety of the men (Tr. 129).

Mr. Brown testified that the No. 2 entry is a roadway used by the scoops bringing materials from the supply area to the face, and the entry is not normally used as a coal transportation route. Mr. Brown confirmed that "coal dirt" was packed in the hole in the roadway and that this was done to facilitate the movement of equipment through the area. He did not believe that dumping coal in that hole was a violation of any safety standard, and he indicated that this had been a longstanding practice observed by other MSHA inspectors who made no issue over it (Tr. 131). Mr. Brown stated that the No. 2 entry had been previously rock dusted, but he could not recall the exact dates when it had been last dusted, and indicated that it is dusted when the conditions warrant (Tr. 131). There are four holes in the entry in question, at a depth of approximately 12 inches, and he conceded that loose coal accumulations were present but denied that any float coal dust was present in the area. The holes were cleaned out, but not refilled, and this has resulted in the equipment not being able to operate in the area. The holes are presently filled with water from the mine floor (Tr. 134).

On cross-examination, Mr. Brown conceded that Inspector Ross told him he could fill the empty holes with rock or "bridge" over them (Tr. 136). He also conceded that holes in haulage roads were routinely filled with coal, packed down, and then wet down with water. He also agreed with Mr. Ross that the roof area had not been dusted, and agreed with the depths of the accumulations found by the inspector in the first crosscut inby the tailpiece between the Nos. 2 and 3 entries. Mr. Brown believed the accumulations there resulted from rib sloughage which had been ground into fine dust by the scoops traveling through the area. Since the scoops make 17 to 20 daily trips, spillage could occur from the previous shift, and he conceded that "ridges of coal" were present in the crosscut when the inspector arrived on the scene (Tr. 137-140).

Mr. Brown confirmed that coal was mined and loaded on the section during the hours of 8 and 10 on Monday morning, the day before the inspection, and he indicated that most of the spillage was there and that it was possible that some of it had been there from the previous Thursday or Friday, but since he was not at the mine on those days he could not be sure (Tr. 140-141). Aside from the pan line spillage, which he attributed to the broken chain, he believed the spillage found in the two crosscuts and the No. 2 entry resulted from spillage form the scoops traveling in the area on Monday as well as from the scoop blades as they start into a crosscut and from sloughage from the ribs. Coal was mined for about an hour and a half on Monday morning but ceased for a short time when the pan chain broke. Mining resumed again at 9:15 a.m., and continued throughout the shift (Tr. 142-146). The broken belt

previously mentioned was located outby the pan line and was not in this area and the location of that belt is not shown on the sketch identified on Exhibit G-3. When the inspector arrived on the scene, men were not assigned to clean up because they were working on greasing and servicing the pan line, but cleaning began when the mine foreman instructed him to assign men to this task (Tr. 147-150).

On redirect examination, Mr. Brown confirmed that cleaning began at 9 a.m., Monday morning after the mine foreman informed him that it was necessary, but cleaning ceased after the pan line broke, and on Tuesday morning the conditions were the same as they were when he left the mine on Monday and the "shovel was still in the coal" where it was left on Monday (Tr. 150). The pan line malfunction caused the spillage on Monday, one man was cleaning during the day shift that day, and coal was also mined (Tr. 151). Moisture was present on the roof in the No. 2 entry, but he did not know how much, and he did not know when the No. 2 entry had been last rock dusted (Tr. 152-154).

In response to bench questions, Mr. Brown stated that he did not initially inform Inspector Ross about the problems with the belt or pan line because when Mr. Ross informed him about the violation at approximately 8 a.m., he believed that it was a routine citation. Mr. Brown stated that he did not know that the citation was an unwarrantable failure until he learned this at 11:50 a.m. (Tr. 156). He reiterated that the coal accumulations found in the No. 2 entry were due to dumping it in the hole (Tr. 159). The other spillages identified by the inspector at five locations were caused by sloughage off the scoops and the scoops moving in and out of the areas (Tr. 160).

Donald Hughes, mine foreman, testified that he was present in the 4 Right area on Monday morning, the day before the inspection in question, and he found the pan chain line "dirty" and informed Mr. Brown to proceed with cleaning it up. Shortly after cleanup had begun, the chain line broke and that resulted in coal spillage accumulating quickly, but he did not know how much had accumulated. Trouble then developed with the No. 2 belt which had broken and he instructed Mr. Brown to take his men off his section and assign them to work on the spillage resulting from the No. 2 belt breakage (Tr. 161-163).

Mr. Hughes stated that he was not underground when Mr. Ross first arrived there on Tuesday morning, but went to the 4 Right section at 9 or 9:30 a.m., and he advised Mr. Ross that the belt had broken the day before and that he had not had a chance to clean up the spillage. He surmised at that time that Mr. Ross would issue a citation, but he did not believe that it would be an unwarrantable failure citation (Tr. 164).

On cross-examination, Mr. Hughes stated that he could not estimate the amount of spillage which could have accumulated between 9 and 9:30 a.m. on Monday, but stated that the amounts described by the inspector along the pan line could have accumulated in an hour. The amounts described by Mr. Ross in the two crosscuts in the No. 2 entry were "normal" and would take 15 to 20 minutes to clean up. On Tuesday, some of the men were cleaning the pan line and some were cleaning the roadway, and cleanup operations continued until 12:55 (Tr. 165-168).

In response to bench questions, Mr. Hughes confirmed that he told Inspector Ross that the section was "in the worst shape I've seen it in" and that was the reason why he was taking the steps to have it cleaned up (Tr. 172).

Fred Ferguson, mine superintendent and part-owner, testified that the practice of filling holes in the mine floor with coal is one that is followed by most coal companies in West Virginia and that no inspector, other than Mr. Ross, has ever questioned it. He also stated that he was formerly employed by MSHA from 1967 to 1977 as a supervisory mine inspector and that MSHA has always accepted blanket rock dusting in lieu of cleaning up accumulations of coal and coal dust in areas such as return airways and where it is physically impossible to move equipment. He is certain that Mr. Ross worked under his supervision at one time or another during his tenure with MSHA (Tr. 173-175).

Mr. Ferguson explained "rib sloughage," and he stated that if it is permitted to be ground up and moved into the roadways and entries by the action of the equipment running over it, it could become a violation. He stated that he was present on the section a month before the citation in question was issued by Mr. Ross, and at that time the entire section was rock dusted. He also walked through the section approximately 2-1/2 weeks before the citation issued and he observed no loose coal or coal dust present. He explained his cleanup program as well as problems that he was having with filling pot holes on the underground roadways (Tr. 176-181). He did not recall discussing the specific accumulation problems with Mr. Ross on the day the citation issued (Tr. 181).

On cross-examination, Mr. Ferguson conceded that any rib sloughage which may have been present on the 4 Right section was not to the point where it would have reached its "angle of repose" (Tr. 182). During the course of a colloquy with MSHA's counsel, he took the position that normal rib sloughage, which in effect remains at its angle of repose against the rib, need not be cleaned up, even though it constitutes an accumulation of loose coal and coal dust, as long as it is rock dusted (Tr. 183-187). However, once the rib sloughage is dragged and spread through an entry and ground up by the movement of equipment, it must be inerted by rock dust or cleaned up and removed from the mine immediately after the shift or during the cleanup cycle (Tr. 188-190).

Mr. Ferguson stated that the mine cleanup cycle was followed in this case, and he indicated that when rib sloughage is dragged into an entry, it could be ground up and mixed in with the rock dust and that it is normally removed by the scoop. Spillage is expected at the dumping point and this area is normally cleaned up three times a day by the scoop pushing the material into the dumping point. In one of his one-section mines, the production crew runs coal from 7 a.m. to 3 p.m., and after that a crew of three or four men and a boss on the section service the equipment and check for needed repairs. They then scrape every dumping point and roadway, and may also shoot coal in preparation for loading (Tr. 193). The No. 3 Mine has two sections, but at

the time in question he only had one maintenance crew which he had to utilize for other work on a third shift and he in effect lost one maintenance crew for one of his sections (Tr. 194). He also stated that a cleanup man is regularly assigned to clean the belt head and pan line (Tr. 195).

Mr. Ferguson confirmed that he was not present with Mr. Ross on the 4 Right section at the time he issued the citation in question and he did not observe the conditions described by him in the order (Tr. 196).

Inspector Ross was recalled by me and he confirmed that he would cite an operator for a violation of section 75.400 if he found pot holes filled with loose coal. However, if he observed rock dust being mixed in with the coal used to fill the holes, or if he observed that there was rock dust mixed with the coal, he would not cite a violation for accumulations (Tr. 206). He also indicated that before citing an operator for accumulations which may have been caused by a defective belt he would first ascertain all of the facts, including the time period over which the accumulations were permitted to exist and the efforts made at taking corrective action (Tr. 208). In the instant case, Mr. Ross stated that he decided to issue the unwarrantable failure citation because Mr. Hughes and Mr. Brown advised him that while the belt broke on Monday, the conditions had existed since the previous Friday and a weekend had elapsed before cleanup was accomplished. In addition, once the belt was repaired on Monday, there was ample time to clean up before he arrived on the scene on Tuesday. The accumulations could have been cleaned up during the remainder of the first shift or the second shift on Monday (Tr. 209).

Stipulations

Although this is not a civil penalty proceeding, the parties stipulated that Maben Energy Corporation owns three additional small mines, that the No. 3 Mine produces 400 tons of coal a day and employs 34 miners, and that Maben may be considered to be a small-to-medium-sized mine operator. The parties also agreed that the mine is subject to the Act and that assuming a violation is affirmed, any reasonable penalty which may be assessed in a future civil penalty proceeding will not adversely affect Maben's ability to remain in business (Tr. 211-213).

Findings and Conclusions

As pointed out earlier in this decision, Inspector Ross issued the contested section 104(d)(2) withdrawal order upon inspection of the mine on August 26, 1980, and the discovery of accumulations of loose coal, coal dust, and float coal dust at the locations described by him on the face of the order. A copy of the order, Exhibit G-1, reflects that Mr. Ross cited a violation of 30 C.F.R. § 75.400, found that the violation was significant and substantial, and in the space marked "Initial Action," he makes reference to the underlying order, No. 0651213 issued on July 24, 1980. He also testified that he was aware of the fact that the underlying citation and order had previously been issued (Tr. 51-54).

The statutory scheme concerning the issuance of unwarrantable failure citations and orders pursuant to section 104(d) of the Act involves a chain of enforcement actions. It begins when an inspector issues a section 104(d)(1) citation notice based on his findings of (1) a violation of a mandatory safety standard, (2) the violation does not create an imminent danger, but could significantly and substantially contribute to the cause and effect of a mine hazard, and (3) the violation was caused by the unwarrantable failure of the operator to comply with the mandatory standard in question. "Significant and substantial" has been interpreted to exclude only technical violations which pose no risk of injury at all, or violations which pose a risk of injury which has only a remote or speculative chance of coming to fruition, Alabama By-Products Corporation (On Reconsideration), 7 IBMA 85 (1976). "Unwarrantable failure" has been defined to mean the operator failed to abate the conditions or practices cited as a violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference, or lack of reasonable care, Zeigler Coal Company, 7 IBMA 280, 295-296 (1977).

The second link in the enforcement chain authorizes the issuance of a section 104(d)(1) withdrawal order if the inspector finds another violation during the same inspection or during any inspection over the next 90 days caused by the operator's unwarrantable failure to comply. There is no requirement for this order to be based on a violation which "significantly and substantially" contributes to the cause and effect of a mine hazard, International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir.), cert. denied, sub nom. Bituminous Coal Operators' Association v. Kleppe, 429 U.S. 858 (1976).

Once the conditions or practices which prompted the section 104(d)(1) order are abated, the order is terminated, but liability for the issuance of a subsequent section 104(d)(2) order begins. That is, an inspector is authorized to issue such an order during any subsequent mine inspection where he finds any violations similar to those that resulted in the issuance of the section 104(d)(1) order until such time as an inspection of the mine discloses no similar violations. There is no requirement of substantive similarity of violations. "Similar" violations does not mean violations of a similar mandatory standard, but rather means violations which similarly occur through the operator's unwarrantable failure to comply, Zeigler Coal Company (On Reconsideration), 4 IBMA 139 (1975). In other words, a section 104(d)(2) order is not invalid simply because the underlying violation as set forth in the section 104(d)(1) order involves a different mandatory health or safety standard.

In a proceeding to review a section 104(d)(2) withdrawal order, MSHA must establish a prima facie case with respect to: (1) the existence of the underlying section 104(d)(1) citation and order, (2) the fact of violation, (3) unwarrantable failure, and (4) the other requirements for issuance of a section 104(d)(2) order. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975).

The underlying section 104(d)(1) citation which began the enforcement chain in this case is an unwarrantable citation numbered 653368, issued by an MSHA inspector on May 19, 1980 (Tr. 5). A contest regarding that citation was filed by the contestant, the case was heard by Judge Melick (Docket No. WEVA 80-437-R), and it is my understanding that he affirmed the citation from the bench, and finalized his decision in writing on January 28, 1981. Contestant made reference to that underlying citation when it filed its September 8, 1980, notice of contest in this proceeding, and while MSHA and the contestant did not submit copies of that citation during the hearing in this matter, contestant does not deny its existence and it seems clear to me that the citation was in fact issued and received by the contestant.

The underlying section 104(d)(2) unwarrantable failure order is an order numbered 0651213, issued by an MSHA inspector on July 24, 1980 (Tr. 5-6). That order is mentioned by the contestant in its notice of contest filed in this case, is the same order identified by Inspector Ross in the "Initial Action" block on the face of his order, and it was discussed on the record during the hearing of November 6, 1980, in Docket No. WEVA 81-72-R. That case was subsequently dismissed by me on January 21, 1981, because of the contestant's failure to timely file its notice of contest, and a copy of the transcript concerning the arguments advanced on MSHA's motion to dismiss that case is included in the record of this proceeding for the convenience of the parties.

Contestant has not denied the existence of the underlying section 104(d) citation and order on which the contested section 104(d)(2) order in this case was based and has not raised this as an issue. Accordingly, I find that MSHA has met its burden in establishing the existence of those underlying citations, and contestant has not rebutted this fact.

Fact of Violation

Contestant is charged with a violation of the provisions of 30 C.F.R. § 75.400, which provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

With respect to the question as to whether the evidence adduced in this proceeding supports a finding that the contestant violated the provision of 30 C.F.R. § 75.400, as charged by the inspector, I take note of the fact that the Commission, in Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also, MSHA v. C.C.C.-Pompey Coal Company, Inc., Docket No. PIKE 79-125-P, decided by the Commission on June 12, 1980, remanding the case to the judge to apply its holding in Old Ben.

Turning to the evidence and testimony adduced in this case, the preponderance of the evidence establishes the existence of the accumulations of loose coal and coal dust, including float coal dust, in the areas described by Inspector Ross on the face of his order. The detailed testimony of Mr. Ross concerning the conditions which he observed in the active workings at first hand, including a sketch, measurements, and notes that he took on the day in question more than adequately establish the conditions he described on the face of his order (Tr. 20-32, 38-46). He also testified that he sifted through the coal and coal dust and determined that it contained no moisture, was not compacted, that he could observe tracks from equipment which had passed through the areas, that he could kick the loose coal around with his foot, and that he observed no other materials, such as rock or rock dust, mixed in with the loose coal and coal dust (Tr. 61-64, 98-103).

Respondent's testimony does not rebut the fact that the accumulations existed as described by Mr. Ross. As a matter of fact, during arguments at the close of MSHA's case in support of a motion to dismiss (which I denied), contestant's counsel more or less conceded the existence of the accumulations but denied that the violation was an unwarrantable failure (Tr. 110-115). Further, the testimony of contestant's witnesses does not rebut the existence of the cited accumulations, and contestant's defense is essentially based on asserted mitigating circumstances surrounding a broken pan chain and a defective belt in another mine area which contestant contended caused the initial spillage and subsequent accumulations found by the inspector. Under the circumstances, I conclude and find that MSHA has established by a preponderance of the evidence that the accumulation of the materials cited by the inspector in the order existed as alleged, that they constituted a violation of section 75.400, and the citation is AFFIRMED.

Significant and Substantial Contribution to the Cause and Effect of a Mine Safety Hazard

Section 104(d)(2) does not condition the issuance of an order of withdrawal on a finding that the condition found significantly and substantially contributed to the cause and effect of a mine safety hazard. There is no such gravity requirement for orders of withdrawal issued under section 104(d)(2). See, International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403, 1407 (D.C. Cir. 1976). Even if there had been such a requirement, it would have been met in this case, and my reasons for this conclusion follow.

While it is true that the inspector found no imminent danger and stated that he detected no methane during the course of his inspection, the fact is that the accumulations of loose coal, coal dust, and float coal dust which he observed visually, were not inerted with rock dust. While there is some testimony from the contestant that the areas were previously rock dusted, the fact is that when Inspector Ross observed the conditions all that he saw was loose coal and coal dust. He believed the conditions presented a hazard, and that they could have contributed to a mine fire or explosion. Even though Mr. Ross stated that he observed no ready ignition sources in the area where

he found the accumulations, permissible electrical battery-powered scoops were operating in the section during active mining operations, men were working on the section, electrical components and cables were present, and Mr. Ross had also cited a later permissibility violation on one of the scoops while he was on the section (Tr. 34-45). Thus, it can hardly be said that the violation in question was of a technical nature. To the contrary, I find that the facts presented support a finding that the cited violation of section 75.400 presented a clear potential hazard and danger to the miners working on the section. As pointed out by the Commission in MSHA v. Old Ben Coal Company, Docket Nos. VINC 75-180-P et seq. (October 24, 1980):

> We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if the ignition source were present.

See also, Old Ben Coal Company, Docket No. VINC 74-11; Peabody Coal Company, Docket No. VINC 77-91, and Freeman United Coal Company, Docket No. VINC 78-395-P, all decided by the Commission on December 12, 1979.

Unwarrantable Failure

As stated earlier, a violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violations, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296 (1977). While it may be true that a violation of a mandatory safety standard is not negligence per se, and that a violation may exist without negligence on the part of an operator, the record adduced in this proceeding establishes negligence and an unwarrantable failure to comply well beyond the guidelines enunciated in Zeigler, and my reasons for this conclusion follow.

Inspector Ross testified that he initially based his unwarrantable failure order on the fact that he had been informed by Mine Foreman Hughes that the section was in the "worst shape" that he had ever seen, and the admissions by Section Foreman Brown that the accumulations were present since the previous Friday and that the accumulations "stay like this" because "I've been so short of men I can't produce and clean up like I should" (Tr. 27-32). Although Mr. Brown denied making the statements to Mr. Ross, Mr. Ross stated that his notes taken at the time of the conversation confirm the prior admissions made to him by Mr. Brown. Mr. Hughes was not on the section on Tuesday morning when Mr. Ross arrived on the scene, but he candidly admitted that he was on the section the previous Monday and found the pan line "dirty," and

while he instructed Mr. Brown to begin cleanup, he admitted that he did not have ample time to clean up the accumulations found by Mr. Ross. Mr. Hughes also candidly admitted that he told Mr. Ross that the section was the "worst" he had ever seen. Mr. Ross also testified that his review of the preshift and onshift records for Monday and Tuesday contained notations that the 4 Right section was in need of cleaning and rock dusting.

Although the parties waived the filing of posthearing arguments, contestant's arguments during the course of the hearing in defense of the order seem to rest on the assertion that the failure to timely clean up the accumulations resulted from a defective belt and a broken pan chain line. However, the record reflects that any problems which may have occurred with the belts happened early on in the Monday morning shift and it was corrected within a relatively short period of time. As a matter of fact, Section Foreman Brown admitted that once the problem with the chain was taken care of on Monday, he resumed mining on the section for the rest of the shift even though he was aware that the spillage and accumulations had not been cleaned up. Further, on the day of the inspection, the next day, his men were engaged in greasing and servicing the pan line, and only after Mr. Hughes instructed him to commence cleaning the area did he actually begin to clean up. Under these circumstances, I fail to understand how the contestant can argue that it acted to achieve cleanup as soon as it became aware of the problem. To the contrary, I find that cleanup could have been accomplished on the first shift on Monday as soon as the belt problems were taken care of, or at least during the maintenance shift. Contestant chose to continue mining coal and to perform maintenance work during the periods following the correction of the belt problems and this indicates a lack of due diligence and indifference amounting to a lack of reasonable care to insure the cleanup and removal of the accumulations found by the inspector. In these circumstances, I conclude and find that the citation in question resulted from an unwarrantable failure by the contestant to comply with the provisions of section 75.400, and the order was properly issued and it is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Order of Withdrawal No. 0654036, issued on August 26, 1980, is AFFIRMED, and this contest is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Robert A. Burnside, Jr., Esquire, File, Payne, Scherer & Brown, Drawer L, Beckley, WV 25801 (Certified Mail)

Stephen P. Kramer, Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 3 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GOLD SEEKERS, (EAST FORK CREEK MINING, Tom Williams), Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-216-M A/O NO. 50-01294-05001 R Mine: Gold Leaf

Appearances:

Marshall Salzman, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102
for the Petitioner

Before: Judge Virgil E. Vail

DECISION AND ORDER ASSESSING DEFAULT PENALTY

STATEMENT OF THE CASE

On August 3, 1979, the respondent was issued citation number 354606[1] for his refusal to allow federal mine inspectors entry to the premises for the purpose of conducting an inspection. The inspectors returned to the mine the following day and Mr. Williams again refused them entry to the mine. A second citation, number 351915, was issued on August 4, 1979, charging respondent with violating section 104(b) of the Federal Mine Safety and Health Act of 1977 (hereinafter referred to as the Act).

1/ Citation number 354606 states that, "Tom Williams, leaser (sic) of the claim refused to allow Thomas Usselman and Vern Boston, authorized representatives of the Secretary, entry on to the Gold Leaf mining claim for the purpose of investigating a written complaint of safety hazards in existence and conducting an inspection pursuant to § 103(a) of the Act.

The Secretary of Labor filed a proposal for assessment of civil penalty on March 21, 1980, alleging that respondent had violated sections 104(a) and (b) of the Act. Tom Williams filed an answer to the Secretary's proposal on June 16, 1980 and the case was then forwarded to the undersigned.

A hearing was scheduled in Ankorage, Alaska for October 22, 1980. The respondent was sent two notices of the hearing. The amended notice of hearing was sent by certified mail and signed for by Mr. Williams. Despite these notifications, Mr. Williams failed to appear, send a duly authorized representative or notify the undersigned that he would be unable to attend the hearing. The undersigned, counsel for the petitioner and petitioner's witnesses all traveled to Ankorage, Alaska and were prepared to proceed with the hearing as previously scheduled.

On November 21, 1980, an Order to Show Cause was sent by certified mail to Mr. Williams, granting him 20 days to show cause why the proposed civil penalty should not be summarily entered as a final order. Although respondent received the order, he has failed to file a response. Therefore, I find the respondent to be in default. 29 C.F.R. § 2700.63(b).

PENALTY ASSESSMENT

I find that the gravity and negligence of the violation were of a serious nature. Respondent's refusal to allow an inspection is viewed as an attempt on his part to totally circumvent the purpose of the Act. Furthermore, the fact that the inspectors were at the mine site in order to investigate a written complaint of safety hazards at the mine adds to the seriousness of the respondent's failure to allow them entry. There is nothing in the record that indicates that the imposition of the penalty will affect the respondent's ability to continue in business.

The proposed penalty was $200.00. Under Rule 29(b) a Judge is not bound by the Secretary's proposal. Further, in view of the respondent's actions in this matter and obvious refusal to comply with the provisions of the Act, I find that a penalty of $500.00 is appropriate.

ORDER

It is hereby ORDERED that respondent pay the penalty of $500.00 within thirty (30) days from the date of this decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq.
Office of the Solicitor
United States Department of Labor
11071 Federal Building
450 Golden Gate Avenue
San Francisco, California 94102

Mr. Tom Williams
Box No. 66
Hope, Alaska 99605

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
	)	DOCKET NO. WEST 79-79-M
	)	A/O No. 02-00151-05009
	)	DOCKET NO. WEST 79-158-M
	)	A/O No. 02-00842-05007
Petitioner,	)	DOCKET NO. WEST 79-351-M
	)	A/O No. 02-01391-05004
v.	)	DOCKET NO. WEST 79-382-M
	)	A/O No. 02-00151-05011
MAGMA COPPER COMPANY,	)	DOCKET NO. DENV 79-485-PM
	)	A/O No. 02-00151-05008
Respondent.	)	
	)	MINE: SAN MANUEL

APPEARANCES: Alan M. Raznick, Esq., United States Department of Labor, Office of the Solicitor, 11071 Federal Building 450 Golden Gate Avenue, San Francisco, California 94102 for the Petitioner,

N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills 1700 TowneHouse Tower, 100 West Clarendon Phoenix, Arizona 85013 for the Respondent.

Before: John A. Carlson, Administrative Law Judge

DECISION

INTRODUCTION:

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., [hereinafter the Act], arose out of inspections conducted by representatives of petitioner at three of Respondent's mine facilities near San Manuel, Arizona. The inspections were conducted in October of 1978 and in January, April and May of 1979. Following the inspections, 27 citations, comprising nine docketed cases, were issued. A hearing on the merits was held in Phoenix, Arizona. Only nine citations were actually tried.[1] At the outset of the hearing all nine cases were consolidated (Tr. 4)[2]. Jurisdiction was not contested. Both parties filed post-hearing briefs.

1/ Of the 27 citations issued, 16 were settled prior to the hearing. Two citations were settled during the hearing (Tr. 200,341).

2/ Of the nine cases, five were settled completely; those five were severed from the remaining cases in order to expedite the final orders.

DISCUSSION

Docket Number WEST 79-351-M:

Citation No. 376974 -- Water and Mud in Basement of Crusher Building:

a. Violation:

While inspecting respondent's lime plant on April 25, 1979, Inspector Richard Escalante observed three inches of water and mud on the basement floor of the crusher building.[3] Presence of the water and mud is not disputed. It had collected during a rainy period. The cited standard, 30 CFR § 57.20-3(b) provides:

> The floor of every workplace shall be maintained in clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats or other dry standing places shall be provided where practicable.

The issue here is whether the basement area is in fact a "workplace". Respondent maintains that it is not. In support of this position respondent points out that the inspectors saw no employees in the basement and that, during ordinary operations, none had occasion to be there.

The record does show conclusively that no worker was regularly stationed in the basement. Operators of the crusher worked upstairs. Thus, workers would be on the basement floor only to clean the tail pulley on the conveyor or to make repairs. Regular maintenance was done once every three months (Tr. 102-103), but the tail pulley could require cleaning at any time (Tr. 105, 106). The flooded condition had existed for about six days (Tr. 101, 102).

The Secretary argues that these facts show violation because respondent's employees had access to an area made dangerous by the water; and that ordinary maintenance or repair requirements of the crusher could at any time cause an employee to go there.

Respondent argues that mere "access" is not enough, particularly since 41 CFR § 55.2 declares a "working place" to mean ". . . any place in or about a mine where work is being performed." (Emphasis added.)

I agree, however, with the Secretary's view. Use of the present tense in a definition of this sort does not mandate the narrow construction suggested by respondent - - that no "working place" exists unless the inspector actually sees workers there.

3/ An inspector other than Escalante issued the citation, but was unavailable for trial. Escalante saw the area in question, and testified at the hearing.

In an industrial society "work" is often performed by machines which require only occasional human presence. I agree with respondent's view that violation cannot exist where no miner can be exposed to the hazard contemplated by the standard. This would be true, for example, of a wholly abandoned extraction site on a mining property. But for purposes of the cited standard, any location which could reasonably require or invite even the occasional presence of employees is a "workplace". No other construction is consistent with the remedial purposes of the Act. The flooded basement was such a location. The water could have been removed by pumping, but respondent permitted it to remain for several days.

Respondent further suggests that no violation occurred because crusher employees were told by their foreman to stay out of the basement until it was pumped out (Tr. 100). Such an oral warning cannot serve as a substitute for the physical abatement comtemplated by the standard. The crusher was operating, and it must be assumed that workers would try to clear it should it have become clogged.

b. Penalty:

This citation was issued at respondent's San Manuel lime plant, a relatively small facility.[4] Counsel stipulated that during the two years prior to the inspection in April of 1979, 8 violations, in 14 inspection days, were assessed at the lime plant (Tr. 78). The hazard presented by the violation was moderate: A worker could have fallen on the slippery floor, possibly causing a broken arm or leg (Tr. 85). It appears that respondent knew of the violation. One of respondent's employees told the inspector that a sump pump had been removed from the basement of the crusher building to another location (Tr. 86). Work to abate the violation was started immediately and completed the next day (Tr. 86). Payment of an appropriate penalty for this violation would not affect respondent's ability to continue in business (Tr. 10).[5] Considering all of the above factors together, I find the penalty proposed by petitioner, $ 32.00, to be appropriate.

4/ The San Manuel lime plant operates at slightly less than 50 thousand manhours annually. The remaining citations discussed in this decision were issued at a large underground mine operating at more than 4 million manhours annually. The size of respondent's company varies with the time of inspection (8.5 million manhours in 1978, 9.5 million in 1979); in any event, the company is large (Tr. 9). These factors have been considered in determining appropriate penalties where violation was established.

5/ Counsel stipulated at the outset of the hearing that respondent's ability to continue in business would not be affected by an penalty payment involved in these cases (Tr. 10). This factor was considered in determining all penalties.

Docket Number WEST 79-382-M:

Citation Number 378580 - - Back-up Alarm:

a. Violation:

On May 10, 1979, inspector Eugene Pesqueira observed a large front-end loader operating without a back-up alarm. He therefore charged respondent with a violation of 30 § 57.9-87 which provides:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The undisputed evidence shows that the loader had an obstructed view to the rear, and that its back-up alarm was not working. Respondent stresses that the alarm had been operative at the beginning of the shift. It argues that it therefore should be excused from any finding of violation because it had taken all reasonable precautions and could not have known that the device would break down. In this regard it cites El Paso Rock Quarries, Inc., 1 FMSHRC 2046 (1979) in which a similar citation was vacated.

The argument presents two difficulties. First, lack of negligence is not a valid defense against violation of a mandatory standard. The degree of fault bears only upon penalty. United States Steel Corp., 2 FMSHRC 1306, 1307 (1979). Second, El Paso Rock is inapposite. There the judge noted that drivers were instructed "to take any truck to the shop to be fixed when a failure occurs." There is no evidence that Magma enforced an equivalent work rule or that the failure occurred at the very moment of the inspector's visit. Had such an instantaneous failure occurred, it is likely that the driver would have mentioned it when interviewed by the inspector (Tr. 167), or that respondent would have made it known on the record. As it was, respondent was content to point out that the alarm was checked at the beginning of the shift. Petitioner established the violation.

b. Penalty:

It is plain,as the inspector claimed, that a massive machine, backing up without a signalman or audible alarm, posed a danger of grave bodily harm (Tr. 168). In that sense the gravity of the violation is high. On the other hand, respondent's loaders were equipped with alarms which were checked at the beginning of each shift; the duration of violation was apparently short; and abatement was accomplished swiftly. For these mitigating reasons, a penalty of $114 is appropriate.

Citation No. 378587 -- Steel Upright Used for Ground Support.

a. Violation:

On May 15, 1979, Inspector Pesqueira issued a citation alleging that a four-inch steel upright used for ground support in an underground travelway "was damaged, loosened and dislodged and could create a hazardous condition." The cited mandatory standard, 30 CFR § 57.3-26, reads:

> Timbers used for support of ground in active workings shall be set, blocked, or blocked and wedged so that a tight fit is achieved. Damaged, loosened, or dislodged timbers which create a hazardous condition shall be promptly repaired or replaced.

Respondent does not dispute the inspector's testimony that the upright in question was bent approximately two feet out of its intended position, and that one of two bolts was missing. Respondent contends, however, that the condition was not violative because the damage did not create a hazardous condition.

The inspector had no ready access to the history of the damage, but concluded that the upright had been out of place for at least several weeks because of the presence of rust and muck accumulation.

Respondent's defense appears to be that it deliberately refrained from replacing the upright because the bent steel still supported some weight, and because the need for support had lessened as ore was removed from the drift area (Tr. 190-196). Its safety engineer, Mr. Lucas, testified that although uprights or sets were spaced at 5-foot intervals in accordance with the original engineering plan, examination of the side lagging, other supports, and surrounding ground condition indicated no hazardous condition existed because of the single damaged support (Tr. 194-196). At one point Lucas said the condition had existed "at least a few days", but not for as long as two months (Tr. 197). Had it been that long, he said, it would have been "taken care of" (Tr. 198). Yet other evidence, undisputed by respondent, showed the condition had existed for a year (Tr. 199, petitioner's exhibit 3).

Respondent is perhaps correct that a mine operator need not replace every damaged or weakened support. But if that is so, the Secretary is doubtless correct in insisting that where a damaged support in a working area of a mine is not replaced, that decision must rest on a thorough and prudent assessment of the effect of weakened support on safety. That the support was first put there creates a strong presumption that it was a necessary part of a timbering system. Here, respondent's evidence to the contrary is unconvincing. The damage had existed for a year, but respondent's own safety engineer evidently believed it should have been replaced within two months after the damage. From the evidence of record, one must conclude that respondent's investigation and replacement efforts were, at best, haphazard. The mandatory standard was violated.

b. Penalty:

The hazard, that of a cave-in, is grave. The record shows that the support had been bent and out of place for at least several weeks and perhaps for as long as a year. Although the duration of the violative condition suggests some negligence on respondent's part, it also indicates that the probability of callapse was relatively remote. Respondent abated the violation promptly (Tr. 188). Considering these and all other factors bearing on penalty, I conclude that $114.00 should be assessed.

Citation Number 378700 -- Burned Out Floodlight:

a. Violation:

Inspector Thomas Aldrete, on May 3, 1979, noted that a floodlight on the surface framing shed was burned out. He therefore charged a violation of 30 CFR 57.17-1, which provides:

> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

The undisputed evidence shows that the light intended to illuminate a two-foot-high lumber storage platform was burned out. It also shows that employees, in the ordinary course of their work, went to the platform to stack 3 x 12 timbers. The inspector claimed that employees worked on the platform from one to three times a week; respondent's safety engineer maintained that no work had been done there during the previous week, but did not deny that employees were intermittantly present there.

Respondent has raised several defenses. First, its safety engineer suggested that lights from a parking lot 200 feet away furnished enough illumination "that a person familiar with this area could move around . . . very safely . . . ." I find otherwise. The standard is not qualified by considerations of an employee's familiarity with the workplace. It requires enough light to allow objects to be seen, not merely sensed with the help of daylight recollections. I accept the testimony of the inspector that workers were exposed to a danger of tripping and perhaps falling from the platform because they could not adequately see objects on the ground.

Respondent also suggests that violations of the illumination standard must be proved by "objective evidence" in the form of a scientific measurement. I disagree.

The standard covers a multitude of locations at which the amount of light necessary for safe activity could differ widely. The illumination required for walking safely down a walkway, for example, would likely be less than that needed for the safe operation of a switch panel where proper reading of small inscriptions could be crucial. Thus, a general and admittedly judgmental test was incorporated in the regulation. A light meter reading would have been admissible, perhaps even desirable, but was not necessary. The essential question was whether the anticipated activity (walking and moving lumber on the platform) could be carried on safely. Proof that the inspector could not make out objects on the ground satisfies the evidentiary burden imposed by the standard.

Respondent further suggests that no violation occurred because no workers were on the platform at the time of inspection. This agreement parallels that made concerning the flooded crusher basement (Citation No. 376974, supra), and the result must be the same.

Neither is it a defense that respondent had a system for reporting nonfunctioning lights. Fault or negligence is not relevant to a determination of violation. United States Steel Corp., supra.

b. Penalty:

Counsel stipulated that during the two years preceding the May, 1979 inspection, 78 violations were assessed in 141 inspection days (Tr. 182) -- a significant number.[6] However, the proposed penalty should be reduced for two reasons. First, the degree of negligence was slight. Second, employees were seldom on the platform and any exposure would have been brief. A reasonable penalty is $ 32.00.

DOCKET NUMBER WEST 79-79-M

Citation Number 376888 -- Guarding of Head Pulley:

This citation concerns guarding of a head pulley at the top of the batch plant gravel conveyor. Inspector Thomas Aldrete testified that the pulley was about 18 inches from an adjacent incline walkway on the south side of the conveyor. His citation, written on October 19, 1978, charged a violation of 30 CFR § 57.14-1, which provides:

> Gears, sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

6/ These figures apply to all the citations in docket number WEST 79-382-M which were actually tried.

Testimony of the parties was sharply divided. No one disputed that the south side of the pulley needed guarding of some sort to protect the pinch point, since that part of the pulley was close enough to a walkway and platform that an employee, losing his balance, could catch an arm in the mechanism. Respondent, however, contended that the south side of the pulley was already guarded at the time of inspection, and produced a photograph (respondent's exhibit 5) which shows a guard in place. Ward Lucas, respondent's safety director, claimed that this photograph, taken a day later, showed the condition at the time of inspection. According to Lucas, Inspector Aldrete at the inspection had complained only of the need for a grate over the top of the pulley. Aldrete agreed that he had recommended or suggested the grate (which was promptly installed) and that such a guard was not required by the standard, but insisted that the absence of a side guard was the violation he had in mind.

Testimony on this matter was lengthy but inconclusive.[7] Recollections of witnesses for both parties were obviously dimmed to some extent by the passage of time. On the evidence presented, I was simply not convinced that the side of the pulley (as opposed to the top arm) was unguarded at the time of inspection. In short, the Secretary failed to sustain his burden of proof. Consequently, the petition as to this citation is dismissed and no penalty is assessed.

Citation No. 377070 -- Loose Ground:

On January 16, 1979, Inspector Jaime Alvarez cited respondent for violation of 30 CFR 57.3-22, which provides:

> Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled and supported as necessary.

The essential question presented here is the meaning of the term "loose ground." Inspector Alvarez was concerned about one wall of a pocket formed in the sinking of a new production shaft where several miners were at work. He saw fracturing in the walls but was told by the shaft foreman that it was safe because it was "keyed in." Alvarez, however, proceeded to strike the wall with a pry bar, and to him it sounded "hollow." He therefore proceeded to scale the wall with the bar. After 15 to 20 minutes of work with the bar, he was able to dislodge a slab of rock weighing perhaps a ton. He then issued the citation.

7/ The citation itself is of no help; it speaks only of "guarding."

Respondent adduced evidence through its witnesses that the area had been checked and barred down before the inspector came. Richard Skelton, respondent's safety employee who had inspected the shaft, did not believe that the wall sounded hollow when hit, and was convinced that the ground was not loose (Tr. 309-310). He believed the wall was safe and pointed out that sets and logging would soon be installed (Tr. 303-307).

Having considered all the evidence, I am not convinced that the ground was "loose" within the meaning of the standard. On the contrary, the 15 minutes of vigorous labor necessary to bring down a part of the wall indicate that it was essentially stable. The petition is therefore vacated as to this citation.

Citation Number 377071 -- Lockout of Electrical Pump

This citation charges that respondent violated 30 CFR 57.12 - 16, which provides:

> Mandatory. Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or authorized personnel.

The requirements imposed by the standard are threefold: (1) deenergize the equipment to be worked on; (2) lockout the power switches or "[take] other measures ..."; (3) post warning notices at the power switch(es). The evidence clearly shows that respondent did not post warning notices at the power switch before the pump was replaced (Tr. 314, 329, 334-335). Respondent, therefore, violated the standard.

Other evidence, however, indicates that the violation was not serious, and that a penalty less than the $ 295.00 originally proposed should be assessed. Although the power switches were not locked out (Tr. 314, 322, 337), the pump had been deenergized (Tr. 314); the leads running from the isolator (circuit breaker) to the pump had been disconnected, taped and wrapped up (Tr. 316, 323, 329, 335); the isolator had been opened and the circuit disconnected (Tr. 320-321); the pump starter had been removed (Tr. 320, 340); and the fuses had been removed (Tr. 321). Under these circumstances the possibility of injury was remote. Further, the violation was abated within ten minutes (Tr. 316). The violation did involve negligence, however, because respondent itself requires that power switches be locked out and warning notices be posted (Tr. 315, 322). Considering these factors, I find that a penalty of $50.00 is appropriate.

Citation No. 377238 -- Inspection and Maintenance of Shaft Hoisting Equipment:

This citation charges respondent with a violation of 30 CFR § 57.19-120, which provides:

> A systematic procedure of inspection, testing and maintenance of shaft and hoisting equipment shall be developed and followed. If it is found or suspected that any part is not functioning properly, the hoist shall not be used until the malfunction has been located and repaired or adjustments have been made.

The citation alleges specifically that the vertical sections of six shaft guides were misaligned by 1/2 inch. The guides restrained the lateral movement of conveyances moving up and down the shaft. A penalty of $725.00 was proposed.[8]

Respondent uses conveyances to move men, equipment and mining refuse up and down the shafts of its underground facility. The conveyances move vertically along wooden guides which are attached to steel beams (Tr. 39-40). The guides are installed in eighteen foot sections (Tr. 43). They are kept firm by "shims" (thin steel wedges) which are bolted between the guide and the shaft wall (Tr. 34).

The undisputed evidence is that there was 1/2" play in several guides (Tr. 16, 49, 66-67; respondent's brief at 1), [9] and that respondent had in effect a constant inspection and replacement program (Tr. 20; respondent's brief at 1). The issue, therefore, is whether the 1/2" misalignments constitute a malfunction within the meaning of the standard. For the reasons discussed below I conclude they did not.

Inspector Pesqueira testified that he felt a "hard bump" while riding the conveyance at operational speed (800 - 1000 feet per minute), and that he had to "grab on to a rope to keep from falling" (Tr. 28, 76). During the inspection, Mr. Pesqueira observed several loose guides and

---

8/ A withdrawal order was also issued on the ground that the misalignment created an imminent danger of harm. The validity of the withdrawal order may not properly be considered in a penalty proceeding. Pontiki Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), 1 FMSHRC 1476 (1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979).

9/ The guides apparently became loose when respondent began to use dry desert air instead of humid air (from the bottom of the shaft) to ventilate the mine (Tr. 49).

bolts, allowing the 1/2" movement (Tr. 16).[10] Based on his observations, he thought a guide would soon break and cause a serious accident (Tr. 18 - 19).

Mr. Robert Zerga, an electrical engineer, testified for respondent. Mr. Zerga had spent sixteen years in mining, ten of those underground (Tr. 50), and seven years working specifically in the area of shaft (and shaft conveyance) maintenance (Tr. 59-60). He testified at length concerning the structure of the guide system (Tr. 59-60); and he was well acquainted with the #5 shaft, having ridden "up and down that shaft continually" (Tr. 53).

Mr. Zerga conceded that there were several 1/2" misalignments, but maintained that only slight jostling would result; he would not expect a 1/2" offset to throw a man off balance (Tr. 44; 55-56). Mr. Zerga's estimation of the weight of the conveyance -- 10 tons or more -- supports this contention (Tr. 53).

The inspector's testimony is weakened by his apparent confusion about the design and operation of the hoist system.[11] Most important, he testified that nothing was built into the system to allow for slight misalignments (Tr. 27). This testimony was directly contradicted by Mr. Zerga, who offered a detailed explanation of several devices used to minimize the effects of small misalignments. (Tr. 42-43).[12] Furthermore, it is difficult to understand how a misaligned guide would cause someone to be thrown out of an enclosed conveyance.

10/ Although Mr. Mirich claims that Inspector Pesqueira did not have enough time to ride the conveyance at operational speed before issuing the citation, the evidence as a whole indicates otherwise. Mr. Mirich based his claim on the false assumption that the citation was issued at 10:45 a.m. In fact, the citation itself indicated that it was written at 11:30 a.m.; at 10:45 a.m. the inspector had merely stated his intention to issue a citation (Tr. 69-72). Since it would have taken only a few minutes to ride to the bottom of the shaft and return at operational speed (Tr. 69), Mr. Pesqueira could have done so easily between the time he told Mr. Mirich he would issue a citation and the time he actually issued one.

11/ The inspector also seemed confused about the layout of the mine, and the terminology used to describe the hoist system (Tr. 13-14, 31, 33; also see 41).

12/ These devices included "shoes and rubber donuts." Shoes insure that, in the event of misalignment, the rollers on the conveyance will be supported. Rubber donuts sit on all planes of the shaft and are very flexible. In the event of misalignment, the donuts act as shock absorbers, allowing the rollers to move the conveyance smoothly (Tr. 43-44).

Mr. Zerga believed that the system was functioning properly on the day of the inspection (Tr. 55). His opinion is strengthened by his general understanding of hoist systems and by his specific experience with respondent's system (Tr. 39-44). The existence of devices designed to compensate for small misalignments supports the view that some misalignment was contemplated and accounted for in the design of the hoist system. Petitioner offered no evidence to show that 1/2 inch misalignments signal structural breakage. I find, specifically, that the misalignments caused only slight jostling and were not severe enough to create a hazard.

In summary, the government did not adequately rebut respondent's credible showing that its hoist system was functioning properly, and at no point suggested that the system should be redesigned. The citation is therefore vacated for lack of proof. The withdrawal order remains effective because its validity may not be properly considered in a civil penalty proceeding.

Citation No. 377319 -- Vent Raise Fan:

At the 2375 level Inspector Pesqueira issued a citation for an unguarded vent raise fan in a pony set. The pertinent part of 30 CFR § 57.14-1, the mandatory standard cited by the Secretary's representative, provides:

> . . . fan inlets . . . and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded.

The record here presents one essential issue: Was the fan situated where it could be accidentally contacted by miners , or was it effectively shielded by location? The testimony was sharply divided.

Witnesses for neither party disputed that the 20 horsepower fan was enclosed by a 36 inch-long metal tube. The fan blades, positioned behind stationary vanes, were 28 inches from one end of the tube, and virtually at the mouth of the other end (Tr. 222-223). No one suggested that the blades, if contacted by a worker, could inflict serious harm. Beyond this, there was little agreement on anything except that the fan was operable at the time of inspection and that, as the government contended, it had no mesh guard over either end of the tube.

Inspector Pesqueira testified that the fan was mounted at the lower end of the vent raise on the pony set at a place directly behind the work station of the miner who operated the ore raise (Tr 204,272). The miner, he claimed, could touch the lip of the tube surrounding the fan, whose blades were recessed but 4 to 5 inches .

Pesqueira also asserted that the hazard was increased because the miner customarily used an 8 foot stick or bar to loosen the ore when the ore raise became clogged. The stick, he said, could accidently be thrust into the fan blade.

Respondent's witnesses presented a wholly different picture of the physical lay-out of the pony set. Nick Mirich, who represented Magma during the walk-around portions of the inspections, testified that the inspector never climbed up on the pony set and was mistaken about the location of the fan raise in relation to the vent raise. First, Mirich testified, the vent raise was on the same side of the set as the ore raise, not the opposite side as Pesqueira maintained. Thus, it was not directly behind the miner, but 10 feet away on the same side as the ore chute. Moreover, because the floor or platform did not extend below the vent raise, there was no way a worker could stand near the fan. This witness also maintained that all vent raise fans were installed with the fan blades at the upper end of the tube, placing them ever further from any possible worker contact. This was done, according to Mirich, to satisfy cooling requirements of the fan motor (Tr 218,221,222,234-236). Mirich also denied that employees used 8 foot sticks to free a clogged ore chute; only 10 to 12 foot blasting sticks were used, by workers standing far below on the haulage tracks.

Onofre Tafoya, respondent's general haulage foreman, gave general support to Mirich's testimony. He, too, insisted that the inspector did not climb up on the pony set here in question, but did in fact climb on some others. His testimony implied that Mr. Pesqueira's assertion that the fan was "[r]ight on the floor of the pony set" (Tr. 272) may have sprung from recollections of a fan elsewhere in the haulage drift which was at floor level (Tr. 251).

Having carefully weighed and considered all the conflicting testimony, I am convinced that respondent's evidence concerning the location of the fan is accurate: that the fan, although unguarded, was elevated over the pony set where there was no flooring and no genuine possibility of worker contact. The cited guarding standard is not absolute; it applies only to moving parts "which may be contacted by persons. . . ." Because the fan was effectively isolated from worker contact, the standard was not violated. Consequently, the penalty proposal is vacated.

CONCLUSIONS OF LAW

1. Respondent violated 30 C.F.R. § 56.20-3(b), as alleged in citation 376974, and a penalty of $32.00 is appropriate for such violation.

2. Respondent violated 30 C.F.R. § 57.9-87, as alleged in citation 378580, and a penalty of $114.00 is appropriate for such violation.

3. Respondent violated 30 C.F.R. § 57.3-26, as alleged in citation 378587, and a penalty of $114.00 is appropriate for such violation.

4. Respondent violated 30 C.F.R. § 57.17-1, as alleged in citation 378700, and a penalty of $32.00 is appropriate for such violation.

5. Respondent did not violate 30 C.F.R. § 58.14-1 as charged in citation 376888.

6. Respondent did not violate 30 C.F.R. § 57.3-22, as charged in citation 377070.

7. Respondent did not violate 30 C.F.R. § 57.12-16, as charged in citation 377071.

8. Respondent did not violate 30 C.F.R. § 57.19-120, as charged in citation 377238.

9. Respondent did not violate 30 C.F.R. § 57.14-1, as charged in 377319.

ORDER CONCERNING
CITATIONS ACTUALLY TRIED

Pursuant to the foregoing, it is ORDERED that the penalty proposals made in connection with Citations 376888, 377070, 377071, 377238 and 377319 are vacated, and that the penalty proposals made in connection with Citations 376974, 378580, 378587 and 378700 are affirmed.

In connection with the penalty proposals which have been affirmed, the following penalties are ORDERED assessed:

Docket Number WEST 79-351

Citation Number 376974: $32.00

$32.00

Docket Number WEST 79-382:

Citation Number 378580: $114.00
Citation Number 378587: $114.00
Citation Number 378700: $ 32.00

$260.00

ORDER CONCERNING CITATIONS SETTLED

Prior to the hearing, petitioner submitted written motions to approve partial settlement agreements made with respondent. The agreements provided as follows:

Docket Number WEST 79-158-M

Citation Number 376968 withdrawn
Citation Number 376968 $225.00
Citation Number 377108 withdrawn

$225.00

Docket Number WEST 79-382-M

Citation Number 377291 -- withdrawn
Citation Number 378586 -- withdrawn
Citation Number 378866 -- withdrawn
Citation Number 378788 -- withdrawn
Citation Number 378560 -- $240.00
Citation Number 378699 -- $ 66.00

$306.00

Citation Number 376887 -- $ 48.00

$ 48.00

Prior to the hearing petitioner also filed a motion to dismiss the penalty proposals made in connection with three citations (376897, 377068, 377069) in Docket Number WEST 79-79-M. To support this motion and the withdrawals in the settlement agreements petitioner claims that there is insufficient evidence to substantiate violation. In its motions to approve settlement, petitioner discusses the penalty criteria set out in § 110(i) of the Act to support the agreed penalty reduction.

At the hearing, counsel moved for approval of settlement agreements made in connection with citations 377072 and 378559 (Tr 200-201; 341). The agreements provide for payment of the penalties originally proposed: $240.00 for citation 377072, $78.00 for citation 378559. The record developed at the hearing provides information relating to the penalty criteria set out in § 110(i) of the Act.

Upon due consideration I conclude that the proposed settlements are consistent with the purposes of the Act and should be approved. Accordingly, petitioner's motions are granted and the settlement agreements are ORDERED approved; petitioner's motion to dismiss citations in WEST 79-79-M is also granted and those citations are ORDERED withdrawn.

If the agreed penalties have not previously been paid, respondent is ORDERED to pay the sum of $897.00, together with the assessed penalty sum of $292.00, within 30 days of this order.

John A. Carlson
Administrative Law Judge

Distribution:

Alan M. Raznick, Esq., United States Department of Labor, Office of the Solicitor, 11071 Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102

N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, 1700 TowneHouse Tower, 100 West Clarendon, Phoenix, Arizona 85013

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 5 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. HOPE 78-722-P A.O. No. 46-01398-02020F
v.	:	Shannon Branch UG Mine
ALLIED CHEMICAL CORP., Respondent	:	

DECISION ON REMAND

Statement of the Case

On December 19, 1980, the Commission issued its decision in this matter and remanded the case to me for further proceedings for the limited purpose of making findings concerning the following items which apparently troubled the Commission during its consideration of the appeal taken by MSHA, and the items listed are quoted from pgs. 5 and 6 of the decision and remand:

1. Although the judge found that "the locomotive had a dual braking system installed . . .," he did not explicitly determine what constituted the pneumatic portion of the dual braking system. We believe that the judge should have made explicit findings as to whether the truck emergency brake and its air supply were part of the pneumatic braking system. The failure to determine whether the truck emergency brake was part of or independent of the pneumatic braking system leaves unanswered the major factual issue in this case, whether the dual braking system was operable. If the truck emergency brake were found to be part of the pneumatic system, questions remain as to whether it was operable in these circumstances and could have supplied air to the brake cylinders.

2. Therefore, we remand to the judge for further proceedings. Specifically, we remand for a finding as to whether the dual braking system was operable. In order to make this ultimate finding, findings are also necessary on why the primary pneumatic brake failed to stop the train after the electricity was interrupted; whether the truck emergency brake is part of the pneumatic portion of the dual braking system; and, if so, why it failed to stop the train.

Discussion

The alleged violation of 30 CFR 75.1404, is stated on the face of the citation issued on September 9, 1977, and the conditions described by the inspector are as follows:

> The pneumatic braking system on the No. 20 locomotive being used for coal haulage purpose was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks and could not apply uniform frictional pressure on the braking surface. The linkage for the manual brake was disconnected completely. 75.1404.

30 CFR 75.1404, a statutory provision dealing with automatic brakes and speed reduction gear, provides as follows:

> Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary, which are designed to stop the locomotives and haulage cars with the proper margin of safety.

30 CFR 75.1404-1, a regulatory standard dealing with braking systems, provides as follows:

> A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of § 75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design capabilities and at speeds consistent with the condition of the haulage road. A trailing locomotive or equivalent devices should be used on trains that are operated on ascending grades.

As stated by me during the course of the hearing, the critical issue in this case is whether the petitioner (MSHA) has carried its burden of proof in establishing that the pneumatic braking system on the locomotive in question was sufficient or adequate to control the trip of cars it was pulling on the day in question (Tr. 54). Petitioner has the burden of establishing that the braking system was in face inadequate. In my original decision of April 3, 1979, I specifically rejected any notion that petitioner had established a casual connection between the brake shoe condition described by the inspector on the face of the citation and the failure of the locomotive to stop, and specifically found and concluded that petitioner had not proven by a preponderance of the evidence that any misalignment of the brake shoes adversely affected the braking capacity of the locomotive on the day in question.

It should be noted that respondent was not charged with a violation of section 75.1404-1. The initial alleged violation of section 75.1404 was based on the inspector's belief that the locomotive pneumatic braking system was not sufficient to control the trip of cars it was pulling on the day in question, and his belief that asserted misalignment of the brake shoes and disconnected manual brake somehow contributed to his conclusion that the braking system was insufficient. Since the locomotive in question had a dual braking system consisting of a dynamic system and a pneumatic system, rather than automatic brakes, reference must be made to section 75.1404-1 in order to determine whether the dual braking system on the locomotive in question met the requirements of section 75.1404-1, and if it did, then it necessarily follows that respondent has complied with the cited section 75.1404 requirements. However, throughout this whole examination of the interrelationship of these standards, it should be kept in mind that the burden of proof is on MSHA, not the respondent.

In its brief filed with the Commission on appeal, petitioner took the position that in order to establish a violation of section 75.1404-1, it may show (1) that the locomotive was not equipped with a dual braking system, (2) that the locomotive was being operated beyond the limits of its design capabilities, or (3) that the locomotive was being operated at a speed inconsistent with the conditions of the haulage road. The petitioner conceded that it never alleged that the locomotive was operated at excessive speed or that it was operating beyond its design capabilities and that these issues are not present in this case, and I specifically made that finding in dispatching petitioner's arguments on these points.

It would appear to me that the parties may have read into my decision a conclusion that I based my decision vacating the citation on a cursory finding that once it has been established that a dual braking system was in fact installed on the locomotive, respondent must prevail. As a matter of fact, the thr[illegible] of petitioner's arguments to the Commission on appeal is the assertion that I concluded that the mere presence of a dual braking system satisfied the requirements of section 75.1404, and in support of such a conclusion, petitioner cites "numerous occasions" during the course of the hearing where "the judge gave indications that he believed the regulation in issue required only the mere presence of a dual braking system" (citing Tr. 101-102, 109, 115-116, 182, 237). In short, petitioner believes that I concluded that the presence of defective or misaligned brakes was irrelevant, as long as the dual braking system was installed on the locomotive.

In retrospect, I can understand how the parties may have concluded that this was the basis of my decision. Although my decision contains a detailed discussion concerning the somewhat superficial after-the-fact investigation conducted by MSHA with respect to the condition of the locomotive brake shoes, and although I specifically found that MSHA had failed to establish a nexus between the asserted defective brake shoes and the braking capacity of the locomotive on the day in question, by

simply adopting respondent's arguments that section 75.1404 and 1404-1 are merely "design" criteria, the parties may have been misled in believing that this was the crucial focus of my decision.

I have carefully re-examined the transcript references referred to by the petitioner to support its assertion that I believed the mere presence of a dual braking system, whether defective or not, satisfies the requirements of section 75.1404-1. While it is true that my inquiries focused on design capabilities, they were made in the context of the manner in which petitioner's counsel was developing his theory of the case, namely that the presence of misaligned or worn brakes ipso facto established that the locomotive was not being used as originally designed. The transcript references follow below.

(Tr. 101-102)

JUDGE KOUTRAS: Okay. Because what we've got so far is it is MESA's position apparently that the misalignment of the brakes and the disconnected linkage on the parking brake, those two conditions were in violation of 75.1404 and/or .1404-1.

MR. MORAN: Yes, in that those systems were -- primarily the former system was unable to adequately control the locomotive with the number of cars it had on that trip.

JUDGE KOUTRAS: Notwithstanding the fact that the locomotive itself may be designed to operate within its designed capabilities, et cetera. In effect, what your argument is there were some worn brakes and misalignment of a brake here; therefore the locomotive was not designed to do what is intended.

MR. MORAN: That's right.

JUDGE KOUTRAS: Would that also apply to brakes that are worn as a normal everyday wear and tear situation?

MR. MORAN: Yes. If the weekly inspections are carried out, that would disclose a condition like that, and obviate a violation of that.

JUDGE KOUTRAS: It might disclose it but not necessarily result in correction of the condition.

What I'm saying is if the inspector happens on the scene one day and inspects a locomotive and he finds some worn brakes on it, does he immediately come to the conclusion that that locomotive is not designed to do what is intended, simply because there are some worn brakes on it?

MR. MORAN: No, but if the brakes are misaligned -- if he determines they are not capable of not stopping the locomotive, then he would issue a violation of 75.1404-1.

(Tr. 109)

JUDGE KOUTRAS: You don't know of any such requirement of policy. Okay.

Let's go back to the objection now. I digressed a little bit. See if you can develop a few more facts. What we are talking about is a specific incident here. Now the operator in this case is charged with using a locomotive which, MESA -- MSHA claims was not operating within its capabilities. In other words with a faulty brake mechanism on it.

So, what I'm concerned about and what we all should be concerned about is whether or not this particular locomotive, on this particular day, under the conditions which prevail, was it in fact operating within its limits or not?

So, if we can get a little bit more information; like did anyone make a judgement as to how fast this thing was traveling, or what the loads were?

BY MR. MORAN:

Q. Mr. Smith, did you consider on issuing your order the number of trips, the number of cars involved in the trip?

A. No, sir.

(Tr. 114-116)

JUDGE KOUTRAS: Let me ask you, Mr. Moran, this question.

Assuming you've got brake shoes, brakes, wheels, dual braking systems, the whole bit for a locomotive in a mine, and that's all up to snuff. It meets the specifications -- the braking system. Someone evaluated the locomotive, the way it's used in the mine on a daily basis, and they decided that this braking system is up to snuff. As a matter of fact, let's assume again for this hypothetical MSHA looked at it, inspected it and gave its stamp of approval on it.

For some reason the locomotive is down at maintenance. It's in the maintenance shop and the mechanic is putting the wheels and putting the brakes back on, et cetera, et certera.

For some unknown reason he puts them on backwards and they are misaligned, and the inspector walks in the mine, sees that condition and cites a violation.

Would it be your position then that that particular locomotive is not designed, et cetera, et cetera, et cetera as .1404-1 requires?

MR. MORAN: Yes, that's our position. That is a violation of 75.1404.

If the braking system, although it's great, if it is put on wrong then you don't have an effective braking system.

JUDGE KOUTRAS: You don't view that as a separate violation, separate from the --

MR. MORAN: Well, there's no other regulation that provides for that sort of thing.

JUDGE KOUTRAS: Well, that's part of the problem here. Maybe there should be. Maybe in the Secretary's infinite wisdom when he set up a .1404-1, he should have a -2 to cover that situation. So, what you're doing now is your --

MR. MORAN: It depends on one individual's reading of .1404 versus another.

JUDGE KOUTRAS: That's right. And it takes a lot of straining I might add, to get to the conclusion that the hypothetical I just gave you does to the design capabilities of the locomotive, as the standard itself is written and as embellished by .1404-1.

MR. MORAN: Well, we're getting into an extended legal discussion. It's from my point of view -- to state that you have an operative dual braking system which is improperly aligned, it can't do the job of stopping the locomotive, then you have a violation of 75.1404. What's the point of having the system if it's not on there right?

JUDGE KOUTRAS: Okay.

MR. MORAN: It seems to be an implicit but common sense interpretation of 75.1404-1.

JUDGE KOUTRAS: That remains to be seen.

MR. MORAN: That is the Secretary's position.

After careful review of the aforementioned transcript references, I honestly fail to understand how the petitioner can represent that they support a conclusion that my decision was based on the primary premise that the presence of a dual braking system per se can constitute compliance, with no regard given to whether the dual braking system was effectively operable. Petitioner's cited transcript reference at pgs. 182 and 237 are omitted because they lend absolutely nothing to petitioner's arguments in this regard. Further, petitioner's piecemeal transcript citations, taken out of context, are of no value to any rational consideration of the basic problem in this case, a problem that stems from standards which lend themselves to several interpretations, compounded by the fact that MSHA simply failed to prove a case, and my observations made during the hearing which appear as follows at pgs. 183-184, are in my view still applicable in this proceeding:

> JUDGE KOUTRAS: I get the distinct feeling from this case, from what I've heard so far, that we found some defective brakes that were inoperable; that possibly if it had not been for the fact of the loss of power in this locomotive it probably would have done the job that day and we wouldn't have had the citation, and there wouldn't have been any question but that the locomotive was doing its job that it was designed to do.
>
> JUDGE KOUTRAS: I get the further distinct feeling in this case after we go through the investigative process and interview all these people, and we find that the brakes are worn and all this, and we know that, "Look, here is a fatality. There is a violation someplace. Let's look around and see what section we can find to hang it on."
>
> And lo and behold 75.1404 rears its head. I get the distinct feeling from the testimony I have heard that that is precisely what happened in this case.

I believe that a closer examination of the record will show that my ultimate decision in dismissing this case was based on the fact that petitioner failed to establish by a preponderance of the credible evidence adduced in support of its case that the brakes were in fact defective or that the asserted defects rendered them inadequate to control the locomotive. Inspector Smith testified that he issued the citation on the basis of the fact that he believed the faulty conditions of the brakes rendered them inadequate to control the locomotive (Tr. 118), and that if he were to conduct another inspection and find a locomotive with the same brake conditions as those he observed, he would conclude that the brakes would be inadequate to stop the locomotive, even though it had no trips coupled to it (Tr. 111). In short, the inspector did not divorce the alleged brake shoe defects from his conclusion that the dual braking system was rendered inoperable because of these asserted defects, and neither did I. I simply

concluded that petitioner had failed to establish through any credible evidence that the cited defective brake shoe conditions had anything to do with the failure of the locomotive to stop before it derailed. I am still of that view.

Locomotive braking systems - definitions.

The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968 Edition, contains the following definitions:

> dynamic. Forces tending to produce motion.
>
> dynamic braking. A method of retarding an electric winder or haulage in which a direct current is injected into the alternating-current winder motor stator during the deceleration period; the motor then acts as an alternator and the negative load of the winding cycle is absorbed as electric power and wasted as heat in the controller. Compared with reverse current braking, it saves power, but the energy dissipated in braking is again wasted in the rotor resistance. See also electric braking.
>
> electric braking. A system in which a braking action is applied to an electric motor by causing it to act as a generator.
>
> pneumatic. Set in motion or operated by compressed air.
>
> airbrake. A mechanical brake operated by air pressure acting on a piston.
>
> mechanical brake. The brake in which the brakeshoes are pressed against the brake-drum by mechanical connections.
>
> auxiliary. A helper or standby engine or unit.
>
> compressed air. Air compressed in volume and transmitted through pipes for use as motive power for underground machines.
>
> compressor. a. A machine, steam or electrically driven, for compressing air for power purposes. Small air compressors may be compund steam and double-stage air. Large compressors may be triple-expansion steam and three-stage air and always used with condensers. b. Any kind of reciprocating, rotary, or centrifugal pump for raising the pressure of a gas. d. A machine which compresses air.

air compressor. A machine which draws in air at atmospheric pressure, compresses it, and delivers it at a higher pressure. It may be of the reciprocating, centrifugal, or rotary (vane) type.

Locomotive braking systems - testimony.

Petitioner presented the testimony of MSHA Inspectors James E. Kaylor and Gerald F. Smith in support of its case, and they explained what they believed to be the braking mechanisms on the locomotive in question. Respondent presented the testimony of William E. Funsch, a General Electric Representative whose experience includes the design of locomotive braking systems. He testified that the locomotive in question had four independent braking systems, consisting of a dynamic brake, straight service or pneumatic air brake, truck emergency brake, and a parking brake. The "parking brake" is the manual mechanical brake referred to by the witnesses, and it consists of a screw device which jacks the brake shoes against the wheels. It is not used to stop the locomotive once it is in motion because it takes too long to operate the screwing device (Tr. 241).

It would appear from all of the testimony adduced in this case that the locomotive in question had at least four identifiable methods of braking, and a discussion of these systems, including a recapitulation of the supporting testimony, follows below.

The dynamic braking system

Inspector Kaylor described the locomotive dynamic brakes as follows (Tr. 69-70):

A. Dynamic brakes is a reversal of the polarity of your motors to give a braking effect, but it is not a brake. But it's a -- gives you a braking effect.

Q. It's kind of like shifting your car into low?

A. Yeah. And it doesn't stop it, but it will slow it down, greatly.

* * * * * * * * * * * *

A. The dynamic brakes gives you a reversal of polarity. What it tries to do is reverse your motors -- or it will reverse your motors, in some motors. And it gives you a slowing down effect instead of locking the wheels and skidding the wheels.

Q. Okay. It's like a drag on a motor. Isn't that a pretty good description of it.

A. Yeah.

In describing the comparative efficiency between pneumatic and dynamic braking systems, Mr. Kaylor indicated that the dynamic system would be the better method of slowing down a locomotive, and if he were operating it his practice would be to attempt to slow it down by use of the dynamic motor brake drag and then revert to the pneumatic or air brakes (Tr. 69-71). He confirmed that air was required to operate the dynamic braking system, and he indicated that "jockeing" or "tapping" the pneumatic air brakes will deplete the air supply. In the event of loss of electrical power the air compressor will stop, and subsequent "tapping" of the pneumatic brakes will deplete the air supply (Tr. 72-73). In describing the way the dynamic system functions, Mr. Kaylor stated as follows (Tr. 74-75):

A. Well, I know a little about it. You've got contactors in this particular motor that is operated by air through a solenoid or a --

Q. So you've got some contactors that need to make contact to operate the electricity, the internal function?

A. Right.

Q. And the contactors are designed to operate by air.

A. Right.

Q. Okay. So if you lose your air, even though you call them electrical brakes, they function through the use of air, also.

A. Partially, right.

Q. Well, you need the air in order to make the contact which is making the electricity flow?

A. Right.

Q. So if you lose your air, you lose your dynamic brakes. So, Tom Williams -- as you mentioned -- you called him, Tom -- if Mr. Williams is coming down that hill, once he lost that electricity, the harp came off. It no longer could connect up. What's he left with?

A. Well, he's left with -- depending on how much air he had in his tank, he's got that air in that tank and however he used that air and when it's gone it's gone.

Q. Okay. So what he's got left, X thousand feet up the line, when the trolly wire comes off is what's in the tank.

A. That's right.

* * * * * * * * * * *

A. When you have power, air compressor builds your pressure up to a certain point. All right. All the time that you are operating this motor when you are using a certain amount of this air this compressor is kicking on and building this pressure back up to that certain number of pounds that's held in this tank.

Q. Okay. It could be ninety, hundred, hundred ten pounds of pressure as an example.

A. Yeah, different size motors.

Q. Do I understand what you are saying is as long as you've got your electricity -- assume the trolly wire is operating, the trolly pole is operating properly -- you can use air however you want to use air and the compressor still keeps filling up.

A. It's --

Q. That's the way the compressor and the whole system is designed.

A. Right.

And, at Tr. 80(g) and (h):

Q. Okay. Assume you have a situation where the trolly harp assembly becomes disconnected from the wire, okay?

A. Okay.

Q. Is it correct for me to understand that at that point in time the compressor is no longer filling up the air tanks?

A. Right.

Q. Okay. Is it also correct to assume that you have a limited amount of air at that time?

A. Right.

Q. Okay. Now, Mr. Feinberg tried to bring out that point in time that you would not have more brakes, but that is not quite correct, is it?

A. No, sir. It's not correct.

Q. Okay. The fact that if you applied the brakes, you apply the pneumatic brakes one time, you may not be out of air, is that correct?

A. That's right.

Q. All right. In other words, the ones he used to tap on the brakes will not necessarily exhaust your entire braking power.

A. One tap on the brakes would not exhaust it.

MSHA Inspector Smith testified he was familiar with the braking system on the locomotive in question and confirmed that it was equipped with a dynamic braking system. Both he and Inspector Kaylor confirmed that "electric brake" is the same as a "dynamic" brake. Mr. Smith confirmed that the purpose of a dynamic system is "more or less a speed reduction", similar to "downshifting a car", which slows down a locomotive rather than bringing it to a stop. He also confirmed that the locomotive in question did not have an automatic brake, but was equipped with a dual braking system, namely, a pneumatic or air brake, and a dynamic brake (Tr. 86-87).

The pneumatic braking system

Inspector Smith described the pneumatic braking system as follows (Tr. 87-88).

Q. Was this locomotive, No. 20, equipped with automotive [sic] brakes?

A. No, sir.

Q. It did have a dual braking system, is that correct?

A. Yes, sir.

Q. Do you consider one part of the braking system to be the dynamic brake?

A. Yes, sir.

Q. What would be the other part of this dual braking system?

A. The pneumatic brake.

Q. The pneumatic brake is also call [sic] the what of brake?

A. Air brakes.

Q. Would you briefly describe the way the pneumatic or air brake operates?

A. Well, it's a air system which has a valve, which you disperse the air to the cylinder, which in turn apply pressure to the brake shoes, which in turn they apply pressure to the trucks of the locomotive.

Q. And as I understood from earlier testimony -- correct me if I'm wrong -- this system operates on a compressor which is operated by electricity?

A. It does.

Mr. Funsch described a pneumatic brake as follows (Tr. 247):

> A pneumatic brake system works by supplying air from two main reservoirs on the locomotive, through a brake valve. When you move the brake valve, it allows air to flow into four brake cylinders. The brake cylinders exert a force as a piston, which moves a lever, which has lever ratio. It pushes the brake shoe against the wheel. The brake shoe against the wheel generates friction, which retards the rotation of the wheel, and slows the train down.

And, at pg. 263:

Q. You've heard talks about Standard 75.1404 requiring a dual braking system?

A. Yes.

Q. Does this locomotive have what you -- in your expertise -- consider a dual braking system?

A. It does. I would consider the dynamic brake and the service brake meeting that requirement.

Q. Service meaning what we've been calling as the air brake, or pneumatic brake?

A. Yes.

Q. In fact it's got a couple more brakes too. But it is at least a dual brake system?

A. Yes.

The auxiliary or "safety" braking system

Inspector Smith referred to an "auxiliary system" used in connection with the pneumatic brakes, and he described it as follows at pg. 88:

Q. Is there any sort of an auxiliary system in connection with this pneumatic or air brake?

A. Yes, sir.

Q. Would you describe this auxiliary system?

A. Yes, sir. It's a separate tank, air tank, that is used to, when the pressure in the system drops down to a certain level, what air is in this tank then will be dispersed to the air system, which would set the brakes.

Q. Then is it considered to be a safety system which provides additional air when the main system has bled out to a certain pressure level?

A. Yes, sir.

And, at pgs. 134-135:

Q. Now the auxiliary brake that you keep mentioning doesn't have anything to do with this .1404 either, does it?

A. These locomotives were designed with the auxiliary system on it, so I would assume that they were designed to -- for their capability --

Q. It's a fourth brake though, isn't it?

A. No, sir. That's a safety -- that's a safety feature of the pneumatic system.

Q. It's not called the safety brake?

A. Yes, sir, you might imply that.

Further, at pgs. 137-137(a), 144-145:

Q. And you agree with that, the conclusions from Mr. Kaylor in that discussion, that once you lost your electricity on this No. 20 locomotive, you've only got left the air in the compressor? You can't get anymore.

A. Not in the compressor. In the tank.

Q. In the tank, the compressor isn't running, so you can't get anymore into the tank?

A. Yes, sir.

Q. So you've got what you've got then?

A. Yes, sir.

Q. And you are using it for sand? Do you agree to that?

A. Yes, sir.

Q. And you're using it for your pneumatic air brakes?

A. Yes, sir.

Q. Eventually you are going to run out of air?

A. Yes, sir. I might state one more thing. That when you run out of air, that's when the auxiliary system sets the brakes.

Q. But you run out of air?

A. But this auxiliary tank is still filled with air until you come down to what you call running out of air out of the main tank to the compressor.

Q. Now, I have a question about the auxiliary system, since Mr. Feinberg referred to it. My question relates to the nature of this auxiliary system. What I want to know is, is this auxiliary system part and parcel of the pneumatic or air system, or is it more like a special addon?

Like when you order a locomotive from GE like this one, you state, "Hey and don't forget to include the auxiliary system. I really want that special feature." Like an AM-FM radio, you don't get it unless you ask for it. Or does it come with that as a standard part of the locomotive? Is it an option?

A. I don't have any idea whether it's optional or whether it's a standard part of the pneumatic system. Most of the trams of that size have the auxiliary system on it.

Q. Okay. Does it appear -- is that auxiliary system connected to the main tank, is that correct, by a valve?

A. Yes, sir. It's all piped into the same system.

Q. Did it have the appearance of being built in and being part of this system?

A. Yes, sir.

Q. You know of no federal statute or regulation that requires that auxiliary brake, do you Mr. Smith?

A. No, sir.

Mr. Funsch testified that the auxiliary truck emergency brake is not a part of the straight service air brake (pneumatic brake), and he described the truck emergency brake as follows (Tr. 242-243):

Q. You were here yesterday when you heard some discussion about an auxiliary braking system which the government has indicated it considers part of what you just described as a service or air brake. Is -- as I think you mentioned it -- an emergency truck brake, a part of the service brake?

A. No. I'd say it's a completely independent system, put on the locomotive as an additional safety feature, to cover a weak link in the system; which is an air hose that goes between the main frame of the locomotive and the trucks which must swivel; so you have to have -- you can't have pipe -- you have to have a hose that is flexible enough to move. The hose is subject to abrasion; and hitting objects on the track, could break. It's not made of heavy gauge pipe, as the rest of the system is. So, this is the weak link. If that hose was severed, this truck emergency system is designed to automatically supply air to the four brake cylinders.

Q. Somehow when there's a loss of pressure in the air hose to the jacks --

A. In the emergency pipe, we call it. Loss of air in that pipe automatically opens the valve, allowing stored air in each truck to go to the brake cylinders, and --

Q. What triggers that emergency truck brake? Is the severing of an air hose --

A. Or the equivalent. If you opened up any place in that line to vent it, as is done when the hose breaks, it automatically would apply 75 pounds cylinder pressure to each cylinder.

Q. It is not used in the normal functioning of the pneumatic or service brake system?

A. That is true. It's a back-up emergency system.

And, at pgs. 247-253:

Q. Let's go back to the auxiliary brake; what you termed as the emergency truck brake; what the government has called an auxiliary brake. You talked about a severing of the air hose, or what you called the pipe?

A. Energency pipe.

Q. Is that emergency truck brake designed to activate if all the air is bled off?

A. Are you speaking of the main reservoir here, or the two large reservoirs? If you lost the compressor, which is making the air; you used up all the air in your main reservoir system; it's independent of that -- it would not operate. It's not meant to; and it's not connected with it.

Q. What it's connected to is that little hose, so that if the hose severs, you will get brakes?

A. Exactly. That's the main feature.

* * * * * * * * * * *

Q. Was the auxiliary system -- what you called the auxiliary system --

A. I called it a truck emergency system.

Q. And that is not to be confused with the parking brake, or mechanical brake system?

A. Right.

Q. Was this auxiliary system designed as part of the integral part of this locomotive?

A. It was.

Q. It wasn't an option that was especially ordered by someone who said, "I want a No. 20 locomotive"?

A. It's a standard feature.

Q. And it isn't just the severing of the hose, as I understand it, that would trigger this auxiliary system -- this truck emergency system. Is that correct? There are other circumstances under which this auxiliary system will operate?

A. Only one that I know of.

Q. Tell us.

A. That is, if you put the brake valve in the emergency position.

Q. What brake valve are we talking about?

A. The operator's brake valve -- in the cab of the locomotive.

Q. And the valve that operates the pneumatic brake?

A. Yes. There's an emergency segment to it.

Q. If you're running your sanders, and all of the air is exhausted, are you telling us that the auxiliary system will not kick on to provide additional braking power, if you have on the pneumatic brake?

A. That is true.

Q. Only if you put it in the emergency position, will that activate the system?

A. By putting it in the emergency position, you vent the emergency pipe. All it does is open up a hole, and allows the pipe to vent. It's similar to breaking the hose, and allowing it to vent, which triggers the system.

Q. To provide that last safety margin?

A. Yes. I'm talking about an M 36 brake valve.

* * * * * * * * * * *

Q. But in any event, do you know, on the locomotive, is there a description on there that says, "Emergency condition," or is it just the furthest lever over? I don't know what this exactly looks like. Tell us.

A. I have a print here I'd like to show you, or maybe I can explain it. You move a brake valve handle through a roughly 180-degree segment. The first hundred degrees of

that segment is the normal service brake range. The further you move the brake valve handle, the more pressure you get in the brake cylinders. It's like opening a water faucet further and further -- you get more flow.

Q. Or similar to how hard you push down on the brake pedal on a car?

A. Yes. If you go beyond the service brake range, you get into the emergency range; and that's where it opens up the hold and applies 75 pounds through the truck emergency system. And I have a print of that valve, if anyone is interested in looking at it.

Q. I'm not, right at this moment. Perhaps Mr. Feinberg would be. When you're looking at this 180-degree lever, is there something to indicate when you reach that emergency level? Is there a marking on there?

A. There is a notch. You feel it, by feel. There is a detent in this segment which lets you feel that you're going past normal service brake range.

Q. And again, activating the sanding devices would not affect this auxiliary system. You've still got that in reserve, no matter how long the sanders are on?

A. Yes. That's right.

Q. Would you consider --

A. Let me qualify that. There is -- to supply air to this emergency system, we charge it through a small orifice. If you didn't have any air -- I'm talking about, like it would take a day to bleed that system back through that small hole, or many hours. So, I qualify it -- not normally by bleeding down the main reservoir supply, with the use of sanders -- it would not trigger the system. But if you left it there for a day, it conceivably could.

* * * * * * * * * * *

THE WITNESS: The shoes are common to both the truck emergency system and the normal service brake.

Steve Halsey, respondent's maintenance supervisor, testified that while the auxiliary of emergency truck braking system uses the same brake shoes and jacks as the air brake, it is a separate and different braking system which he characterized as an "emergency or third brake". He considered the dual braking system to be the pneumatic and dynamic brake and indicated that they are designed to stop the locomotive under

normal conditions (Tr. 335-336). He confirmed that the auxiliary braking system may be activated by (1) a break in the main line going to the grake cylinder valve, (2) the bleeding of the air over a long period of time through an orifice used for that purpose, and (3) placing the brake lever "all the way over" (Tr. 367).

The manual mechanical brake

Inspector Smith confirmed the fact that the manual mechanical brake was Inspector Smith's testimony confirms the fact that the manual mechanical brake was not part of the dual dynamic and pneumatic braking systems, and his testimony in this regard is as follows (Tr. 88-89).

Q. Did this locomotive No. 20, have any other type of braking system on it other than the ones we've covered, being the dynamic and the pneumatic?

A. Yes, sir; it had a manual brake.

Q. Is that sometimes referred to as the mechanical brake?

A. Mechanical brake, yes, sir.

Q. Was that mechanical brake operative on this particular locomotive?

A. No, sir.

Q. How could you determine that?

A. It was disconnected.

Q. Where was it disconnected?

A. From where the chain, which is connected to the linkage, to the brake rigging.

Q. And did you determine this was disconnected when you made your underground investigation?

A. Yes, sir.

A. I might state that the manual brake is more or less used just as a parking brake.

Q. Is there any other type of braking system on this No. 20 locomotive, other than the dynamic and the pneumatic?

A. No.

And at pgs. 98-99:

JUDGE KOUTRAS: So, the manual brake then was an additional thing that's really not required. I mean, if you'd walked in that mine and found a hand brake with the linkage misaligned could you have issued a separate citation on that, in and of itself? And if so, which standard would you say?

THE WITNESS: Your Honor, at that particular time that was the policy that we were following. That's the guidelines we have, that the manual brake is mandatory, too. But that's strictly policy. We have no --

JUDGE KOUTRAS: Whose policy is that?

THE WITNESS: MSHA's.

JUDGE KOUTRAS: What, the district management level?

THE WITNESS: No, in our guidelines, in our manual that we use.

JUDGE KOUTRAS: In the inspector's manual?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So in other words, even though this locomotive has a dual braking system, which seemingly satisfies the requirements of 75.1404, if an operator happens to put a hand brake on, or some other device that is inoperative, then the policy at that time was citing them if they found something wrong with that?

THE WITNESS: Yes, it was.

After testifying about MSHA's enforcement policy concerning an inoperative manual mechanical brake, Inspector Smith's later testimony seems to indicate that this is not an issue in this case, and his testimony is as follows, at pg. 133:

Q. We're talking about section 75.1404, the section that you used for your order. So it's your contention that the dual braking system called for by that section is the dynamic or electrical brake and the pneumatic or air brake?

A. Yes, sir.

Q. The mechanical brake has nothing to do with the dual -- the mechanical park brake has nothing to do with that dual braking system, does it?

A. .1404? No, sir, it doesn't.

Q. You have no quarrel with that dynamic brake, is that correct?

A. No, sir.

Q. This case is all about the pneumatic air brakes?

A. Yes, sir.

In response to my order of January 9, 1981, petitioner has filed a motion for further discovery in this case, and asserts that an additional supplemental hearing is required to resolve the questions presented by the Commission's remand. Specifically, petitioner now seeks to obtain copies of "necessary technical papers" relating to the braking system on the locomotive in question by subpoena served on the General Electric Company. Petitioner further seeks permission to depose respondent's expert witness William Funsch, a pneumatic engineering and brake systems specialist, and if necessary, subpoena him for further testimony.

Respondent opposes any further discovery or hearing, and asserts that it is no longer in the coal mining business and has not owned the subject mine since January 1980, and no longer employs the individuals who testified in its behalf at the hearing. Further, as pointed out by respondent in its opposition to petitioner's motion for further discovery, more than two years have passed since the hearing was held in this matter, and more than 21 months since I issued my decision in this matter. I believe there is sufficient testimony and evidence in the present record to enable me to make the specific findings ordered by the Commission in its remand, and under these circumstances petitioner's motion for further discovery in this matter is DENIED. In addition, the request by the parties for further briefing is likewise DENIED.

In view of the foregoing rulings, and in further consideration of the present record adduced in this proceeding, including the foregoing discussion, my further findings and conclusions on remand follow below.

Findings and Conslusions

As the Commission stated at page 3 of its decision, "to resolve any doubts, we hold that 30 CFR 75.1404-1 requires that a dual braking system be both present and operable". To resolve any further doubts, I agree with the Commission, and adopt this as my finding on this issue.

What constituted the pneumatic portion of the dual braking system.

The pneumatic portion of the locomotive dual braking system is that system which activates the brakes by means of an air compressor which supplies and disperses compressed air to the locomotive brake shoes, which in turn causes them to move and engage against the locomotive

trucks (wheels), thereby retarding the rotation of the wheels. The system is graphically described by the aforementioned testimony of the witnesses at pgs. 12 through 13, and need not be repeated here.

Why the primary pneumatic brake failed to stop the train after the electricity was interrupted.

It seems to me that the question as to why the primary pneumatic brake failed to stop the locomotive after the electricity was interrupted was something that MSHA should have initially explored in more detail at the time of the investigation of the derailment. After all, the statutory scheme regarding such investigations is intended to provide answers to previsely the type of questions that we are not exploring well after the fact. As I observed several times during the course of the hearing, MSHA failed to obtain any documentation concerning the engineering specifications of the locomotive braking systems, engaged in no pretrial discovery to ascertain all of the pertinent facts, presented no expert testimony, and simply relied on a rather superficial inquiry conducted by MSHA inspectors who had no real background or training on braking mechanisms. The inspectors did the best they could under the circumstances.

Mr. Kaylor stated that when he looked down inside the motor of the locomotive at the scene of the derailment the full braking surface of the brake shoe was not completely on one of the locomotive wheels, and he attributed this to the fact that the shoes had "leaked off" or "backed off" because the air pressure was gone (Tr. 58). He reiterated that when he observed the control levers for the pneumatic air brakes and the sanding device they were both engaged to the "on" position, thus indicating that the locomotive operator was using them, and he stated that both devices function by means of compressed air (Tr. 68).

Mr. Kaylor candidly conceded that had the harp assembly supplying power to the locomotive not fallen off, it was very possible that there would have been no accident, and sufficient air would have been maintained for both the dynamic and pneumatic braking systems (Tr. 180-181).

Mr. Kaylor conceded that the loss of the trolley harp assembly resulted in the loss of electrical power to the locomotive and he indicated that with the exception "of the mechanical", the trolley harp supplied "the entire needs for the locomotive, everything on that locomotive" (Tr. 13). He went on the explain that the only source of power to the locomotive is the electric trolley harp assembly which is connected to the overhead trolley wire, and that the loss of the harp assembly results in a loss of electrical power, which in turn results in a loss of the braking system because the air compressor cannot function without power and it becomes inoperative. The only air which is left in the system is that which is stored in the air tanks. The loss of electrical power automatically shuts down the air compressor, and any remaining air which may be stored in the air tanks will supply air to the braking system until such time as it is exhausted by applying the brakes, leaks, or use of the sanding device.

Mr. Kaylor testified further that when he inspected the locomotive at the scene of the derailment, the brake lever was engaged, the locomotive power controls were "wide-open", and the sanding device was open. In these circumstances, since all of these devices function by air pressure supplied by the air compressor, if that compressor is not functioning, any remaining air pressure in the system will be lost over a period of time, and the air brakes and pneumatic brakes would be rendered inoperative due to the loss of air pressure (Tr. 38-43).

MSHA electrical inspector Gerald F. Smith assisted in the investigation of the derailment and he observed the brake shoes visually at the scene of the derailment. He candidly admitted that when he visually observed the condition of the brake shoes at the scene of the derailment, he made up his mind that a violation of section 75.1404 had occurred, and that this was before the locomotive was removed to the surface. He conceded that at the time he issued his order he cited a violation of section 75.1404 because he was acting under the assumption that the brakes were the cause of the accident and that he was under instructions to cite section 75.1404 in these circumstances (Tr. 147-148).

Locomotive operator Thomas M. Williams testified that at all times during the operation of the locomotive, up until he lost the electric trolley pole, he experienced no difficulties in the operation of the locomotive and detected nothing wrong with the braking systems which he had used, including the dynamic and pneumatic brakes. He also indicated that he had checked out the sanding device, the brake shoes, air pressure, and several other devices and found them all in satisfactory working condition (Tr. 275-276, 279, 282-284).

Mr. Williams testified that while traveling and approaching the "18 Hill" area underground, he momentarily lost his trolley pole, but quickly replaced it by hand. At this time he experienced no difficulties in negotiating the hill and was using both the dynamic and pneumatic brakes and the sanding device. He indicated that he used about "two-thirds" of the dynamic air brake control lever, periodically used his air brake "on and off", and had no difficulty controlling the trip of cars (TR. 287-288). However, he encountered serious problems when he discovered that he had completely lost the trolley harp assembly which supplies electric power to the locomotive while travelling in the two north parallel section (Tr. 288). After making this discovery, he "went to using every device on the motor that I knew to keep it under control" (Tr. 290), and he described his efforts at stopping the locomotive as follows (TR. 291-292):

> Q. And you say you did everything you could to bring the trip under control, or to maintain control?
>
> A. To keep it under control.

Q. What all did you do? What did that involve?

A. Well, that would involve using your -- well, I guess I opened the sand wide open, and I was using the dynamic brake and the air brake.

Q. Were you able to control the trip?

A. No.

Q. Did you ever have occasion to --

A. I mean, at this point, now the trip was all right, but as your air decreases, you're letting up.

Q. Because your harp was off the trolley wire, because you had no harp, your compressor was knocked out. Is this right?

A. Didn't have any compressor; didn't have anything.

Q. You wern't building up any additional air pressure?

A. No.

Q. And what pressure you had when the harp came off was all the pressure you had for the rest of the trip?

A. That's all.

Q. And you used your air, your sand and your electric brake to control the trip until it depleted your air supply?

A. That's right.

Q. Did you have occasion to look at the guage at any point -- your air guage?

A. Yes.

Q. What did it read when you looked at it?

A. It was on zero.

Q. The only time you oooked at it was when it said zero?

A. Yes.

Q. That was some time, I take it, after you had done everything that you could to get the trip stopped?

A. Yes.

And, at pgs. 296-298:

Q. When you went down the hill until the harp had come off, and you were in the process of doing whatever you could to gain control of the motor -- you said you were working with your air brake, you were working with your electric brake and your sand.

A. Yes.

Q. Would you have had occasion during your manipulations to have taken the controller off of the electric brake and swing it over into the accelerating mode?

A. That would have been under maybe the motor went into a slide. As I previously stated, we never did use over about two thirds of the dynamic brake; all the way would lock it up. It may be, when all of this happened so fast until I did open it up, trying to control it, and it locked, and I had to come back off of dynamic into -- it's very possible.

Q. You would have swung it over into the accelerating mode to stop it from skidding?

A. To stop it from -- yes, sliding.

Q. And then go back to your brake?

A. Yes.

Q. When you realized that you had no air, did you continue to try to operate the controls in hope that something might happen to slow you down?

A. Well, I did everything humanly possible. I just can't give you item for item what I did there because things was getting out of hand then.

Q. Is it possible, from your experience running the locomotive under varying conditions, that, realizing your electric brake was not operating, you would have swung the controller back and forth, trying to get it to kick in?

A. That's true.

Q. And would that involve swinging it all the way over to ten points and all the way back onto full brake?

A. Yes.

Q. It's possible you could have swung it to ten before you jumped and left it on ten?

A. Left it on ten, that's right.

Q. But you were getting no response from that anyway?

A. No response.

Q. Prior to the time you lost your harp on No. 18 hill, in your opinion, were you under control? Was your trip under control?

A. At all times.

Q. There's no question in your mind about that?

A. No.

Q. And you were having no difficulty handling it?

A. No.

On the basis of the foregoing testimony of record, I conclude and find that the reason the primary pneumatic braking system failed to stop the locomotive after the electricity was interrupted was that the loss of electric power rendered the air compressor which supplied compressed air to the brake shoes inoperative, and that any available air which may have remained in the compressor after the loss of electrical power was depleted by the manipulation of the brakes and the sanding device by the locomotive operator in his attempts to bring the locomotive under control.

Whether the truck emergency brake was part of or independent of the pneumatic braking system.

MSHA's supervisory accident investigator James E. Kaylor, testified that he had no formal training in the operation of braking systems, was unfamiliar with some of the brake system technical terms, and that his knowledge of brakes and brakes shoes came about through experience (Tr. 47-48). Significantly, while Mr. Kaylor spent the entire morning of the first day of the hearing testifying in behalf of MSHA, and was subjected to vigorous cross-examination, and redirect, not once did he mention any auxiliary or emergency braking system. His focus was on the condition of the brake shoes which he visually observed at the scene of the derailment.

MSHA's September 8, 1977, official accident investigation report (exhibit P-7) compiled by Inspector Kaylor contains not one word about any auxiliary braking system, and it seems to me that if MSHA considered it significant it should have been explored in more detail as part of its investigation. The "findings of fact" made by Mr. Kaylor at pg. 5 of his report were limited to (1) an assertion that the pneumatic braking system was not adequately maintained because the brake shoes were not properly aligned with the wheels, thereby diminishing the braking ability, and (2) an assertion that the manual brake linkage was disconnected.

Mr. Kaylor concluded that these alleged conditions constituted a violation of section 75.1404. A second "finding" made by Inspector Kaylor in his report relates to an asserted violation of section 75.512, for allegedly failing to maintain the mechanical braking machinery operative.

Mr. Smith's first reference to any auxiliary braking system appears at pg. 88 of the transcript where he described it as a "separate air tank" which disperses air to set the brakes "when the pressure in the system drops down to a certain level". He considered it to be a "safety system which provides additional air when the main system has bled out to a certain pressure level" (Tr. 88). A second reference to the auxiliary system is made at pg. 106 of the transcript where Mr. Smith stated the auxiliary system "was not operative". Later, at pg. 134, he states that "these locomotives were designed with the auxiliary system on it" as "a safety feature of the pneumatic system". And, finally, he was of the opinion that the air supply for the auxiliary system was connected to the main locomotive air compressor tank by a valve, and that "It's all piped into the same system" (Tr. 144). When asked by petitioner's counsel whether the auxiliary system was a standard or optional part of the locomotive, he responded, "I don't have any idea whether it's optional or whether it's a standard part of the pneumatic system. Most of the trams of that size have the auxiliary system on it" (Tr. 144).

Notwithstanding Mr. Smith's somewhat contradictory and equivocal testimony concerning the auxiliary braking system, it seems obvious and clear to me that the thrust of his testimony, like Mr. Kaylor's, was his contention that the asserted violation focused on the alleged misaligned brakes shoes.

Although Mr. Funsch agreed that the locomotive brake shoes are common to both the pneumatic and auxiliary or truck emergency system, and that it was designed as an integral standard part of the locomotive, both he and maintenance supervisor Hasley regarded it as a completely separate braking system which was designed to activate in an emergency situation. Mr. Funsch characterized it as a "completely independent system" and Mr. Hasley stated it was a "separate and different braking system" and an "emergency or third brake". Mr. Funsch also testified that in the event of a total loss of air due to the loss of the locomotive compressor the auxiliary system would not operate and this is because it is not designed to rely on the main air reservoir and is independent and not connected with it.

I believe that the preponderance of the credible evidence and testimony adduced in this case, particularly the testimony by respondent's witnesses, supports a finding and conclusion that the auxiliary or emergency truck braking system, while a part of the locomotive, operated and functioned separately and independently of the pneumatic air braking system.

(1) Assuming the truck emergency brake were found to be part of the pneumatic system, was it operable and could it have supplied air to the brake cylinders?

(2) Assuming the truck emergency brake is part of the pneumatic portion of the dual braking system, why did it fail to stop the train?

Even if one were to conclude that the auxiliary or truck emergency braking system was part of the pneumatic system, the burden of proof is on the petitioner to establish that it was not operable and could not have supplied air to the brakes. As for the question as why the auxiliary system failed to stop the train, that is a question that should have been considered during MSHA's investigation. This civil penalty proceeding should not be used as a forum for reinvestigation of the cause of an accident which occurred over three years ago.

At page six of its petition for review filed with the Commission, petitioner asserts that Mr. Funsch would not consider the locomotive's braking system to be in perfect working order if the truck emergency system was malfunctioning, and that he stated that there was a malfunction (citing Tr. 246, 253). These conclusions and supporting transcript references are taken completely out of context, and this is a typical example of an advocate arguing for a position on appeal that he could not support before the trier of fact. A closer examination of the transcript reflects that Mr. Funsch was responding to questions from respondent's coulsel concerning the design characteristics of the locomotive and he specifically stated that assuming sufficient air were present in the system, he had no doubts the design capacity of the locomotive would have permitted it to stop within the distance in question. Mr. Funsch's comment that "there was a malfunction -- something happened" related to the locomotive design and Inspector Kaylor's previous testimony that there was a malfunction. It is absolutely clear from the record that Mr. Funsch had no idea what that malfunction may have been. Since the burden of proof is on the petitioner, it is incumbent on the petitioner, not the respondent, to establish what that malfunction was.

With regard to Mr. Funsch's observation that he would not consider the braking system to be in perfect working order, his testimony was qualified and was in response to the hypothetical condition of the brake shoes, and it appears as follows at pgs. 253-255:

> Q. Would you consider the locomotive in question -- which you admittedly have never seen or examined at any time -- would you consider the locomotive's brake system to be in perfect working order, if I told you hypothetically that the auxiliary system was malfunctioning?

A. I would say certainly not in perfect order.

Q. Would you consider the system to be in proper working order, the way it was designed to be functioning, if I told you that the brake shoes were misaligned?

MR. FEINBERG: Objection. What system are we talking about? He's testified that the auxiliary, or what he calls emergency truck brake system, is not part of the dual braking system, that this case is all about.

JUDGE KOUTRAS: I assume Mr. Moran has reference to one of the two dual braking systems?

MR. MORAN. That's right. We're talking about the pneumatic system, which operates the brake shoes.

MR. FEINBERG: This gentleman has just testified that the auxiliary brake is not part --

MR. MORAN: We've covered that; and now I'm going on to another aspect of the braking system.

MR. FEINBERG: I just don't want a confusion in the record when the word system comes in, without describing what system we're talking about.

JUDGE KOUTRAS: Why don't you describe the particular system in your hypothetical, Mr. Moran?

BY MR. MORAN:

Q. Mr. Funsch, were you confused by my question:

A. No.

JUDGE KOUTRAS: All right. Don't describe it, then, if he can understand the question.

THE WITNESS: The shoes are common to both the truck emergency system and the normal service brake.

MR. MORAN: That's right. And that's the only way I understood the system to be also.

BY MR. MORAN:

Q. Now, if I told you that the brake shoes were improperly aligned, improperly adjusted, would you say that this was in satisfactor working order? Would you consider that to be the way it was designed? Does it matter --

A. (Indicating).

Q. You shook your head, and that won't appear on the record. Does it matter?

A. It does matter. However, usually the shoes -- if you have a loose brake shoe hanger, it wobbles. But it usually seeks the flange on the wheel, and the flange will center it on the wheel. So. you usually don't get gross misalignment.

Q. So, the purpose of the flange is to keep the shoe in line?

A. One of the purposes, yes. Ans also to create more brake shoe area on the wheel.

Q. But as I understand it, it's not the flange itself that does the job of braking the locomotive. That is not its primary purpose?

A. True.

Q. And if I told you that perhaps the flange was doing the primary job of braking that particular locomotive, that would give you some cause for concern, would it not?

MR. FEINBERG: Objection. I assume this is a hypothetical?

JUDGE KOUTRAS: Yes.

BY MR. MORAN:

Q. That is a hypothetical. And when you nod, it doesn't appear on the record. Would you express it verbally?

A. I would say, if you're only braking on the flange of the wheel, it's a dangerous sitaution.

Inspector Smith testified that the auxiliary system "sets the brakes" when the air supplied by the compressor is exhausted due a loss in electric power or use of the pneumatic brake and sanding devices, and he believed that even though the available air in the main compressor has been depleted, the auxiliary air tank still contains enough air to activate the brakes "until you come down to what you call running out of air out of the main tank to the compressor". He also testified that the auxiliary air system is connected to the main air tank by a valve and stated that "It's all piped into the same system". I find Mr. Smith's testimony to be somewhat contradictory, and it seems to suggest that the air supply for the auxiliary system, as well as the air supply for what has been characterized as the pneumatic system (air brakes), all comes from common air compressors

which rely on electrical power to function. If this were the case, then it would logically follow that any loss of power would necessarily interrupt the normal available air pressure required to activate the brakes, and once that supply is exhausted by the locomotive operator's attempts to stop the locomotive, there is none left. As a matter of fact, Inspector Kaylor's accident investigation report concluded at pg. 5 that "the major contributing factor to the accident was the disengagement of the locomotive trolley pole from the wire and the subsequent loss of the trolley harp assembly which led to a premature loss of the pneumatic and dynamic braking systems (The dynamic braking contactors were pneumatically operated)".

Mr. Funsch testified further that the auxiliary braking system was designed to activate when (1) the flexible hose or "pipe" supplying air to the brake cylinders are severed, or (2) the locomotive operator activates the emergency control lever, thereby venting the pipe and triggering the system. He made it clear that by simply engaging the pneumatic brake, any subsequent loss or exhaustion of air will not activate the auxiliary system or provide additional braking power. Petitioner has presented no credible evidence to establish that the auxiliary braking system was in fact inoperable. While there was some testimony concerning the position of the brake system levers at the scene of the derailment, including the testimony of the locomotive operator, and some mention of this in MSHA's accident report, MSHA simply has provided no evidence to support a conclusion that the locomotive operator engaged the emergency brake lever to its full "on" position, and that due to some inoperable condition, that system failed to function properly. In short, as stated in my original decision, MSHA simply failed to make a case, and hindsight, further discovery, or additional hearings will not cure this defect in its position in this matter.

ORDER

In view of the foregoing findings and conclusions made by me on remand, my prior decision and order vacating the citation and dismissing this proceeding is reaffirmed, and this case is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

William B. Moran, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Lee F. Feinberg, Esq., William T. Brotherton, Esq., Spilman, Thomas, Battle & Klostermeyer, 1101 Kanawha Banking & Trust Bldg., Charleston, WV 25301 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 5 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 80-298 A.O. No. 03-00286-03006
v.	:	Ozark Surface Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION AND ORDER

On the basis of a stipulation of material facts not in dispute the operator has waived an evidentiary hearing and moved for summary decision and an order of dismissal. The agreed upon facts show that at the time the TD-25 International Bulldozer in question was cited it was provided with adequate rollover (ROPS) and falling object protective structures (FOPS). Stip. Para. 13. Nevertheless, the Secretary opposed the motion on the ground that additional FOPS in the form of brush guards or sweeps should have been installed to provide further or additional protection from "falling material from the trees" that were being cleared from the site of a surface coal mine.

Unable to point to any specific requirement for such additional structures, MSHA relies on the inspectors' belief that the absence of such additional devices may be treated as "equipment defects affecting safety" within the meaning of 30 C.F.R. 1606(c) of the mandatory safety standards relating to the inspection and maintenance of loading and haulage equipment.

The Mine Safety Law and the mandatory safety standards having the force and effect of law are remedial. They are, therefore, to be liberally construed. But because they are also penal the due process clause prohibits the imposition of sanctions without fair warning of the acts and conduct prohibited. Cape & Vineyard Division v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); General Dynamics Corporation v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979). An objective appraisal of the evidence, including the depositions of the inspectors, is persuasive of the fact that the operator did not know and had no reason to know that if its equipment was provided with adequate ROPS and FOPS, as the government has stipulated, it should have anticipated that an inspector on the basis of information entirely extraneous to that germane to the regulatory

process or any administrative or judicial interpretation might "believe" that brush guards or sweeps should also be required. There is no dispute about the fact that as previously applied 1606(c) was interpreted as applying only to defects "affecting" devices already affixed to machinery in service and not to the necessity of providing additional safeguards. The same considerations led the inspectors to reject the use of 30 C.F.R. 77.404(a) as the basis for requiring installation of sweeps (Dorton Deposition, 8). As so applied, of course, the standards are permissibly intelligible and valid.

The novelty of the inspectors' interpretation in this case was underscored by the Assessment Conference Officer who noted:

> This is considered a very technical violation in that protection was provided for the equipment operator (cab) and the probability and degree of injury is not very severe, a borderline violation in that this standard pertains to equipment defects not safeguard inadequacies.

Thus not only did the operator not know or have reason to know of the inspectors' interpretation or of any industry practice but so also the Assessment Office was surprised to learn of that interpretation and viewed it as "borderline". Indicative of the subjective nature of the inspectors' interpretation is the fact that Inspector Newport got the idea for expanding the scope of the standard from a newspaper article about a friend who was killed pushing down trees (Newport Deposition 8-9). Nothing in the newspaper article, however, referred to the lack of a brush guard as a cause of the fatality (Newport Deposition 9-10). This is not to say that brush guards or sweeps should not be required on dozers clearing trees. A simple notice to provide safeguards or an interpretive bulletin from MSHA to the operators may easily cure the deficiency in the standard's present coverage. All that I hold in this decision is that the standard as applied to the facts of the violation alleged is impermissibly vague. Thus, unlike a finding of facial vagueness, which results in a standard being declared unenforceable against all operators, the finding that the interpretation urged renders the standard impermissibly vague as applied to these facts results only in a vacation of the citation.

If we are to have a government of laws and not of men, an inspector's subjective belief, no matter how sincerely held, cannot be made the basis of a finding of civil or criminal violation. This is fundamental to any system of orderly regulation. As Professor Bickel has so trenchently noted:

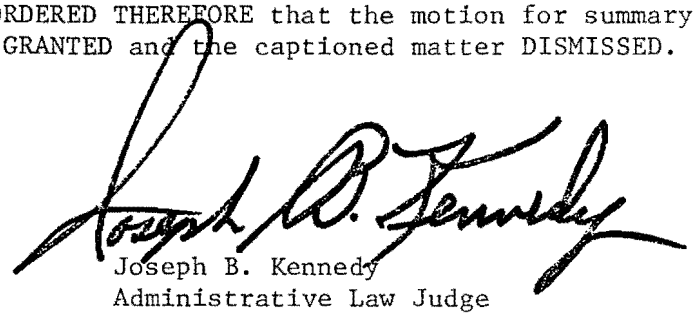
> With an administered statute, there is no duty to obey and no peril to the individual before the administrator acts, and his action is ample warning. A decisive consideration here . . . is, rather, that a loosely worded statute allows latitude for discontrol,

> irrationality, for erratic, prejudiced, discriminatory, or overreaching . . . exercises of authority. The danger is greatest from administrative officials -- particularly from petty officials -- but it should be guarded against as well with prosecutors, who have power to harrass, and with judges and juries. Hence this is a relevant consideration in self-enforcing criminal statutes as well as in administered ones.
>
> The evil at the root of the risks . . . is irresponsibility. A vague statute delegates to administrators, prosecutors, juries, and judges the authority of ad hoc decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact. In addition, such a statute delegates authority away from those who are personally accountable, at least for the totality of their performance, to those who are not, at least not directly. In both aspects, it short-circuits the lines of responsibility that make the political process meaningful. And so it is far from sterile conceptualism to say that a vague statute delegates power to make decisions that do not derive from a prior legislative decision and that do not, therefore, represent the soverign will, expressed as it should be. Of course, differences of degree are vital. Much will depend on what sort of decision is delegated, how much of it, and to whom. Be that as it may, when the Court finds a statute unduly vague, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision. It does not hold that the legislature may not do whatever it is that is complained of but, rather, asks that the legislature do it, if it is to be done at all. A. M. Bickel, The Least Dangerous Branch 151 (1962). 1/

The operator was also cited for not recording in its on-shift examination book the claimed violation of 77.1606(c). 30 C.F.R. 77.1713(a). Since I find there was no violation of 1606(c), it follows that the violation of 1713(a) alleged did not, in fact, occur.

1/ See also, A. G. Amsterdam, The Void for Vagueness Doctrine In the Supreme Court, 109 U. Pa. L. Rev. 67, 80, 90, 108 (1960); J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L. J. 575, 582-586 (1972); Secretary of Labor v. Massey Sand and Rock Company, 1 FMSHRC 545, 554-555 (June 1979). Compare, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952).

Accordingly, and for the additional reasons so ably tolled in the operator's supporting brief, I find (1) there is no genuine issue of material fact and (2) that the operator is entitled to summary decision as a matter of law. It is ORDERED THEREFORE that the motion for summary decision be, and hereby is, GRANTED and the captioned matter DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Thomas R. Gallagher, Esq., P.O. Box 235, St. Louis, MO 63166 (Certified Mail)

Richard L. Collier, Esq., U.S. Department of Labor, Office of the Solicitor, 555 Griffin Square, Suite 501, Dallas, TX 75202 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 5 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 79-113
Petitioner	:	A.C. No. 15-02012-03022V
v.	:	
	:	Fies Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; William K. Bodell II, Esq., for Respondent.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Evansville, Indiana. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Island Creek Coal Company, operated a coal mine known as the Fies Mine in Hopkins County, Kentucky, which produced coal for sales in or substantially affecting interstate commerce.

2. Prior to December 1978, Respondent began to decrease production of coal at the Fies Mine. Sections of the mine were gradually closed down and mining crews and surplus mining equipment were transferred to producing sections. A set of conventional mining equipment generally consisted of six to eight pieces, including a loader, shuttle cars, a cutter, a drill and roof bolters. The loaders and shuttle cars were off-track vehicles with rubber

tires and wheel bases generally wider than the trolley haulage track. Such equipment could move along the track haulage entry under its own power; however, it was generally towed behind a locomotive when it was transported through the track haulage entry.

3. On December 27, 1978, a recovery crew was moving equipment from one area of the mine to another. They had begun moving the shuttle cars about four shifts earlier and had already moved three to four cars when their shift began.

4. Shuttle cars were used primarily in the mining and loading of coal and were not normally used near trolley wires. Anytime off-track equipment was moved along an energized trolley system with a low overhead clearance, there was a danger of contacting overhead trolley wire. Shuttle cars were about 52 inches high and were especially dangerous to move along an energized trolley system because their sideboards extended above the operator's compartment close to the trolley wire. The roof averaged 56 inches throughout the Fies Mine. Because of the unevenness of the mine floor, the distance between the top of the shuttle car and the trolley wire was not uniform.

Before moving the shuttle cars by locomotive along the trolley system, the crew cleaned the ribs with a scoop and lowered the roadway with picks and shovels so that the cars would not contact the overhead trolley wire. The crew also replaced the tires on the shuttle cars with smaller-sized tires to lower the cars 4 to 6 inches and placed fire-resistant conveyor belting on the shuttle car's metal frame to prevent contact with the trolley wire.

5. Two rails ran through the middle of the entry and an overhead trolley wire was located between the rib and the rail closer to the rib, depending on which side of the entry the trolley pole was placed. The trolley wire was energized with 300 volts DC.

6. At each intersection where the trolley wire branched, a manual trolley switch, known as an Ohio Brass cut-out switch, was located. The switch, which had a rubber handle and was about 8 inches long, could be used to cut off the current inby the switch to the end of the trolley line. The manual trolley switch was not designed to deenergize power under extreme loads because of the danger of an arc or flash burning the person opening the switch.

7. On December 27, Vernon Richardson, a general laborer, was stationed along the track haulage system near telephones at the belt drive and at the mechanic's station. Richardson's primary duties involved stopping the conveyor belt if there was a malfunction and notifying employees on the surface of problems with the conveyors. Richardson was about 300 feet from one of the trolley switches and the recovery crew was instructed to signal Richardson with their cap lamps if a problem arose (in moving equipment in the trolley entry) so that Richardson could deenergize power to the trolley system by opening the trolley switch.

8. Each section of the trolley system at the Fies Mine received power from a separate rectifier. A rectifier was the main source of power for the trolley system and transformed alternating current to direct current. It deenergized power to the trolley system and was designed to lock-out automatically if there was a short circuit or an overload in the system. The lock-out device on the rectifier could also be operated manually by throwing a switch or pressing a button.

9. The main north rectifier was the first automatic circuit breaker outby the equipment being moved during the incident in question. During the equipment move, a miner was not stationed at or anywhere near this rectifier.

10. In the situation in question, Respondent relied on the trolley switch rather than the rectifier switch as an emergency manual cut-off, because Respondent considered it the safest and most practical power cut-off point for moving the shuttle cars. At the time the shuttle cars were being moved, supply locomotives and man trips traveled along the trolley system delivering men and supplies. Using the rectifier to deenergize power would have affected several miles of the system and thus could interrupt the transportation of sick or injured miners in an emergency.

11. At about 3 p.m., while the crew was moving the last shuttle car (towards the main north rectifier) the car moved over a high spot on the mine floor and its metal frame contacted the energized trolley wire, causing a short circuit and fire. The resulting arc ignited material in the car, which included small deposits of oil or grease mixed with coal, coal dust and rock dust. Within about 1 minute, Richardson was able to open the trolley switch to deenergize power and William Foreman, one of the crew members, came up from the shuttle car to make sure that power was deenergized. The trolley switch was about 900 feet from the car at the time of the incident.

12. The fire burned a 6-foot area on the shuttle car near and including part of the right front tire and a reel of cable on that side. The heat from the arc also scorched the shuttle car's frame and the trolley wire.

13. Respondent's safety director, Ray Ashby, was on the surface of the Fies Mine when the fire occurred. He arrived at the fire about 30 minutes later and helped to extinguish the fire with water, rock dust and chemical powder from a fire extinguisher. The recovery crew and miners in other sections of the mine were ordered to leave the mine. Inby the shuttle car, the area had been mined out and no work was being performed.

14. On that day, December 27, 1978, federal inspector George Seiler issued an investigative order of withdrawal to Respondent under section 103(k) of the 1977 Mine Act. The order was later modified to allow Respondent to continue normal operations beginning on the midnight shift of the same day.

15. On December 28, 1978, federal inspector Jewell M. Larmouth conducted an electrical inspection of Respondent's Fies Mine to investigate the mine fire. He was accompanied by Vernon Morris, Lewis Henderson, William Blue,

Bobby Blase, a miners' representative, two safety committeemen, Jack Dixon, the UMW safety coordinator, Judson Sorrell, an MSHA supervisor, and Mr. Whitcomb, a mining engineer. When the inspector arrived at the scene, the crew was preparing to move the shuttle car that was involved in the fire. Power to the trolley wire was still deenergized.

16. On December 28, 1978, Inspector Larmouth issued Citation No. 400846 to Respondent, reading in part: "A miner was not stationed at the main north rectifier providing 300 volts direct current to the trolley circuit extending to the circuit inby No. 8 conveyor belt drive in 1 main east, into the main north entry where a unit of equipment (shuttle car) was being moved."

17. The inspector examined the main north rectifier and found that the automatic lock-out device was inoperative. He believed that the fire could have been avoided or minimized by stationing a miner at the rectifier because, even though the automatic lock-out device on the rectifier did not operate properly, the circuit could have been deenergized immediately once the miner became aware of the short. The rectifier was about 1,200 feet from the shuttle car at the time of the fire. The normal hum of the rectifier would have changed when the short circuit occurred, and thus have alerted a miner stationed at the switch. Also, if the miner had been looking in the direction of the shuttle car, he would have seen a flash and been able to throw the switch in 2-3 seconds. As another safety factor, the locomotive was traveling towards the rectifier so that a miner stationed at the rectifier would have observed a change in the intensity of the locomotive's headlight to indicate a problem.

18. The inspector determined from the burns on the car and the discoloration of the trolley wire that the flame-retardant belting had been damaged before being placed on the frame of the car.

19. The cited condition was found to be abated when the operator told the inspector that, in the future, when off-track equipment was being moved over an energized trolley system, a miner would be stationed at the first automatic circuit breaker (the rectifier in this case) outby the equipment moved and would be in communication with a person on the surface.

DISCUSSION WITH FURTHER FINDINGS

Based on the order of withdrawal issued on December 28, 1978, the Secretary has charged Respondent with a violation of 30 C.F.R. § 75.1003-2(f)(3), which provides:

> (f) A minimum vertical clearance of 12 inches shall be maintained between the farthest projection of the unit of equipment which is being moved and the energized trolley wires or trolley feeder wires at all times during the movement or transportation of such equipment; provided, however, that if the height of the coal seam does not permit 12 inches of vertical clearance to be so maintained, the following additional precautions shall be taken:

* * * * * * *

(3) At all times the unit of equipment is being moved or transported, a miner shall be stationed at the first automatic circuit breaker outby the equipment being moved and such miner shall be: (i) In direct communication with persons actually engaged in the moving or transporting operation, and (ii) capable of communicating with the responsible person on the surface required to be on duty in accordance with § 75.1600-1 of this part.

The Secretary argues that Respondent violated the standard by failing to station a miner at the first automatic circuit outby the shuttle car while it was being moved to another area of the mine. The Secretary contends that Respondent admitted that it stationed a miner at a manual breaker switch with knowledge that the cited standard required that a miner be stationed at the rectifier.

The Secretary proposes a penalty of $5,000.

Respondent argues that stationing a miner at the manual trolley switch was safer than placing a person at the rectifier because the trolley switch was closer to the equipment being moved; and because deenergizing power with the trolley switch would have affected only a small portion of the trolley system, allowing activity to continue in other areas of the mine. Respondent also argues that the mine fire would not have been prevented by stationing a person at the rectifier and that, because both the trolley switch and rectifier were manually operated, the trolley switch was the better location for minimizing the fire.

I conclude that Respondent violated the cited standard as charged. Section 75.1003-2(f)(3) unambiguously requires that a miner be stationed at the first automatic circuit breaker outby the equipment being moved. The evidence establishes, and Respondent admits, that a miner was not stationed at the first automatic circuit breaker outby the shuttle car during the move on December 27, 1978. The alternative method used by Respondent was neither safe nor adequate to assure prompt and effective action to turn off the current in case of an emergency. In the first place, the trolley switch was not designed to deenergize power in an overloaded circuit because an overload created a hazard to the miner throwing the switch. Secondly, Richardson's primary duties on December 27, 1978, did not include standing next to the trolley switch. He was merely in the vicinity of the trolley switch and his primary duty was to watch the conveyor belt; in case of an emergency involving the movement of equipment, it was reasonable to expect that Richardson would or could be late in responding. Ashby testified that Richardson threw the trolley switch about 1 minute after seeing a flash of light from contact between the trolley wire and the shuttle car, which was about 900 feet away. Had a miner been stationed at the rectifier, emergency action would have been safer, faster, and more effective than the alternative method used by Respondent. Finally, the alternative method used was not permitted by the standard and does not alter the fact that the standard was violated.

I also conclude that Respondent was negligent in failing to station a miner at the first automatic circuit breaker. Ray Ashby, Respondent's safety director, testified that he was familiar with the requirements of the cited standard; however, the recovery crew was not instructed to station a miner at the automatic circuit breaker. Ashby testified that he believed the trolley switch accomplished the same purpose as the rectifier and that the trolley switch was a better choice because it was closer to the vehicle being moved and a greater portion of the trolley system would remain unaffected by disengaging power at the trolley switch. However, he made this decision without ascertaining whether the law permitted this procedure. Acting in disregard of the law (the mandatory safety standard) or without making a reasonable effort to obtain an official interpretation as to whether the action was permitted by law constituted negligence in this case.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Respondent violated 30 C.F.R. § 75.1003-2(f)(3) by failing to station a miner at the first automatic circuit breaker as alleged in Citation No. 400846.

3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $5,000 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Island Creek Coal Company shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $5,000, within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

Darryl A. Stewart, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

William K. Bodell II, Esq., Counsel for Respondent, Southcreek Park, Suite A270, 2365 Harrodsburg Road, Lexington, KY 40504 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 5 1981

WESTMORELAND COAL COMPANY, Contestant	:	Contest of Order
v.	:	Docket No. VA 81-4-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 692905
	:	Bullitt Mine

DECISION GRANTING WITHDRAWAL OF CONTEST

Appearances: Thomas L. Hopkins, Esq., Big Stone Gap, Virginia, for Contestant;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

At hearing in Abingdon, Virginia, on January 7, 1981, MSHA agreed to amend the order of withdrawal at issue 1/ changing it to a citation under

1/ This order was issued under the provisions of section 104(d)(1) of the Act. That section reads as follows:

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

section 104(a) 2/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The Westmoreland Coal Company thereafter requested to withdraw its contest which I approved at hearing and now affirm. The background of events leading up to this action was discussed in a bench decision which is set forth below:

> This proceeding is a contest by the Westmoreland Coal Company of Order No. 692905. It was the Government's position in this case that that order was issued orally on September 11, 1980, at 12:01 p.m., and the fact that it was not committed to writing until the 18th of September was irrelevant. It argued that since the order was issued on the 11th and the factors giving rise to that order occurred at that time, the order was therefore issued "forthwith" as required by section 104(d)(1) of the Act. It turns out, however, and there is no dispute over this, that at the time that order was orally issued on September 11, there was no precedential section 104(d)(1) citation in existence. Such a citation is clearly a prerequisite to the issuance of a 104(d)(1) order. The Government now concedes that another section 104(d)(1) order (No. 692904) issued on September 11, which was subsequently amended on September 18 to become a 104(d)(1) citation, could not have had retroactive effect to furnish the requisite underlying 104(d)(1) citation needed on September 11, to provide the necessary foundation for the 104(d)(1) order now before me.
>
> I have also expressed my reservations with the effort by the Government to bootstrap a 104(d)(1) order using a 104(d)(1) citation based on the same event giving rise to the "unwarrantable failure" findings in each. In this case that same event, a downed line curtain, was used as the "unwarrantable failure" for both the underlying 104(d)(1) citation and the 104(d)(1) order. As a result of those reservations, the Government moved to amend the 104(d)(1) order at issue in this case, that is, Order No. 692095, to a 104(a) citation. Westmoreland thereafter requested to withdraw its contest of

2/ Section 104(a) reads in part as follows:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator."

the new section 104(a) citation. Under the circumstances, I see no reason not to accept that request. The contest is accordingly dismissed and the proceeding terminated.

Gary Melick
Administrative Law Judge

Distribution:

Thomas L. Hopkins, Esq., Westmoreland Coal Company, P.O. Drawer A & B, Big Stone Gap, VA 24219 (Certified Mail)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 9 1981

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. PENN 79-38-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 620483; April 30, 1979
	:	Westland Mine
UNITED MINE WORKERS OF AMERICA, (UMWA) Respondent	:	

DECISION

Appearances: William H. Dickey, Jr., Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company; Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Mine Safety and Health Administration; Richard L. Trumka, Esq., United Mine Workers of America, Washington, D.C., for the United Mine Workers of America.

Before: Judge Cook

I. Procedural Background

On May 23, 1979, Consolidation Coal Company (Consol) filed an application for review in the above-captioned proceeding pursuant to section 105(d) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

1/ Section 105(d) provides as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement

(1978) (1977 Mine Act), to obtain review of Order of Withdrawal No. 620483. The order was issued at Consol's Westland Mine on April 30, 1979, pursuant to the provisions of section 104(d)(2) 2/ of the 1977 Mine Act.

The application for review states, in part, as follows:

1. At or about 1030 hours on April 30, 1979, Federal Coal Mine Inspector, Eugene W. Beck, (A.R. 0321),

---

fn. 1 (continued)
by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

2/ Section 104(d) provides as follows:

(1) 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.

(2) 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. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter "Inspector") issued Order No. 0620483 (hereinafter "Order") pursuant to the provisions contained in Section 104(d)(2) of the Act to Richard Wotkowski, Inspector's Escort, for a condition he allegedly observed during an "AAA" inspection (safety and health inspection) in the Westland Mine, Identification No. 36-00965 located in Pennsylvania. A copy of this Order is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.12(b).

2. Said Order under the heading captioned "Condition or Practice" alleges that:

"The designated return escapeway out of 2 Right section was not maintained in a safe condition to insure passage of persons at all times including disabled persons, there was a body of water more than 13 inches deep for a distance of approximately 70 feet near Engineer spad 11+30.5. Water was being discharged into the area from other pump located along the haulage. The record book for the weekly examination showed water in the escapeway and management knew that water was being discharged in the area."

3. Said Order contains the allegation that the above condition or practice constituted a violation of 30 C.F.R. 75.1704, a mandatory health or safety standard, but that the violation has not created an imminent danger. Further, the Inspector determined that the alleged violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and was caused by an unwarrantable failure to comply with the stated standard.

4. Said Order additionally contained the allegation that the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 236380 on September 10, 1978. A copy of Order No. 236380 and termination thereof issued under Section 104(d)(1) of the Act is attached hereto as Exhibit "B".

5. At or about 1155 hours on April 30, 1979, Inspector Beck issued a termination of said Order. A copy of this termination is attached hereto as Exhibit "A".

6. Consol avers that the Order is invalid and void, and in support of its position states:

(a) That the Order fails to cite a condition or practice which constitutes a violation of mandatory health or safety standard 30 C.F.R. 75.1704;

(b) That the Order fails to state a condition or practice caused by an unwarrantable failure of Consol to comply with any mandatory health or safety standard; and

(c) That the Order fails to state a condition or practice which could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard.

* * * * * * *

WHEREFORE, Consol respectfully requests that its Application for Review be granted for all of the above and other good reasons; Consol additionally requests that the subject Order be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

The United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) filed answers on May 29, 1979, and June 7, 1979, respectively. In its answer, MSHA: (1) admitted the issuance of Order No. 620483 and stated that it was properly issued pursuant to section 104(d) of the 1977 Mine Act; (2) submitted that there was a violation of a mandatory safety standard which was caused by Consol's unwarrantable failure to comply with the cited standard; and (3) denied all other allegations set forth in Consol's application for review. Accordingly, MSHA prayed that Consol's application for review be denied and that the withdrawal order be affirmed. The UMWA's answer admitted the issuance of the withdrawal order, but denied all other allegations contained in the application for review.

Various notices of hearing were issued at various stages of the proceeding which ultimately scheduled the hearing for June 18, 1980, in Washington, Pennsylvania. The hearing convened as scheduled with representatives of Consol, MSHA and the UMWA present and participating.

Following the presentation of the evidence, a schedule was established for the filing of posthearing briefs and proposed findings of fact and conclusions of law. The UMWA filed its posthearing brief on August 8, 1980. MSHA and Consol filed posthearing briefs on August 13, 1980. Additionally, MSHA filed a reply memorandum on August 18, 1980.

II. Witnesses and Exhibits

A. Witnesses

MSHA called as its witness Federal mine inspector Eugene Beck.

Consol called as its witnesses Richard Wotkowski, inspector escort at the Westland Mine; Frank Cass, the mine foreman at the Westland Mine; and Robert Brezinski, an assistant foreman at the Westland Mine.

The UMWA did not call any witnesses.

B. Exhibits

1. MSHA introduced the following exhibits in evidence:

M-1 is a copy of Order No. 620483, April 30, 1979, 30 C.F.R. § 75.1704.

M-2 is a copy of a diagram of the area affected by the withdrawal order.

2. Consol introduced the following exhibits in evidence:

O-1 is a blowup diagram of the subject portion of the 2 Right section as it appeared on April 25, 1979.

O-2 is a blowup diagram of the subject portion of the 2 Right section as it appeared on April 30, 1979.

O-3 contains copies of pages from the mine foreman's book.

3. The UMWA did not introduce any exhibits in evidence.

III. Issues

In general, the issue is whether the withdrawal order was validly issued. 3/ The specific issues are:

3/ A mine operator's section 105(d) application for review or notice of contest must contain, amongst other things, a short and plain statement of the mine operator's position on each issue of law and fact that the mine operator contends is pertinent. 29 C.F.R. §§ 2700.20(c) and 2700.21(b) (1979) (Commission's Rules of Procedure, effective July 30, 1979); 29 C.F.R. § 2700.21(a) (1978) (Commission's Interim Procedural Rules, effective March 10, 1978). MSHA has the obligation of presenting a prima facie case, with respect to each issue raised by the mine operator, that the order or citation in question was validly issued. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975); Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975). In CF & I Steel Corporation, Docket No. DENV 76-46 (FMSHRC, filed December 2, 1980), the Commission held that the absence of an intervening "clean" inspection of the entire mine was a prerequisite to the issuance of a withdrawal order under section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970). Such orders are equivalent to section 104(d)(2) orders under the 1977 Mine Act. The Commission also held in

1. Whether the condition cited in Order No. 620483 constituted a violation of mandatory safety standard 30 C.F.R. § 75.1704.

2. If the condition cited in Order No. 620483 constituted a violation of 30 C.F.R. § 75.1704, then whether the violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard. 4/

IV. Opinion and Findings of Fact

A. Stipulations

1. Consolidation Coal Company and its Westland Mine are subject to the provisions of the 1977 Mine Act (Tr. 21-22).

2. Federal mine inspector Eugene Beck was an authorized representative of the Secretary of Labor when the subject order of withdrawal was issued (Tr. 22).

3. Consolidation Coal Company was properly served with the order (Tr. 22).

B. Standards Governing the Validity of Section 104(d)(2) Orders

Section 104(d)(1) of the 1977 Mine Act provides for the issuance of both citations and withdrawal orders. This section of the 1977 Mine Act provides for the issuance of a citation when an authorized representative of the

---

fn. 3 (continued)
CF & I that the government was under an obligation to present a prima facie case of such fact in order to sustain the withdrawal order. The Administrative Law Judge's decision in CF & I, issued on November 3, 1976, indicates that the issue of the intervening "clean" inspection was specifically raised by the mine operator. See also, United States Steel Corporation, Docket No. HOPE 75-708 (FMSHRC, filed January 9, 1981).

In the instant case, Consol did not raise this issue in its May 23, 1979, application for review and did not raise the issue during the hearing. Accordingly, it must be concluded that Consol's failure to raise the issue relieved MSHA of its burden of adducing evidence as to the absence of an intervening "clean" inspection. Additionally, it is significant to note that Consol did not address the issue in its posthearing brief.

4/ The issue as to the significant and substantial criterion cited in the order will not be discussed in this decision because the gravamen of the application for review is directed to a challenge of the order itself. It has been held by the Board of Mine Operations Appeals of the Department of the Interior (predecessor to the Federal Mine Safety and Health Review Commission) that no consideration need be given to the significant and substantial criterion of the violation giving rise to a 104(a)(2) withdrawal order to determine its validity.

Secretary of Labor, upon any inspection of a coal or other mine, finds: (1) that there has been a violation of any mandatory health or safety standard; (2) 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 mine safety or health hazard; and (3) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. The section also provides for the issuance of a withdrawal order if, during the same inspection or any subsequent inspection of the mine within 90 days after the issuance of the citation, an authorized representative of the Secretary of Labor finds another violation of any mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply.

If a withdrawal order has been issued pursuant to section 104(d)(1) with respect to any area in a mine, then section 104(d)(2) authorizes the issuance of a withdrawal order by an authorized representative of the Secretary of Labor who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the 104(d)(1) withdrawal order until such time as an inspection of such mine discloses no similar violations.

Section 104(d)(2) of the 1977 Mine Act imposes no requirement of substantive similarity of violations. Accordingly, a 104(d)(2) withdrawal order is not invalid because the underlying violation, as set forth in the underlying 104(d)(1) withdrawal order, involves a different mandatory health or safety standard. See Eastern Associated Coal Corporation, 3 IBMA 331, 346, 351-352, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), aff'd on rehearing, 3 IBMA 383, 81 I.D. 627 (1974), overruled in part by Zeigler Coal Company, 6 IBMA 182, 83 I.D. 232, 1976-1977 OSHD par. 20,818 (1976) and Alabama By-Products Corporation, 7 IBMA 85, 83 I.D. 574, 1976-1977 OSHD par. 21,298 (1976) and Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1977-1978 OSHD par. 21,676 (1977). Additionally, no consideration need be given to the significant and substantial criterion of the violation giving rise to the 104(d)(2) withdrawal order in order to determine its validity. To be validly issued, a 104(d)(2) withdrawal order must be based upon a violation of a mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. Zeigler Coal Company, 6 IBMA 182, 188-190, 83 I.D. 232, 1976-1977 OSHD par. 20,818 (1976). Since the gravamen of the application for review in this case is directed to a challenge of the order itself, the issue as to the significant and substantial criterion cited in the order will not be discussed in this decision; particularly since all discussions of that issue by the parties were related to the challenge of the order rather than for any other purpose. A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1977-1978 OSHD par. 21,676 (1977).

C. Consol's Motion to Dismiss

Consol made a motion to dismiss at the close of MSHA's case-in-chief arguing that MSHA had failed to prove: (1) that the condition cited in Order No. 620483 was a violation of mandatory safety standard 30 C.F.R. § 75.1704, and (2) that the alleged violation was caused by Consol's unwarrantable failure to comply with such mandatory safety standard. Consol advanced various arguments in support of its motion, and has reasserted those arguments in its posthearing brief. The undersigned Administrative Law Judge made a determination that the evidence adduced by MSHA during its case-in-chief was sufficient to establish a prima facie case as to the issues raised by Consol. Accordingly, Consol's motion to dismiss was denied. However, the undersigned Administrative Law Judge indicated that the motion would be reconsidered at the time of the writing of the decision. (See Tr. 93-102).

All of the evidence contained in the record when the motion was made has been considered fully, and has been found more than sufficient to establish a prima facie case as relates to both issues raised by Consol. Accordingly, the determination made during the hearing denying Consol's motion to dismiss will be affirmed. 5/

D. Occurrence of Violation

The subject 104(d)(2) withdrawal order addresses an accumulation of water existing along a portion of the designated return escapeway leading out of the 2 Right section of the Westland Mine. It is alleged by MSHA that the condition cited therein constitutes a violation of mandatory safety standard 30 C.F.R. § 75.1704, and that such violation was caused by Consol's unwarrantable failure to comply with the mandatory safety standard. The order, 6/ issued at approximately 10:30 a.m. on Monday, April 30, 1979, by Federal mine inspector Eugene Beck, states that:

5/ Consol did not argue that MSHA had failed to establish a prima facie case as to the absence of an intervening "clean" inspection in support of its motion to dismiss. See n. 3, supra.

6/ In a section 105(d) proceeding to review a section 104(d)(2) withdrawal order, MSHA must establish a prima facie case with respect to each issue raised by the mine operator. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975); Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975). The issues which can be raised include: (1) the existence of the underlying 104(d)(1) citation and order, (2) the fact of violation, (3) unwarrantable failure, (4) the occurrence of an intervening "clean" inspection of the entire mine, and (5) the other requirements for issuance of a section 104(d)(2) order. See CF & I Steel Corporation, Docket No. DENV 76-46 (FMSHRC, filed December 2, 1980); Kentland-Elkhorn Coal Corporation, supra.

With respect to issue No. 1, the order of withdrawal at issue in the instant case was based upon underlying Order No. 236380, issued on September 10, 1978 (Exh. M-1). Paragraph No. 4 of Consol's application for review states that:

> The designated return escapeway out of 2 Right section was not maintained in a safe condition to insure passage of persons at all times including disabled persons. There was a body of water more than 13 inches deep for a distance of approximately 70 feet near Engineer spad 11+30.5. Water was being discharged into the area from other pumps located along the haulage. The record book for the weekly examination showed water in the escapeway and management knew that water was being discharged in the area.

(Exh. M-1, Tr. 91-92).

The cited mandatory safety standard provides, in part, as follows:

> Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. [Emphasis Added.]

Three maps or diagrams were placed in evidence by MSHA and Consol which provide a graphic representation of the general physical layout of the area in question (Exhs. M-2, 0-1, 0-2). 7/ These exhibits represent the cited

---

fn. 6 (continued)

"[Order No. 620483] additionally contained the allegation that the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 236380 on September 10, 1978. A copy of Order No. 236380 and termination thereof issued under Section 104(d)(1) of the Act is attached hereto as Exhibit B." The copy of Order No. 236380 filed by Consol states that it is based upon Citation No. 234029, issued on September 6, 1978. In view of the statements contained in paragraph No. 4 of the application for review, and the entries contained in Exhibit B of the application for review, I conclude that Consol admitted the existence of the underlying 104(d)(1) citation and order, and thus relieved MSHA from its obligation to present evidence as to their existence as part of its prima facie case.

Consol never raised issue No. 4 and, accordingly, relieved MSHA of its obligation to present a prima facie case as to the absence of an intervening "clean" inspection of the entire mine. See n. 3, supra.

7/ Exhibits M-2 and 0-2 also show specific conditions existing on April 30, 1979, and Exhibit 0-1 shows specific conditions existing on April 25, 1979.

portion of the return escapeway (area between points B and F on Exh. M-2) as being part of an area roughly corresponding in shape to a right triangle, located on the left hand side of the mouth of 2 Right section, the mouth being the area in which 2 Right section joined the North Mains at a right angle. 8/ The cited portion of the designated return escapeway is along the hypotenuse of the triangle. An entry from 2 Right section and an entry from North Mains comprise the base and the height of the triangle, respectively.

The escapeway ranged from 6 to 7 feet in height (Tr. 57), and was in compliance with the 6-foot width requirement set forth at 30 C.F.R. § 75.1704-1(a) (Tr. 57). However, the evidence does not disclose the precise width of the escapeway. The body of water was approximately 70 feet long and rib-to-rib wide. The water had collected in a swag, or depression (Tr. 40-41, 196, Exh 0-2). When measured at a point approximately 10 to 20 feet from either end of the body of water, a 13 inch depth measurement was obtained (Tr. 29, 35-36, 40, 107). The water exceeded 13 inches in depth for a distance of approximately 30 feet (Tr. 110). At its deepest point, the body of water measured approximately 16 to 17 inches in depth (Tr. 138-139, 195). The water was muddy, and this condition prevented an individual from seeing the bottom (Tr. 135). However, it does not appear that any actual accumulations of mud were present on the bottom (Tr. 196).

Water from the North Mains track haulage was being discharged into a sump area located along the height of the triangle. The water was pouring into the sump area through a discharge line installed through one of the stoppings. (Point E on Exh. M-2, Tr. 37-38, 76, 89, 142). However, the water was not being discharged into the cited portion of the designated return escapeway (Tr. 74-76). The area along the base and height of the triangle was characterized by the presence of water and relatively deep mud which made passage through such areas difficult (Tr. 35-37, 42-130, 180).

The presence of the 70-foot long body of water in the designated return escapeway is the basis for the charge that a violation of mandatory safety standard 30 C.F.R. § 75.1704 occurred. The cited mandatory safety standard requires the mine operator to provide at least two safe and well maintained designated escapeways to insure passage at all times of any person, including disabled persons. The question presented in the instant case is whether the presence of the 70-foot long body of water in the return escapeway on April 30, 1979, constituted a violation of this requirement. For the reasons set forth below, I answer this question in the affirmative.

The evidence presented establishes that the cited portion of the return escapeway was not safe and well maintained, particularly as relates to insuring the passage of disabled persons in the event of an emergency. The return

8/ A copy of Exhibit M-2 has been appended to this decision as Appendix A so as to provide the reader with a graphic representation of the general layout of the area in question. Exhibit M-2 has been selected for this purpose because of its physical dimensions. Consol's exhibits measure approximately 28 inches by 40 inches and are thus unsuited for this purpose.

escapeway is the designated escape route if the intake escapeway is obstructed. A fire in the intake escapeway would render it highly probable that the miners would have to use the designated return escapeway in order to reach safety, and the smoke generated by such fire would be drawn from the section through the same return escapeway used by the retreating miners (Tr. 78). It is highly conceivable that, given the proper circumstances, a disabled miner would have to crawl through the escapeway and, consequently through the body of water. If the self rescuer became wet, it would be rendered ineffective (Tr. 45, 79). Additionally, if the escapeway filled with smoke, the fresh air would be toward the bottom. There could be times when miners, whether disabled or not, would crawl on their hands and knees. Once again, the self rescuer could become wet and, consequently, ineffective (Tr. 79).

The inspector also identified water in the boots impeding travel, slip and fall occurrences, and possible drowning as potential hazards posed by the accumulation of water (Tr. 43, 78). A convincing argument can be made for the proposition that such hazards were not present, in a realistic sense, in nonemergency situations. A miner could safely ford the body of water at a leisurely pace, carefully probing the bottom for debris, depressions or projections. But it must be remembered that the regulation in question is directed toward securing a safe avenue of exit from the mine's underground workings in the event of an emergency, and that during an emergency a hasty retreat is often necessary to assure survival. In the frenzied atmosphere generated by an emergency, in which the thought of death descends upon the minds of the miners, some of the foregoing hazards identified by the inspector could foreseeably impair the odds of survival.

Consol's witnesses sought to establish that walking through the cited body of water posed no hazard (Tr. 108-109, 111-113, 165-166). Their testimony on this point is not deemed persuasive. Their opinions tend to show only that the area afforded reasonably safe passage in nonemergency situations. At such times, an individual could carefully walk through the water and perhaps not sustain injury. Such evidence, however, does not tend to show that the area was well maintained so as to insure safe passage in the event of an emergency.

It is significant to note that Consol's witnesses indirectly confirmed the inspector's opinion that the area was unsafe. Mr. Wotkowski testified that walking through the water slowed his progress (Tr. 133), and the testimony of Messrs. Cass and Brezinski indicates that the water would have posed a hazard to those miners working on the bridge (Tr. 161, 187). The fact that such impediments or hazards existed in the absence of an emergency strongly implies that conditions in the cited area would pose significant hazards to men retreating through the area during an emergency.

Consol argues that it cannot be found to have violated 30 C.F.R. § 75.1704 because MSHA was applying an unwritten 12-inch depth standard to determine whether the accumulation of water constituted a violation of the regulation. According to Consol, (1) a mine operator cannot be found in violation of an unwritten enforcement policy when it has not been apprised of

the existence of such policy, and (2) a policy pertaining to the depth of water, particularly in a wet mine, must be promulgated pursuant to the rule-making provisions set forth in the 1977 Mine Act (Consol's Posthearing Brief, pgs. 7-9). MSHA disagrees, arguing that MSHA does not have such an unwritten enforcement policy (MSHA's Posthearing Brief, pgs. 10-11). For the reasons set forth below, I conclude that the evidence fails to support the contention that an unwritten 12-inch standard existed.

Consol argues that Inspector Beck's conduct belies the existence of a 12-inch standard because: (1) he began measuring only when the depth of the water approached 12 inches and ceased measuring when the water depth reached 13 inches; (2) he terminated the order when the water level had been reduced to a depth of 9 to 11 inches; and (3) the entry contained on Exhibit M-1, under "action to terminate" states that ". . . the water level was reduced to less than 12 inches." However, the inspector's testimony resolves this ambiguity in a way that rebuts the conclusion proffered by Consol. His testimony reveals that the 12-inch figure merely reflects the fact that he was wearing 12-inch boots (Tr. 35-36, 40, 64-65). It does not reflect an enforcement policy. The evidence presented clearly shows that Inspector Beck erred by terminating the order prematurely. But such error in judgment forms no foundation for the assertion that an unwritten 12-inch guideline existed. In fact, his testimony indicates that, under the proper circumstances, 4 inches of water would be sufficient to establish a violation (Tr. 60).

Additionally, Consol points to the enforcement policy set forth in the MSHA inspection manual in reference to 30 C.F.R. § 75.1704-2(a) which states, in part, that the "presence of roof falls does not necessarily indicate that the passageway would not be suitable for evacuation" (Tr. 57-58), and, by analogy, argues that the mere presence of water does not indicate that the passageway would not be suitable for evacuation (Tr. 96, Consol's Posthearing Brief, pg 10). Consol's reliance on this analogy is misplaced. 30 C.F.R. § 75.1704-2(a) requires that escapeways "be located to follow . . . the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners," and the enforcement policy set forth in the manual must be interpreted in accordance with this mandate. It appears that the statement is intended to indicate that the mere presence of roof falls does not necessarily identify the passageway as unsuitable for evacuation if the roof conditions in the area can be controlled. It does not countenance permitting the passageways to remain in an unsafe or poorly maintained condition.

In view of the foregoing, it is found that the body of water in the cited portion of the designated return escapeway constituted a violation of mandatory safety standard 30 C.F.R. § 75.1704.

E. Unwarrantable Failure

As noted previously, a violation of a mandatory safety standard is caused by an unwarrantable failure to comply where "the operator involved has failed to abate the conditions or practices constituting such violation,

conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." 7 IBMA at 295-296. For the reasons set forth below, I find that the violation of 30 C.F.R. § 75.1704 cited in Order No. 620483 was caused by Consol's unwarrantable failure to comply with such mandatory safety standard.

It is important to bear in mind, as general background information, that the Westland Mine is a wet mine (Tr. 66). The testimony of Mr. Frank Cass, the mine foreman, indicates that at all times relevant to the instant case, the area along the height of the triangle (Exh. 0-2, between points C and A) was used as a sump to gather water. In fact, the use of the area as a sump predated development of 2 Right section. The portion of the return escapeway along the hypotenuse of the triangle, described by Mr. Cass as a chute, was driven to circumvent the sump area and prevent water from entering the escapeway. According to Mr. Cass, the chute served its purpose until problems developed with the Thro-Mor pump, the pump used to remove water from the sump. The water level would have to rise substantially to enter the cited portion of the return escapeway (Tr. 142, 152).

The evidence presented reveals that Mr. Larry Stipson, the union fire boss, examined the subject return escapeway on April 11, 1979, April 18, 1979, and April 25, 1979. On each of those dates, he made entires in the record book recording the presence of excess water in the subject return escapeway (Exh. 0-3, Tr. 31-34). Each time Mr. Stipson reported the presence of water, Mr. Cass assigned Mr. Alex Nackoneczny and/or Mr. Fred Bazzoli, pumpers, the task of removing the water. Each time Mr. Nackoneczny was assigned, he would subsequently report to Mr. Cass that the problem had been corrected and Mr. Cass would sign the examination book as mine foreman (Tr. 152-153).

After April 18, 1979, Mr. Nackoneczny started to check the Thro-Mor pump twice daily to make certain that it was operating at all times (Tr. 153).

On the April 25, 1979, 8 a.m. to 4 p.m. shift, Mr. Cass visited the 2 Right section during the course of his routine. When he reached the face area, he discovered the crew and the foreman at the dinner hole. He thereupon asked the foreman what the problem was and why he wasn't loading coal. The foreman responded that the fire boss had come onto the section and informed him that deep water was present in the return escapeway. Mr. Cass testified that he instructed those present to remain where they were, and that he and one of the mine committeemen proceeded to the return escapeway to check on the water (Tr. 153-154).

Mr. Cass testified that the water was, indeed, deep. Water was present along all three sides of the triangle (Exh. 0-1). It appears that the excessive amount of water accumulated in the area because the Thro-Mor pump was not functioning properly (Tr. 158). In fact, Consol had been experiencing difficulties with the pump prior to April 25, 1979 (Tr. 152). Mr. Cass

returned to the face area, evacuated the miners and idled the section (Tr. 154-155). The section was reopened on the Thursday, April 26, 1979, 4 p.m. to midnight shift (Tr. 155-156).

On April 25, 1979, after examining the return escapeway and upon returning to the section, Mr. Cass instructed the general assistant foreman to install another pump in the return to clear the escapeway (Tr. 154). A Flygt pump was installed (Tr. 154-155), not in the cited portion of the return escapeway, but along the triangle near the intersection of the entry from North Mains and the entry from 2 Right section (Exh. 0-1). Mr. Cass testified that people were assigned to constantly monitor the pumps until the water was pumped out (Tr. 155), and that the pumpers were ordered to operate the pumps continuously between April 25, 1979, and April 30, 1979, (Tr. 160). However, the evidence reveals that the water in the cited portion of the designated return escapeway was not pumped out because of: (1) the presence of the swag, or depression, in the escapeway, and (2) the fact that the escapeway was at a slightly higher elevation than the area along the base and height of the triangle (Tr. 40-41, 142).

At approximately 7:45 a.m. on Friday, April 27, 1979, Inspector Beck, while at the mine, received a written complaint pursuant to section 103(g) of the 1977 Mine Act from the chairman of the mine health and safety committee (Tr. 30-31). The complaint, dated April 24, 1979, requested an inspection of the intake and return escapeways in the 2 Right section, contending that high water was present (Tr. 49-50). However, the press of other duties prevented the inspector from inspecting the escapeways that day (Tr. 30-31).

Additionally, on the morning of Friday, April 27, 1979, Mr. Cass talked to John Golanka, the general assistant foreman, and Robert Brezinski, an assistant foreman. It was decided that a bridge would have to be built in the area to prevent the problem from recurring. A supply order was placed to obtain the necessary building materials and Mr. Brezinski was instructed to begin construction at 8 a.m. on Monday, April 30, 1979 (Tr. 156-159, 184).

It appears that one of the principal reasons that construction was not scheduled to commence until April 30, 1979, was the need to reduce the water level in the escapeway to the point where it posed no hazard to the bridge builders (Tr. 161, 163). Mr. Fred Bazzoli was ordered to move the Flygt pump into the cited portion of the return escapeway on Saturday, April 28, 1979 (Tr. 169). However, Mr. Bazzoli failed to follow the instructions (Tr. 169). Although Mr. Cass worked on Saturday, he did not visit the area that day (Tr. 177-178).

Mr. Brezinski arrived in the area between 8:30 a.m. and 8:40 a.m on April 30, 1979, and discovered that Mr. Bazzoli had not moved the pump. Accordingly, Mr. Brezinski, Mr. Nackoneczny, and Mr. Larry Wall, a general assistant foreman, undertook the task of moving it. This entailed not only physically moving the pump, but also extending the electrical cable and obtaining discharge hose (Tr. 187-188). They were still in the process of moving the pump when the order was issued (Tr. 41, 54, 72-74, 105-106, 164),

and it appears that the bridge building supplies were arriving in the area at approximately the same time (Tr. 113-114, 116-119, 149, 150, 190-191). As noted previously, water was being discharged into the sump area when the order was issued, but not into the cited portion of the escapeway. Bridge construction began at approximately 11:15 a.m. (Tr. 120), and the bridge was completed at approximately 3:30 p.m. (Tr. 192).

Consol states in its posthearing brief that "[i]t cannot be denied that mine management was aware of the water present in the escapeway," but points to the efforts made by management to correct the problem and argues that these efforts precluded the valid issuance of a 104(d)(2) order (Consol's Posthearing Brief, pgs. 10-11). I disagree with Consol's proferred conclusion.

Management's actions between April 11, 1979 and April 30, 1979, point unmistakably to an unwarrantable failure. Management was first apprised of the water problem in the return escapeway on April 11, 1979, but did not begin to undertake truly effective steps to correct the condition until April 25, 1979, when Mr. Cass visited 2 Right section, discovered the crew at the dinner hole and subsequently idled the section. When the section was reopened on April 26, 1979, water was still present in the cited portion of the return escapeway and, in fact, management did not even make a decision until the morning of April 27, 1979 to move a pump into that area. The pump had not been installed as of 8:30 a.m., on Monday, April 30, 1979.

Therefore, it must be concluded that mine management knew the condition existed, and that management failed to abate the condition in a timely and expeditious fashion due to a lack of due diligence. Accordingly, it is found that the violation of April 30, 1979, was caused by an unwarrantable failure to comply with the standard. 9/

V. Conclusions of Law

1. Consolidation Coal Company and its Westland Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

9/ There is an apparent conflict in the evidence as to whether the miners on the 2 Right section exercised their individual safety rights under the National Bituminous Coal Wage Agreement of 1978. Unidentified hearsay declarants informed Inspector Beck that on April 26, 1979, such rights had been exercised on the section (Tr. 46-47). However, Mr. Cass testified that he was not aware of the exercise of personal safety rights with respect to the return escapeway (Tr. 155-156). It is unnecessary to resolve this apparent conflict in the evidence in order to decide the issues presented in this case, and, accordingly, no opinion is expressed on this subject.

3. Federal mine inspector Eugene Beck was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. Order No. 620483 was properly issued under section 104(d)(2) of the 1977 Mine Act.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

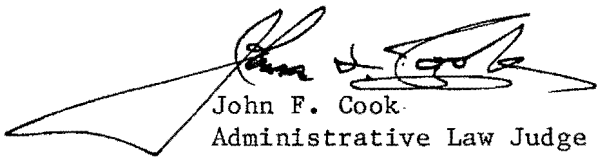
VI. Proposed Findings of Fact and Conclusions of Law

MSHA, Consol, and the UMWA submitted posthearing briefs. MSHA submitted a reply memorandum. Such filings, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

A. The oral determination made at the hearing denying Consol's motion to dismiss is AFFIRMED.

B. The application for review is DENIED and Order No. 620483 is AFFIRMED.



John F. Cook
Administrative Law Judge

Distribution:

Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

William H. Dickey, Jr., Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

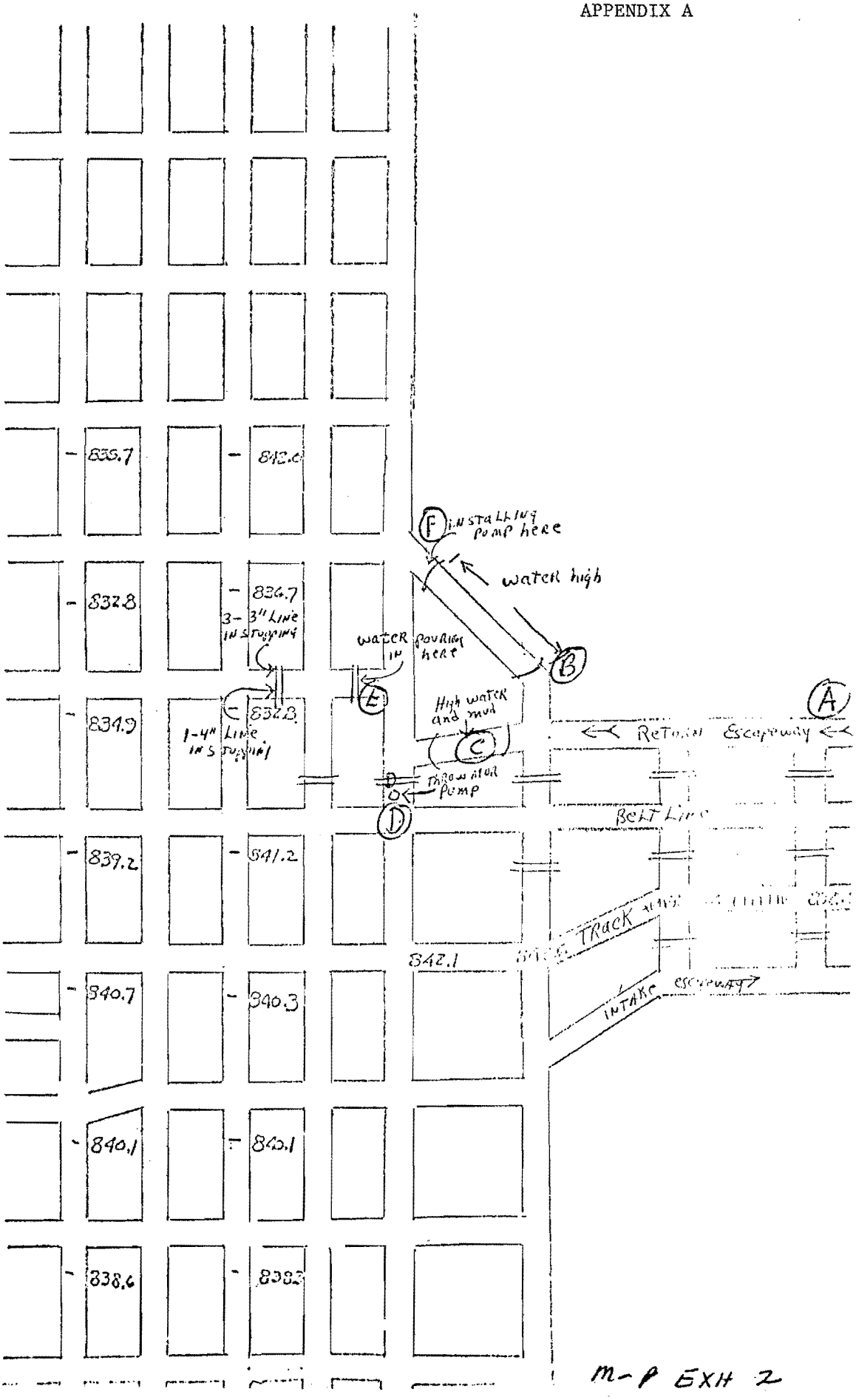
Richard L. Trumka, Esq., United Mine Workers of America, 900 15th Street, NW., Washington, D.C. 20005 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

APPENDIX A



M-P EXH 2

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-63-M MSHA CASE NO. 05-02588-05002
v.	DOCKET NO. WEST 80-356-M MSHA CASE NO. 05-03465-05001
PIONEER URAVAN, INCORPORATED,	
Respondent.	Mine: C-BL-23B

APPEARANCES:

James H. Barkley, Esq., Office of Henry C. Mahlman, Esq., Associate Regional Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294
for the Petitioner,

John F. Peeso, Manager, appearing pro se, Pioneer Uravan, Incorporated, P.O. Box 2065, 2492 Industrial Boulevard, Grand Junction, Colorado 81501
for the Respondent.

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent Pioneer Uravan, Incorporated (Pioneer) violated two safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. Pioneer denies that the violations occurred.

Pursuant to notice, an expedited hearing was held on December 23, 1980, in Grand Junction, Colorado.

The parties filed post trial briefs.

ISSUES

The issues are whether the violations occurred and what penalty, if any, is appropriate.

WEST 80-63

In this case citation 325276 alleges a violation of 30 C.F.R. 57.93-3. The standard provides:

> 57.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

In this case citation 326929 alleges a violation of 30 C.F.R. 57.14-26. The standard provides:

> 57.14-26 Mandatory. Unsafe equipment or machinery shall be removed from service immediately.

The parties agree that the single factual factor determinative of both cases is whether the Pioneer equipment had adequate brakes (Tr 4).

FINDINGS OF FACT

The facts are uncontroverted.

1. The 911 LH loader in issue has a Sundstrand hydrostatic drive transmission (Tr 11-42).

2. The ability of the hydrostatic transmision to brake the loader would be affected by any loss of oil. An efficient hydrostatic system leaks oil from the rotating surfaces. When the oil in the line is dissipated the hydrostatic drive fails (Tr 11-42).

3. The hydrostatic transmission fluid could be lost through a broken hose, a leak, clogging the inlet filter, or through a blow out (Tr 11-42).

4. Some mechanical failures can occur that would offset the hydrostatic power (Tr 11-42).

5. The MSHA inspector observed the Pioneer loader at the bottom of the haulage incline (Tr 43-44).

6. The service brakes were not operable (Tr 44).

7. The operator relied on the parking brake to stop the loader. The parking brake was in good condition (Tr 45,49).

8. There were no inclines of any consequences in the central loading area where the loader was being used (Tr 50,52,53).

9. The manufacturer of the 911 LH loader does not recommend the parking brakes or the hydrostatic transmision should be substituted for the serivce brakes (Tr 65,90).

10. In the Mum Mine the slopes do not exceed 3 to 4 degrees (Tr 96).

11. Pioneer lowers and removes this loader from the mine with a 50 horsepower electrical hoist (Tr 97).

DISCUSSION

Citation 325276 should be vacated.

The evidence shows that the parking brakes of the loader were adequate in view of the flat area in which the loader was operating. Although it is common for the equipment to follow ore bodies up and down, the inspector saw no such incline. The cited standard requires "adequate brakes". Further, the inspector testified there was no incline where any kind of a braking failure would have been hazardous (Tr 50). These circumstances establish that the parking brake was therefore adequate as required by 30 C.F.R. 57.9-3.

MSHA contends that mines of this type follow the ore and as such the degree of incline can rapidly change. In short, MSHA says adequate brakes must describe the braking ability of the loader under all possible applications of the machine and not just at the mine site. I disagree. In determining whether brakes are adequate the circumstances under which the equipment is being used must be considered. To hold otherwise would impugn to an operator an intent to violate the regulation in the future. The service brakes were not maintained due to the abrasive mud in the mine. If a condition existed where a hazard arose from a steeper incline then I would find a violation occurred. However, absent such factual conditions, I rule that the parking brakes were adequate.

WEST 80-356-M

The facts are uncontroverted.

12. An electrical hoist was assisting in lowering a Pioneer loader down a 21 percent incline (Tr 105-107).

13. The two miners were at the bottom of the 600 foot incline (Tr 107).

14. In a 2 foot drop test, the hydrostatic drive, the foot brakes, and hand brakes would not hold the unit (Tr 109-111).

DISCUSSION

This citation should be affirmed.

The test observed by the inspector clearly establishes the brakes were inadequate in view of the circumstances under which the equipment was being used.

Pioneer contends the hydrostatic drive transmission is adequate without any brakes. Further, Pioneer offers evidence that similar loaders sold commercially do not even furnish separate service brakes (Exhibits R2, R3, R4, R5).

I reject Pioneer's arguments. The expert testimony establishes that the hydrostatic transmission drive will eventually leak out a sufficient

amount of oil that its braking power will no longer hold the loader. In addition, the 911 LHD loader operator's manual is contrary to Pioneer's argument (Exhibit P-1, Page 9).

The second argument that other commercial loaders do not furnish service brakes is not supported by Pioneer's evidence. The Clark "Bobcat" shows brakes are "standard equipment" (R2). The J I Case Uniloader and the International Hustler do not indicate they have any service brakes (R3, R4). It may well be that service brakes are such standard equipment that those two manufacturers did not mention that feature in their brochures. The Massey Ferguson skid steer loader brochure under braking indicates "automatic 4-wheel drive with control levers in neutral position". Without additional expert testimony I cannot find that the Massey Ferguson equipment does not have service brakes (R5).

PENALTY

MSHA failed to credit Pioneer with any good faith abatement. In view of this factor and the other statutory criteria[1] I deem a civil penaly of $100.00 to be appropriate.

CONCLUSIONS OF LAW

1. Complainant failed to prove a violation of 30 C.F.R. 57.9-3 and citation 325276 should be vacated (Facts 1-11).

2. Respondent violated 30 C.F.R. 57.14-26 and citation 326929 should be affirmed and a penalty of $100.00 assessed (Facts 12-14).

ORDER

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

WEST 80-63

1. Citation 325276 and all other penalties therefor are vacated.

WEST 80-356-M

2. Citation 326929 is affirmed and a penalty of $100.00 is assessed.

John J. Morris
Administrative Law Judge

1/ 30 U.S.C. § 820(i)

Distribution:

John F. Peeso, Manager of Mines, Pioneer Uravan, Incorporated, P.O. Box 2065, 2492 Industrial Boulevard, Grand Junction, Colorado 81501

James H. Barkley, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-226-M A/O No. 24-01495-05002 R
v.	)	DOCKET NO. WEST 80-260-M A/O NO. 24-01495-05003 W
B & N CONSTRUCTION, INC.	)	MINE: B & N Portable Crusher
Respondent.	)	

DECISION AND ORDER

APPEARANCES:

William W. Kates, Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
for the Petitioner

Fred M. Gibler, Esq.
Brown, Peacock, Keane & Boyd, P.A.
311 Main Street
Kellogg, Idaho 83837
for the Respondent

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [here and after referred to as "the Act"], the Petitioner seeks an order assessing civil monetary penalties against the Respondent for violations alleged in two citations involved in the above captioned cases. The cases were consolidated for hearing in Spokane, Washington on November 4, 1980.

Citation No. 343077 (WEST 80-226-M) alleges a violation of section 103(a) of the Act in that on September 6, 1979, the owner of the Respondent corporation allegedly refused to allow two MSHA inspectors onto property where Respondent was operating its portable crusher, for purposes of continuing an inspection.

Citation No. 343078 (WEST 80-260-M) also issued on September 6, 1980, alleges a violation of section 104(b) of the Act in that Respondent allegedly made no effort to comply with a withdrawal order issued earlier the same day. The withdrawal order referred to in the Citation, Order of Withdrawal No. 34376, stated the Respondent had made no effort to "secure suitable protective footwear" for its employees. The area of withdrawal specified was from "areas or equipment where hazards to the feet exist."

In its answer, Respondent alleges, in effect, that there were no violations of the Act.

FINDINGS OF FACT

1. Respondent has no history of violations prior to August 28, 1979.

2. The parties stipulate, and I find, that the Respondent is a small operator.

3. The proposed penalties will not affect Respondent's ability to continue in business.

4. On August 28, 1979, an MSHA inspector conducted an inspection of Respondent's portable crushing operation set up near Plains, Montana.

5. The crusher was being used to crush and size approximately ten thousand tons of stone for a road project for the State of Montana.

6. The MSHA inspector issued six citations to the Respondent on August 28, 1979, one of which was for an alleged violation of 30 C.F.R. 56.15-3.[1] The citation issued stated that all employees of the Respondent were working without suitable protective footwear and that they were lifting heavy jacks, tools and blocks. By modification of the citation, the alleged violation was to be abated by September 6, 1980.

7. At approximately 2:30 p.m. on September 6, 1980, two MSHA inspectors returned to Respondent's crushing operation and issued Order of Withdrawal No. 343076, in which it was alleged that no apparent effort had been made by the Respondent to secure suitable protective footwear for the employees. The specified area of withdrawal was described as "areas or equipment where hazards to the feet exist."

8. At approximately 5 p.m. on September 6, 1980, one of the MSHA inspectors issued Citation No. 343077, the subject of WEST 80-226-M, alleging that the owner of the Respondent refused to allow the MSHA inspectors to continue their inspection pursuant to section 103(a) of the Act. Earlier that afternoon, at approximately 3 p.m., the owner of the Respondent had ordered the inspectors off the property and not to return without a search warrant.

1/ Mandatory. All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

9. At approximately 7:30 p.m. on September 6, 1980, one of the MSHA inspectors issued Citation No. 343078, the subject of WEST 80-260-M, alleging that no apparent effort was made by the owner of the Respondent to comply with Order of Withdrawal No. 343076, issued at approximately 2:30 p.m. on September 6, 1980.

ISSUES

1. Whether it was necessary for the MSHA inspector to obtain a search warrant in order to inspect Respondent's crusher operation.

2. Whether Respondent failed to comply with the withdrawal order issued at approximately 2:30 p.m. on September 6, 1980.

DISCUSSION

Respondent did not deny the MSHA inspectors access to the property where their portable crusher was located on August 28, 1979. At that time, six citations were issued, including Citation No. 343035 which alleged that Respondent's employees were working without suitable protective footwear. The record shows that the inspector returned to the property on September 4, 1979, and after some discussion with Respondent's foreman extended the abatement time for the citation until September 6, 1979.

At approximately 2:30 p.m. on September 6, 1979, the inspectors returned and began to inspect the property. It was at approximately 3:00 p.m. that the MSHA inspectors were ordered off the property by Respondent's owner and told not to return without a search warrant. The inspectors left the property at that time and then returned at approximately 5:00 p.m. and handed the owner of the Respondent the citation alleging the denial of entry by the Respondent. After the citation was given to Respondent's owner, he allowed the inspectors onto the property to continue the inspection. The inspectors then left the property approximately 30 minutes later. Even though the denial of entry by the Respondent was of short duration, it was a violation of the Act.

A search warrant is not required for an MSHA inspector to conduct an inspection for the purposes set forth in section 103(a) of the Act. The inspectors were on the property in order to determine whether or not there had been compliance with a mandatory health or safety standard, specifically 30 C.F.R. 56.15-3, which allegedly had been violated by the Respondent on August 28, 1979. This type of inspection is specifically authorized by section 103(a)(4) of the Act. Under section 103(a) of the Act, the authorized representative of the Secretary of Labor specifically has a right of entry upon the mine property.

In the case of Marshall v. Wallach Concrete Products, Inc., et al., (U.S. District Court for the District of New Mexico), 1 MSHC 2337 (March 26, 1980), it was held that warrantless inspections of sand and gravel operations under the Federal Mine Safety and Health Act of 1977 meet the standards of reasonableness and pervasiveness of regulation of a particular industry set forth by the U.S. Supreme Court in Marshall v. Barlow's Inc.,

436 U.S. 307 (1978), and, accordingly, are consistent with the fourth admendment to the United States Constitution.

The Wallach case also held that sand and gravel operations were "mines" within the meaning of the Federal Mine Safety and Health Act of 1977 and are therefore within coverage of the Act. The parties in the Wallach case removed and processed the sand and gravel from the surface. In some instances the rock material was screened and crushed.

I find that there is no substantial difference in the operation of Respondent's business in that it removes rock material from the surface, and crushes and processes it pursuant to a road contract with the State of Montana. Accordingly, I conclude that Citation No. 343077 in WEST 80-226-M should be affirmed.

At approximately 7:30 p.m. on September 6, 1979, the two MSHA inspectors again returned to the property where Respondent's portable crushing operation was working. The inspectors observed that the employees of the Respondent were working without what the inspectors considered to be suitable protective footwear. In the opinion of the inspector who issued the citation on August 28, 1979, safety shoes are protective footwear. They consist of shoes "either being metal on the toes, or covering the entire top of the foot."

One of the inspectors then issued to the Respondent's owner Citation No. 343078 for Respondent's alleged failure to comply with Order of Withdrawal No. 343076. The withdrawal order described the area of withdrawal as "areas or equipment where hazards to the feet exist." The equipment on the job site included a Caterpillar front end loader, a semi-tractor, a portable cone crusher, and several conveyors.

I find that Order of Withdrawal No. 343076 was unforceable for two reasons. First, the area of withdrawal was not sufficiently described so that Respondent could be apprised of its location. Second, the order left it to the decision or discretion of the Respondent itself to determine areas where hazards to the feet existed and where suitable footwear should be worn, yet the Respondent had consistently maintained that the heavy leather boots worn by its employees were "suitable protective footwear."

Section 104(b) of the Act provides in pertinent part that if, upon any follow-up inspection, an inspector finds ". . . (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator . . . to immediately cause all persons . . . to be withdrawn from . . . such area . . . ." The wording "areas or equipment where hazards to the feet exist" is too general and not specific enough to apprise the operator of the extent of the area affected by the violation as required in section 104(b).

As part of the decision in the case of Peabody Coal Company v. Mine Workers, 1 MSHC 2220 (November 14, 1979), the Federal Mine Safety and Health Review Commission found that a withdrawal order which specified the

area of the mine where an imminent danger existed was valid because on its face the order sufficiently described the area so that the operator was adequately apprised of its location. This was not the case in the withdrawal order issued to the Respondent. Although the Peabody case involved a withdrawal order issued pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the result would be the same under the 1977 Act. The wording of the Act in regard to this type of withdrawal order is substantially the same.

I make no finding as to whether or not the footwear worn by Respondent's employees was suitable and protective, since that is not the issue in this proceeding. On its face, the withdrawal order was defective in failing to set forth the extent of the area from which all persons should have been withdrawn. In addition, the Respondent could not reasonably be expected to decide where areas were located which could be hazardous to the feet, when the Respondent continually asserted that all employees were wearing suitable footwear in the performance of their jobs.

Since the withdrawal order was defective, Citation No. 343078 (WEST 80-260-M), issued to the Respondent for failure to comply, should be vacated.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter in these proceedings.

2. The Respondent violated section 103(a) of the Act as alleged in Citation No. 343077.

3. The Petitioner failed to prove that Respondent violated section 104(b) of the Act as alleged in Citation No. 343078.

ORDER

Citation No. 343078 and the penalty therefor are VACATED. Citation No. 343077 is AFFIRMED and the Respondent is ordered to pay a civil penalty of $100.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

DISTRIBUTION:

William W. Kates, Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
For the Petitioner

Fred M. Gibler, Esq.
Brown, Peacock, Keane & Boyd, P.A.
311 Main Street
Kellogg, Idaho 83837
For the Respondent

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 11, 1981

FREDERICK G. BRADLEY,	:	Complaint of Discharge,
Complainant	:	Discrimination or Interference
v.	:	
	:	Docket No. WEVA 80-708-D
BELVA COAL COMPANY,	:	
Respondent	:	No. 5B Mine

DECISION

Appearances: Daniel F. Hedges, Esq., Appalachian Research and Defense Fund, Inc., Charleston, West Virginia, for Complainant; Ricklin Brown, Esq., Bowles, McDavid, Graff and Love, Charleston, West Virginia, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant brought this action under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), alleging that he was discharged on June 11, 1980, because of safety-related activities. Respondent's position is that Complainant was discharged for insubordination and poor work performance. Pursuant to notice, the matter was heard on January 28, 1981, in Charleston, West Virginia. Frederick G. Bradley, Thomas Minton, Alonzo Tomblin, Elon Fillinger, Joseph Stollings, Randall Samson, Willard Spence, Roger Sargent, and Harrison Spaulding testified on behalf of Complainant. Larry Davis, Theodore Wilburn, Max West, and Douglas Harris testified on behalf of Respondent. At the conclusion of the testimony, counsel orally argued their positions and each waived the right to file written proposed findings of fact and conclusions of law.

ISSUE

Was Complainant discharged by Respondent because of activities protected under section 105(c) of the Act?

STATUTORY PROVISION

Section 105(c) of the Act provides:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the

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

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

but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

RES JUDICATA AND COLLATERAL ESTOPPEL

Complainant herein has instituted a proceeding before the West Virginia Coal Mine Board of Appeals under an antidiscrimination provision of the West Virginia Coal Mine Safety Law, W. Va. Code Sec. 22-1-21(a). At the hearing, Respondent renewed its contention that the decision of the West Virginia Board which denied the complaint, bars this action before the Review Commission. For the reasons given in my order of January 21, 1981, I reject the contention. I did admit as evidence in this proceeding, the transcript of the hearing before the Board and a copy of the Board's decision.

FINDINGS OF FACT

1. Respondent was at all times pertinent to this decision the operator of a coal mine in Logan County, West Virginia, known as the No. 5B Mine.

2. Complainant was employed as a section foreman at Respondent's No. 5B Mine from January or February 1980, until June 11, 1980. He worked, except for a short period at the beginning of his employment, on the day shift.

3. On June 11, 1980, Complainant was discharged from his position as section foreman for Respondent.

4. On many occasions prior to June 10, 1980, Complainant complained to his supervisors about the condition of the section at the beginning of his shift. Among the conditions he complained of were coal spillage in the roadways, ventilation curtains down or torn, short roof bolts, cables being run over by mobile equipment, etc.

5. For approximately 1 month prior to June 11, 1980, Larry Davis was mine foreman at Respondent's No. 5B Mine and was Complainant's immediate supervisor. He was the person to whom the complaints referred to in Finding No. 4 were primarily directed. He also received complaints from the second shift foreman about the condition of the section at the beginning of the second shift.

6. On June 10, 1980, Randall Samson, a Federal mine inspector and an authorized representative of the Secretary of Labor, inspected the subject mine. He issued three withdrawal orders under section 104(d) of the Act for imminent dangers and nine or 10 citations for violations of mandatory safety standards. The conditions cited included accumulations of combustible materials, inadequate short-circuit protection, and curtains hung incorrectly. The orders were terminated the same day and most of the violations were corrected.

7. On June 11, 1980, Inspector Samson inspected the subject mine primarily as part of a dust-sample survey. He again found accumulations of combustible materials, a trailing cable damaged by mobile equipment and failure to follow the roof-control plan in the face area. Three withdrawal orders were issued, one of which covered the trailing cable, and two or three other citations were issued.

8. The inspector originally told Respondent to take the trailing cable from the mine but later agreed that the damaged part could be removed and a permanent splice installed. The cable was tagged. It had not been energized at the time the order was issued but was still engaged to the continuous miner.

9. Complainant directed the scoop operator, Thomas Minton, to take his scoop and get a load of cribs for the roof in the face area which was inadequately supported.

10. Complainant and Alonzo Tomblin began hanging the miner trailing cable so that the scoop could pass.

11. Larry Davis told Complainant not to bother hanging the cable since it had already been run over and was to be spliced. He directed him to have the scoop run over the cable.

12. Complainant refused to comply with Davis' order and hung the cable while Minton drove by in the scoop.

13. Shortly thereafter, Davis told Complainant to bring a tape line up to the face area where the cribs were being built to measure an area which the Federal inspector said was too wide. Complainant was involved with other compliance work at the time and replied that he could not do two things at the same time. Heated words were exchanged and Davis told Complainant that he was fired. Complainant left the premises.

14. Complainant was discharged for failing to comply with the orders to his superior: (a) to have the scoop operator run over a trailing cable, and (b) To bring a tape line to the face area.

15. Complainant believed in good faith that to run the scoop over the trailing cable would be (1) dangerous, and (2) a violation of Federal safety regulations.

DISCUSSION

There is no dispute that Complainant was told by his superior to have the scoop operator run over the cable which was already the subject of a closure order. Respondent asserts that because it was not energized and was tagged, this was not dangerous. The inspector's testimony was not clear whether he would consider the act another violation. I note: (1) that the cable was not "locked out" and could easily have been energized, and (2) running over the cable again could damage additional areas on the cable. At any rate, the test is whether Complainant in good faith believed the act to be hazardous. I find that he did.

Although he was not discharged immediately, the firing came very soon after his refusal, and I find that one of the reasons for the firing was the refusal to have the scoop operator drive over the trailing cable.

CONCLUSIONS OF LAW

1. At all times pertinent to this decision, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of its No. 5B Mine.

2. At all times pertinent to this decision, Complainant was a miner under the Act and protected by the terms of section 105(c) of the Act.

3. On June 11, 1980, Complainant was discharged by Respondent for activities protected under section 105(c) of the Act.

4. Respondent violated the provisions of section 105(c) of the Act by so discharging Complainant.

ORDER

Therefore, IT IS ORDERED:

1. That Respondent reinstate Complainant in the position from which he was discharged or in a similar position at the same rate of pay;

2. That Respondent reimburse Complainant for back pay to the date of his discharge with interest thereon at the rate of 9 percent per annum, less any amount that Complainant has earned by working during the period;

3. That the employment record of Complainant be expunged of any reference to said discharge;

4. That Respondent reimburse Complainant for all costs and attorney's fees incurred in connection with this proceeding; and

5. That a copy of this decision be placed on Respondent's mine bulletin board.

IT IS FURTHER ORDERED that counsel confer on or before February 27, 1981, with respect to the amount of back pay due under the above order and the amount of costs and attorney's fees due under the above order. If counsel can agree on these amounts, I should be so notified on or before March 6, 1981. If they cannot agree, each side shall state its position on this issue and submit it to me in writing on or before March 6, 1981.

For the above purposes, I retain jurisdiction of this proceeding.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Daniel F. Hedges, Esq., Attorney for Frederick G. Bradley, Appalachian Research and Defense Fund, Inc., 1116-B Kanawha Boulevard, East, Charleston, WV 25301 (Certified Mial)

Richlin Brown, Esq., Attorney for Belva Coal Company, Bowles, McDavid, Graff & Love, 1200 Commerce Square, P.O. Box 1386, Charleston, WV 25325 (Certified Mail)

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 11, 1981

MONTEREY COAL COMPANY,	:	Notice of Contest
Contestant	:	
v.	:	Docket No. WEVA 81-203-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Wayne Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Timothy M. Biddle, Esq., Washington, D.C., and Kenneth C. Minter, Esq., Houston, Texas, for Contestant;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Chief Administrative Law Judge Broderick

The above case was called for hearing on January 9, 1981, in Charleston, West Virginia. Following the presentation of evidence, counsel waived their rights to file written proposed findings of fact and conclusions of law and the following decision was issued from the bench:

> JUDGE BRODERICK: We'll go back on the record. This case was called for hearing on January 9, 1981, in Charleston, West Virginia, pursuant to notice. Marvin Vernatter, a Federal mine inspector, and a duly authorized representative of the Secretary of Labor, testified on behalf of the Government; Charles Pate, Barney Frazier, and Rodney Hunt testified on behalf of Contestant. The basic issue in this case is whether the violation of 30 C.F.R. § 77.1700, which was charged in the citation, occurred.
>
> The mandatory standard contained in 30 C.F.R. § 77.1700 reads as follows: "No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist, that would endanger his safety, unless he can communicate with others, can be heard, or can be seen."

Based on the evidence presented here today, and on the contentions of the parties, I make the following findings of fact and conclusions of law:

(1) Contestant, at all times pertinent to this decision, was the operator of a coal mine located in Wayne County, West Virginia, known as the Wayne Mine.

(2) Contestant was, at all times pertinent to this decision, subject to the provisions of the Federal Mine Safety and Health Act of 1977, in the operation of that mine.

(3) I have jurisdiction over the parties and subject matter of this proceeding.

(4) On or about November 3, 1980, Contestant operated a 50-ton Euclid truck during the second shift on the haul road between the slate bin and the dumping area on the subject mine.

The truck was operated during almost the entire shift by a mobile equipment operator, Barney Frazier. He operated the truck alone, and no one else regularly worked during that shift at or near the bin, the road, or the dumping site. This was the only occasion that the truck was used for this purpose during the second shift, at the subject mine.

(5) There was a telephone at the slate bin. The truck was not equipped with a two-way radio. There was no phone or other means of communication along the road or at the dumping site.

(6) The driver's foreman, Rodney Hunt, checked with the driver three times during the shift, once at about 8 p.m., once at about 10 p.m., and once at about 11:15.

(7) The haulage road surface is of stone; it is 40 to 45 feet wide, and has berms on both sides with a minimum height of 42 inches. The berms were in good condition. The road has a slight grade of about 5.6 degrees. The road was in good condition except for the last 150 to 200 yards beyond the dump site, which were muddy, apparently resulting from the dumping of refuse. The road was approximately one-half mile in length. A truck at the dumping site is not visible from the loading bin.

(8) Federal mine inspector Vernatter issued a section 104 citation, No. 910228 on December 8, 1980, charging a violation of 30 C.F.R. § 77.1700, in that:

> A truck driver operating a 50-ton capacity Euclid dump truck had been assigned to haul slate at the refuse site alone on the second shift. The foreman states that he checked the worker twice during the shift, and two telephones are available at the slate bin. The driver hauls slate from the slate bin, down a declined haul road to the dumping area. The haul road and dumping location is not visible from the other surface facility.

(9) On December 16, 1980, the citation was modified to read as follows: "The operator was requiring the refuse truck driver to perform work alone where he could not be heard or seen, nor was communications provided. This work was being performed alone on an elevated roadway in the area of a valley fill.

(10) On December 16, 1980, Order of Withdrawal No. 913603 was issued because the condition cited was not abated. The order prohibited the use of the Euclid slate truck.

(11) On the same date, December 16, 1980, the order was modified by Order No. 913603-1:

> To permit the use of the truck provided one of the four means of communication is provided; one, a man is not alone -- two people in the area; two, direct radio communication is provided; three, the driver calling in to some person each hour, with someone checking on the driver, should the call be ten minutes late; four, a person visually checking on the driver each hour.

(12) On November 3, 1980, Barney Frazier, an employee of the Contestant, was assigned to perform work alone on the haulage road described above.

(13) The said employee was assigned to work in an area where he could normally communicate with others only at the loading bin. He would normally be at the loading bin every 45 minutes to 1 hour as he loaded his truck with refuse. During the course of his work in hauling the refuse to the dumping site, he normally could not be heard or seen by other employees.

(14) The Government has not established that the area where the said employee was assigned to work was an area where hazardous conditions existed that would endanger his

safety. I do not accept the interpretation that apparently MSHA follows, that any work at a mine site is in an area where hazardous conditions exist that would endanger an employee's safety. Such an interpretation would render the words meaningless. And I am bound to give all words in a mandatory standard meaning, and can only conclude that the standard applies to areas where conditions exist that are hazardous, which would endanger an employee's safety, over and above the conditions that exist throughout the mining industry, or indeed in any industry.

The evidence submitted here today does not show that such hazardous conditions existed on the haulage road where the employee in question drove his truck. Therefore, based upon the above findings of fact and conclusions of law, I issue the following order: Citation No. 910228, issued December 8, 1980, and Order of Withdrawal No. 913603, issued December 16, 1980, are vacated. A written decision will be issued confirming this bench decision.

The above decision is AFFIRMED.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Attorney for Monterey Coal Company, Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036 (Certified mail)

Leo J. McGinn, Esq., Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified mail)

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 12 1981

RICHARD W. NEAL, JR.,	:	Complaint of Discharge
Complainant	:	
v.	:	Docket No. LAKE 80-105-D
	:	
WAYNE BOICH, d.b.a.,	:	C.D. 79-76
W. B. COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Stanley G. Burech, Esq., St. Clairsville, Ohio, for Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by Richard W. Neal, Jr. (hereinafter Complainant) against Wayne Boich, d.b.a. W. B. Coal Company (hereinafter W. B. Coal) alleging that Complainant was discharged from his employment at W. B. Coal on March 19, 1979, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (hereinafter the Act). On March 20, 1979, Complainant filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). On November 16, 1979, MSHA notified Complainant that it determined that no violation of section 105(c) had occurred but that Complainant had 30 days to file his own action with the Commission. This action was filed on November 23, 1979. Upon completion of discovery and prehearing requirements, a hearing was held in Wheeling, West Virginia, on October 7 and 8, 1980. At the hearing, testimony was received from the following witnesses: Maxwell Sovell, Richard W. Neal, Jr., Melvin Schaney, D. Ray Marker, Willard F. Poe, Louis W. Erwin, Edwin E. Mercer, Richard H. Carter, Alfred Haverfield, George Pincola, Joseph Zalesky, Melvin Anderson, and Richard D. Lynch. After the hearing, both parties filed briefs in support of their positions.

ISSUES

Whether W. B. Coal violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. § 815(c) provides in pertinent part as follows:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.
>
> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice

of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

STIPULATION

The parties stipulated the following:

On or about February 16, 1979, at 7:00 a.m., Complainant reported to work at his employer, the Respondent. He began to operate a dozer, also known as a "Push Cat," for the purpose of pushing 631 "Pans." A "pan" or scraper is a machine with a blade in approximately its center which scoops up dirt into itself. The purpose of the dozer is simply to push the pan along, giving it traction. The pan is a rubber tire vehicle unlike a dozer which is a track-type vehicle. The dozer pushes the pan with its blade.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

BACKGROUND

1. W. B. Coal is an operator of a strip coal mine in eastern Ohio, whose products enter interstate commerce.

2. Complainant was hired by W. B. Coal on May 5, 1978, as a blaster. Thereafter, he worked as a driller and bulldozer operator.

3. During the summer of 1978 and in December 1978, Complainant was assigned, at his request, to operate a Caterpillar 631-B pan scraper (hereinafter scraper). He operated the scraper in question for a total of approximately 130 hours prior to February 16, 1979. His operating experience on the scraper was limited to level terrain and hauling and spreading topsoil.

4. From the date of employment of Complainant on May 5, 1978, until the date of the accident on February 16, 1979, W. B. Coal's superintendent, Richard Lynch, conceded that Complainant was a "very good employee."

5. Superintendent Lynch had the primary authority at W. B. Coal to hire and fire employees.

6. At all times relevant herein, W. B. Coal had work rules and policies which included the following: (a) operators may not switch equipment without permission; (b) employees must report equipment in need of repairs; (c) scraper operators must carry the bowl in a low position; (d) seat belts must be worn by heavy equipment operators; and (e) employees would normally not be terminated without a history of past violations of company or safety policy.

Events of the February 16, 1979 Accident

7. The weather conditions on the morning of February 16, 1979 consisted of freezing rain which resulted in ice-covered roadways.

8. On February 16, 1979, Complainant's assigned job was to operate a bulldozer to push a scraper in order to load it.

9. On February 16, 1979, Complainant reported to work at approximately 7 a.m., and was instructed to operate a bulldozer. Approximately 1 hour after commencing work, the bulldozer assigned to Complainant developed a mechanical problem. He drove the bulldozer to the parking area for repairs. At that time, there were no mechanics or supervising personnel present at the parking area. He parked the bulldozer and began to operate one of two scrapers that were not in use. He did not inform a supervisor or mechanic of the problem with the bulldozer or request permission to operate the scraper.

10. There was only one other scraper operator present at this pit on the morning of February 16, 1979. W. B. Coal's foreman, Albert Haverfield, was traveling to another pit of W. B. Coal to pick up another equipment operator to operate the scraper taken by Complainant.

11. Complainant made two or three trips with the scraper over the haul road. At approximately 9 a.m., Complainant was operating the scraper down an ice-covered ramp with a full load. He operated the scraper with the bowl up due to a rise in the roadway. The scraper skidded, hit a spoil bank, and slid backwards over a berm and down an incline into a pit. At no time during the course of this incident did Complainant drop the bowl of the scraper, which would have stopped the scraper instantaneously.

12. After the accident, Complainant walked up out of the pit where the scraper had come to rest and encountered Foreman Haverfield. Foreman Haverfield transported Complainant to St. John's Hospital in Steubenville, Ohio. On the way to the hospital, Complainant told Foreman Haverfield that he had been operating the scraper with the bowl in a high position and that he was not wearing a seat belt at the time of the accident.

13. When Foreman Haverfield returned to the mine site later that day, he advised Superintendent Lynch of the admissions made by Complainant on the way to the hospital.

14. Superintendent Lynch investigated the accident on February 16, 1979, and concluded that Complainant was not authorized to operate the scraper at the time of the accident and that Complainant operated the scraper negligently in that he carried the bowl too high and did not drop the bowl to prevent the scraper from skidding.

15. W. B. Coal sustained an insured loss of approximately $17,000 due to the damage to the scraper.

Events Surrounding MSHA's Investigation of Accident

16. On February 20, 1979, MSHA inspectors D. Ray Marker, and Willard F. Poe arrived at the mine to investigate the accident. On that date, two citations were issued to W. B. Coal: (1) for failure to notify MSHA of an accident and (2) for inadequate berms on roadways.

17. On February 21, 1979, MSHA inspectors Marker and Les Roller interviewed Complainant at St. John's Hospital where he was confined for two broken ribs and a punctured lung. In response to questions from the inspectors and after being advised that anything Complainant told them regarding safety violations would be protected under law, Complainant admitted that he was not wearing a seat belt at the time of the accident and asserted that the brakes of the scraper were inadequate at the time of the accident. Following the interview with Complainant, the MSHA inspectors returned to the mine and issued the following documents to W. B. Coal: a citation for failure to wear a seat belt and an order of withdrawal due to inadequate brakes on the scraper. The citation and order issued on February 21, 1979, were served on Superintendent Lynch. Superintendent Lynch asked the inspectors how they knew that Complainant was not wearing a seat belt at the time of the accident and they responded that this information had been received from Complainant.

18. After receipt of the citation issued on February 21, 1979, Superintendent Lynch called Complainant by telephone and inquired whether Complainant had discussed his failure to wear a seat belt with the MSHA inspectors. Complainant stated that he had done so.

Discharge of Complainant

19. On February 19 and 20, 1979, Superintendent Lynch and W. B. Coal's General Manager, Max Sovell, conferred concerning the possibility of

discharging Complainant. Superintendent Lynch's authority to make that determination was reaffirmed by General Manager Sovell. Superintendent Lynch did not come to a conclusion on the issue of the discharge of Complainant on February 19 or February 20, 1979.

20. Superintendent Lynch was surprised that Complainant told the MSHA inspectors that he was not wearing a seat belt and Superintendent Lynch later told General Manager Sovell that he did not know why Complainant would tell the MSHA inspectors that he was not wearing a seat belt.

21. Superintendent Lynch decided to discharge Complainant after the issuance of the seat belt citation, the issuance of the order of withdrawal due to the scraper's allegedly defective brakes, and his telephone conversation with Complainant of February 21 concerning Complainant's statement to the MSHA inspectors regarding his failure to wear a seat belt. Superintendent Lynch is unable to pinpoint the precise time or date on which he decided to discharge Complainant or drafted the letter to Complainant notifying him of his discharge.

22. No employee of W. B. Coal, except Complainant, has been discharged for operating equipment without permission.

23. No employee of W. B. Coal, except Complainant, has been discharged by W. B. Coal for not wearing a seat belt although W. B. Coal received other citations for failure of its employees to wear seat belts.

24. W. B. Coal has discharged other employees for improper use of equipment.

25. On March 19, 1979, Complainant returned to work at W. B. Coal after convalescing from the injuries received in the accident. At that time, he was summoned to the office by Superintendent Lynch and thereupon discharged from employment by W. B. Coal. Complainant was presented with an undated letter which states as follows:

> You are hereby terminated as an employee with W. B. Coal Company for the following reasons:
>
> 1. Unauthorized use of equipment. (Operating equipment without consent of supervisor or mechanic).
>
> 2. Unsafe operation of said equipment. (Carrying scraper bowl too high off ground for safety).
>
> 3. Failure to utilize safety equipment on said equipment. (Did not fasten seat belts provided).
>
> /S/
> Richard D. Lynch, Superintendent

Claim for Back Pay and Other Expenses

26. On March 19, 1979, Complainant's rate of pay was $7.55 per hour. Had he not been discharged, his rate of pay would have increased to $7.75 per hour on June 1, 1979, and to $8.25 per hour on June 1, 1980. An employee with the same rate of pay as Complainant earned $17,134.71 after the date of Complainant's discharge in calendar year 1979, and earned $18,244.43 through September 28 in calendar year 1980. If Complainant had worked a 40-hour week for the 21 weeks between September 28 1980, and February 28, 1981, his earnings at $8.25 per hour would have been $6,930 for that period of time. Complainant earned $6,106.56 from two additional employers between the date of his discharge and the date of this decision.

27. Complainant's claim for unemployment insurance benefits following his discharge by W. B. Coal was denied by the State of Ohio. Following the termination of Complainant's periods of employment subsequent to his discharge by W. B. Coal, he received unemployment insurance benefits in an unspecified amount. Since the date of his discharge by W. B. Coal, Complainant and his family have received an unspecified amount of public assistance benefits.

28. Complainant has incurred expenses for reasonable attorney's fees in the amount of $7,560 and reasonable costs in the amount of $692.43.

DISCUSSION

Violation of Section 105(c) of the Act

Recently, in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough

to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800.

Complainant contends that he was discharged by W. B. Coal for truthfully answering the questions of MSHA inspectors concerning alleged safety violations, including his own failure to wear a seat belt while operating heavy equipment. Complainant asserts that his statements to the inspectors constitute protected activity pursuant to section 105(c) of the Act and that his discharge was the result of this activity. W. B. Coal contends that:

> Complainant was not discharged by W. B. Coal Company for engaging in protected activity, i.e. talking to the MSHA inspectors, but rather his employment was terminated as a result of a chain of events which stemmed directly from his own lack of judgment, rash and irresponsible behavior, and failure to abide by the safety rules and work policies of [W. B. Coal].

The parties agree that Complainant's conversation of February 21, 1979, with MSHA inspectors concerning the facts of his accident constitutes protected activity under section 105(c) of the Act. I agree. Hence, under the Commission's guidelines as set forth in Pasula, supra, Complainant established that he engaged in protected activity. To establish a prima facie case, Complainant must also show "that the adverse action was motivated in any part by the protected activity." Pasula, supra at 2799.

The evidence shows that Complainant was discharged from W. B. Coal by Superintendent Richard Lynch. Although Superintendent Lynch was unsure of the precise time at which he decided to discharge Complainant, he testified that no decision had been made prior to his telephone conversation with Complainant on February 21, 1979. Shortly before making this call, Lynch had been issued a citation for a seat belt violation. The MSHA inspector informed Lynch that Complainant had supplied the information leading to the citation. Lynch, thereupon, called Complainant who confirmed that he had told the MSHA inspectors that he had not worn a seat belt. On direct examination, Superintendent Lynch was asked to give his reasons for discharging Complainant. In his narrative answer to this question, Superintendent Lynch cited Complainant's unauthorized use of the scraper, negligent operation of the scraper, and concluded by stating:

> They [MSHA inspectors] started writing out the violations, and one of them said the seat belt wasn't fastened.
>
> I said, how do you know the seat belt wasn't fastened? It was after the fact. They said, Mr. Neal told us that the seat belt was not fastened.

That was another citation.

I took all of these actions of Mr. Neal and put them together, and it amounted in my mind to cause for his dismmissal. (R. 557)

In this case, the time at which W. B. Coal, through its superintendent, decided to discharge Complainant is of critical importance. Complainant's accident occurred on February 16, 1979, but he did not engage in any protected activity until February 21, 1979. Therefore, if the evidence established that W. B. Coal had decided to discharge Complainant prior to February 21, 1979, Complainant would fail to establish a prima facie case under Pasula, supra. However, the evidence is clear that the decision to discharge Complainant was not made until after the protected activity occurred. While Superintendent Lynch and General Manager Sovell discussed the possibility of discharging Complainant on February 19 and 20, Superintendent Lynch stated that he did not make the decision to discharge Complainant until sometime after he talked with him on February 21, 1979. Moreover, the evidence establishes that all of the reasons cited by W. B. Coal in its letter of discharge, were known to W. B. Coal on February 16, 1979. When Superintendent Lynch went to the scene of the accident, he knew that Complainant was not authorized to use the scraper and that the bowl of the scraper had been carried too high. When Foreman Haverfield returned from the hospital on the day of the accident, he reported to Superintendent Lynch that Complainant stated that he was not wearing a seat belt at the time of the accident. Although Superintendent Lynch denies the fact that Complainant's statements to the MSHA inspectors played any part in his decision to discharge Complainant, his other testimony on direct examination establishes that he did consider Complainant's admission which led to a citation, as a factor in the discharge. W. B. Coal contends that it delayed its determination to discharge Complainant because of his prior record as a good employee and to determine whether there were extenuating circumstances surrounding this accident. This assertion is unconvincing in light of the fact that it was not until after the seat belt citation was issued, some 5 days after the accident, that Superintendent Lynch contacted the Complainant. Therefore, under the guidelines set forth in Pasula, supra, I find that Complainant has established a prima facie case of violation of section 105(c) of the Act, because his discharge was motivated in part by the protected activity.

Since Complainant established a prima facie case of violation of section 105(c) of the Act, we come now to W. B. Coal's affirmative defense. Here, W. B. Coal must prove, by a preponderance of the evidence, that it was also motivated by Complainant's unprotected activities and that it would have taken adverse action against him in any event by reason of the unprotected activities alone. I find that W. B. Coal's decision to discharge Complainant was also motivated by the unprotected activity set forth in its letter terminating Complainant's employment. However, W. B. Coal has failed to establish that it would have taken adverse action against Complainant for the unprotected activities alone. Superintendent Lynch was the person with the authority to discharge Complainant. He had discussed a possible discharge with General

Manager Sovell on February 19 and 20. Although General Manager Sovell testified that he believed that Superintendent Lynch decided to discharge Complainant following those meetings, Superintendent Lynch denied this and testified that he made no such decision until after the seat belt citation was served by MSHA and after he called Complainant to confirm the fact of Complainant's admission to the inspectors. I have considered W. B. Coal's prior practices in connection with its stated reasons for discharging Complainant. No employee had ever been discharged for the unauthorized use of equipment. Normally employees would not be discharged by W. B. Coal for negligent or unsafe use of equipment without a history of prior violations. No employee had ever been disciplined by W. B. Coal for failure to wear a seat belt. This is not to say that W. B. Coal could not have discharged Complainant for the reasons given. However, in this case, W. B. Coal failed to establish that it would have discharged Complainant for the unprotected activities alone. As the Commission said in Pasula, supra, "it is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activities; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." Id. at 2800. The passage of 5 days from the date of the accident, during which time W. B. Coal made no decision to discharge Complainant, although possessing all the information it subsequently cited to justify his termination, established that Complainant would not have been discharged by W. B. Coal but for his protected activity of disclosing a safety violation to the MSHA inspectors. Since W. B. Coal failed to establish its affirmative defense, Complainant has sustained his complaint of discharge in violation of section 105(c) of the Act.

Award to Complainant

Section 105(c)(3) of the Act provides in pertinent part that if the charges are sustained, Complainant shall be granted such relief as is appropriate "including but not limited to an order requiring rehiring or reinstatement of the miner to his former position with backpay and interest or such remedy as may be appropriate." Therefore, based upon my finding that Complainant was discharged in violation of section 105(c) of the Act, W. B. Coal is ordered to rehire Complainant and reinstate him to his former position with full seniority rights.

The evidence of record establishes that another miner employed by W. B. Coal at the same rate of pay as Complainant on March 16, 1979, earned total wages of $17,134.71 in the period beginning with the date of Complainant's discharge through the end of 1979. That other employee of W. B. Coal earned wages of $18,244.43 from January 1, 1980, through September 28, 1980. In the 21 weeks from September 28, 1980, through February 28, 1981, if Complainant had worked 40 hours a week at his $8.25 per hour rate of pay, he would have earned an additional sum of $6,930. Both parties agree that Complainant's wages from other employers during this period are to be deducted from any award herein. In this case, Complainant earned a total of $6,106.56 since the time he was discharged. Therefore, W. B. Coal is ordered to pay Complainant a sum of $36,202.58 as back wages and interest at the rate of 6 percent

per annum from the dates such payments were due. I find that Complainant's claim for back wages in a lesser amount is based upon an erroneous calculation using net wages paid to the other employee at W. B. Coal rather than gross wages. Since this award is subject to the withholding of Federal and state income taxes, social security, and union dues, I find that gross wages, as opposed to net wages, is the proper standard.

W. B. Coal also asserts that any sums received in public assistance benefits must also be deducted from any award herein because such sums would not have been received if Complainant had been employed. W. B. Coal cites EEOC v. Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977). W. B. Coal also suggests that "if Complainant was not required to return the unemployment compensation he had received from the State of Ohio as a result of termination of other employment, it too would be deducted from an award of backpay." Complainant argues that neither public assistant benefits nor unemployment insurance benefits may be deducted from a back pay award.

The Second Circuit Court of Appeals in EEOC, supra, conceded that "the weight of common law authority is that collateral sources are not deductible from a tort damage award." Id. at 591. It also noted that the U.S. Supreme Court held that the NLRB "has the power to enter an order refusing to deduct unemployment compensation benefits from back pay." Ibid. See NLRB v. Gullett Gin Co., 340 U.S. 361 (1951). However, the Second Circuit went on to hold that it was not an abuse of discretion for the district court to deduct sums received from collateral sources such as unemployment compensation. Id. at 592. In Wilson v. Laurel Shaft Construction Co., 2 FMSHRC 1047 (September 12, 1980), Judge William Fauver followed NLRB v. Gullett Gin Co., supra, and held that unemployment compensation benefits are not earnings to be deducted from an award of back pay under the Federal Coal Mine Health and Safety Act of 1969.

I am persuaded that the better view is that payments received by Complainant from collateral sources such as public assistance and unemployment compensation should not be deducted from a back pay award pursuant to section 105(c) of the Act. Moreover, it appears that Complainant may be obligated to reimburse the State of Ohio for such unemployment insurance benefits. Ohio Rev. Code section 4141.35(B)(1). I agree with the judicially approved NLRB policy which holds that in cases similar to those brought pursuant to section 105(c) of the Act, back pay awards will be reduced only by interim earnings.

Award of Attorney's Fees and Costs

Counsel for Complainant has submitted an itemized invoice for services and costs. W. B. Coal has not challenged any aspect of this claim. I have reviewed the invoice and find that Stanley G. Burech, Esq., is entitled to a reasonable attorney fee in the amount of $7,560 and reimbursement for reasonable costs in the amount of $692.43 for a total award of $8,252.43.

Other Relief

Although Complainant has not requested any other specific form of relief in this case, the legislative history of section 105(c) of the Act provides additional guidelines as follows:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full senority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for posting of notices by the operator.

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 625.

Consistent with the legislative history of section 105(c), W. B. Coal shall expunge all references to Complainant's discharge from his employment records, post a copy of this decision and order on a bulletin board at the mine for a consecutive period of 60 days, and shall cease and desist from discriminating against or interfering with Complainant because of activities protected under section 105(c) of the Act.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and W. B. Coal were subject to the provisions of the Act.

2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. On February 16, 1979, Complainant engaged in the following activities which do not constitute protected activities under section 105(c) of the Act: (a) unauthorized use of equipment; (b) unsafe and negligent operation of equipment; and (c) failure to wear a seat belt.

4. On February 21, 1979, Complainant engaged in the following activity which is protected under section 105(c) of the Act: conversation with MSHA inspectors concerning his accident, including the alleged danger of the equipment he was operating and his failure to wear a seat belt in violation of the safety provisions of the Act.

5. On February 16, 1979, W. B. Coal was aware of all three areas of Complainant's unprotected activity, supra, but did not determine to discharge Complainant until after he engaged in protective activity on February 21, 1979.

6. Complainant has established that he was discharged by W. B. Coal on March 19, 1979, because of his protected activities, supra, and he would not have been discharged but for such protected activity.

7. W. B. Coal has established that its determination to discharge Complainant was also motivated by Complainant's unprotected activities, supra.

8. W. B. Coal has failed to establish that it would have taken adverse action against Complainant for the unprotected activities, supra, alone.

9. Complainant Richard W. Neal, Jr. was discharged by W. B. Coal in violation of section 105(c) of the Act.

10. Complainant shall be rehired and reinstated to his former position at W. B. Coal with full senority rights.

11. During the period beginning on March 19, 1979, and ending on February 28, 1981, Complainant would have earned $42,309.14 as an employee of W. B. Coal if his employment had not been terminated. During the aforementioned period, Complainant earned $6,106.56 from other employment and this amount shall be deducted from the sum of $42,309.14. Complainant is entitled to an award of $36,202.58 as backpay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date payment is made.

12. The sums of money previously awarded to Complainant as unemployment insurance benefits and public assistance payments may not be offset against the award of back pay.

13. Complainant's counsel, Stanley G. Burech, Esq., is entitled to an award of $8,252.43 for his reasonable costs, expenses, and attorney's fee in connection with the prosecution of this action.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED and Complainant shall be rehired and reinstated to his prior position at W. B. Coal with full senority rights.

IT IS FURTHER ORDERED that W. B. Coal shall pay to the Complainant the sum of $36,202.58 for back wages plus interest at the rate of 6 percent per annum from the dates such payments were due to the date payment is made.

IT IS FURTHER ORDERED that W. B. Coal shall pay to Stanley G. Burech, Esq., the sum of $8,252.43 for reasonable costs, expenses, and attorney's fee.

IT IS FURTHER ORDERED that W. B. Coal shall:

1. Expunge all references to Complainant's discharge from his employment records;

2. Within 15 days from the date of this order, post a copy of this Decision and Order on a bulletin board at the mine where notices to miners are normally placed and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days;

3. Cease and desist from discriminating against or interfering with Complainant because of activities protected under section 105(c) of the Act.

James A. Laurenson, Judge

Distribution Certified Mail:

Stanley G. Burech, Esq., 116 W. Main Street, St. Clairsville, OH 43950
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, 900 Oliver Building, Pittsburgh, PA 15222

Carl Moreland, Esq., Friefield, Bruzzese, Wehr, Moreland and England Co., P.O. Box 1506 Steubenville, OH 43952

Assistant Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Special Investigation, MSHA, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
Phone (703) 756-6236

FEB 12 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-7
	:	A/O No. 44-00241-03013
v.	:	
	:	Lambert Fork Mine
CLINCHFIELD COAL COMPANY, Respondent	:	

DECISION

On February 6, 1981, 4 days before this case was set to go to trial, Respondent filed a motion to dismiss and the Government announced that it would not oppose the motion. This case has been in progress since November of 1979. Numerous documents have been filed, motions have been made and denied, and a substantial amount of time has been spent by the Government, by Respondent, and the Commission in this case.

It now turns out that the withdrawal order which was issued because of Respondent's failure to abate the citation involved in this case was before another Commission judge for review, and that on October 3, 1980, he vacated the order of withdrawal because of the invalidity of the citation. That ruling is binding upon me and upon the parties.

The citation involved herein is VACATED and this case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Barbara K. Kaufmann, Esq., U.S. Department of Labor, Office of the Solicitor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Fletcher A. Cooke, Esq., The Pittston Company Coal Group, Lebanon, VA 24266 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 12 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 80-134-M A/O No. 02-00024-05008-H
UNITED STEELWORKERS OF AMERICA, LOCAL 616, Petitioner	:	Morenci Mine and Mill
v.	:	
PHELPS DODGE CORPORATION, Respondent	:	

DECISION

Appearances: Alan Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA; Angel Rodriguez, United Steelworkers of America, Local 616, Clifton, Arizona, for Petitioner, United Steelworkers of America; James G. Speer, Esq., and Stephen Pogson, Esq., Evan, Kitchell and Jenckes, Phoenix, Arizona, for Respondent, Phelps Dodge Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Phelps Dodge Corporation. A hearing was held on January 20, 1981.

At the hearing, the parties agreed to the following stipulations (Tr. 5-6):

1. The operator is the owner and operator of the subject facility.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction of this case.

4. The inspector who issued the subject order was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject order was properly served on the operator.

6. Copies of the subject order and termination are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statement asserted therein.

7. The imposition of any penalty will not affect the operator's ability to continue in business.

8. The alleged violation was abated in good faith.

9. In the 8 to 12 months prior to June 1979, the operator had 60 violations and there were 66 inspection days. This is a low history.

10. This is an open-pit mine which produced 2 million tons in 1979. It is large in size.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 17-176). At the conclusion of the taking of evidence, the parties, in an off-the-record conference, waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench. A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 189-193).

BENCH DECISION

This case is a petition for the assessment of a civil penalty for an alleged violation of 30 C.F.R. § 55.12-16. The subject mandatory standard provides as follows:

> Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked-out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The alleged violation is as follows: "Lock-out procedures were not in use at the smelter jaw crusher. Men were observed working and getting into the panfeeder hopper of the jaw crusher."

Many of the essential facts are not in dispute. Rocks which had been dumped by trucks into the chute or pocket leading to the panfeeder became jammed. The crusher operator was standing on the rocks which were lying on the panfeeder inside the pocket as the inspector arrived on the scene. At that time, the panfeeder was not running since it had been turned off by pushing the button on the nearby control panel. The operator admits that the fact that the button on the nearby control panel was pushed does not constitute a lock-out procedure or otherwise satisfy the mandatory standard. The testimony makes clear that the button on the control panel could be accidentally pushed and the panfeeder started up. Also, the testimony indicates that sometimes the button got stuck because of dust.

What is involved here is an interpretation of the subject mandatory standard and certain of its specific terms. The operator contends, first, that mechanical work was not being performed. In the operator's view, dislodging the rocks does not constitute mechanical work.

I conclude that mechanical work was being done. "Mechanical" is defined in the first instance as "of or pertaining to machinery or tools." Webster's New Collegiate Dictionary, 1979 edition. This chute was an integral unit of an assemblage of parts making up a complicated machine. Also, specific tools such as a jackhammer with a long bit, a long crowbar, and a crane, were used to dislodge rocks, depending on the circumstances. The work done to restore and reinstitute operation by dislodging the rock was therefore, mechanical. There is no basis to limit mechanical work to maintenance or to work done only by mechanics. If the mandatory standard intended such a limited interpretation, it could easily have set forth such a circumscribed definition.

The next issue is whether dislodging the rocks falls within the purview of the standard's requirement that electrically powered equipment be deenergized and that, thereafter, lock-out procedures be followed. The panfeeder was electrically powered. The chute itself, of course, was not. The rocks were poured into the chute from a higher level by truck, and because of gravity, they fell downward onto the panfeeder unless, as here, they became jammed. However, after giving the matter much thought, I do not believe it makes sense to split the subject process into separate components for purposes of applying this mandatory standard. The movement of the rock was one integral process involving electrically powered equipment. This process should be viewed as an indivisible whole. This was the inspector's

view and I accept it. Moreover, as the Solicitor pointed out, to hold that the subject condition did not fall within the standard would result in not requiring any protection here, whereas if the panfeeder itself were broken, such protection would be afforded although the same injuries could result in both situations. Such inconsistent consequences are to be avoided wherever possible.

Accordingly, I conclude the subject condition is covered by the mandatory standard.

With respect to gravity, the injury was potentially serious. Standing on the rocks was unstable and if the panfeeder should start up, the individual standing on the rocks could trip, fall and be hurt. The description of the operator's witnesses as to how the individual hung onto a rope and kept one foot on a step demonstrates to me that a serious risk was involved. Nevertheless, I note that the evidence does indicate there have not been any injuries from this type of condition. In light of all the evidence in the record, I conclude the violation is serious.

I further conclude the operator was guilty of ordinary negligence.

I further bear in mind the stipulations entered into by the parties with respect to the other criteria set forth in section 110, and in this instance I note particularly the operator's low history.

In light of the foregoing, and particularly in light of the operator's low history, a penalty of $750 is assessed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay $750 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Alan Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, 450 Golden Gate Avenue, Room 11071, Federal Building, San Francisco, CA 94102 (Certified Mail)

Angel Rodriguez, President, Local 616, United Steelworkers of America, P.O. Box 1071, Clifton, AZ 80533 (Certified Mail)

James G. Speer, Esq., and Stephen W. Pogson, Esq., Evans, Kitchell and Jenckes, 363 North First Avenue, Phoenix, AZ 85003 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. PENN 79-122
v.	:	A.C. No. 36-00910-03015V
	:	Robena No. 2 Mine
UNITED STATES STEEL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: James Kilcoyne and Covette Rooney, Esqs., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging violations of a safety regulation. The general issue is whether Respondent has violated the cited regulation, i.e., 30 C.F.R. § 75.200, and, if so, the appropriate civil penalty to be assessed. An evidentiary hearing was held in Pittsburgh, Pennsylvania, on November 19, 1980.

30 C.F.R. § 75.200 facially requires that the mine operator adopt a roof-control plan approved by the Secretary. That part of the standard has been construed however to mean also that the operator must comply with its approved roof-control plan. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976). It is a violation under that standard and under the roof-control plan here in effect for persons to proceed beyond the last permanent roof support unless adequate temporary support is provided.

The citation at bar actually charges two violations. As amended, it first charges that, in essence, permanent roof supports (roof bolts) were not installed to within 12 feet of the face before pillar extraction was attempted and, secondly, charges that the continuous-miner operator was exposed to unsupported roof.

It is undisputed that the approved roof-control plan then in effect required that roof bolts be located not more than 12 feet from the face or gob area before commencing retreat mining. MSHA inspector Robert Newhouse, conducting a special inspection at the 2 Main 4 Left Section of the mine on April 5, 1979, observed what he thought was a particularly long unsupported working place in which a continuous miner was in the process of retreat mining. With the help of assistant mine foreman Edward Kopec he nailed together several brattice boards and using these for support he extended his tape rule from a position below the last roof bolt to what he determined was the face. It measured 24 feet. Since it was 19 feet from the position of the machine operator's controls to the cutter head of the continuous miner, Newhouse concluded that the miner operator must have been exposed to at least 5 feet of unsupported roof when he cut through into the gob area. According to Newhouse, the miner operator, John Henderson, admitted that he had mined "a little bit past the bolts."

Newhouse concluded that the operator was negligent for allowing the condition to exist inasmuch as Assistant Mine Foreman Malinoski was standing next to the continous miner as it was operating. Although Newhouse conceded that the roof over the cited area was stable, roof conditions outby were weak, thus suggesting the potential for similar conditions in the cited area. The hazard present here is of course from roof falls causing serious and fatal injuries. Work was immediately discontinued when Inspector Newhouse issued his citation and posts and jacks were set before work resumed.

Assistant Mine Foreman Malinoski disagreed with the inspector's measurement. He maintained that Newhouse should have taken the measurement from a roof bolt that was actually 6 inches closer to the gob area. He also argued that the inspector's measurement was inaccurate because it was taken at a 15- to 20-degree angle from the direction of the entry and because debris on the mine floor caused the tape to bend. Malinoski did, however, hear miner operator Henderson admit that he could have been working under unsupported roof.

Frank Novaski, the general mine foreman, met Malinoski in the mine after the citation was issued. They measured along the left rib from the nearest roof bolt to the point where it was "holed through" and where bit marks from the continuous miner could be seen. It measured 14 feet. Novaski was not told however where the inspector made his 24-foot measurement and he did not bother to ask.

Assistant Mine Foreman Kopec also testified on behalf of the operator. He watched as the inspector measured 24 feet from a point beneath the nearest roof bolt to what Kopec described as the pie-shaped block of coal depicted on Exhibit R-1. He accepted the word of the inspector that this was the actual distance measured but he thought it might actually have been up to 6 feet less because of the terrain over which the tape measure was bent. He admitted however, that the distance measured by the inspector appeared to exceed that allowed by the roof-control plan and that it appeared that the miner operator might have worked beyond the last row of roof bolts.

Within this framework of evidence, I am convinced that the operator's roof-control plan was indeed violated. The testimony of Inspector Newhouse is credible in itself but is also corroborated in significant respects by the operator's own witness, assistant mine foreman Kopec, who watched the inspector make his 24-foot measurement. Indeed, Kopec in essence conceded that the violation existed. The 14-foot measurement made by Malinoski and Novaski was taken at an entirely different location along the left rib of the entry and therefore is essentially irrelevant. Indeed, by conceding that the distance along the left rib from the closest roof bolt to the gob was in excess of 12 feet they have admitted that the roof-control plan was also violated at that location.

I cannot conclude, however, that John Henderson did in fact operate the continuous miner under unsupported roof. Newhouse admittedly did not actually see this occur and the circumstantial evidence is inconclusive. I accord little weight to the statements attributed to Henderson which are equivocal at best. Moreover, because of the potential for inaccuracies in the measurement of the unsupported area as described by the operator's witnesses, I believe that an error of as much as 6 feet could have been made by the inspector. Since the machine controls were located 19 feet from the ripper head, it cannot be inferred that the machine operator was exposed to the unsupported roof. I cannot therefore conclude that the second violation did occur.

No convincing evidence has been submitted to show that the mine operator had actual knowledge of the violation of its roof-control plan. I conclude, however, that the operator, through its foreman, should have known of and prevented the violative condition as part of its general responsibility for control of the work place. It was therefore negligent. The hazard presented was serious, possibly leading to fatal injuries. I find the mine operator to be large in size and that any penalty imposed in this case would not affect its ability to continue in business. The operator has a substantial history of violations, including 21 previous violations dating back to April 8, 1977, of the standard cited herein. Under the circumstances, a penalty of $1,000 is appropriate. The operator is ordered to pay the aforesaid penalty within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

James Kilcoyne and Covette Rooney, Esqs., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

Louise Symons, Esq., United States Steel Corporation, Law Department, 600 Grant Street, Pittsburgh, PA 15230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1981

LOCAL UNION NO. 5899, UNITED MINE WORKERS OF AMERICA (UMWA),	:	Complaint for Compensation
	:	Docket No. KENT 79-223-C
On behalf of:	:	
	:	Tansy Beth No. 1 Mine
Michael Johnson, Joe Johnson, Moses Maggard, Jimmy Joe Gray, Clarence Osborne, Leo Johnson, James Taylor, Richard Gibson, A. P. James, J. D. Reynolds, Alvin Spears, Homer Burke, Applicants	:	
v.	:	
TANSY BETH MINING COMPANY, Respondent	:	

SUMMARY DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for the Applicants;
Phillip D. Damron, Esq., Prestonburg, Kentucky, for the Respondent.

Before: Judge Cook

This is a compensation proceeding arising under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The Applicants filed an application for compensation on July 16, 1979, and filed an amendment thereto on January 8, 1980, 1/ seeking compensation under that part of section 111 which provides that:

1/ The amendment was filed pursuant to an order issued on December 18, 1980. The order stated, in part, as follows:

"29 CFR 2700.36 requires that a claim for compensation include: '(a) A short and plain statement of the facts giving rise to the claim, including the period for which compensation is claimed; * * *.'

"Although the Applicant, in paragraph V, states that the listed miners were idled for an entire 8 hour shift, Applicant does not specify the actual

> If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

On October 25, 1979, the Applicants filed a motion for an order requiring the Respondent to show cause why a default should not be entered based upon the Respondent's failure to file an answer to the July 16, 1979, application for compensation. The requested order to show cause was issued by Chief Administrative Law Judge James A. Broderick on October 31, 1979, and the Respondent filed a response thereto on November 20, 1979, requesting a stay of the proceedings. The case was assigned to the undersigned Administrative Law Judge on November 26, 1979, with the request for a stay pending.

On December 18, 1979, an order was issued requiring the Applicants to file certain amendments to the application for compensation, 2/ requiring the Respondent to file a more specific request for a stay, and requiring the Respondent to file a proposed answer within 20 days after service of the amended application for compensation. The Applicants filed the amendment on January 8, 1980, and the Respondent filed an answer on January 30, 1980.

On February 27, 1980, an order was issued denying the Respondent's request for a stay because sufficient information to provide the basis for a stay had not been provided. That same day, a notice of hearing was issued scheduling the case for hearing on the merits on March 26, 1980, in Prestonburg, Kentucky. On March 18, 1980, the parties filed a joint motion for continuance. As grounds therefor, the parties stated an intent to enter into stipulations and thereafter to request that the case be decided on the basis of a motion for summary decision. On March 19, 1980, an order was issued granting a continuance until April 18, 1980, to permit the filing of a properly supported motion for summary decision.

On April 22, 1980, the Applicants filed a motion for summary decision accompanied by a motion to accept it for late filing. Joint stipulations of

---

fn. 1 (continued)
time period during which each miner was idled. No allegation was made as to the actual time periods for the shifts in operation at such mine. Without such information it is not possible to determine which provision of Section 111 of the Act the Application is brought under. Therefore, IT IS ORDERED that the Applicant, within 20 days, file an amendment to the Application indicating the actual time periods during which it is claimed that each named miner was idled and also the times for the shifts at such mine."

2/ See, n. 1, supra.

fact were filed on April 25, 1980. On June 18, 1980, an order was issued accepting a late filing of the motion for summary decision. However, the motion for summary decision was denied, and a notice of hearing was issued scheduling the case for hearing on the merits on July 15, 1980, in Pikeville, Kentucky.

On July 7, 1980, the Applicants filed a request for admissions, and a motion to continue the hearing pending resolution of the civil penalty proceeding in Docket No. KENT 80-104. The civil penalty proceeding encompassed the withdrawal order at issue in this case. The Applicants stated that should the civil penalty proceeding result in a determination that the Respondent did violate the cited mandatory safety standard, the parties should be able to resolve the compensation case without the need for a hearing. An order was issued on July 8, 1980, granting a continuance pending either resolution of the civil penalty proceeding or the scheduling of such civil penalty proceeding for hearing. On July 11, 1980, the Respondent filed answers to the request for admissions, and filed a motion joining the Applicants in their motion for continuance.

On October 14, 1980, a prehearing notice was issued noting that on August 27, 1980, an order was issued finding the Respondent in default in Docket No. KENT 80-104, imposing the proposed penalties as the final order of the Federal Mine Safety and Health Review Commission (Commission), and directing that such penalties be paid. The parties were accorded 30 days for the filing of any motions that they desired to file. It was noted that if no motions were filed within the 30-day time period, then the case would be scheduled for hearing.

On October 22, 1980, the Applicants filed a renewal of request for summary decision. The certificate of service indicates that a copy of such filing was served on the Respondent on October 21, 1980.

The time periods set forth at 29 C.F.R. §§ 2700.8(b) and 2700.10(b) (1979), elapsed, and no statement in opposition thereto was filed by the Respondent. Accordingly, on November 13, 1980, an order was issued requiring the Respondent to set forth adequate reasons, in writing, on or before December 3, 1980, as to: (1) why it failed to file a statement in opposition to the Applicants' renewal of request for summary decision within the time periods set forth at 29 C.F.R. §§ 2700.8(b) and 2700.10(b) (1979); and (2) why its failure to file a statement in opposition to the Applicants' renewal of request for summary decision should not be deemed an admission of the Applicants' contentions, as set forth therein, entitling them to the relief requested. The official case file contains a certified mail receipt indicating that counsel for the Respondent received the order on or around November 18, 1980. Additionally, a copy of the order was sent by certified mail, return receipt requested, to Mr. Claude Hall at the address set forth in the distribution list. The copy addressed to Mr. Hall was returned to the undersigned by the U.S. Post Office bearing the notation "unclaimed." The Respondent did not respond to the order.

The Commission's Rules of Procedure provide that "[w]hen a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal." 29 C.F.R. § 2700.63(a) (1979). Accordingly, on January 8, 1981, an order was issued requiring the Respondent to show cause, in writing, on or before January 28, 1981, as to why summary decision should not be entered in the Applicants' favor and as to why the following should not be entered as the findings of fact and conclusions of law in this case:

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. Respondent operates the No. 1 Mine.

3. The products or operations of Respondent's No. 1 Mine affect interstate commerce.

4. Respondent and its No. 1 Mine have been subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act), at all times relevant to this proceeding.

5. Respondent is an operator for purposes of section 111 of the 1977 Mine Act.

6. Inspector Jerry W. Sosbee was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

7. At 8:27 p.m. on Thursday, June 14, 1979, Inspector Jerry W. Sosbee issued Withdrawal Order No. 707632 to Respondent at its No. 1 Mine.

8. Withdrawal Order No. 707632 was issued pursuant to the provisions of section 104(d)(1) of the 1977 Mine Act.

9. Withdrawal Order No. 707632 cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 75.200 which occurred at its No. 1 Mine. The withdrawal order describes the cited "condition or practice" as follows:

> The supports inby the portal approximately the roof support inby the portal approximately 500 feet is not supported adequately. The 6 X 8 steel beams are twisted and bent and the header legs are broke. The foreman and all personnel travel under these conditions to the 0020 section. This is the haulageway from the 0020 section.

10. Respondent did not initiate a proceeding pursuant to section 105(d) of the 1977 Mine Act, within 30 days of its receipt of Withdrawal Order No. 707632, to contest the validity of such withdrawal order's issuance.

11. The "condition or practice" cited in Withdrawal Order No. 707632 existed at Respondent's No. 1 Mine as alleged in such withdrawal order, and constituted a violation of mandatory safety standard 30 C.F.R. § 75.200.

12. Withdrawal Order No. 707632 was not modified or terminated until Monday, June 18, 1979, at 12:35 p.m.

13. During all periods of time relevant to this proceeding, Respondent regularly operated two daily production shifts at its No. 1 Mine. These shifts are commonly referred to as the day shift and the evening shift.

14. Miners scheduled to work the day shift at Respondent's No. 1 Mine worked from 7:30 a.m. to 3:30 p.m.

15. Miners scheduled to work the evening shift at Respondent's No. 1 Mine worked from 3:30 p.m. to 11:30 p.m.

16. The following miners, who were scheduled to work the 3:30 p.m. to 11:30 p.m. shift (evening shift) on June 15, 1979, at the Respondent's No. 1 Mine, were idled for their entire 8-hour shift as a direct result of Withdrawal Order No. 707632:

Michael Johnson
Joe Johnson
Moses Maggard
Jimmy Joe Gray
Clarence Osborne

17. If the miners identified in Paragraph No. 16 had worked during the shift referred to in Paragraph No. 16, they would have earned the amounts of money listed below:

Michael Johnson	$ 77.28
Joe Johnson	74.34
Moses Maggard	72.74
Jimmy Joe Gray	72.74
Clarence Osborne	72.74

18. The following miners, who were scheduled to work the 7:30 a.m. to 3:30 p.m. shift (day shift) on June 18, 1979, at Respondent's No. 1 Mine, were idled for their entire 8-hour shift as a direct result of Withdrawal Order No. 707632:

Leo Johnson
James Taylor
Richard Gibson
A. P. James
J. D. Reynolds
Alvin Spears
Homer Burke

19. If the miners identified in Paragraph No. 18 had worked during the shift referred to in Paragraph No. 18, they would have earned the amounts of money listed as follows:

Leo Johnson	$ 78.92
James Taylor	78.92
Richard Gibson	78.92
A. P. James	72.74
J. D. Reynolds	72.74
Alvin Spears	78.92
Homer Burke	78.92

20. As a result of being idled as a direct result of Withdrawal Order No. 707632, the various Applicants are entitled to an award of compensation in the respective amounts set forth in Paragraphs 17 and 19.

21. Each Applicant is also entitled to interest at the rate of 6 percent per annum on the amount of compensation awarded in this proceeding, commencing on the day following the day each amount was due in June of 1979, and ending on the date when the compensation is paid.

The official case file contains a certified mail receipt indicating that counsel for the Respondent received the January 8, 1981, order to show cause on January 12, 1981. The copy of such order sent to Mr. Hall by certified mail, return receipt requested, was returned to the undersigned by the U.S. Post Office bearing the notation "out of business." To date, the Respondent has not responded to the January 8, 1981, order to show cause.

Summary decision may be granted "only if the entire record, including the pleadings, despositions, answers to interrogatories, admissions, and affidavits 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." 29 C.F.R. § 2700.64(b) (1979). In view of the Respondent's failure to file a response to the orders dated November 13, 1980, and January 8, 1981, I conclude that the Respondent has admitted the contentions set forth by the Applicants in their October 22, 1980, renewal of request for summary decision entitling them to the relief requested, and that summary decision should be entered in the Applicants' favor. The matters set forth in paragraph Nos. 1 through 21 of the January 8, 1981, order to show cause will be entered as the findings of fact and conclusions of law in this case.

The July 16, 1979, application for compensation requested an award of attorney's fees incurred in obtaining compensation in this case. Section 105(c)(3) of the 1977 Mine Act expressly permits the successful applicant in a discharge, discrimination or interference proceeding to recover costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred for, or in connection with, the institution and prosecution of such proceeding. Section 111 of the 1977 Mine Act accords no such right to the successful applicant in a compensation case. Accordingly, the Applicants' request must be denied. Accord, Local Union 9856, District 15, United Mine Workers of America v. CF & I Steel Corporation, Docket No. DENV

73-111 (October 4, 1973) (construing the parallel provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970)). 3/

ORDER

Accordingly, IT IS ORDERED that the Applicants' renewal of request for summary decision be, and hereby is, GRANTED, and that summary decision be, and hereby is, ENTERED in the Applicants' favor.

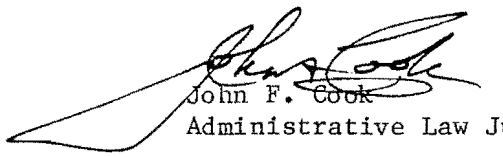
IT IS FURTHER ORDERED that the matters set forth in paragraph Nos. 1 through 21 of the January 8, 1981, order to show cause be, and hereby are, ENTERED as the findings of fact and conclusions of law in this case.

IT IS FURTHER ORDERED that the Respondent pay compensation to the individual miners set forth below, with interest computed at the rate of 6 percent per annum for the period commencing on the day following the day each amount was due in June of 1979, and ending on the date when the compensation is paid:

Name	Date of Idlement	Compensation Award
Michael Johnson	June 15, 1979	$ 77.28
Joe Johnson	June 15, 1979	74.34
Moses Maggard	June 15, 1979	72.74
Jimmy Joe Gray	June 15, 1979	72.74
Clarence Osborne	June 15, 1979	72.74
Leo Johnson	June 18, 1979	78.92
James Taylor	June 18, 1979	78.92
Richard Gibson	June 18, 1979	78.92

3/ In UMWA v. Rushton Mining Company, 3 IBMA 231, 81 I.D. 368, 1973-1974 CCH OSHD par. 18,113 (1974), aff'd. on other grounds sub nom. Rushton Mining Company v. Morton, 520 F.2d 716 (3rd Cir. 1975), the Interior Board of Mine Operations Appeals (Board) disallowed an award of interest and costs in a compensation case arising under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act), on the grounds that section 110(a) did not expressly provide for such relief. In UMWA v. Youngstown Mines Corporation, 1 FMSHRC 990, 1 BNA MSHC 2114, 1979 CCH OSHD par. 23,803 (1979), the Commission declined to follow the Board's decision in Rushton and held that interest is awardable in compensation cases arising under section 110(a) of the 1969 Coal Act. However, the Commission's decision did not address the issue of costs, and, accordingly, it must be concluded that the Board's decision in Rushton, as relates to the issue of costs, remains good law. Such result accords with the traditional approach that attorneys' fees are not awardable unless expressly authorized by contract or statute. See Hall v. Cole, 412 U.S. 1, 93 S. Ct. 1943, 36 L.Ed.2d 702 (1973); Wolf v. Cohen, 379 F.2d 477 (D.C. Cir. 1967).

A. P. James	June 18, 1979	72.74
J. D. Reynolds	June 18, 1979	72.74
Alvin Spears	June 18, 1979	78.92
Homer Burke	June 18, 1979	78.92



John F. Cook
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

Phillip D. Damron, Esq., 12 South Front Avenue, I.O.O.F. Building, P.O. Box 197, Prestonburg, KY 41653 (Certified Mail)

Mr. Claude Hall, Tansy Beth Mining Company, General Delivery, Price, KY 41654 (Certified Mail)

Assistant Solicitor, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-166
	:	Assessment Control No. 15-11787-03003 H
v.	:	
KENTUCKY MAY COAL COMPANY, Respondent	:	Kentucky May Preparation Plant

DECISION

Appearances: George Drumming, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michael Buchart, Coeburn, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 26, 1980, a hearing in the above-entitled proceeding was held on December 10, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 88-99):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-166 on March 24, 1980, by the Secretary of Labor, seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 77.1605(b) by Kentucky May Coal Company.
>
> The issues in a civil penalty proceeding are whether a violation occurred and, if so, what penalty should be assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> I shall make some findings of fact on which my decision will be based, and these facts will be set forth in enumerated paragraphs.

1. The parties entered into some stipulations under which it was agreed that Kentucky May Coal Company is subject to the provisions of the 1977 Act and that the judge has jurisdiction to hear and decide this proceeding.

2. It was also stipulated that Kentucky May Coal Company is a small operator which processes approximately 200,000 tons of coal annually at its preparation plant, and which employs six persons besides the president of the company who testified in this proceeding.

3. There was no stipulation made with respect to the criterion of whether payment of penalties would cause Kentucky May to discontinue in business. In the absence of any testimony or evidence to the contrary, I find that the payment of penalties would not cause respondent to discontinue in business (Buffalo Coal Company, 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 164 (1974)).

4. As to the criterion of history of previous violations, it was stipulated that Kentucky May Coal Company had only two previous violations in the 24-month period preceding the writing of the order involved in this proceeding. Neither of those violations was of the section which is alleged to have been violated here today, namely, section 77.1605(b).

5. Inspector John W. Dishner went to the Kentucky May Preparation Plant on August 30, 1979, for the purpose of providing some materials for the operator's information because the preparation plant had only been operating a short time and certain materials were required.

While the inspector was on the premises, he observed a driver standing by a coal truck which was being loaded by a 275-B Michigan end loader. The inspector noticed that the operator of the coal truck was not wearing a hardhat and he issued a citation with respect to that. The truck driver was not an employee of Kentucky May Coal Company, nor did the truck belong to Kentucky May Coal Company, nor was the truck driver or the company for which he worked under contract to haul coal for Kentucky May Coal Company.

6. The inspector also noticed that the end loader had a noise coming from it which he believed was associated with the end loader's braking system. He therefore decided to issue a citation with respect to the brakes on the end loader, and went into the office of Kentucky May Coal Company where he talked to a person named Donna Blanton who was the safety director at that time. She indicated to the inspector

that she could not stop the end loader from operating until the brakes were repaired. The inspector believed that the end loader should not continue to be operated. Therefore, he went back to the area where the end loader was operating and had the truck removed from the area and made a test of the end loader's brakes.

According to the inspector's testimony in this proceeding, he found that the brakes were defective because, under his measurement, the end loader traveled 10 feet after the brakes were applied and it was his judgment that the end loader should have stopped within a distance of about 6 feet, and therefore, he felt that an imminent danger existed and he issued Order No. 746773 under section 107(a) of the 1977 Act.

7. The inspector served the withdrawal order on Donna Blanton and she in turn notified the company that the end loader could not be operated. Thereafter, a company by the name of Rudd was asked to repair the equipment. To the best of the recollection of the president of the company, who testified in this proceeding, the Rudd Company was unable to send a repairman until the following Monday, which would have been September 3.

When the repairs were made, it is the president's recollection that only the compressor on the end loader had to be repaired in order to make the brakes operable. The inspector thinks that the brake linings also were replaced. Regardless of whether the inspector's recollection is correct or whether the president's recollection is correct, the end loader was in a safe and operable condition when the inspector checked it on September 4, at which time he terminated the order of withdrawal.

8. After the repairs had been completed, the inspector had a test made of the brakes similar to the test which had been made before the withdrawal order was issued. At that time, the inspector found that the end loader would stop within a distance of approximately 6 feet, as compared with the 10 feet which he found prior to the repairs.

While the inspector believed that the screeching noise, heard before the repairs were made, was associated with the brake itself, the president of the company said that it might have been associated with the compressor, which did need to be repaired or replaced. Regardless of where the noise may have come from in the first instance, it did not exist after the repairs were made. Therefore, it may be concluded that the noise was associated with the failure of

the brakes to work on August 30, 1979, when the order was issued.

The president of the company testified that approximately 12 to 15 trucks were loaded at the preparation plant on a daily basis back in August of 1979. He said that some of the truck drivers did get out of their trucks to supervise the placement of the bucket loads of coal in their trucks. But he said that there was no reason for the two employees in the tipple, or preparation plant itself, to be on the ground in the vicinity of the operation of the end loader. Therefore, the primary persons who were exposed to any hazards as a result of the brakes not working properly on the end loader would be the truck drivers who got out of their trucks to supervise the loading of their trucks.

10. The president of the company indicated that the Michigan 275-B loader cited in the inspector's order as having defective brakes was an end loader that had been obtained from another company or leasing agency, and was not owned by Kentucky May Coal Company. The end loader, the 275-B Michigan end loader, was replaced shortly after it was restored to proper operating condition with another end loader which the president of the company thought was more appropriate for the type of operation that was conducted at the preparation plant.

11. Section 77.1605(b) provides that mobile equipment shall be equipped with adequate brakes and all trucks and front-end loaders shall also be equipped with parking brakes.

I think that those findings are sufficient for stating the primary facts that have to be considered in this proceeding.

The first matter that has to be considered is whether a violation occurred. The testimony of the company's president primarily opposes the issuance of the order in this instance on the basis that the inspector's test was not made under proper scientific controlled conditions that should be required when determining whether brakes are free from defects. I recognize that the inspector did not have the facilities or the laboratory conditions required to make a precise determination as to what percentage of deficiency the brakes may have had on the Michigan 275-B loader on August 30, 1979.

Despite the lack of the inspector's ability to make a perfect scientific determination as to the brakes' ability to

stop the machine on August 30, I find that there was sufficient reason for him to doubt the brakes' efficiency on that day to warrant the citing of section 77.1605(b), because I do not think that the facts support a finding that the brakes were entirely free of problems. The fact that the compressor was not working and that some repairs were required to get the brakes in good condition indicates that the inspector was within a reasonable conclusion, based on the facts that he had, to warrant his citing the piece of equipment for a violation for having inadequate brakes on that day.

Another reason for my believing that the brakes were defective is the lack of controverting evidence by any eyewitness. The president of the company was not at the site at the time the brakes were considered defective. Additionally, the operator of the Michigan end loader was a man named Arthur Back and he did not appear here today to testify that the brakes were free of all defects. The president does not recall any specific dissent by Mr. Back concerning the alleged defectiveness of the brakes on August 30. So the inspector's testimony is the only eyewitness testimony in this case that can be relied upon as to the exact condition of the brakes on August 30 when the order was written.

Having found that a violation occurred, it is now necessary to consider the remaining criteria which must be considered in assessing a penalty. My findings have already dealt with the fact that we have a small operator, that there is no history of a previous violation of section 77.1605(b), and that the assessment of a penalty will not cause the operator to discontinue in business.

The fourth criterion, which I have not considered, is whether the operator demonstrated a good faith effort to achieve compliance after the violation was cited. The company called a repair organization as soon as the Michigan end loader was cited for a violation in the inspector's order, and the brakes were repaired as soon as that company could provide a serviceman for the purpose. Therefore, I find that the company demonstrated a good faith effort to achieve compliance.

The remaining two criteria to be considered are negligence and gravity. With respect to negligence, it is difficult to find negligence more than ordinary in nature because we do not have any testimony as to how long the brakes had been defective and we do not know what period of time may have elapsed after the brakes became less than adequate before the inspector cited them. Consequently, the evidence will support a finding of only ordinary negligence.

As to the gravity of the violation, there was, in the vicinity of the loading machine, only those people who were associated with the direct loading of the coal. In other words, the end loader operator himself would not have been endangered much by the failure of the brakes to work perfectly because he was inside the machine and it was on a relatively level area, unless the operator deliberately allowed the machine to coast up on an incline near the loading area, and that would not have caused the machine to travel any great distance before it would have rolled back down on a relatively level area. So the primary people who would have been exposed to danger would have been the truck drivers. Since they got out of their trucks primarily for the purpose of directing the operation of the end loader in the placement of coal, it is unlikely that they would have been hit by the end loader since they would probably have been looking at it at such times as they were standing on the ground.

Nevertheless, the fact remains that they could have been hit by the end loader and they might not have been aware that the brakes were defective because the drivers varied from truck to truck. That is, the president of the company indicated that from 12 to 15 trucks were loaded on a daily basis and there is no indication that the same 12 or 15 trucks with the same drivers were involved all of the time. So it would have been possible for someone to have been hit by an end loader and injured or even killed because he might have been assuming that the end loader could stop quickly, when in fact it could not. Consequently, I find that the violation was serious in nature.

When penalties are assessed with respect to small companies, a small penalty has a greater deterring effect for a small company than a large penalty might have for a large company. Based on the evidence that I have already discussed, showing that there is no history of a previous violation, that there was ordinary negligence, that payment of penalties would not cause the operator to discontinue in business, that the operator demonstated a good faith effort to achieve compliance, and that there was a serious violation, I shall assess a penalty of $200.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Kentucky May Coal Company shall pay a penalty of $200 for the viola-

tion of section 77.1605(b) cited in Order No. 746773 dated August 30, 1979.

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

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Michael P. Buchart, President, Kentucky May Coal Company, Inc., P.O. Box 310, Coeburn, VA 24230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 19, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. LAKE 79-202-M A.C. No. 20-00371-05013
v.	:	
WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, Respondent	:	Docket No. LAKE 80-24-M A.C. No. 20-00371-05017 White Pine Mine
LOCAL 5024, UNITED STEELWORKERS OF AMERICA, Representative of Miners	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner;
Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, Ishpeming, Michigan, for Respondent;
Harry Tuggle, Safety and Health Department, United Steelworkers of America, Pittsburgh, Pennsylvania, for the Representative of the Miners.

Before: Chief Administrative Law Judge Broderick

Statement of the Cases

These are consolidated cases involving three citations for violations of the same mandatory standard, 30 C.F.R. § 57.12-82. The standard reads: "Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines." Respondent, White Pine Copper Division (the "company") uses a 440-volt electrical distribution system in its underground mine in White Pine, Michigan. Electricity is conveyed from power centers through cables suspended from the roof ("back") by insulated hangers set behind metal pipelines. The citations were issued when a Federal inspector observed cables in contact with metal-compressed air lines and with a support chain for an air line. The conditions were abated when agents of the company repositioned the cables, separating them from the air lines.

The company claims that the cables in question are not "powerlines" covered by the standard and, even if they are, that they were "insulated" from the air lines as that term is defined in 30 C.F.R. § 57.2.

A hearing was held in Houghton, Michigan, on October 23-24, 1980, pursuant to notice. Witnesses for MSHA were Bruce Haataja, the Federal inspector who issued the citations, William Carlson, a supervisory official with MSHA, James Vollmer, an electrician employed at the White Pine Mine, and Paul Price, an electrical engineer in the MSHA Denver Office. Witnesses for the company were Robert Graham, a self-employed consultant on electrical engineering specializing in wire and cable, James Wood, an electrical engineer at the White Pine Mine, Theodore Blom, chief mine electrician, and Albert Goodreau, the company's safety engineer. John Cestowski, president of the local union and an employee at the White Pine Mine, testified on behalf of the Representative of the Miners.

Each party has filed a posthearing brief. I have also examined other recent decisions on point. 1/ Having considered the evidence presented at the hearing and the contentions of the parties, I make the following decision.

Findings of Fact

1. White Pine Copper Division, Copper Range Company, is the operator of a large underground copper mine in White Pine, Michigan.

2. The mine extracts copper by the room and pillar method. Headings are advanced by drilling, loading and blasting the face with explosives. The resulting rubble ("muck") is removed by scooptrams, transferred to shuttle vehicles and dumped at underground crushers which feed the ore to the surface via conveyor belts.

3. On March 13, 1979, at approximately 8:20 a.m., two energized 440-volt electrical cables were touching a metal-compressed air line in NE 1, Unit 56 of the mine.

4. On March 14, 1979, at approximately 9:30 a.m., there was a 480-volt energized electrical cable touching a metal-compressed air line in E 7 between N 2 and N 3 in Unit 56 of the Mine.

5. On June 4, 1979, at approximately 10 a.m., there was a 440-volt energized cable passing through and contacting the support chains for the metal air and water lines serving working areas in Unit 95 of the mine.

6. The electrical cables are used to distribute power in the mine. They are suspended from the back by insulated hangers and are ordinarily separated

1/ Climax Molybdenum Company v. MSHA and Climax Molybdenum Workers, 2 FMSHRC 3681 (December 18, 1980); MSHA v. Homestake Mining Company, 2 FMSHRC 2295 (August 20, 1980); MSHA v. Ozark Mahoning Company, 1 FMSHRC 1922 (November 29, 1979).

from metal lines. Each cable consists of three insulated conductors and three grounding wires surrounded by a jacket, composed of neoprene. They have a maximum voltage rating of between 600 and 2,000 volts and have at least 25,000 volts of dielectric resistance.

7. Citations were issued by Inspector Haataja for the conditions described in Findings 3, 4 and 5. The conditions were promptly corrected by separating the electrical cables from the metal pipelines. The company displayed ordinary good faith in doing so.

8. The company was aware that MSHA requires electrical cables to be separated from metal lines or insulated from such lines by nonducting material. The record does not show how long the cables in question had been touching the lines before the inspector observed them.

9. Under the circumstances, it was unlikely that the electrical cables would energize the metal lines. However, if the lines did become energized and an employee touched one of them, serious injury would occur.

10. The company has a moderate history of prior violations.

11. Any penalty imposed herein will not affect the company's ability to remain in business.

Issues

1. Are the electrical cables described in the subject citations "powerlines" covered by 30 C.F.R. § 57.12-82?

2. If so, were those cables well separated or insulated from the metal lines described by the inspector?

3. If violations occurred, what are the appropriate penalties?

Discussion

The parties are in substantial agreement as to the facts. The cables described in Citation Nos. 286960 and 286661 were touching metal air lines at a few points. The cable described in Citation No. 294045 was touching a chain from which metal air and waterlines were suspended. The company made no issue of the fact that the cable was not actually touching a metal line. I find that the chain was composed of metal and was not insulated from the lines it supported. For the purposes of this case, it was part of those lines.

The pivotal issue is whether the electrical cables (samples were submitted as Respondent's Exhibits 9, 10 and 11) are "powerlines" within the meaning of 30 C.F.R. § 57.12-82. It is the company's position that only the conducting materials in the heart of each cable are powerlines. If so, the regulation would be inapplicable under the facts presented.

"Powerlines" is not defined in the regulations, nor is it a term of art in the field of electrical engineering. 2/ Trying to ascertain its meaning by analyzing other standards in which it appears is not helpful since words are not used with much precision in the regulations. 3/ In the absence of persuasive reasons to the contrary, therefore, "powerlines" should be given the ordinary meaning that the word suggests. See Chrobak v. Metropolitan Life Insurance Company, 517 F.2d 883, 886 (7th Cir. 1975); MSHA v. Burgess Mining Corporation, 2 FMSHRC 2538, 2540 (September 5, 1980). In fixing that meaning, the purposes of the cited standard and the characteristics of the cables should be borne in mind. MSHA v. Rushton Mining Company, 1 FMSHRC 794-795 (July 9, 1979). The interpretation which would subject the cables to coverage should be preferred, if reasonable, given the remedial aims of the 1977 Mine Act. Cf. District 6, UMWA v. Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (D.C. Cir. 1976); Cleveland Cliffs Iron Company v. MSHA, 1 FMSHRC 1965, 1969-1970 (December 3, 1979); MSHA v. Peabody Coal Company, 1 FMSHRC 28, 38 (April 3, 1979).

Following these guidelines, I find that each of the cables cited by the inspector was a "powerline" covered by 30 C.F.R. § 57.12-82. In common understanding, a powerline is any device intended to carry electrical current from a generating or transmitting point to a point where the current will be transformed or retransmitted. It may be that only the inner, metallic portions of the cables actually conduct power, but I conclude that the ordinary meaning of the term "powerline" includes the jacketing and insulation surrounding the conductors.

Since the cited cables are powerlines, it follows that they were neither well separated nor insulated from the metal lines they touched. To be separated, the cables and metal lines would have to be removed from direct or indirect contact with each other. To be insulated, nonconducting material would have to be inserted between the cables and the lines. Even though the cables insulated the conductors, the cables themselves were not "insulated from" the metal lines.

This determination is in accord with MSHA's interpretation of the standard. In February of 1975, the agency addressed an intepretive memorandum to its area directors (Respondent's Exh. 1) incorporating the interpretation of 30 C.F.R. § 57.12-82 set forth above. This interpretation, of course, is not binding on the Commission. However, the evidence establishes that requiring an insulating substance between the cables and the metal lines enhances the

2/ Paul Price, testifying for MSHA, found a definition of "powerlines" in a blaster's manual published by DuPont which would include insulated electrical cables (Tr. 333-334). Based on the whole record, however, I find it is not an authoritative definitional source in this case.

3/ Section 57.12 refers to "power wires and cables," "power cables," "powerlines, including trolley wires," "powerlines (other than trolley lines," "bare powerlines," and "powerlines." The terms are not all synonomous nor does each difference in wording appear to carry a difference in meaning. They can be understood only in the specific context in which they appear.

safety of the miners. 4/ The burden placed on the company is minimal. 5/ The company, moreover, has long been aware of MSHA's position and, in fact, generally abides by it. In light of these factors, I think MSHA's view of the standard is entitled to special weight. Homan & Crimen, Inc. v. Harris, 626 F.2d 1201, 1208-1209 (5th Cir. 1980); MSHA v. Helen Mining, Inc., 1 FMSHRC 1796, 1801 (November 21, 1980); Udall v. Tallman, 380 U.S. 1, 17 (1965).

I find that the three citations issued by the inspector describe violations of 30 C.F.R. § 57.12-82. The company should have been aware of the conditions and therefore was negligent in permitting them to exist. When the violations were brought to its attention by the inspector they were promptly corrected. In the circumstances presented here, the chances that a metal line would be energized and electrocute a miner were remote. Should it occur, however, the injury would be quite serious. The violations were moderately serious. I conclude that the following penalties should be assessed:

Citation No.	Penalty
286960	$150
286661	150
294045	250
Total	$550

Conclusions of Law

1. The Commission and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter of these proceedings.

2. The electrical cables described in the subject citations are "power-lines" covered by 30 C.F.R. § 57.12-82.

3. Those cables were neither well separated nor insulated from the metal lines described by the inspector.

4. The three citations describe violations of 30 C.F.R. § 57.12-82.

5. The violations were moderately serious and were the result of Respondent's negligence. The degree of negligence involved in Citation

4/ Falling ground ("loose") or flyrock from blasting operations could puncture a cable suspended from the back. William Carlson testified for MSHA that the puncture need not occur at the point of contact with the metal line in order for the line to be energized. In a moist mine atmosphere, current could be conducted through the puncture and thence along the outside of a cable to the metal line, energizing it. It is by no means certain that the cable would then be deenergized automatically by a ground-fault system.

5/ Although separation is the preferred means of compliance, insulation may be accomplished with a piece of wood or rubber. Thus, compliance is neither difficult nor expensive.

No. 294045 was greater than in the other two citations, because the prior citations had put the company on notice of the violations.

ORDER

Respondent, White Pine Copper Division, Copper Range Company, is ORDERED TO PAY the sum of $550 within 30 days of the date of this decision.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Gerald A. Hudson, Attorney, Office of the Solicitor, U.S. Department of Labor, 231 West Lafayette, Room 657, Detroit, MI 48226 (Certified Mail)

Ronald E. Greenlee, Esq., Counsel for White Pine Copper Company, Clancey, Hansen, Chilman, Graybill & Greenlee, P.C., Peninsula Bank Building, Ishpeming, MI 49849 (Certified Mail)

Assessment Office, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-677
	:	A.C. No. 46-01455-03055V
v.	:	
	:	Contest of Citation
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 80-109-R
	:	
	:	Osage No. 3 Mine

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner;
Samuel Skeen, Esq., Senior Counsel, Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Lasher

These proceedings arose under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Morgantown, West Virginia, on January 20, 1981, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions and rationale appears below as it appears in the record aside from minor corrections.

> These matters came on for hearing on January 20, 1981, in Morgantown, West Virginia, having arisen upon the filing of a petition for assessment of civil penalty by the Secretary of Labor on October 20, 1980, and the filing of a notice of contest by Consolidation Coal Company on November 21, 1979. The civil penalty proceeding is Docket No. WEVA 80-677, and the notice of contest is Docket No. WEVA 80-109-R. These

1/ Tr. 206-221.

two proceedings were consolidated by me pursuant to Rule 12 of the Commission's Rules and Regulations, 29 C.F.R. § 2700.12.

In the penalty proceeding, MSHA seeks that a penalty be assessed against Consolidation Coal Company for a violation of 30 C.F.R. § 75.400. Consolidation seeks review of the subject Citation No. 0626780, issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, hereinafter the Act, on the basis that the coal mine inspector who issued such citation, Paul A. Mitchell, was mistaken in concluding that an accumulation of float coal dust was present on rock-dusted surfaces of the roof and ribs of the right return entry starting at Spad Station 1871 outby to Spad Station 1561, a distance of approximately 300 feet, and from Spad Station 1871 to Spad Station 1932 in the crosscut from the No. 8 entry to the No. 6 entry, again a distance of approximately 300 feet.

In addition to the question whether or not the physical conditions of the area of the mine described in the citations did exist, the questions for resolution in this decision at the commencement of the hearing were whether or not the section 104(d)(1) citation was properly issued and, more particularly, whether or not any alleged violation which occurred resulted from an unwarrantable failure of the respondent coal operator to comply with the allegedly violated regulation, and, if so, whether the condition in question substantially and significantly contributed to the cause and effect of a safety or health hazard.

The general legal authorities establishing the parameters of the questions involved herein are section 104(d)(1) of the Act and 30 C.F.R. § 75.400, which latter source provides:

> Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings or on electric equipment therein.

The parties have stipulated as follows:

(1) The Osage No. 3 Mine is owned and operated by Consolidation Coal Company.

(2) Consolidation Coal Company and the Osage No. 3 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.

(5) A true and correct copy of the subject citation and modification were properly served upon the operator in accordance with section 104(a) of the 1977 Act.

(6) Copies of the subject citation, modification, and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

(7) The alleged violation was abated in a timely fashion, and the operator demonstrated good faith in attaining abatement.

(8) The computer printout of the past history of violations for the Consolidation Coal Company may be entered into evidence as an official business record of the Mine Safety and Health Administration.

(9) Consolidation Coal Company is a large operator within the meaning of the Act, and assessment of a civil penalty in these proceedings will not adversely affect the operator's ability to continue in business.

The primary and critical factual issue involved in these cases is whether or not an accumulation of float coal dust was present on a rock-dusted surface in the area described by the inspector in the citation. All witnesses who testified concerning the same indicated that such was a judgment call and that the only means for ascertaining whether or not the presence of float coal dust amounted to an accumulation can be determinable only by a visual test and not by any other test. The witnesses of both parties, without contradiction, indicated that color alone was the determinative factor in determining whether or not an accumulation existed. In summary, the record indicates that if the color of the surface is dark gray to black, then a violation is properly found. Lighter shades of gray and white indicate that there is no accumulation so as to constitute a violation, according to the position advanced by Consolidation's witnesses. The Government's position whether or not a medium gray shade of surface would constitute an accumulation is not sufficiently clear for me to summarize.

Inspector Mitchell testified that on November 13, 1979, while conducting a section 103(i) "spot" inspection, he was in the 14-North section and in the return entry discovered the two areas described in the citation were in violation of section 75.400 of the regulations because in the two 300-foot areas mentioned he found the color of the surface of the roof and ribs to be black to "real dark gray". He indicated that the coal dust he observed covered the entire length of the rock dust and also that he saw float coal dust in other places in the general area, where the color ranged from gray to white. Inspector Mitchell testified that after going down the return, he noticed that other examiners of the section had been marking on the surface, that is, that they had placed their initials and dated the same. It appeared, however, that the citation contained the names of the initialers only insofar as they were so-called company personnel and that union employees who had also initialed in the area, while mentioned in the inspector's notes, were not mentioned in the citation.

Inspector Mitchell advised Walter Wymer, a regional inspector for Consolidation who was a walkaround on the November 13, 1979, inspection, that a violation of law existed. Wymer called for the section foreman, and then Joseph Pride, the superintendent of the mine, and Thomas Simpson, assistant superintendent of the mine, arrived. According to Inspector Mitchell, they admitted that the condition did exist but protested against the issuance of a section (d)(1) citation, which is the so-called unwarrantable failure citation provided for in the Act. According to the inspector, the coal operator had "drug" the floor of the area but not the roof and ribs. "Dragging" involves moving a piece of brattice cloth through the area where float coal dust is allegedly present for the purpose of removing it. The inspector indicated that the methane content of the air in the affected area was .4 of 1 percent and that there was 31,000 cubic feet of air going down the entry. Exhibit M-3 indicates that the velocity was 31,000 CFM.

Respondent was given until 12:30 p.m. to abate the citation, which was issued at 9:30 a.m. In a subsequent modification of the citation, the inspector corrected the original citation to show the abatement expiration time was 12:30 instead of 10:30, as shown on the citation, and also to correct the original citation, which showed that it was a 104(b)(1) citation instead of a 104(d)(1) citation, which the inspector intended. A final correction in the modification, which was issued on November 14, 1979, amended the citation to include the color of the float coal dust and show the same

as dark gray to black. The inspector indicated that he made these mistakes as a result of the pressure which personnel of Consolidation Coal Company placed on him after they were advised that he was going to issue a citation. The inspector indicated that he completed Exhibit M-3, the inspector's statement, after he went to his office.

The area in which the allegedly violative condition was seen had a height of 6 to 7 feet and was approximately 16 feet wide.

The risk from a section 75.400 violation would be an explosion or an ignition resulting in an explosion which could have fatal consequences for the employees working in the section, as well as the approximately 150 miners who constitute the total payroll at the Osage No. 3 Mine, should the explosion be of a sufficient degree of severity.

The inspector indicated that the initialling of the company personnel and union employees who initialed the area (at points marked "X" or "Z" in red on Exhibit A-1) stood out like a "sore thumb", and he indicated that there was no dust in the indentations where the initials were etched. The inspector said that in his conversation with Robert Cordwell, the section boss, on November 13, 1979, Cordwell indicated that he, Cordwell, saw the condition and did date it. Cordwell, who was the sixth of eight witnesses for the Respondent, in contradiction to the inspector, testified that he examined the area on November 13, 1979, as well as on November 7, 8, 9, and 11, and that he found no accumulations on any of those days.

I would footnote at this point that the presence of the initials etched in the surface of the area does not indicate a belief on the part of the person making his initials in the surface that a violative condition exists but is an indication that such person was fulfilling a duty to examine the area and had actually made an examination on the date indicated next to the initials.

As indicated in the citation, different persons had initialed the area on November 7, 8, and 9, as well as November 13, 1979, and, according to the overwhelming evidence presented by Consolidation, the area was checked 21 times during the period November 7, 1979, up to 9:30 a.m. on November 13 and some six separate people had made those checks, all of whom at all of the said times had found no violation. In addition, Walter Wymer testified that on November 9, 1979, he walked the area with Roger Hinkle, a mine inspector for the State of West Virginia, at which time no violation was discovered.

The record indicates that the Hinkle investigation was conducted on a Friday and that on the next 3 days, Saturday, November 10, Sunday, November 11, and Monday, November 12 (a holiday), the mine was not in production. Production resumed at 12:01 a.m. on November 13, 1979, and coal began being cut at approximately 6:30 a.m. (Testimony of mine superintendent Joseph Pride.) Pride indicated that the type of cutting which would have occurred between 6:30 a.m. and 9:30 a.m. on November 13, 1979, would not have created much coal dust since the continuous miner doing the same, a 12 CM, has some 56 water sprays. This is to be contrasted with an earlier version of the CM which had only 30 such sprays.

I would summarize at this point that the situation present on the morning of November 13, 1979, was one in which the mine had been examined by numerous persons, none of whom noted an accumulation of float coal dust in the area and apparently none of whom made entries in preshift examination reports and the like to the effect that such a hazardous violation was present in the area. The inspector took the position that the alleged violation had probably been in existence since November 7, 1979, based on the fact that there was no dust in the indentations made by the initials of those who had initialed the area on that date and by the fact that such initials had been placed in the surface of the ribs and roof, apparently without disturbance, as early as November 7, 1979.

In addition to the testimony of the inspector, the Secretary presented evidence in the form of an opinion from Edward Kawenski, a supervisory support engineer, who for some 15 years has been employed at the MSHA experimental mine, who has authored various publications and conducted various experiments relating specifically to coal dust explosions and related subjects, all specifically germane to this matter. Kawenski indicated that there was no sampling technique for the measurement of float coal dust and that while the determination whether or not an accumulation of float coal dust exists is a judgment call, the determination is not difficult. His opinion was that an accumulation should be easily recognizable. Kawenski indicated that rock dust and float coal dust, the former being in the form of slivers and the latter being spherical, travel approximately the same distances together under fixed velocity conditions. He emphasized that float coal dust is extremely volatile and is a special substance because of its easy susceptibility to ignition.

The Secretary's third witness, Robert C. Moore, who is not a certified fire boss, testified that he was the union walkaround with inspector Mitchell on the November 13 inspection. He supported the inspector by characterizing the color

of the surface substance as dark gray at the point where the initials were etched. Mr. Moore, when asked what the color of the surface was in other areas, engaged in a long hesitation, then indicated that he would say "probably yes" that there was a sufficient darkness in the other areas. He pointed out that "everybody sees it different", and that two people looking at the same condition may not see the same thing.

As I have previously noted, the fundamental determination in this matter is whether or not an accumulation of float coal dust existed on the rock-dusted surface described by the inspector and that visual observation is the customary, if not only, means of making such a determination.

The inspector thought this violation had existed going back to November 7, 1979. However, the numerous witnesses presented by Consolidation Coal Company who examined the area on November 7, such as Frank Denjen, a section boss (November 7, 1979); Nathan Lipscomb, assistant mine foreman, who signed the fire boss report after an inspection on November 10 and who, incidentally, was a union employee; and Kurt Zachar, who examined the area on the evening of November 11, 1979, all indicated that, based on their visual examinations, there was no accumulation of float coal dust in the area. I interpret their testimony in various contexts to mean that they did not make the visual determination that the rock-dusted surface was coated with a dark gray or black substance. Ronald L. Davis, a certified fire boss, examined the area on November 12, 1979, from 10:40 to 11:08 p.m. and indicated that the color he saw was "light gray".

Their testimony, as well as that of Robert Cordwell, who made the examination on November 13, and the unanimous opinion of the other seven witnesses for the Respondent coal operator cannot all be discounted--in the sense that they would all be mistaken as to the color of the surface of the are in question. On the other hand, I felt that when Inspector Mitchell was testifying he was entirely credible and was the type of an individual whose testimony would ordinarily be received and credited. In resolving the conflict in testimony, in view of the overwhelming evidence presented by Consolidation Coal Company, I have no alternative but to reject the inspector's opinion as to the color of the substance in question. I do so, however, not on the basis of rejecting the inspector's testimony in the ordinary sense of credibility.

One explanation which was presented in the record as to how a mistake can be made in evaluating or gauging color was that the floor of the area in question was especially clean

and was of a particularly and unusually white color, the explanation following is that in measuring the contrast between the color of the surface and the color of the floor, a distanct contrast was present which was not typical and that because of the great disparity, the surface color of the roof and ribs would seem darker than if the same were viewed with a darker floor being present to contrast with it. This is a subject upon which reasonable men can differ. I found Respondent's witnesses to be emphatic and, for the most part, entirely credible. I also credit the version of the color presented by Respondent's witnesses because in some instances their testimony was somewhat more detailed than that of the inspector. In this case, the inspector made several mistakes on November 13, 1979, which are not helpful to the possibility of having the conflict resolved in his favor. It is quite significant that the citation filled out at the time did not mention the color or specify the color observed since that is the primary means by which an accumulation of float coal dust is determinable. Although the Commission has held that the absence of evidence with respect to depth or extent of accumulations is not fatal to the Government's case, Old Ben Coal Company, 2/ Docket No. VINC 75-180-P (October 24, 1980), here the question is not as to depth or extent but as to the quantity of the float coal dust which was present. To be of a sufficient quantity to constitute an accumulation, the color must appear to be black or dark gray. Thus, this

2/ In Old Ben Coal Company, supra, the Commission stated:

"We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials could cause or propagate a fire or explosion or what Congress intended to proscribe.

"Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present."

The Commission footnoted a reference to the above quotation to the effect that the validity of the inspector's judgment is subject to challenge before the administrative law judge. A bald reading of the first-quoted language would seem to indicate that the inspector's subjective opinion as to the presence of an accumulation and, as in this case, a conclusion which boils down to the color of the material characterized by the inspector would be binding. However, by its qualification that the inspector's opinion is subject to challenge before an administrative law judge, the Old Ben case I believe should be interpreted to indicate that (1) the inspector's opinion that an accumulation exists is subject to contradiction by witnesses called by the opposing party and (2) that in such event the resolution of the dispute must be made in accordance with the established legal standards, i.e., which party establishes its case by a preponderance of the evidence.

fundamental point of proof has not been established by the Government as part of its prima facie case, and I must conclude, therefore, that a violation of 30 C.F.R. § 75.400 did not occur.

Having concluded that Consolidation Coal Company did preponderate on the critical factual issue involved, I find no violation and Citation No. 0626780 is ordered vacated.

The relief requested in Consolidation's notice of contest is granted, and the remedy sought by the Secretary's petition for assessment of civil penalty is denied.

ORDER

(1) Citation No. 0626780 is VACATED.

(2) All proposed findings of fact and conclusions of law not expressly incorporated herein are REJECTED.

Michael A. Lasher, Jr., Judge

Distribution:

James P. Kilcoyne, Jr., and Sidney Salkin, Esqs., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

Samuel P. Skeen, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 20 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. KENT 80-297
v.	:	Assessment Control No. 15-09973-03007
WRIGHT COAL COMPANY, INC.,	:	No. 3 Mine
Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; David Wright, Dorton, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 26, 1980, a hearing in the above-entitled proceeding was held on December 10, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 81-93):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-297 on August 25, 1980, by the Secretary of Labor, seeking to have civil penalties assessed for four different alleged violations of the same mandatory health and safety standard, that is, 30 C.F.R. § 75.1710, by Wright Coal Company, Inc.
>
> The issues in a civil penalty case are whether violations of a mandatory safety standard occurred and, if so, what civil penalties should be assessed based on the six criteria set forth in section 110(i) of the Federal Coal Mine Health and Safety Act of 1977.
>
> I shall make some findings of fact on which my decision will be based, and those facts will be set forth in enumerated paragraphs.

1. The parties have stipulated that Wright Coal Company, Inc., is subject to the Federal Mine Safety and Health Act of 1977 and that I have jurisdiction to hear and decide this case. The Wright Coal Company operated, at the time the notices of violation were written in this case, a No. 3 Mine. The company is a small operator which produces approximately 30,000 tons of coal on an annual basis and employs 12 persons. The No. 3 Mine involved in this case is no longer in operation, having been closed in January of 1980, after all the coal reserves had been exhausted.

2. On October 6, 1977, inspector William E. L. Canada went to the No. 3 Mine and observed that none of the face equipment had installed on it a cab or a canopy, as required by section 75.1710. Therefore, he issued four notices of violaton covering each piece of equipment which did not have a canopy.

His Notice No. 1 WELC pertained to an S and S battery-powered scoop and his Notice No. 2 WELC pertained to another S and S battery-powered scoop of the same design. His Notice No. 3 WELC pertained to an Acme roof-bolting machine. His Notice No. 4 WELC related to a similar piece of equipment, that is, an Acme roof drill, but that piece of equipment had been converted by the operator so as to provide only for the drilling of coal at the face for the purpose of installing explosives for loosening the coal for production purposes.

All of the four notices were written on the same day. All of them were extended at various times, up until the time that the No. 3 Mine was abandoned by the operator, and the notices were all terminated on March 10, 1980, as shown in the subsequent action sheets which constitute page 7 of Exhibits 1, 2, 3, and 4 in this proceeding.

3. The notices were extended at various times, mostly on the basis of a letter which the operator had written in which he had described how he was planning to install canopies on the pieces of equipment. The extensions were not all granted by the same inspector who wrote the initial notices of violation because the first inspector was assigned other mines in the period between issuance of the inital notices and the time that they were finally terminated.

4. Since there were various inspectors involved from the time that the original notices were issued and the time that they were terminated, no inspector, particularly the one who issued the original notices, had any detailed knowledge of what actually happened at the No. 3 Mine.

5. The operator was represented in this proceeding by Mr. David Wright, who is vice president of Wright Coal Company, Inc. He had knowledge of what had been done in an effort for his company to comply with section 75.1710. That section provides in pertinent part that all self-propelled electric face equipment employed in active workings of each underground coal mine on and after January 1, 1973, will be equipped with substantially constructed canopies or cabs located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face or rib, or from rib and face rolls. That section also provided that the canopies should be installed depending upon the height of the coal seam in which the various mines happened to be operating at a given period of time.

On July 7, 1977, there was published in the Federal Register, 42 FR 34876, a notice indicating that the Secretary of the Interior, who was then responsible for promulgating regulations under the Federal Coal Mine Health and Safety Act of 1969, had suspended the requirements as to installation of canopies for coal mines in which the actual height from the bottom to the top was less than 42 inches. Therefore, at the time the notices of violation involved in this proceeding were written, canopies were not required if the coal height was less than 42 inches.

6. Inspector Canada, at the time he wrote the four notices of violation involved in this proceeding, made measurements in the face area and he stated that the lowest measurement he made was 43 inches and the highest measurement was more than 50 inches, and that the average height in the area, as he calculated it, was 48 inches. The operator's witness in this proceeding, Mr. David Wright, stated that he agreed that the measurements made by Inspector Canada existed on October 6, 1977, but he said that the coal height was frequently 39 inches and that he encountered low coal on a very erratic basis.

7. Mr. David Wright gave testimony concerning the conditions that existed with respect to each of the pieces of equipment which were cited in the notices written by Inspector Canada. The circumstances with respect to the S and S scoops, cited in both Notice Nos. 1 and 2, were identical, because both S and S scoops have the same basic design and the ability of their being adapted for the use of canopies and low coal is identical for each piece of equipment.

Mr. Wright stated that he already had in his possession canopies for the S and S scoops at the time the notices of

violation were written. He had been unable to use those canopies, but in an effort to comply with the standard cited in the notices, he had the canopies reinstalled and had present at the time that the scoops were taken into the mine a Federal inspector, a State inspector and a UMWA representative.

When the scoops reached a point in his mine where a crossbar measuring 3 inches thick, 8 inches wide, and 16 feet long was encountered, the State inspector indicated that the canopy would not clear that crossbar and consequently the State inspector ordered Mr. Wright to have the canopy removed from the S and S scoops which were taken outside the mine for that purpose.

Mr. Wright says that the Federal inspector, who was a supervisory inspector named Smith, whose first name is not known, did not object to removal of the canopies. The Union representative suggested that the canopies be modified. Mr. Wright had 8 inches cut from the legs of a canopy and had it reinstalled. At that time, the operator of the scoop stated that he would not operate it with the canopy on it because of the discomfort and difficulty of trying to operate the scoop while under the low canopy. Therefore, the canopies were removed from the S and S scoops and they were continued to be used in the coal mine from 1977 until 1980 when the mine was closed.

8. The Acme roof-bolting machine cited in Notice No. 3 WELC, or Exhibit 3 in this proceeding, was of a design for which the Acme Company had no canopy or cab. Mr. Wright, in an effort to obtain a canopy for the Acme roof-bolting machine, contacted a firm or person named Reo Johns of Wheelwright, Kentucky, who stated that he could make a satisfactory canopy for the Acme roof-bolting machine. Such a canopy was made and was brought to the mine and installed, but Mr. Wright was unable to get the Acme roof-bolting machine into the mine with that canopy on it. Therefore, that roof-bolting machine was continued to be operated until 1980 without any canopy on it.

9. The conditions with respect to the piece of equipment cited in Notice No. 4 WELC, which is Exhibit 4 in this proceeding, are similar to the conditions with respect to the Acme roof-bolting machine. The difference between the two pieces of equipment is that the Acme coal drill was adapted from an Acme roof drill, and the adaptation involved the installation of some hydraulic hoses 25 feet long, so that the hydraulic system on the roof-bolting machine could be used for the purpose of operating a hand-held drill in the face area.

The person who operated the drill was, of course, a considerable distance from the piece of equipment on which a canopy would exist. Mr. Wright explained that it would be impossible for the person who was drilling coal at the face to be under a canopy installed on the roof drill or piece of equipment providing the hydraulic power, even if the canopy did exist. Despite the fact that the canopy would have no practical use underground, Mr. Wright did purchase from Reo Johns a similar canopy, which he would have used if he could have gotten it underground.

I believe that those facts cover the essential points in this proceeding.

The former Board of Mine Operations Appeals held in Buffalo Mining Company, 2 IBMA 226, 259 (1973), Associated Drilling, Inc., 3 IBMA 164, 173 (1974), and in Itmann Coal Company, 4 IBMA 61 (1975), that if materials needed for abatement of a given violation were unavailable, no notice of violation should be written. I believe that the findings of fact that I have given in this proceeding show that the materials needed to comply with section 75.1710 were unavailable in 1977 when the notices of violation were written.

I believe that the testimony of Mr. Wright, which is uncontroverted, supports a finding that he had already obtained canopies for the S and S scoops before the notices were written and that he made every effort to use the canopies after the notices were written, but it was impossible for him to do so. Therefore, I find that the notices of violation should not have been written in this case because the required equipment was impossible for Mr. Wright to obtain at that time.

Mr. Drumming, for the Secretary of Labor, has made a very pertinent observation in that he indicated that Mr. Wright would apparently continue to operate in the same way that he did from 1977 to 1980 without canopies in a given mine if the coal height should happen to be the same as those encountered in the No. 3 Mine. I believe that the answer to that objection is that if equipment continues to be unavailable for the low coal in which Mr. Wright was operating, then I would assume that Mr. Wright would have to continue to operate without canopies.

We should bear in mind the fact that Mr. Wright explained that the canopies have to be raised about 2 feet above the height of the equipment in order to install them. Consequently, if a person is operating in low coal running from below 42 inches to slightly above 42 inches, there

would be times when a measurement taken in the working face would indicate that canopies should be installed because the actual height would be greater than 42 inches.

But the canopies cannot be put on in coal which is only slightly above 42 inches because the height of the mine does not permit it. In this instance, Mr. Wright has shown, and his testimony supports the fact that if he goes outside with the piece of equipment and installs the canopy, then in his particular mine, he could not get back in with the canopy installed because he would encounter areas below the height of the canopy as installed on the given piece of equipment.

In such mines, I would assume that when the Secretary suspended the requirement of canopies in coal under 42 inches, that he took into consideration that the technology did not exist at that time, and probably does not exist at this time, to have canopies on every piece of equipment all the time.

So while I agree with Mr. Drumming that the possibility of noncompliance is unfortunate, I think that those periods of noncompliance will simply have to take into consideration the technology that exists at a given period in time.

For example, there undoubtedly are mines operating right now in coal heights well below 42 inches in which no canopies are required because the Secretary has suspended canopies for those low coal heights. Yet, the miners who operate equipment in those low coal mines are exposed to the same kind of possible roof falls and injuries that would otherwise exist in the higher coal mines where canopies can be used to offset the danger of possible roof falls. So what we have here is simply a matter of technology, and the fact that it may well be possible that by the time the manufacturers have experimented over the next few years, that they will be able to construct equipment which can operate with canopies in heights lower than 42 inches without difficulty.

But the point of my decision in this case is that these notices of violation were written in October of 1977, and at that time Mr. Wright did not have access to manufacturers who could provide the kind of equipment that was needed to operate in the coal heights that he experienced.

If, at any time between October 6, 1977, when the notices were written, and March 10, 1980, when they were terminated, MSHA had determined that the technology existed for construction and installation of canopies adaptable to the equipment in respondent's mine, MSHA could have issued withdrawal orders compelling respondent to use canopies. The fact that extensions for

compliance were repeatedly issued for a period of over 2 years shows that MSHA recognized the nonexistence of the technology required for installation of canopies on the S and S scoops and Acme roof-bolting machines here involved.

WHEREFORE, for the reasons given above, it is ordered:

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-297 on August 25, 1980, is dismissed.

Richard C. Steffey

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

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Wright Coal Company, Inc., Attention: David Wright, Vice President, Box 140, Dorton, KY 41520 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 20 1981

SOUTH EAST COAL COMPANY,	:	Contest of Citation
Contestant	:	
v.	:	Docket No. KENT 80-327-R
	:	Citation No. 720881
SECRETARY OF LABOR,	:	June 18, 1980
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	No. 8 Mine
Respondent	:	

DECISION

Appearances: James W. Craft, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for Contestant;
George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order issued September 26, 1980, a hearing in the above-entitled proceeding was held on December 9, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 77-86):

> This hearing involves a filing by South East Coal Company on August 4, 1980, of a Petition for Review or Notice of Contest of Citation No. 720881 dated June 18, 1980, alleging a violation of 30 C.F.R. § 75.312. I have consolidated with this case the civil penalty issues that will be raised in the event that the Secretary of Labor files a Petition for Assessment of Civil Penalty with respect to the violation alleged in Citation No. 720881. If my decision is issued in final form prior to a receipt of such a Petition from the Secretary of Labor, I shall sever the civil penalty issues from the decision and the decision on the civil penalty aspect of the case will be issued at a subsequent time after I have received the Petition. It will, however, be decided on the basis of the record we have made here today without any additional hearing being provided for.

I shall make some findings of fact on which this decision will be based. Some of those findings of fact were the subject of stipulations entered into by the parties. The findings of fact will be given in numerical paragraphs.

1. South East Coal Company is subject to the Federal Mine Safety and Health Act of 1977. South East Coal Company is subject to the Commission's jurisdiction and to my jurisdiction for the purposes of deciding this case.

2. South East Coal Company operates a No. 8 Mine which produces on an annual basis approximately 60,000 tons of coal and has approximately 25 employees. South East Coal Company, on a company-wide basis, produces about 950,000 tons of coal annually and has approximately 600 employees. On the basis of such data, I find that South East Coal Company is a large operator.

3. From the standpoint of the history of previous violations, the stipulation of the parties indicates that South East Coal Company has not previously violated section 75.312.

4. Inspector Carlos P. Smith was asked to make a spot inspection of the No. 8 Mine of South East Coal Company on the afternoon of June 18, 1980. When he arrived at the No. 8 Mine, he went underground and met the crew that was then working, coming out of the mine because they had determined that no further work could be done until some additional equipment was obtained for the coal drill. The inspector was accompanied by another inspector at the time and they both went back out on the surface with the crew which was coming out of the mine. After the inspector had examined the books of the company, he went back underground for the second time to make his examination. He was accompanied on his inspection by Mr. Charles Holbrook, who worked for the company.

5. Inspector Smith's investigation was directed to a complaint MSHA had received by telephone. The complaint expressed a fear that the miners in the active workings of the mine might cut into an abandoned area and be exposed to possible hazards such as accumulations of water.

Inspector Smith went to an area of the mine which is shown on Exhibit 2 as being Survey Station No. A568 which is the same area shown in Exhibit 3. In that area, especially as shown on Exhibit 3, Inspector Smith found that three openings had been cut into an adjoining abandoned mine formerly owned by the Smith-Elkhorn Coal Company. Inspector Smith made a check of the air coming from the abandoned areas and he found that in two of the entries, the air was being

properly directed into a bleeder system and was going out of the mine, but as to the air in entry No. 1, Inspector Smith used smoke tubes to check the air, and he found by releasing successive amounts of smoke that the air was traveling down the No. 1 entry and into the No. 2 entry which was an active working place.

6. Inspector Smith, on the basis of his use of the smoke tubes, wrote Citation No. 720881 dated June 18, 1980, at 6 p.m., citing a violation of section 75.312 and describing the condition or practice observed as follows: "A substantial movement of air was detected using chemical smoke coming from the old abandoned Smith-Elkhorn Mine and this air was being coursed directly to the active working places of the 001-0 working section."

7. After Inspector Smith had indicated that the air from the abandoned mine was traveling to the working place, the representative of South East Coal Company, Mr. Holbrook, hung a curtain in the No. 1 entry at a point which would have kept the air from the abandoned mine from going into the working section, but Inspector Smith believed that a temporary curtain would not be substantial enough to satisfy the purposes of the Act in assuring that no air from the abandoned section came into the working place. Therefore, he concluded that the hanging of the curtain was not a sufficient act to abate the citation on a permanent basis.

8. The next day, an inspector by the name of Cecil Davis came to the mine because Inspector Smith had a different obligation on the next day. At that time, Inspector Davis wrote an extension of time on the basis that temporary seals had been constructed and that new ventilation proposals were being submitted by the company. The record does not show that Citation No. 720881 has been abated and Inspector Smith was unable to state today what the ultimate outcome of the effort to submit new ventilation plans had been.

9. The evidence submitted by South East Coal Company consists of two exhibits, A and B, taken from the preshift mine examiners' report and the primary purpose for submitting those two exhibits is that Exhibit A indicates that a volume of air of 20,000 cubic feet per minute was being delivered to the working place on June 18, 1980, when the last preshift examination was made. Inspector Smith did not take any readings with the use of anemometer at the time he wrote his citation on June 18, 1980, and Inspector Smith stated that he had no reason to doubt that a volume of 20,000 cubic feet per minute of air was flowing into the working place. Inspector Smith also testified that he had no reason to believe

other than that the fresh air going onto the section constituted the major portion of the air which was actually reaching the working face. In other words, there was a large amount of fresh air going into the working section at the same time some air from the abandoned area was being merged with the fresh air, or intake air, coming into the section.

10. Inspector Smith was unable to find or detect any methane in the air with a methane detector and his flame safety lamp indicated that oxygen was adequate in the air that was coming from the abandoned section. Inspector Smith took some samples of the air coming from the abandoned section and the analyses of those samples also indicated that the air did not contain methane and that the air was composed of a normal and adequate amount of oxygen.

I believe that those 10 findings of fact are sufficient for writing the decision in this case.

The issue, of course, is whether there was a violation of section 75.312. That section reads in pertinent part: "Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine." Counsel for the Secretary has argued that there can be no doubt but that there was a violation because the inspector's testimony is uncontroverted in the sense that he definitely was able to trace the air from the abandoned section or mine into the working section, which was in the No. 2 entry at that time.

Counsel for South East Coal Company, on the other hand, has taken the position that while there may have been some air from the abandoned section which was reaching the working place, that the amount of intake air being transmitted to the working face, as shown by Exhibit A, was 20,000 cubic feet per minute, and therefore would have been great in volume and able to carry away any toxic materials or methane which might have existed. Consequently, his conclusion is that it cannot be said that the air from the abandoned area was being used to ventilate the working place.

The finding of the violation of section 75.312 then turns on an interpretation of what the section means when it refers to the provision that air from an abandoned area shall not be used to ventilate any working place. I have had several cases involving this section and the first time that I ever considered that phrase, I had the same misgivings about it that counsel for South East has emphasized in this proceeding, because if you read that phrase all by itself, it sounds as if a company would have to be deliberately using

air from an abandoned area, and be consciously using it, to ventilate a working section, when as a matter of fact, the evidence in this case indicates that some air from the abandoned area was getting into the working place, but that the company was endeavoring to ventilate the working section, and was ventilating the working section, with a large amount of intake air, which the inspector agreed was much greater than the amount of air that was getting onto the section from the abandoned area.

It is possible that section 75.312 should have employed words similar to those which were used by Inspector Smith when he wrote Citation No. 720881, because in his citation, Inspector Smith refers to the air from the abandoned section as being coursed directly to the active working place, and I think that that would have been a better way to have expressed what was happening in this instance, but if you think about that phrase for awhile, I think that the words used in section 75.312 should be interpreted to mean that if air coming from an abandoned area is going into or being coursed into a working area, that becomes equivalent to using the air to ventilate, because the air does get there and it does have the effect of either ventilating or causing a problem, depending on what substances are being carried in the air from the abandoned area.

The fact that Mr. Holbrook was able to hang a curtain which had the effect of preventing the air from the abandoned section from going into the working face shows that the company failed to take an action which it could have taken to assure that no air from the abandoned area would get into a working place, so the failure of the company to prevent the air from the abandoned area from getting into the working place made it possible for air from the abandoned area to be used in the working place, even though the company did not set out to ventilate its mine in that manner whatsoever. Of course, the regulations and the Act are directed toward providing as safe working conditions as it is possible to provide, so I interpret this section as meaning that air from an abandoned area cannot be permitted to go into an area where the men are working, and if a company fails to prevent such air from going into such a working place, then the equivalent effect is that the air from the abandoned area is being used to ventilate.

From the standpoint of the civil penalty case, which may ultimately be before me, it is obvious that in this instance, no adverse effects on the miners would have occurred because the air from the abandoned mine contained no methane and did contain an adequate amount of oxygen.

For the reasons that I have just explained, I find that a violation of section 75.312 was proven.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed on August 4, 1980, in Docket No. KENT 80-327-R is denied and Citation No. 720881 dated June 18, 1980, is affirmed.

(B) The civil penalty issues with respect to the violation of section 75.312 are severed from this proceeding and will be decided in a separate decision when and if a case is assigned to me in the future involving a Petition for Assessment of Civil Penalty in which the Secretary of Labor seeks to have a civil penalty assessed for the violation of section 75.312 alleged in Citation No. 720881.

Richard C. Steffey

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

Distribution:

James W. Craft, Esq., Attorney for South East Coal Company, Polly, Craft, Asher & Smallwood, 7-10 Bank Building, P.O. Box 786, Whitesburg, KY 41858 (Certified Mail)

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 79-336
Petitioner	:	A/O No. 15-02129-03053 V
v.	:	
	:	Hamilton No. 1 Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; William K. Bodell II, Esq., Island Creek Coal Company, Lexington, Kentucky, for Respondent.

Before: Judge Cook

I. Procedural Background

On October 9, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act), alleging violations of two provisions of the Code of Federal Regulations. On October 25, 1979, an answer was filed by Island Creek Coal Company (Respondent). 1/

Pursuant to a notice of hearing issued on March 7, 1980, and an amended notice of hearing issued on April 17, 1980, the hearing was held on June 26, 1980, in Evansville, Indiana, with representatives of both parties present and participating. Following the presentation of evidence, a schedule was

1/ Respondent's prayer for relief requested the Judge to vacate the withdrawal orders, and Respondent has reasserted the request in its posthearing brief. It is well established that the validity of the issuance of a withdrawal order is not at issue in a civil penalty proceeding. Pontiki Coal Company, 1 FMSHRC 1476, 1 BNA MSHC 2208, 1979 CCH OSHD par. 23,979 (1979); Jewell Ridge Coal Corporation, 3 IBMA 376, 81 I.D. 624, 1974-1975 CCH OSHD par. 18,901 (1974); Coal Processing Corporation, 2 IBMA 336, 342, 80 I.D. 748, 1973-1974 CCH OSHD par. 17,978 (1978); Eastern Associated Coal Corporation, 1 IBMA 233, 236, 79 I.D. 723, 1972-1973 CCH OSHD par. 15,388 (1972).

set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. Additionally, the parties were instructed to file a stipulation on or before July 10, 1980, setting forth Respondent's size in terms of total tons of coal produced annually.

On July 14, 1980, Petitioner filed a motion requesting that the tonnage report attached thereto be used to verify the size of Respondent's business in view of the fact that the report was not available at the time of the hearing. No response or objection to the receipt of the report in evidence was filed by Respondent. Therefore, on August 6, 1980, an order was issued marking the report as Exhibit M-7 and receiving it in evidence.

Petitioner and Respondent filed posthearing briefs on September 12, 1980, and September 22, 1980, respectively. Neither party filed a reply brief.

II. Violations Charged

Order No.	Date	30 C.F.R. Standard
796000	March 22, 1979	75.1303
796081	April 12, 1979	75.518

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witnesses Jesse O. Allen, a section foreman at the subject mine on April 12, 1979, but unemployed at the time of the hearing; Dennis M. Padgett, an underground unit mechanic at the subject mine; and Charles F. Clark, a Federal mine inspector (electrical).

Respondent called as its witnesses Ben F. Brinkley, maintenance superintendent of Respondent's River Division; Harold M. Gamblin, Sr., assistant superintendent of the subject mine; and Raymond Ashby, director of safety for Respondent's West Kentucky Division.

Additionally, both Petitioner and Respondent called Federal mine inspector Ronald L. Goldsberry as a witness.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout from the Directorate of Assessments listing the history of previous violations at Respondent's Hamilton No. 1 Mine for which assessments have been paid, beginning April 13, 1977, and ending April 12, 1979.

M-2 is a copy of Order No. 796081, April 12, 1979, 30 C.F.R § 75.518, and a copy of the termination thereof.

M-3 and M-4 are copies of the inspector's statements pertaining to Order No. 796081, April 12, 1979, 30 C.F.R. § 75.518.

M-5 is a copy of Order No. 796000, March 22, 1979, 30 C.F.R. § 75.1303, and a copy of a modification thereof.

M-6 is a copy of the termination of Order No. 796000, March 22, 1979, 30 C.F.R. § 75.1303.

M-7 is a report showing the size of Respondent's business in terms of tons of coal produced annually.

2. Respondent introduced the following exhibits in evidence:

O-1 is an electrical diagram for a 750 KVA nitrogen filled, wheel mounted transformer.

O-2 is a copy of the maintenance request dated April 11, 1979, submitted by Jesse O. Allen.

O-3 is a copy of a report dated April 12, 1979.

3. The following exhibits contain reproductions of various drawings made on the blackboard by various witnesses during the course of their testimony as relates to Order No. 796081, April 12, 1979, 30 C.F.R. § 75.518:

X-1 contains the reproductions of the drawings made by Inspector Goldsberry (No. 1) and Inspector Clark (No. 2).

X-2 contains the reproduction of the drawing made by Mr. Brinkley.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory health or safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Administrative Law Judge has jurisdiction in this proceeding (Tr. 11-12).

2. Federal mine inspector Ronald L. Goldsberry was a duly authorized representative of the Secretary of Labor when the subject orders were issued (Tr. 11).

3. The assessment of civil penalties in this proceeding will not affect Respondent's ability to remain in business (Tr. 12).

4. Respondent is a large operator (Tr. 12).

5. Respondent is operating in interstate commerce (Tr. 12).

6. The size of Respondent's West Kentucky Division is rated at 4,399,525 tons of coal per year (Tr. 365).

B. Order No. 796000, March 22, 1979, 30 C.F.R. § 75.1303

Occurrence of Violation

Federal mine inspector Ronald L. Goldsberry visited Respondent's Hamilton No. 1 Mine on March 22, 1979, as part of his regular inspection (Tr. 288). After completing his preliminary duties on the surface, he proceeded underground accompanied by Mr. Elroy Mills, his supervisor, Mr. Everett Miller, the union representative, and Mr. Harold M. Gamblin, Sr., the assistant superintendent of the mine (Tr. 289-290). Inspector Goldsberry issued Order No. 796000 at approximately 9:45 a.m. citing Respondent for a practice in violation of mandatory safety standard 30 C.F.R. § 75.1303 in that: "[p]ermissible explosives were not being used in a permissible manner in Nos. 1 through 6 entries on No. 9 Unit, ID070, South off 3 west in that there were [sic] evidence that the explosives had been detonated on solid. The drill holes were drilled from 10 to 40 inches deeper than the faces were undercut" (Exh. M-5). Throughout the hearing, the practice of detonating explosives on solid was referred to as "shooting on solid," and will be so referenced throughout this decision.

The use of explosives is an integral part of the coal mining method known as conventional mining. Conventional mining is defined as the "cycle of operations which includes cutting the coal, drilling the shot holes, charging and shooting the holes, loading the broken coal, and installing roof support." Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at p. 259. According to Inspector Goldsberry, shooting on solid occurs when the shot holes are drilled deeper than the undercut (Tr. 293-294). An individual who has accidentally drilled past the undercut can prevent shooting on solid by putting some stemming in the shot hole to bring the explosive out to the outby end of the undercut (Tr. 310). The inspector testified that shooting on solid is not permitted without a permit (Tr. 299), and that Respondent does not have a permit authorizing it to shoot on solid (Tr. 300).

The inspector did not observe the actual drilling, undercutting and blasting operations (Tr. 300). Rather, his determination that shooting on solid had occurred was based upon a series of measurements and visual observations. His testimony, as set forth below, establishes by a preponderance of the evidence that shooting on solid had occurred in the Nos. 2, 3, 4 and 5 entries. 2/

The inspector's opinion as an expert that shooting on solid had occurred in these four entries is entitled to great weight in view of his extensive experience in coal mining. It is important to bear in mind that the inspector had shot on solid in the 1940's (Tr. 299). It can therefore be concluded that his familiarity with shooting on solid, based on his own first hand experience, enabled him to properly identify the physical evidence produced when one engages in such practice.

The inspector's testimony as relates to blasting practices in general indicates the following: Proper blasting procedures entail drilling and undercutting to the proper depth. Additionally, proper blasting procedures envision having an 18 inch burden in all directions, if the height of the coal permits (see, e.g., Tr. 300-301). If these procedures are employed, the new face will occur at the end of the cut after the shots are fired (Tr. 306). Failure to provide the 18-inch burden in all directions will result in the presence of overhangs (Tr. 300-301). If the shot holes are drilled deeper than the undercut, the extent of the overdrilling will be present on the new face (Tr. 307). The presence of mushroomed shot holes on the face would indicate that such holes had been drilled on solid (Tr. 306-307). A mushroomed shot hole is one whose diameter is largest on the outside, i.e., largest where the face is broken off even with the cut (Tr. 300-304).

In the instant case, the inspector examined the shot holes in the face of the Nos. 2, 3, 4 and 5 entries. The holes were mushroomed and penetrated

---

2/ The evidence is insufficient to support the allegation that shooting on solid had occurred in the Nos. 1 and 6 entries. The inspector's testimony indicates that no evidence of shooting on solid was found in the No. 1 entry (See, e.g., Tr. 297). Additionally, the inspector's testimony indicates that he was unable to take measurements or make observations in the face area of the No. 6 entry because the area was not bolted and the face was too far away to see (Tr. 309).

The inspector did, however, testify that evidence of shooting on solid was observed in a crosscut off the No. 6 entry (Tr. 309-310). It is significant to note that the order addresses only the entries, and not this crosscut. It is even more significant to note that Petitioner's brief is confined to a consideration of the conditions existing in the Nos. 2, 3, 4 and 5 entries of the No. 9 Unit, and makes no reference to conditions existing in the crosscut off the No. 6 entry. Accordingly, it must be concluded either that the crosscut is not encompassed by the order or that Petitioner has abandoned any attempt to include the crosscut within the scope of the order.

deeper than the face of the coal (Tr. 300-304). Measurements were taken which revealed the following: In the No. 2 entry, the left side hole was 16 inches deeper than the undercut, and the left center hole was 22 inches deeper than the undercut (Tr. 303-304). In the No. 3 entry, the left center hole was 18 inches deeper than the undercut, the left side hole was 20 inches deeper than the undercut, the right center hole was 23 inches deeper than the undercut, and the right side hole was 36 inches deeper than the undercut (Tr. 305). In the No. 4 entry, the left center hole was 22 inches deeper than the undercut, the left center hole was 30 inches deeper than the undercut, the right side hole was 36 inches deeper than the undercut, and the right center hole was 18 inches deeper than the undercut (Tr. 307). In the No. 5 entry, the drill holes on the right rib were 31 inches deeper than the undercut, the left center hole was 22 inches deeper than the undercut, and the left rib was 43 inches deeper than the undercut (Tr. 309).

In view of the foregoing, it is found that shooting on solid had occurred in the Nos. 2, 3, 4 and 5 entries as alleged in the order of withdrawal. 3/ The testimony of Mr. Raymond Ashby, director of safety for Respondent's West Kentucky Division, is insufficient to rebut the inspector's opinion as an expert that shooting on solid had occurred.

The principal question presented is whether shooting on solid constitutes a failure to use permissible explosives in a permissble manner in violation of mandatory safety standard 30 C.F.R. § 75.1303. Petitioner contends that Part 15 of Title 30 of the Code of Federal Regulations expressly states that the practice at issue is a failure to use permissible explosives in a permissible manner. (Petitioner's Posthearing Brief, pps. 8-9). Respondent's position as relates to Part 15 of Title 30 is phrased in terms of adequacy of notice (Respondent's Posthearing Brief). An analysis of the relevant provisions of Part 15 and Part 75 of Title 30 reveals the following:

Mandatory safety standard 30 C.F.R. 75.1303 is a verbatim restatement in the Code of Federal Regulations of section 313(c) of the Federal Coal Mine

3/ The inspector appeared to indicate at one point in his testimony that the presence of overhangs was an indication that shooting on solid had occurred (Tr. 300-301). However, the presence of overhangs is not deemed a probative indication of shooting on solid, although it may point to other improper blasting practices. The inspector's testimony indicates that the overhang condition could have been caused by drilling the shot holes without allowing for the 18-inch burden, i.e., by drilling the shot holes in the wrong location as opposed to drilling the shot holes to an excessive depth (Tr. 300-301, 309). Therefore, the presence of overhangs is not necessarily indicative of shooting on solid.

This determination does not affect the issue of whether shooting on solid occurred. The inspector's testimony points to the presence of an overhang in the No. 4 entry, but not in the Nos. 2, 3 and 5 entires. The characteristics of the shot holes in the four entries establish that shooting on solid occurred.

Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act). The standard provides, in part, as follows:

> Except as provided in this section, in all underground areas of a coal mine only permissible explosives, electric detonators of proper strength, and permissible blasting devices shall be used and all explosives and blasting devices shall be used in a permissible manner.

For the purpose of Part 75 of Title 30, the term "permissible" as applied to explosives, shot-firing units, or blasting devices used in a coal mine refers to explosives, shot-firing units or blasting devices which meet specifications which are prescribed by the Secretary, 30 C.F.R. § 75.2(c)(2), and as applied to the manner of use of equipment or explosives, shot-firing units, and blasting devices, means the manner of use prescribed by the Secretary. 30 C.F.R § 75.2(c)(3). Part 75 of Title 30 does not contain a provision characterizing shooting on solid as a failure to use permissible explosives in a permissible manner, and does not contain a cross reference to any provision of the Code of Federal Regulations containing such a characterization. However, Part 15 of Title 30 contains a permissibility section specifically addressing explosives, and Petitioner points to the provisions of such part as containing the Secretary's determination that shooting on solid is an impermissible blasting practice.

Part 15 of Title 30 bears the heading "Explosives and Related Articles." The regulations in Part 15 of Title 30 "state the requirements for certification of explosives as permissible for use in underground coal mines; provides standards for the examination of explosives previously certified to check conformance to their basic specifications; and provide for miscellaneous tests not leading to certification." 30 C.F.R. § 15.1. "An explosive certified as permissible under [Part 15] is permissible in use so long as it meets" five enumerated requirements. 30 C.F.R. § 15.19. One of the five requirements mandates that the explosive be "in all other respects used in conformance with the regulations specified in the most recent edition of the applicable Federal Mine Safety Code." 30 C.F.R. § 15.19(e). The following provision is set forth immediately after 30 C.F.R. § 15.24:

> Section 15.19 of Part 15 deals with the use of permissible explosives, and paragraph (e) of that section incorporates the "regulations specified in the most recent edition of the applicable Federal Mine Safety Code." Except for provisions which impose requirements now expressly dealt with in, or which are inconsistent with, the Federal Coal Mine Health and Safety Act of 1969, these regulations are as follows:

Blasting practices in bituminous coal and lignite underground mines are addressed immediately following this passage. Article IV, section 5, paragraph 3 thereof states that "[w]here the coal is cut, shots shall not be fired if the blast hole is drilled beyond the limits of the cut."

Respondent challenges all references to Part 15 of Title 30 on both substantive and procedural grounds. Both grounds are phased in terms of adequacy of notice.

Respondent correctly observes that neither the order of withdrawal issued by the inspector nor the pleadings filed by Petitioner makes reference to the provisions of Part 15 of Title 30 as forming a basis for the charge that shooting on solid is an impermissible blasting practice within the meaning of 30 C.F.R. § 75.1303. Additionally, Respondent argues that it was not informed by Petitioner, in any manner, prior to the hearing that the provisions of Part 15 of Title 30 were involved in this proceeding. Accordingly, Respondent argues that such actions on Petitioner's part are wholly unacceptable and improper for two reasons.

First, Respondent argues from a substantive standpoint that Part 75 of Title 30 contains all of the mandatory safety standards applicable to underground coal mines, as reflected by its heading. Therefore, Respondent argues that any definition of or criteria for permissible use of explosives in underground coal mines should be set forth in Part 75 of Title 30, not in Part 15 of Title 30, or, in the alternative, that 30 C.F.R. § 75.1303 should contain an appropriate cross reference to the appropriate provisions of Part 15 of Title 30. However, Respondent does not cite any authority in support of this position. Second, Respondent asserts from a procedural standpoint that Petitioner failed to give it proper and timely notice prior to the hearing of the standard Respondent is alleged to have violated. In support of its position, Respondent cites the decisions of the Interior Board of Mine Operations Appeals (Board) in Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 CCH OSHD par. 19,723 (1975); and Eastern Associated Coal Corporation, 1 IBMA 233, 79 I.D. 723, 1971-1973 CCH OSHD par. 15,388 (1972); and the provisions of section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. § 554(b)(3) (1978).

I disagree with Respondent's position for two reasons. First, the relevant provisions of Part 15 of Title 30 were duly published in the Federal Register on March 31, 1970, see 35 Fed. Reg. 5335-5339 (1970), and, accordingly, Respondent must be charged with constructive notice thereof. It is a well settled principle of law that the publication of regulations in the Federal Register gives legal notice of their contents to all who may be affected thereby. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385, 68 S. Ct. 1, 92 L.Ed. 10 (1947); Wolfson v. United States, 492 F.2d 1386, 1392 (Ct. Cl. 1974); Federal Register Act of 1935, 44 U.S.C. § 1507 (1978). Accordingly, it must be concluded that Respondent had legal notice that shooting on solid was a failure to use permissible explosives in a permissible manner.

It should also be noted that 30 C.F.R. § 15.14 sets forth, amongst other things, certain requirements for the packaging of permissible explosives. Paragraph (d) of 30 C.F.R. § 15.14 provides that the Applicant for a certificate of approval for permissiblity "must warn the user by means of a case-insert that the explosive is permissible only when used in conformance with

MSHA's requirements (§ 15.19)." Thus, the purchaser of the explosives is to be notified of these requirements with a reference to 30 C.F.R. § 15.19 which incorporates the specific requirement involved in this case.

Second, Respondent was timely informed of the matters of fact and law asserted in this case as required by section 5(b)(3) of the Administrative Procedure Act. Adequate notice is necessary to enable the mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." 4 IBMA 198 at 208. In a civil penalty proceeding, notice is adequate, even though it does not specify the particular section of the 1977 Mine Act or mandatory safety standard violated, if the alleged violation is described with sufficient specificity to permit abatement. At the stage where the operator is charged with a violation of law in a civil penalty proceeding, it is entitled to adequate and timely notice of the section of the 1977 Mine Act or mandatory safety standard involved so as to permit preparation of a timely and adequate defense. Old Ben Coal Company, supra; Eastern Associated Coal Corporation, supra. In determining whether adequate notice has been given, the inquiry need not be confined to the four corners of the citation or order. It is appropriate to consider other oral and written communications given to the operator. Jim Walters Resources, Inc., 1 FMSHRC 1827, 1 BNA MSHC 2233, 1979 CCH OSHD par. 24,046 (1979).

The subject withdrawal order alleged that shooting on solid had occurred in the Nos. 1 through 6 entries on the No. 9 Unit, South off 3 west, in violation of the requirement set forth in mandatory safety standard 30 C.F.R. § 75.1303 that permissible explosives be used in a permissible manner. The fact that neither the withdrawal order issued by the inspector nor the pleadings filed herein reference the provisions of Part 15 of Title 30 does not amount to a failure to give due notice of the violation charged. As noted previously in this decision, Respondent is charged with constructive knowledge of the Secretary's determination that shooting on solid is an impermissible blasting practice based upon the publication of such determination in the Federal Register.

In view of the foregoing, I conclude that shooting on solid constitutes a failure to use permissible explosives in a permissible manner and, accordingly, is a violation of mandatory safety standard 30 C.F.R. § 75.1303.

Negligence of the Operator

The best available evidence indicates that one cutting machine was used on the unit. At the time of the inspection, it was located in the No. 2 entry (Tr. 301, 304). There was nothing on the cutter machine that could have been used to measure the depth or angle of the shot holes (Tr. 321). Although the No. 1 entry had been drilled and undercut and water tamping dummies had been placed in each of the shot holes (Tr. 291), there is no probative evidence in the record that water-tamping dummies were present or had been used in the Nos. 2, 3, 4 and 5 entries. The fact that shooting on solid

had occurred in those four entries, as evidenced by the mushroomed shot holes, clearly indicates that water-tamping dummies had not been used. (See, e.g., Tr. 322-323).

The fact that the practice was extensive enough to encompass four entries indicates that it occurred over a sufficient period of time to have been detected by Respondent's supervisory personnel. Accordingly, Respondent knew or should have known of the practice. Ordinary negligence has been established by a preponderance of the evidence.

Gravity of the Violation

The inspector characterized the violation as a dangerous one because any number of accidents and fatalities can occur as a result of drilling on solid (Tr. 315). Although his testimony does not supply an exhaustive catalog of the types of occurrences and injuries that could reasonably be anticipated as a result of the cited practice, it appears that a methane ignition could occur as a result of shooting on solid (Tr. 315). However, his testimony indicates that no appreciable quantity of methane was detected on the No. 9 Unit (Tr. 325). Additionally, no testimony was elicited from the inspector as to the probability of occurrence or as to the number of persons who would have been affected by an occurrence.

Mr. Raymond Ashby, director of safety for Respondent's West Kentucky Division, approached shooting on solid principally from the standpoint of its effect on efficient production. According to Mr. Ashby, shooting on solid is not a good production practice because it causes more coal to fly down the room or entry, adversely affects coal preparation, makes the resulting face very erratic and unsquare, and makes the face much more difficult to prepare during the next mining cycle (Tr. 355-356). However, he testified that "the coal would have to be loosened in the face as such that it might be somewhat of a hazard to the shot firer the next time he went to tamp it up" (Tr. 356). Additionally, he conceded at an earlier point in his testimony that shooting on solid does not create the most ideal situation from a safety standpoint (Tr. 339).

In view of the foregoing, it is found that the violation was serious.

Good Faith in Attempting Rapid Abatement

Inspector Goldsberry characterized abatement of the violation as evidencing good faith on Respondent's part (Tr. 316). Accordingly, it is found that Respondent demonstrated good faith in attempting to achieve rapid compliance.

C. Order No. 796081, April 12, 1979, 30 C.F.R. § 75.518

Inspector Goldsberry arrived at Respondent's Hamilton No. 1 Mine at approximately 3 p.m. on April 12, 1979, to continue a regular health and safety inspection (Tr. 22-23). While on the surface, the inspector was

apprised by Mr. Dennis Padgett, the mechanic on the No. 6 Unit, that the 1200 amp main circuit breaker on the No. 6 Unit's power center substation, or transformer, was not operating properly (Tr. 23-24). The inspector consulted company records and discovered that Mr. Jesse O. Allen, a section foreman, had submitted a maintenance request on April 11, 1979, indicating that the main circuit breaker would not drop out and thus deenergize the transformer when the power was pulled from and subsequently restored to such transformer (Tr. 26-27, Exh. O-2).

Inspector Goldsberry then proceeded underground, arriving at the transformer shortly before Mr. Padgett's arrival. The inspector testified that he requested Mr. Padgett to test the 1200 amp main circuit breaker in the manner Mr. Padgett had mentioned earlier (Tr. 27-28). It is therefore clear that Mr. Padgett, and not the inspector, selected the test to be performed. It is significant to note at this point that Inspector Goldsberry is not classified as an electrical inspector, that he had received only generalized training in electrical matters, and that he had received no specific electrical training as relates to the operation of electrical circuitry, circuit breakers or transformers (Tr. 13-19).

Mr. Padgett proceeded to the outby end of the transformer and, using the disconnect switch, pulled the power from the transformer, waited an unspecified period of time, and then restored power to the transformer. This test was performed several times and yielded the same results each time. The 1200 amp main circuit breaker was supposed to drop out and deenergize the transformer when the power was restored, but it did not do so (Tr. 28). The inspector thereupon issued Withdrawal Order No. 796081, citing Respondent for a violation of mandatory safety standard 30 C.F.R. § 75.518 in that "the 1200 amp main circuit breaker serving the power center substation (transformer) on No. 6 unit was inoperative in that the circuit breaker would not provide short circuit protection nor overload protection for the 550-volt alternating current mining equipment being used on the unit" (Exh. M-2). The cited mandatory safety standard requires, in part, that "[a]utomatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads."

For the reasons set forth below, I conclude that the evidence fails to support the allegation that a violation of mandatory safety standard 30 C.F.R. § 75.518 occurred. The most probative evidence was provided by the testimony of Mr. Dennis Padgett, Federal mine inspector Charles F. Clark, a Mine Safety and Health Administration electrical inspector, and Mr. Ben F. Brinkley, the maintenance superintendent of Respondent's River Division, because these witnesses possess the requisite education and experience to qualify as experts in the function and operation of electrical circuits, circuit breakers and transformers.

The transformer referred to in the w[illegible]awal order was a 750 KVA transformer manufactured prior to the passage of the 1969 Coal Act, and purchased

from the Ensign Electric and Manufacturing Company of Huntington, West Virginia (Tr. 160, 169-170). Twelve thousand four hundred seventy volts of electricity enters the transformer when its manually operated disconnect switch is closed (Tr. 161). It appears that the transformer contains various windings which are used to transform the voltage entering the unit into that needed to operate the various pieces of mining equipment supplied by the unit (Tr. 160-161). The transformer supplies power to the equipment by way of approximately 11 individual circuits, each of which contains a circuit breaker. Two of these circuits have 600-amp circuit breakers, two have 400-amp circuit breakers, and it appears that approximately six have 225 amp circuit breakers. The remaining circuit supplies the lights with current, and this circuit has a 30-amp circuit breaker (Tr. 163). These 11 circuit breakers directly provide overload and short circuit protection to the 11 respective pieces of equipment (Tr. 178).

The transformer contains bus bars which supply current to the 11 circuits (Tr. 192-193). The bus bars are uninsulated copper bars measuring approximately 2 inches in width and approximately three-eights of an inch in thickness (Tr. 214-215). The 1,200-amp main circuit breaker is located immediately off of the bus bars (Tr. 161-162). According to Mr. Brinkley, the purpose of the 1,200 amp main circuit breaker is not to protect the individual pieces of equipment drawing power from the transformer through the 11 individual circuits, but to protect the bus bars (Tr. 169-170). It's main purpose is to provide overcurrent and short circuit protection to the bus bars, but it also provides undervoltage protection to the transformer by way of a 120-volt shunt trip picking up its power from a stepdown transformer (Tr. 169-172). It appears that a shunt trip is not a true undervoltage release (Tr. 170), but that shunt trips are accepted by the Federal Government as a means of providing undervoltage protection for circuits on transformers manufactured prior to the passage of the 1969 Coal Act (Tr. 170-172).

The shunt trip coil on the 1,200-amp main circuit breaker is hooked up so as to act as an undervoltage release upon a loss of voltage in the ground trip relay. It has a set of normally closed contacts, which indicates that the contacts are closed with the loss of voltage. These contacts set up a circuit to the shunt coil. When the power is interrupted, the 1,200-amp main circuit breaker remains up. When the power is restored, it appears that the 120 volt stepdown transformer is somehow energized, setting up a 120-volt shunt power on the shunt trip which, in turn, immediately operates the thermal unit which trips the 1,200-amp main circuit breaker (Tr. 172-173). According to Mr. Brinkley, the primary purpose of the shunt trip in the 1,200 amp main circuit breaker is to provide undervoltage protection for the bus bars (Tr. 183-184).

Additionally, each of the 11 circuit breakers on the circuits serving the 11 respective pieces of equipment are equipped with shunt trips. However, these shunt trips are not hooked up in the same way as the shunt trip in the 1,200-amp main circuit breaker. Rather, they operate when a ground fault condition is created in the circuit. The ground fault will trip the shunt trip which, in turn, opens the breaker on the individual circuit affected (Tr. 173).

The 1,200-amp main circuit breaker failed to operate during the test performed on April 12, 1979, because it was equipped with a 480-volt shunt trip instead of a 120-volt shunt trip (Tr. 203-204). According to Mr. Brinkley, replacing the 480-volt shunt trip with a 120-volt shunt trip had no effect on the overcurrent and short circuit protection afforded by the 1,200 amp main circuit breaker (Tr. 207).

The testimony of Mr. Brinkley establishes that the test performed on April 12, 1979, determined only that the undervoltage protection was inoperative. I find his testimony on this point to be credible, and I find the testimony of Mr. Padgett and Inspector Clark inadequate to establish a proposition contrary to the one advanced by Mr. Brinkley. The transformer in question was manufactured prior to the effective date of the 1969 Coal Act and, consequently, a shunt trip was employed on the 1,200-amp main circuit breaker to provide undervoltage protection in lieu of an undervoltage release. It is Mr. Brinkley's detailed familiarity with the particular transformer in question that renders his testimony credible.

According to Mr. Brinkley, the 1,200-amp main circuit breaker has more than one function (Tr. 184). Undervoltage, ground, short circuit and overload protection are separate functions (Tr. 180-181). The thermal magnetic trip device is the component that provides short circuit and overload protection (Tr. 179-180). According to Mr. Brinkley, the test performed at Inspector Goldsberry's request does not activate the thermal trip device, but tests only for undervoltage protection (Tr. 180-181). The presence of the 480 volt shunt trip in the 1,200-amp main circuit breaker had no effect whatsoever on the overcurrent and short circuit protection that the breaker afforded the system (Tr. 207).

Mr. Padgett opined that the 1,200-amp main circuit breaker acts as a backup for the circuit breakers serving the 11 individual circuits. According to Mr. Padgett, a dead short or a ground on one of these 11 breakers should activate the 1,200-amp main circuit breaker (Tr. 93, 97-98). However, his testimony is insufficient to establish the necessary correlation between the test performed and the nature of the violation. His testimony points to some type of malfunction in the circuit breaker, but he never affirmatively testified that the test performed was a proper one for purposes of determining whether the circuit breaker was providing short circuit or overload protection.

Similarly, Inspector Clark's testimony is insufficient to establish the requisite correlation between the test performed and the violation charged. Inspector Clark terminated the withdrawal order on April 13, 1979 (Exh. M-2). The type of test performed at Inspector Goldsberry's request comprised one part of the considerably more extensive test performed by Inspector Clark (Tr. 126-129). He testified that when he deenergized the transformer, the main circuit breaker remained in the "on" position, which indicated that it was equipped with a shunt trip, not an undervoltage (Tr. 131-132). When the power was restored to the transformer, the circuit breaker dropped out, which indicated that the shunt coil was operative (Tr. 132). His testimony strongly implies that the 1,200-amp main circuit breaker's failure to trip when the

power was restored to the transformer, on the day the order was issued, could have been attributable to an absence of undervoltage protection (Tr. 133-134). Additionally, it is significant to note that Inspector Clark testified that absent a complete test of the type performed by him on April 13, 1979, one cannot determine whether short circuit or overload protection is present (Tr. 130-131).

Accordingly, I find that the test performed on April 12, 1979, established that the 1,200-amp main circuit breaker was not providing undervoltage protection to the transformer or the various pieces of equipment obtaining current from the transformer. 4/

4/ The transformer mentioned in the withdrawal order was associated with an accident that occurred on April 4, 1979. Substantial testimony was elicited by both parties as relates to the surrounding circumstances. It appears that the 225-amp circuit breaker on the circuit providing power to the cutting machine tripped several times. Following several unsuccessful attempts to locate the source of the trouble, Mr. Jesse O. Allen and Mr. Dennis Padgett removed the trailing cable from the reel on the cutting machine to perform a visible examination of the cable. They were unable to detect any visible signs of damage (Tr. 74-75, 95-96). Mr. Allen thereupon instructed Mr. Dennis Kirchner and another miner to station themselves at the transformer and reset the 225-amp circuit breaker (Tr. 74-75). It is unclear as to how many times Mr. Kirchner proceeded to reset it. Mr. Allen testified that he instructed them to reset the circuit breaker one time to see if it would remain up (Tr. 74-75). However, Mr. Harold M. Gamblin, Sr., the assistant mine superintendent, testified that Mr. Kirchner said that Mr. Allen had stationed him at the transformer in order to reset the breaker several times in rapid fashion in order to blow the cable (Tr. 275-279). Regardless of the instructions or how many times Mr. Kirchner reset the breaker, the results are not in dispute. The contacts in the 225-amp circuit breaker welded, and an arc, or explosion, occurred in the trailing cable. Mr. Allen sustained second and third degree burns on his leg, hands and arms (Tr. 69). Mr. Padgett sustained third degree burns on his hands while extinguishing the flames on Mr. Allen (Tr. 97).

The evidence presented fails to support the contention that the malfunction detected on April 12, 1979, was related to the injuries sustained on April 4, 1979. The 1,200-amp main circuit breaker was replaced after the accident, but prior to the April 12, 1979, inspection. Furthermore, Inspector Clark testified that it would not necessarily be the case that if the 225-amp circuit breaker failed to function properly and fused, that the 1,200-amp main circuit breaker should have solved the problem (Tr. 137-138).

One additional point is worthy of mention. The testimony of Mr. Allen indicates that on April 3, 1979, the then present 1,200-amp main circuit breaker was not affording undervoltage protection (Tr. 71-72). As noted in this decision, the evidence presented indicates that the test performed on April 12, 1979, established only that the circuit breaker was not providing undervoltage protection. The testimony of Inspector Clark strongly indicates that the absence of undervoltage protection was not related to the April 4, 1979, accident (Tr. 137-138).

The remaining question presented is whether a mine operator violates mandatory safety standard 30 C.F.R. § 75.518 by failing to provide undervoltage protection for all electric equipment and circuits. I answer this question in the negative.

The cited mandatory safety standard makes reference only to short circuit and overload protection, and contains no mention of undervoltage protection. In contrast, mandatory safety standards 30 C.F.R. § 75.800 and 30 C.F.R. § 75.900 make express reference to undervoltage protection.

30 C.F.R. § 75.800 requires high voltage circuits entering the underground area of any coal mine to be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such circuit breakers must be equipped with devices to provide protection against undervoltage, grounded phase, short circuit and overcurrent.

30 C.F.R. § 75.900 requires low and medium voltage power circuits serving three-phase alternating current equipment to be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such circuit breakers must be equipped with devices to provide protection against undervoltage, grounded phase, short circuit and overcurrent.

The express reference to undervoltage protection in 30 C.F.R. § 75.800 and 30 C.F.R. § 75.900, coupled with the absence of such reference in 30 C.F.R. § 75.518, clearly indicates that the failure to provide undervoltage protection does not constitute a violation of mandatory safety standard 30 C.F.R. § 75.518.

In view of the foregoing, the proposal for a penalty will be dismissed as relates to Order No. 796081, April 12, 1979, 30 C.F.R. § 75.518.

D. History of Previous Violations

The history of previous violations at Respondent's Hamilton No. 1 Mine for which Respondent had paid assessments between April 13, 1977 and March 22, 1979, is summarized as follows:

30 C.F.R. Standard	4/13/77 - 3/22/78	3/23/78 - 3/22/79	Totals
All Sections	438	590	1,028
75.1303	5	7	12

(Exh. M-1).

E. Size of the Operator's Business

The parties stipulated that Respondent is a large operator (Tr. 12) (see also, Exh. M-7). The parties also stipulated that the size of Respondent's West Kentucky Division is rated at 4,399,525 tons of coal per year (Tr. 365).

F. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

The parties stipulated that the assessment of civil penalties in this proceeding will not affect Respondent's ability to remain in business (Tr. 12).

VI. Conclusions of Law

1. Island Creek Coal Company and its Hamilton No. 1 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Ronald L. Goldsberry was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the withdrawal orders which are the subject matter of this proceeding.

4. The violation charged in Order No. 796000, March 22, 1979, 30 C.F.R. § 75.1303 is found to have occurred as alleged.

5. The condition cited in Order No. 796081, issued on April 12, 1979, does not constitute a violation of mandatory safety standard 30 C.F.R. § 75.518.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties filed posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Order No.	Date	30 C.F.R. Standard	Penalty
796000	3/22/79	75.1303	$1,500.00

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of $1,500.00 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the proposal for a penalty be, and hereby is, DISMISSED as relates to Order No. 796081, April 12, 1979, 30 C.F.R. § 75.518.

John F. Cook
Administrative Law Judge

Distribution:

Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

William K. Bodell, II, Esq., Island Creek Coal Company, 2355 Harrodsburg Road, P.O. Box 11430, Lexington, KY 40775 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1981

COUNCIL OF THE SOUTHERN MOUNTAINS, INC., Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. KENT 80-222-D
MARTIN COUNTY COAL CORPORATION, Respondent	:	No. 1-S Mine

DECISION DETERMINING ATTORNEYS' FEES AND OTHER EXPENSES

Appearances: L. Thomas Galloway, Esq., and Richard L. Webb, Esq., Center for Law and Social Policy, Washington, D.C., for Complainant; Jack W. Burtch, Jr., Esq., and James F. Stutts, Esq., McSweeney, Stutts & Burtch, Richmond, Virginia, for Respondent.

Before: Administrative Law Judge Steffey.

The Question of the Judge's Continuing Jurisdiction

A decision was issued on October 3, 1980, involving the complaint filed in this proceeding as well as other matters pertaining to Docket Nos. KENT 80-212-R, et al. That decision found, among other things, that respondent had violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and ordered respondent to reimburse complainant for all attorneys' fees and other expenses incurred in connection with the filing and prosecution of the complaint in Docket No. KENT 80-222-D.

Complainant's posttrial brief (p. 11) had stated that it expected me to determine the actual amount to be awarded for attorneys' fees and other expenses in the "relief phase" of the case. I interpreted complainant's reference to the "relief phase" to mean a proceeding which I would hold after the Commission had determined whether there had actually been a violation of section 105(c)(1) because complainant is not entitled to recover anything unless the Commission agrees that respondent's refusal to permit complainant to monitor training classes constituted a violation of section 105(c)(1) of the Act.

Despite complainant's failure to give me any facts as a basis for determining attorneys' fees and other expenses and despite its insistence that I issue the decision no later than October 3, 1980, complainant filed a petition for discretionary review with the Commission claiming that my decision

of October 3, 1980, was not a final decision because I had not determined the exact amount of attorneys' fees and other expenses to which it is entitled. The Commission agreed with complainant's arguments and issued an order on November 12, 1980 (2 FMSHRC 3216), finding that I still have jurisdiction to determine costs and expenses and returning the record to me until such time as I have written a decision determining attorneys' fees and other expenses.

In complainant's memorandum in support of its statement of costs and expenses (p. 2) filed November 24, 1980, and in complainant's submission of supplemental data (p. 12) filed January 16, 1981, complainant expressly requests me to retain continuing jurisdiction over the matter of determining attorneys' fees and other expenses so that, after I have rendered the initial determination made in this decision, complainant may hereafter request that I make a supplemental and final award to cover attorneys' fees and expenses incurred subsequent to October 31, 1980.

I am expressly not retaining continuing jurisdiction over the matter of determining attorneys' fees and other expenses. It is obvious that the Commission and I cannot assert jurisdiction simultaneously because the record must be in the hands of the entity having jurisdiction at a given time. The record must be with the Commission after I have issued this decision so that any party seeking review of my decision may cite references to the record as required by section 113(d)(2)(A)(iii) of the Act. It should be recalled that the Commission returned the record to me so that I could make an initial award for attorneys' fees and other expenses. After this decision is issued, the record will again be forwarded to the Commission. If the Commission reverses me on appeal, complainant will not be entitled to the attorneys' fees and expenses which I am awarding in this decision. If the Commission should affirm me, it will either make a determination as to attorneys' fees or order me to make a further determination as to attorneys' fees and any other expenses that may be associated with complainant's participation in any appeals before the Commission and for the period for which complainant has voluntarily refrained from providing data, that is, for the period from October 31, 1980, to the date of issuance of the Commission's decision on appeal.

Complainant's anxiety as to whether anyone will be required to determine attorneys' fees is beyond by comprehension. The Act provides for award of attorneys' fees if a violation of section 105(c)(1) is found to have occurred. The Commission would certainly provide for whatever relief is appropriate under the Act and the Commission at all times has the power to order me to make such determinations as it sees fit regardless of whether I assert that I have continuing jurisdiction over the matter of determining attorneys' fees.

Actual Expenses Incurred by Complainant

Complainant in this proceeding is seeking to recover an amount of $626.78 which it allegedly spent for labor, travel, meals, Xeroxing, postage, and phone calls. Complainant's statement of costs and expenses contains a four-page affidavit by Mr. Dan Hendrickson, one of complainant's employees, describing the above-mentioned items for which complainant seeks reimbursement. There is

no specific listing showing the addition of the items described in the affidavit. When I made separate listings of the items described in the affidavit, my figures produced a total amount of $626.69 which is 9 cents less than the amount claimed by complainant. If complainant can show from its own figures any error in my calculations and additions, I will be glad to order respondent to pay the additional 9 cents because all of the expenses are well supported in Mr. Hendrickson's affidavit and are reasonable in every way. Therefore, I find that the expenses described in the affidavit were incurred by complainant in connection with its efforts to obtain permission to monitor training classes and respondent will be ordered to reimburse complainant for the expenses listed below:

Type of Expense	Amount Expended
Phone Calls	$ 50.42
Fee paid to mine foreman to monitor training classes, although such monitoring was denied by respondent	40.00
Xeroxing and postage	43.11
Mileage (578 miles at 20 cents per mile)	115.60
Meals for Mr. Hendrickson on day of hearing	18.19
Hours expended by Mr. Hendrickson in effort to achieve permission to monitor classes (66 hours at $4.80 per hour)	316.80
Hours expended by Ms. Stanley in effort to achieve permission to monitor classes (11 hours at $3.87 per hour)	42.57
Total Expenses Allowed	$ 626.69

DETERMINATION OF ATTORNEYS' FEES

Amount Claimed

Complainant asks that it be awarded a total of $20,246.38 in attorneys' fees, including attorneys' expenses, for the period from October 1979 through October 31, 1980. Complainant will submit additional claims for attorneys' fees in connection with work done by its counsel subsequent to October 31, 1980. The total amount sought of $20,246.38 includes $864.57 in reproduction costs, telephone calls, postage, messenger service, and travel as well as a bonus of $2,528.06, the justification for which will hereinafter be evaluated.

The Claimed Basic Hourly Rate and Number of Hours Worked

Two lawyers worked for complainant from the filing of the complaint in Docket No. KENT 80-222-D up to and including the submission of the claims

for attorneys' fees here under consideration. The senior attorney seeks reimbursement for 77.25 hours at an hourly rate of $85 and the junior attorney seeks reimbursement for 150 hours at an hourly rate of $55. Five different law students worked on the case and reimbursement for their services is sought for a total of 81.50 hours at an hourly rate of $25. In Lindy Bros. Builders, Inc. of Phila. v. American R. & S. Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973), the court indicated that the value of an attorney's time generally is reflected in his normal billing rate. In fixing a reasonable hourly rate, the court thought that a judge should take into consideration the attorney's legal reputation and status. The court believed that it would be appropriate to fix different hourly rates for different attorneys and to find that the reasonable rate of compensation should vary for different activities.

In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), the court set forth 12 criteria which should be considered by a judge in determining a lawyer's hourly rate and in establishing the number of hours claimed. In Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974), the D.C. Circuit Court stated, "[w]e align ourselves with the guidelines set out by the Fifth Circuit in Johnson." Inasmuch as two circuit courts have adopted the 12 criteria established by the Fifth Circuit in the Johnson case, I believe that I should consider those 12 factors in evaluating the claims for attorneys' fees made in this proceeding. Since all of the factors are designed to assist the judge in arriving at a reasonable hourly rate as well as a reasonable number of hours, I find that the order of arrangement used by the Fifth Circuit is awkward to apply in this proceeding. Therefore, although I shall use the criteria established by the Fifth Circuit in the Johnson case, I shall consider them in an order which enables me to evaluate the specific types of work which were performed by complainant's attorneys in this proceeding.

The Twelve Criteria

1. The experience, reputation, and ability of the attorneys. Complainant's memorandum (p. 9) in support of attorneys' fees states that the senior attorney has had considerable experience in practicing before administrative agencies and Federal courts. The senior attorney was in private practice for an unstated number of years and in 1975 became an attorney on the staff of the Center for Law and Social Policy. Since that time, he has represented complainant and individual miners in litigation in administrative proceedings, judicial review proceedings, and in the Federal courts. He was active in the legislative process in the passage of the Federal Mine Safety and Health Act of 1977 and presented testimony in both House and Senate proceedings. He has also testified extensively in rulemaking proceedings under the 1977 Act.

The junior attorney who represented complainant in this proceeding graduated from the Georgetown University Law School in 1978. While he was attending law school, the junior attorney worked for a private law firm and for the Center of Law and Social Policy. Since 1978, the junior attorney has been employed by the Center and has worked with the senior attorney on a number of mine safety issues.

I find that complainant has justified paying a larger hourly fee for the services rendered by the senior attorney than for the work performed by the junior attorney. The memorandum shows that the junior attorney has been practicing law for a period of only 2 years, but the court stated in the Johnson case (488 F.2d at 719), that a young attorney should not be penalized for only recently having been admitted to the bar if he demonstrates skill and ability. The fact that the junior attorney is claiming payment for 150 hours of work, as compared to the 77.25 hours claimed by the senior attorney, shows that the basic drafting of pleadings, briefs, etc., has been done by the junior attorney. The detailed data submitted by complainant indicates that the junior attorney spent more time on the preparation of briefs and pleadings than the senior attorney did. The quality of work done on the various documents in this proceeding is considered under the criterion of the attorneys' skill. That evaluation shows that the junior attorney has a sufficient ability in drafting legal documents to merit the hourly fee of $55 which he claims in this proceeding.

Law students performed much of the legal research done in the preparation of briefs. Their work has been billed at a rate of $25 per hour. That is a reasonable charge and should be allowed because the cost to respondent for preparation of briefs has been considerably reduced by the fact that the law students performed 63.5 hours of the work required to prepare those documents.

2. The skill requisite to perform the legal service properly. In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261, 271-274 (S.D.N.Y. 1978), the judge evaluated the quality of work done on each pleading and the performance of the attorneys in personal appearances before the judge for the purpose of evaluating the skill they had displayed in carrying out their work. In this proceeding, complainant's attorneys prepared 11 pleadings of various types and made a personal appearance before me on August 21, 1980. In many cases, the courts have remarked about the distasteful aspects of having to evaluate attorneys' work. In the Johnson case, the court appropriately stated (488 F.2d at 720):

> * * * The trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful. But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorneys' fees just as he would bear the burden of proving a claim for any other money judgment.

With the foregoing observation in mind, I now turn to the unpleasant task of evaluating the attorneys' work done in this proceeding. The first example of the attorneys' work is to be found in the complaint itself which was filed on April 10, 1980. The complaint is 10 pages in length and there are 31 pages of appendices attached to the complaint. Section 2700.42 of the Commission's Procedural Rules provides that a complaint of discharge, discrimination, or interference "* * * shall include a short and plain statement of the facts * * * and a statement of the relief requested." The complaint fails to

comply with section 2700.42 because it is unduly long; it is tedious to read; and it was, in fact, difficult for me to determine initially just what the complaint did allege. After I had spent several hours reading the mass of detail, I finally summarized all of the essential allegations in the complaint in 20 lines on page 2 of my order issued May 30, 1980, setting the case for hearing.

Complainant's supplemental data show that one of the law students spent 13 hours in drafting the complaint, that the junior attorney spent 5 hours in reviewing or conferring with the law student or the senior attorney about the complaint, and that the senior attorney spent 1.5 hours in reviewing and editing the complaint, or a total of 20.5 hours. I can understand why a law student might think that a lengthy document would be acceptable as a complaint, but both the junior and senior attorneys should have known that it was unduly long and they should have used their time for the purpose of complying with the Commission's Procedural Rules.

I cannot find that complainant's counsel are entitled to 20.5 hours of work for the drafting of the complaint. Neither the senior attorney nor the junior attorney was performing at his usual billing rates of $85 and $55 per hour, respectively. Therefore, the amount of time spent on the complaint by the senior attorney will be reduced by 1 hour, the time spent on the complaint by the junior attorney will be reduced by 3 hours, and the amount of time spent on the complaint by the law student will be reduced by 2 hours. I am not proportionately reducing the law student's time as much as I have the attorneys' time because the law student would not necessarily have been expected to know that he was making an unduly long draft. It was the responsibility of supervisory counsel to edit the law student's draft so as to make the complaint comply with the Commission's Rules.

The second group of documents submitted by complainant in this proceeding consisted of 10 pages of interrogatories and requests for production and 8 pages of requests for admission. Both the 10-page and the 8-page documents were filed on April 30, 1980. There were 46 questions in the interrogatories, but the last two questions repeated the use of Nos. 34 and 35 which had previously been used. That was a careless error and required respondent's counsel to have to answer two questions numbered "34" and two questions numbered "35." The senior attorney requests that he be paid for 15 hours of work at $85 per hour, or an amount of $1,275, for preparing the interrogatories and requests for admission. That is an exorbitant sum for respondent to pay for the preparation of interrogatories in a case as factually simple as this one. The only factual issue was whether respondent had refused to allow complainant to monitor training classes. Respondent has never denied that it refused to allow complainant to monitor training classes. In such circumstances, the facts in this proceeding are so simple that they did not warrant the filing of lengthy interrogatories. Such extensive use of discovery is unjustified and should be discouraged. Therefore, the senior attorney's claim for 15 hours of time for preparation of interrogatories and requests for admission will be reduced by 10 hours. The junior attorney only claims to have spent .75 of 1 hour in working on discovery matters. Therefore, his time will not be reduced.

The next document filed in this proceeding by complainant's counsel was a three-page motion to consolidate submitted on May 9, 1980. That motion asked that complainant's case be consolidated with two factually related cases which had been filed by respondent's counsel in Docket Nos. KENT 80-212-R and KENT 80-213-R. That motion was well drafted and was prepared by the junior attorney who claims a total of 2 hours for drafting, editing, and proofing the motion. His time for that document at the rate of $55 will be allowed in full.

The fifth document filed by complainant was a motion for leave to file for summary decision or, in the alternative, to reschedule the hearing at a subsequent time. That motion was submitted on June 23, 1980, and the junior attorney claims 2 hours for drafting the motion, editing it, and filing it. Both the senior and junior attorneys claim some time for conferring about the motion, but those conferences will be discounted in a subsequent discussion and only the 2 hours for drafting the motion will be considered at this point. It should be noted that section 2700.64(a) of the Commission's Rules provides that a motion for summary decision may be filed at any time "* * * before the scheduling of a hearing on the merits." I had issued an order on May 30, 1980, scheduling a hearing to be held on the merits commencing on July 17, 1980.

Complainant's counsel not only waited until the time had passed during which a motion for summary decision could be filed, but waited 3 weeks after the order providing for hearing had been issued, to submit the motion which alternatively requested a continuance on the ground that complainant's counsel would be "out of the country" on July 17, 1980, the date of the hearing, and would not be back until August 11, 1980. Under the Commission's Rules (§§ 2700.8(b) and 2700.10(b)), respondent was entitled to 15 days within which to answer the motion. Inasmuch as I was involved in holding hearings in other matters, there was not time to wait 15 days before acting on the motion and still act in adequate time before the hearing was set to begin. Therefore, it was necessary for me to get the replies of respondent's and MSHA's counsel to the motion by telephone in order that a prompt decision could be made with reference to the motion. As it turned out, respondent's counsel wished to present evidence at the hearing and would not agree with complainant's contention that no genuine issue of fact existed. Therefore, the motion for permission to file a motion for summary decision had to be denied. Eventually, counsel for all parties agreed to a mutually convenient date for hearing and an order was issued on July 2, 1980, granting the complainant's motion for continuance and rescheduling the hearing for August 21, 1980.

In Parker v. Matthews, 411 F. Supp. 1059, 1066 (D.C. Cir. 1976), the court allowed attorneys' fees at an hourly rate of $60 after taking into account the fact that plaintiff's counsel "* * * has objected to any delays and has always stood ready and fully prepared to proceed." As will hereinafter be explained, counsel in this proceeding have seldom been ready to proceed and on two occasions either delayed, or tried to delay the hearing, by filing tardy motions which required me to make phone calls to obtain answers to the motions so that they could be granted or denied before the 15-day period for answering the motions had elapsed.

I do not think that attorneys with the experience claimed by the senior attorney in this case should be so disorganized that they have to wait to the last minute to file their motions. Tactics such as those used by complainant's attorneys are responsible for the criticism which is often leveled at administrative agencies for failure to complete cases expeditiously. Complainant's counsel were responsible for bringing the action and should have been prepared to proceed diligently in representing their client at all stages of the proceeding.

Inasmuch as the filing of the motion for permission to file a motion for summary decision or, in the alternative, for continuance of the hearing was tardily filed, I do not believe that complainant's counsel should be rewarded fully for the time they spent in seeking to delay the proceeding and for failing to make a timely motion for summary decision. Therefore, the 2 hours claimed by the junior attorney will be reduced to 1 hour.

The sixth pleading filed by complainant in this proceeding consisted of some stipulations of fact which were submitted by the parties on July 18, 1980. They consist of 10 short paragraphs covering only two pages. The junior attorney claims that he spent 2.50 hours in drafting the stipulations and in editing and distributing them. The best work done in this case was the drafting of the stipulations. They are short, concise, and free of all excess verbiage. The junior attorney is to be commended for his role in bringing about the stipulations and he should receive full compensation for his work with respect to the stipulations. Neither the senior attorney nor any law student claims any time regarding the preparation of the stipulations.

The seventh pleading filed by complainant was a two-page letter submitted on August 8, 1980. The letter contended that no facts remained in dispute, insisted that I issue an order specifying the issues in dispute, and objected to attending a hearing in Pikeville, Kentucky. The letter was not filed until 20 days after the stipulations had been submitted. The letter was received on a Friday afternoon, too late for me to obtain the replies of respondent's counsel to the letter. I was eventually able during the subsequent week to get in touch with respondent's counsel and MSHA's counsel by telephone. Respondent's counsel still contended that he wished to present evidence at the hearing. I issued an order on August 12, 1980, requiring the parties to file a list of the witnesses they expected to present at the hearing to be held on August 21, 1980, and summarizing the subject of the prospective witnesses' testimony. The simplicity of the issues did not justify such an order, but the order was issued at the request of complainant's counsel. The junior attorney claims 2.25 hours for the time he spent in drafting the two-page letter. Since the stipulations of fact had been submitted on July 18, 1980, there was no need for complainant's counsel to wait an additional 20 days to renew his motion for permission to move for summary decision or for him to request that the issues be restated, or to request at the last minute that he be supplied with a list of witnesses and a summary of their testimony. The letter, in any event, should not have taken more than 1 hour to write. In view of the letter's dilatory nature, the time of 2.25 hours claimed by the junior attorney should be reduced by 1.25 hours to 1 hour.

The eighth pleading filed by complainant's counsel was a pretrial brief submitted on August 15, 1980. The brief is 35 pages long. The first 11 pages are devoted to repeating unnecessary facts which were already stated in the unduly long complaint described above. The next four pages of the brief give reasons why a non-employee representative of miners ought to be permitted to monitor training classes. Pages 15 to 21 argue that a violation of section 105(c)(1) occurred, and pages 31 to 34 contend that a maximum civil penalty of $10,000 should be assessed for the violation of section 105(c)(1). Excluding time spent in conferences, which will be treated separately, the senior attorney claims that he spent 6.25 hours in editing the brief, the junior attorney claims that he spent 40.50 hours in drafting the brief, and a law student claims that she spent 20 hours drafting the brief. At their respective rates of $85, $55, and $25, per hour, complainant's attorneys seek a total of $3,258.74 for preparing the pretrial brief.

While I feel that the pretrial brief is unnecessarily long and cites many cases which are not helpful in deciding the issues, it is a fact that complainant's counsel were trying to persuade a judge to decide a novel issue in their favor. The brief was written within a short period of time. In this instance, I believe that both attorneys and the law student were working at the outer limits of their abilities and experience and are entitled to the full amount which they claimed for preparation of the pretrial brief.

The ninth pleading filed by complainant's attorneys in this proceeding was a posttrial brief submitted on September 25, 1980. The brief is 12 pages long. Pages 1 to 7 discuss the implied violation of the Act, pages 7 to 10 argue that a violation of section 105(c)(1) occurred, and pages 10 to 12 ask that I order respondent to pay complainant for the expenses it incurred in bringing the action in this proceeding. The senior attorney claims that he spent 6.50 hours in editing and reviewing the brief, the junior attorney claims that he spent 5.25 hours in drafting the brief, and a law student claims that she spent 16 hours in doing research and drafting the brief. At the rates allowed for each person, the brief involves a total charge of $1,241.25. It should be recalled that I had already issued a bench decision finding in complainant's favor. The posttrial brief was written primarily because respondent's attorney insisted on being given an opportunity to file a brief between the time that my bench decision had been rendered and the time when the bench decision was issued in final form on October 3, 1980.

There was one issue in complainant's posttrial brief which was raised because I indicated at the hearing that I would not require respondent to pay the "damages" which complainant was seeking. I had so ruled at the hearing because I thought complainant was asking for punitive damages rather than for reimbursement for out-of-pocket costs associated with bringing the action. After reading the last two pages of complainant's posttrial brief, I realized that I had no problem with complainant's request that I order respondent to pay complainant's expenses.

The brief's request for award of expenses was poorly prepared because it suggests that the exact amount of expenses and attorneys' fees will be considered in a "relief phase" of the proceeding. Since I knew that my decision

would be appealed to the Commission, I interpreted the "relief phase" to be a further proceeding which would be necessary only if the Commission should affirm my decision. If complainant's counsel wanted to be reimbursed for attorneys' fees before the Commission had acted on the petition for discretionary review to be filed by respondent, they should have indicated that fact in their posttrial brief and should have presented a statement of costs and expenses at the time they filed the posttrial brief.

Since both respondent's and complainant's posttrial briefs were filed simultaneously, complainant's brief did not reply to the new arguments advanced by respondent in its posttrial brief. Therefore, complainant's posttrial brief was useless to me in the writing of my supplemental decision, but that is no fault of complainant's counsel. Complainant's attorneys no doubt felt that they should submit a posttrial brief since respondent had requested permission to do so. Despite the misleading part of the brief dealing with recoupment of complainant's expenses, I believe that the amount of time claimed by complainant's counsel with respect to the drafting of the posttrial brief has been justified and should be allowed in full.

The tenth pleading filed by complainant's attorneys was submitted on October 22, 1980, and asked me to retain jurisdiction over this proceeding until such time as I had determined the amount that respondent should be required to pay for attorneys' fees and other expenses. The motion is four pages long and the junior attorney claims that he spent 3 hours in drafting and filing the motion. Some courts have declined to allow attorneys to obtain any compensation for time spent in justifying an award of attorneys' fees. In Kiser v. Miller, 364 F. Supp. 1311, 1318 (D.D.C. 1973), the court discounted by 30 percent the amount of time spent by attorneys on the question of attorneys' fees, but most courts have allowed the full amount of time spent to collect attorneys' fees (Parker v. Matthews, 411 F. Supp. 1059, 1066-1067 (D.D.C. 1976)). In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1180 (W.D.Pa. 1977), the court allowed in full the amount of time spent in recovering attorneys' fees, noting that work to justify fees is just as much a part of the cost of a case as are the court costs associated with initiation of the action. In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261, 270 (S.D.N.Y. 1978), the court held that attorneys are entitled to the time spent on attorneys' fees because denial of that time would discourage attorneys from representing indigent clients and acting as private attorneys general in vindicating congressional policies. In the Mid-Hudson case, the court awarded $31,945 in attorneys' fees, but only $10,092.50 of that amount was awarded for work other than time spent in justifying attorneys' fees. Therefore, I am allowing the full amount claimed by the junior attorney for preparation of the motion for clarification.

The eleventh pleading filed in this proceeding by complainant's attorneys was a petition for discretionary review submitted on October 31, 1980. That petition is six pages long and asks the Commission to hold that I still had jurisdiction, after issuance of my decision on October 3, 1980, to decide the question of the amount of attorneys' fees and other expenses. The junior

attorney claims that he spent 2.25 hours in preparing the petition for discretionary review and the senior attorney claims that he spent .25 of an hour in reviewing the petition. Those claims are reasonable and will be allowed in full.

The twelfth pleading filed by complainant's attorneys is a statement of costs and expenses which was submitted on November 24, 1980, but which was prepared and completed by the junior attorney on October 27, 1980. The junior attorney claims that he spent 13 hours preparing that statement. It is 32 pages long, but it did not provide a complete breakdown of data to permit me to analyze it under the court decisions cited by complainant in support of the award of attorneys' fees. Therefore, it was necessary for me to issue an order on December 30, 1980, requiring complainant's attorneys to submit supplemental data. Those data were filed on January 16, 1981, but none of the work done in preparing the supplemental data is before me at this time because complainant's counsel have not sought to collect attorneys' fees for any work performed after October 31, 1980.

Complainant's attorneys also submitted a memorandum in support of their statement of costs and expenses. That memorandum cited a large number of cases to show how the courts have determined attorneys' fees. Despite the fact that the cases were cited by complainant's attorneys to persuade me to allow all the claims which they have made, they did not prepare their materials properly with the result that I was forced to spend a great deal of time in the preparation of the order of December 30, 1980. Although most courts have said that the time spent by counsel to obtain attorneys' fees should be allowed in full, I have not seen any court allow the full amount of time when the material submitted was not correctly and fully prepared. Therefore, I think that the 13 hours claimed by the junior attorney for the preparation of the statement of costs and expenses should be discounted by 50 percent; consequently, he will be allowed only 6.50 hours of the 13 hours claimed.

The final matter to be considered under the criterion of the attorneys' skill is the time claimed by both the senior attorney and the junior attorney for preparation for hearing, for traveling to Pikeville, and for attending the 6-hour hearing. The senior attorney claims that he spent 26 hours for those purposes and the junior attorney claims that he spent 34.25 hours for those purposes. The time claimed by each attorney includes 13.50 hours used in traveling to and from Pikeville. Excluding actual traveling costs, the senior attorney seeks $2,210 for attending the hearing and the junior attorney seeks $1,856.25 for attending the hearing, or a total of $4,066.25.

Complainant's memorandum in support of its statement of costs seeks to justify the time and costs of two attorneys at the hearing on several grounds. They argue that they tried to get the case disposed of on the basis of a motion for permission to file a motion for summary decision. They note that their motion to do so was denied because respondent's counsel insisted on introducing evidence at the hearing. Then they claim that their position that no hearing was required was vindicated at the hearing because no testimony by any witness was received in evidence and the case was disposed of on

the basis of the stipulations which had been filed on July 18, 1980. Complainant's attorneys overlook the important fact that I announced at a prehearing conference held before any evidence was submitted that I was going to rule in respondent's favor as to all issues in the case except for complainant's contention that refusal of respondent to allow complainant to monitor training classes was an implied violation of the Act as well as a violation of section 105(c)(1) of the Act. That ruling required a complete reappraisal by respondent's attorney of his previous belief that he needed to present evidence and, not surprisingly, he decided that he did not need to introduce any evidence beyond the stipulation of facts which had already been prepared. There is no doubt in my mind that a conference of counsel for complainant, respondent, and MSHA was needed to resolve the doubts which each attorney had about whether their clients' best interests could be served without the introduction of evidence in the form of testimony.

Another factor about the case which complainants' attorneys decline to evaluate is the fact that they asked that their case be consolidated with other proceedings in which Martin County Coal Corporation had the burden of proof and in another case in which MSHA had the burden of proof. Martin County's attorney had requested that the hearing be held in Pikeville. It would have been improper for me to deny Martin County a hearing in Pikeville simply because complainant's attorneys happen to have an office in the District of Columbia. Therefore, their claim that no hearing was necessary is without merit.

Another reason advanced by complainant's counsel for having two attorneys attend the hearing in Pikeville is that respondent was represented at the hearing by two attorneys. If that were any reason to justify the use of two attorneys to represent complainant, then it would be offset by the fact that MSHA was represented at the hearing by only one attorney. MSHA's attorney made some of the most persuasive arguments on complainant's behalf which were advanced at the hearing and yet at no time did he have a second attorney to assist him. Moreover, the issue before me is the ability of complainant's attorneys to justify the fees they are asking me to award. There is nothing in the record to show why respondent was represented at the hearing by two attorneys and I do not know whether respondent was billed for the hours both attorneys spent in representing respondent at the hearing.

In the Johnson case, supra, the court stated (488 F.2d at 717):

> * * * If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. * * *

The duplication of effort by the senior and junior attorney with respect to both preparation for trial and attendance at the hearing is obvious from the hours shown on the summary sheet located between pages 9 and 10 of the complainant's supplemental data. The senior attorney seeks to recover payment for 6.50 hours of trial preparation, while the junior attorney seeks payment

for 14.75 hours of trial preparation. Each of the attorneys seeks payment for 6 hours for attending the hearing and each of the attorneys seeks payment for 13.50 hours for traveling to and from Pikeville. Their request for $682.14 in traveling expenses is not itemized except for the rental of a car at a cost of $125.00, but it is obvious that the total expenses include two round-trip plane tickets to Huntington, West Virginia, and the cost of meals and lodging for two attorneys. Each of the attorneys also seeks payment for 4 hours for preparing a single witness for testifying at the hearing.

At the hearing, the senior attorney did all the talking on complainant's behalf. I do not believe that allowance of two attorneys' time can be justified for attending a hearing which was not factually complicated, especially since complainant's attorneys had already filed an extensive prehearing brief discussing the legal issues. While I doubt that the junior attorney's trial preparation of 14.75 hours was necessary in view of the simple factual issues involved, I shall allow him to be paid for that amount of time because he could have prepared questions for prospective witnesses and other materials which could have been used by the senior attorney if witnesses had been presented at the hearing. There is not, however, any justification for respondent's having to pay two attorneys to make a round trip to Pikeville and attend a hearing in Pikeville. Therefore, all of the 26 hours claimed by the senior attorney for trial preparation, travel, and attendance at the hearing will be allowed and the 14.75 hours expended by the junior attorney for trial preparation will be allowed, but the 19.5 hours for the junior attorney's traveling to and from Pikeville and attending the hearing will be disallowed.

Complainant's counsel seek to recover a total of $682.14 in expenses for traveling to Pikeville from Washington, D.C., and returning. The statement of expenses does not show a breakdown for air fare to Huntington, West Virginia, where a rental car was obtained at a cost of $125.00. Therefore, the claim for traveling expenses in the amount of $682.14 will be allowed except that the cost of one round-trip ticket to Huntington, West Virginia, the cost of a single daily room for one person, and the cost of one person's meals shall be deducted from the traveling expenses.

3. The amount involved and results obtained. The third criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is the size of the monetary award which the plaintiff obtained. The Johnson case involved a racial discrimination issue tried under the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a et seq. Although the instant case was brought under the discrimination provisions of the Act here involved, no large monetary award for reimbursement of back pay is at issue here because the complainant is seeing only to be permitted to monitor training classes. The monetary award for expenses, apart from attorneys' fees, amounts to only $626.69. Therefore, the monetary amount involved in this case is small and requires no upward adjustment in attorneys' fees on the ground that complainant's attorneys have been able to recover a large sum of money.

The remaining aspect of the third criterion is whether the results obtained from the decision in this case will benefit a large class of persons.

Complainant's counsel did not introduce any evidence regarding the number of persons employed at respondent's mines, but Exhibit 1, page 11, introduced by MSHA's counsel, shows that respondent produced 1,212,092 tons of coal at all of its mines in 1980. I have always considered a company which produces well over a million tons of coal annually to be a large operator. A large operator generally employs at least 200 miners. There is no evidence in the record to show that complainant represents miners who work for companies other than the respondent in this proceeding. The results of the decision in this case, therefore, would not appear to benefit a large class of persons. Cf. Lindy Bros. Builders, Inc. v. Am. Radiator, Etc., 540 F.2d 102, 114 (3d Cir. 1976), which involved a consolidation of 374 cases and over 10,000 claims filed by builder-owners, and Kiser v. Miller, 364 F. Supp. 133 (D.D.C. 1973), involving recovery of from $8,495,193 to $15,911,206 in welfare benefits for from 356 to 666 miners.

4. The customary fee. The fourth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the hourly fee sought by the attorneys is in line with the customary fee charged for similar work in the community where the attorneys practice law. I have already noted in considering the first criterion, supra, that the senior attorney in this case is seeking an hourly fee of $85 and that the junior attorney is seeking an hourly fee of $55. In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261, 270 (D.N.Y. 1978), the court found as reasonable in 1978 an allowance of $55 per hour for attorneys with 0 to 3 years of experience, of $70 per hour for attorneys with 4 to 6 years of experience, and of $80 per hour for attorneys with 7 or more years of experience. In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1180 (D.Pa. 1977), the court found that an attorney's hourly fee should be allowed to increase from $60 at the beginning of the case in 1973 to $90 at the end of the case in 1977 "* * * due to the progress of inflation * * *". In Parker v. Matthews, 411 F. Supp. 1059, 1066 (D.D.C. 1976), the court allowed the senior attorney's hourly fee to increase from $50 in 1973 to $75 in 1975. Although the court in the Parker case allowed the senior attorney's fees to increase from $50 in 1973 to $75 in 1975, all in recognition of inflationary trends in recent years, the court declined to allow a similar increase for junior attorneys' hourly rates from a low of $40 in 1974 to a high of $55 in 1975. The refusal to allow the amounts asked by junior attorneys in the Parker case, however, was based on the failure of the attorneys to specify their prior experience in the civil-rights type of case which was before the court in that instance.

In this proceeding, the affidavit submitted by the junior attorney shows that he has had prior experience in cases involving the mining industry and my discussion under the first criterion, supra, shows that the junior attorney in this proceeding was initially responsible for the drafting of most of the pleadings submitted in this proceeding. Therefore, I find that his request for $55 an hour is justified on the basis of the work which has been done in this case as well as the experience discussed in his affidavit.

The only Commission case involving attorneys' fees cited by complainant's counsel is Joseph D. Christian, 1 FMSHRC 126, 140 (1979), in which

Judge Stewart allowed a senior attorney to recover for his services at an hourly rate of $85 and allowed the junior attorney to recover at an hourly rate of $60 for work done in 1978 and 1979. There can hardly be any doubt but that the fees of $85 and $55 requested by the senior and junior attorneys, respectively, in this proceeding are within the customary range charged by attorneys in the Washington, D.C., area.

Respondent's response (p. 3) objects to the hourly fees sought by complainant's counsel on the ground that their fees would not be as high as claimed if they did not practice in the Washington, D.C., area. Respondent argues that it should not be required to pay complainant's attorneys at a higher hourly fee than it pays its own senior attorney who charges only $70 per hour (Council's Memorandum, p. 12). Respondent also argues that it "* * * should not be penalized because the Council chose its representation from one of the nation's highest priced legal communities" (Response, p. 3). The cases which I have cited above indicate that the hourly rates sought by the senior and junior attorneys in this proceeding are not out of line with the amounts which have been allowed by other courts for attorneys practicing in cities other than Washington, D.C. As to the argument that respondent should not be penalized by the fact that complainant chose lawyers from a high-cost area, respondent must be reminded that the kind of relief complainant sought was somewhat novel and was not the type of case which the average lawyer would have been willing to undertake, especially since, as hereinafter discussed, complainant's counsel brought the action in this case with the understanding that they would receive no compensation whatsoever if they failed to win the case on its merits. In such circumstances, it is not surprising that complainant sought legal assistance from attorneys who practice law in the Washington, D.C., area.

Complainant's attorneys seek to recover an hourly amount of $25 for work done by law students. The response filed by respondent's counsel has not objected to complainant's request that it be reimbursed for work done by law students at the rate of $25 per hour, but the letter filed on November 24, 1980, indicates that respondent's attorney pays only $20 for such services. I have read no cases in which the courts objected to allowing a request of $25 per hour for work done by legal assistants. As I indicated in considering the first criterion, supra, the hourly rates sought by the senior and junior attorneys and by the law students are reasonable. Certain adjustments have been, and will be, made in the number of hours claimed, but I find that the basic hourly rates are in line with the customary fees charged by law firms in 1980.

5. Awards in similar cases. The fifth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees involves a comparison of the amount sought in the case before the judge with awards which the courts have made in similar cases. Complainant's counsel argue in their memorandum in support of their statement of costs and expenses (pp. 13-14) that they are entitled to a 15-percent bonus in addition to the basic hourly fees of $85, $55, and $25 for senior attorney, junior attorney, and law students, respectively. The bonus of $2,528.06 was calculated by

taking 15 percent of the sum of $16,853.75 in attorneys' fees which was computed, in the first instance, by multiplying the number of hours claimed by the respective hourly rates referred to in the preceding sentence (Statement of Costs and Expenses, p. 2).

The bonus which complainant's counsel seek is supported in their memorandum (pp. 13-15) by reference to cases in which the courts have allowed incentive fees when the work done by the attorneys was considered to be outstanding or there was a strong risk that they would recover nothing in the event they failed to prevail. The bonus to which complainant's counsel refer has not always been considered by the courts and has not been awarded for the same reasons in all cases. In no event, should a bonus be allowed apart from some unusual risk or performance of unusually high quality of work by the attorneys.

In Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), for example, the court allowed an incentive fee of 10 percent because the court had found that the attorneys' contingent fee arrangement was void as being contrary to public policy. Since the court's decision had barred the attorneys from being paid the lucrative fees they had anticipated receiving, the court allowed a contingency fee of 10 percent as "* * * a premium, for class representation" (364 F. Supp. at 1318). In Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), the court awarded a 25 percent incentive fee in a case involving almost 3 years of work, research of 20 years of the plaintiff's employment record, and a demonstration on the part of counsel of great diligence, persistence, and dedication. In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1181 (W.D. Pa. 1977), the court allowed an increase of 20 percent in the hourly rate because of quality trial work.

In cases where the judge is applying the 12 criteria set forth by the court in the Johnson case, the judge will necessarily have to consider whether any incentive award is required, but the award, when made, will be specifically associated with one of the 12 criteria. I am hereinafter discussing at considerable length, in considering additional criteria, why complainant's counsel in this proceeding are not entitled to any incentive awards. The quality of the work performed by complainant's attorneys has been discussed under the second criterion evaluated above and the hourly allowances there made are fully adequate to pay complainant's counsel for the caliber of work which they performed in this proceeding.

The primary argument advanced by respondent in opposition to the attorneys' fees sought by complainant's attorneys is that complainant did not prevail on the majority of the issues involved in the consolidated proceeding in Docket Nos. KENT 80-212-R, et al., of which the complaint filed in Docket No. KENT 80-222-D is only a part. Respondent argues that since complainant's counsel did not break down their hourly claims on the basis of the number of hours devoted to the issues which were lost, that it is not possible to determine whether they are entitled to payment for the number of hours claimed.

The courts have uniformly rejected the foregoing argument made by respondent's counsel. In M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911

(D. Mass. 1978), the court noted that the plaintiff had raised eight claims and had prevailed only as to part of the first claim and all of the fifth, but the court nevertheless held that plaintiffs were prevailing parties for the purpose of awarding attorneys' fees because they had succeeded in achieving some of the benefits which they had sought in bringing the action. In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175 (W.D. Pa. 1977), the court rejected defendants' argument that the fees claimed by plaintiffs' attorneys should be reduced because the plaintiffs' had failed to win on all points raised. The court denied that argument after noting that a prudent lawyer would have litigated all the points he lost, but that since the plaintiffs had won on the primary issues, no reduction should be made in their claimed fees just because they did not win on every single issue.

In this proceeding, complainants' attorneys requested that their complaint be consolidated with other cases in which counsel for the Secretary of Labor was contending that respondent had committed an implied violation of 30 C.F.R. § 48.3 in refusing to allow complainant's non-employee representative access to the mine site for the purpose of monitoring training classes. In my decision, I found that no implied violation of section 48.3 had occurred, but I found that an implied violation of the Act had occurred and that respondent had also violated section 105(c)(1) of the Act by interfering with the right of complainant's representative to come on mine property to monitor training classes. Therefore, complainant's counsel won the only real issue claimed in their complaint filed in Docket No. KENT 80-222-D and their request that their complaint be consolidated with the proceedings involving the Secretary's alleged violation of section 48.3 was an action which any prudent lawyer would have taken to make certain that an adverse decision in Docket Nos. KENT 80-212-R, et al., would not prejudice their chances of obtaining a favorable decision on their complaint filed in Docket No. KENT 80-222-D. Therefore, I find that complainant's attorneys do not need to break down their claims for hours worked in accordance with the exact number of hours spent working on the issues raised by respondent in the other cases in the consolidated proceeding in Docket Nos. KENT 80-212-R, et al.

I believe that the discussion above shows that the attorneys' fees being awarded in this decision are in line with awards made by courts in similar cases.

6. Nature and length of relationship. The sixth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is the question of whether the attorneys here involved would be inclined to vary their fees for representing the complainant in this case because the attorneys have represented complainant in prior cases over a number of years. If I had not issued an order on December 30, 1980, requiring complainant's counsel to submit supplemental information, the sixth criterion could not have been evaluated.

The information submitted in response to my order of December 30 shows that complainant was organized in 1913 as a nonprofit association and was

thereafter incorporated in 1944 in the State of Kentucky as a nonprofit corporation whose purpose of incorporation was to promote the best economical, cultural, spiritual, and health interests of the people of the Appalachian region with special concern for those in deprived areas. Complainant moved its base of operations to Clintwood, Virginia, in 1972, and it is currently located in Clintwood. Among other things, complainant has an ongoing mine safety and health program. Complainant has a committee which has the delegated responsibility of approving strategy to further the complainant's mine safety and health program.

Complainant's attorneys in this proceeding are employees of the Center for Law and Social Policy. The Center is a nonprofit, public-interest law firm which was incorporated in the District of Columbia in 1968. The Center is an educational and charitable organization, one of whose purposes is to conduct litigation and other legal activity on behalf of the poor and under-represented. One of the components of the Center is the Mining Project which was founded in 1975 for the purpose of assisting under-represented interests under the federal mine safety and strip-mining control laws. The Center has been representing the complainant in this proceeding as only one of many clients represented by the Center's Mining Project. An executive committee of the Center's Board of Trustees must approve any litigation before it is undertaken by Center staff attorneys on behalf of any client.

As will hereinafter be shown in my consideration of the eleventh criterion regarding the payment of fees, the Center is a nonprofit organization which cannot legally accept fees from its clients. Therefore, the sixth criterion is inapplicable in the circumstances involved in this case because complainant's attorneys in this case do not vary their fees on the basis of any long-term relationship in view of the fact that no fees at all are charged any of their clients.

7. Preclusion of other employment. The seventh criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the attorneys, in agreeing to represent complainant in this proceeding, became so completely committed to representing complainant that they were required to forego acceptance of business which might otherwise have been available if the attorneys had not undertaken to represent complainant in this proceeding. As to the seventh criterion, complainant's attorneys have failed to provide any data and I did not request any supplemental information concerning this criterion in my order of December 30 because the facts in this proceeding show that complainant's attorneys did not forego any business otherwise available to them as a result of their having agreed to represent complainant in this proceeding. The occurrence of several events supports the foregoing conclusion.

The first event was that when this case was initially set for hearing on the merits, complainant's attorneys asked for a postponement of the hearing because they were scheduled to be "out of the country" on another matter and could not come to the hearing first scheduled. Additionally, complainant's counsel had apparently not evaluated the facts in the case sufficiently

to know whether a timely motion for summary decision would be appropriate because, after the case had been scheduled for hearing on the merits, they filed a motion for permission to file a motion for summary decision. Their preoccupation by other matters additionally is shown by the fact that the motion for postponement was not filed until 23 days after the order scheduling the hearing was issued.

The second event showing that complainant's counsel were occupied by other matters occurred after the parties had filed a stipulation of the facts on July 17, 1980. Even though all the essential facts had been covered in the stipulation, complainant's counsel waited 20 additional days and filed a letter on August 8, 1980, contending that the case could be disposed of on the basis of the stipulation and without the need of holding a hearing. That pleading was not received by me until late on a Friday afternoon which forced me to call counsel for the other parties to obtain their responses to the second request for summary decision and issue a second order on August 12, 1980, reconsidering the same questions which had already been dealt with in my order issued July 2, 1980.

The third event showing preoccupation by complainant's counsel with other matters and reluctance to pursue diligently their client's interest, may be found in the representation by complainant's counsel in their motion filed on June 23, 1980, to the effect that attending a hearing in Pikeville would be especially burdensome to their client because its resources were limited. A hearing held in Pikeville would not have been any more burdensome to their client than a hearing held in Washington, D.C., where the client's lawyers are located because the client's location is Clintwood, Virginia, which is about 92 miles from Pikeville. The client's representative drove about the same distance to Pikeville to come to the hearing that the client's attorney drove from the airport to Pikeville. In other words, it did not cost the client any more to pay for its lawyer to come to Pikeville than it would have cost the client to send its representative to a hearing held in Washington, D.C., and a hearing was necessary, as will hereinafter be explained.

Moreover, the representation in the motion filed on June 23, 1980, to the effect that a hearing held in Pikeville would be unduly burdensome for their client was a false claim because the supplemental data provided by complainant's attorneys on January 16, 1981, stated at page six that "[a]s a §501(c)(3) non-profit organization, the Center legally cannot accept fees from its clients" but the Center does expect its clients to pay out-of-pocket expenses incurred in the course of the clients' representation. Inasmuch as complainant's attorneys each claimed 13.5 hours of salary at the rate of $85 and $55 per hour, respectively, solely for the time spent in traveling to and from Pikeville, there were more than out-of-pocket expenses associated with the trip to Pikeville. There was certainly no explanation in the motion filed by complainant's attorneys to the effect that all they were concerned about were the out-of-pocket expenses associated with their trip to Pikeville.

The plain truth of the matter is that the Center for Law and Social Policy paid the salaries of complainant's attorneys for the trip to and from Pikeville.

The reluctance of complainant's attorneys to travel to Pikeville was purely an effort on the part of complainant's attorneys to save money for the Center. The arguments made by MSHA's counsel and complainant's counsel at the prehearing conference held in Pikeville were the sole basis for complainant's having won a favorable decision in this proceeding. My announcement at that prehearing conference that I was going to rule in respondent's favor with respect to three of the four cases set for hearing was almost entirely responsible for the fact that respondent chose not to present witnesses at the hearing. It is arrogant for complainant's counsel to claim on page five of their memorandum in support of legal fees that their position that this complaint should have been disposed of by summary decision was vindicated at the conference held on August 21, 1980, because I would have found against complainant on all issues if I had decided this case on the basis of a motion for summary decision and on the basis of the pretrial brief filed by complainant's counsel in this proceeding.

The foregoing discussion shows that the preoccupation of complainant's attorneys by other cases or their concern about saving their employer (the Center for Law and Social Policy) money almost caused their client to lose every point argued by them on behalf of their client.

The events discussed above do not end the list of items showing indifference by complainant's attorneys to their responsibilities in this proceeding. After the Commission had ruled in its order of November 12, 1980, that I still had jurisdiction to determine the issue of appropriate attorneys' fees, I issued an order on November 14, 1980, requiring the parties to file a stipulation as to attorneys' fees and other expenses by November 24, 1980, or to file an itemization of costs, hours, etc., by November 24, 1980, if they could not agree on a stipulation. Additionally, I ordered counsel for the parties to appear at a conference to be held on November 28, 1980, to consider the question of attorneys' fees and other expenses. Instead of appearing at the conference, counsel for both complainant and respondent filed a joint motion for an extension of time to and including December 15, 1980, within which to reach a settlement of the amount to be awarded for legal fees and other expenses. I issued an order on November 24, 1980, granting the request for an extension of time, although I observed in that order that counsel had already had a period of 50 days within which to arrive at a settlement if they were inclined to do so.

Complainant's counsel filed on December 15, 1980, a short two-paragraph letter in which they stated that no settlement had been reached because "Martin County Coal Corporation has failed to make any counter-offer to the Council's Statement of Costs and Expenses, filed with the Court on November 24, 1980, and indeed has offered no explanation for its objection to the amount requested therein." Despite the fact that complainant's counsel had requested an extension of time to December 15, 1980, for settling the question regarding attorneys' fees, they seemed to think that they had carried out their obligations toward settlement by declining to initiate discussions with respondent's counsel when respondent's counsel failed to make a counteroffer. Furthermore, complainant's counsel incorrectly state that respondent's counsel had failed

to explain his objections to the attorneys' fees claimed by complainant's counsel because complainant's counsel had been served with a copy of the response filed by respondent's counsel on November 24, 1980. That response made it abundantly clear that respondent was objecting to all aspects of the claims for attorneys' fees submitted by complainant's counsel.

Although complainant's counsel had stated on page 15 of their memorandum submitted on November 24, 1980, in support of their statement of costs and expenses that they thought oral argument before me would assist me in disposing of the question of attorneys' fees, in their letter filed on December 15, 1980, they announced that they believed that I could dispose of the question on the basis of the information they had already supplied. Then they condescendingly added that they stood ready to appear at any conference or hearing that I might schedule so long as the date of the conference is "* * * a date prior to January 10, 1981, when counsel will be out of the country." Here, once again, complainant's counsel were so preoccupied with other cases that they had to put a deadline on any date that I might set for a conference or hearing with respect to the question of determining attorneys' fees. As will hereinafter be shown, complainant's counsel declined my offer to hold a hearing even though I agreed to do so prior to January 10, 1981, so that the conference or hearing could be held before complainant's counsel had to leave the country.

The refusal by complainant's counsel of my offer to hold a hearing or conference came about as a result of my having carefully examined the statement of costs and expenses and memorandum in support of those costs and expenses which had been submitted by complainant's counsel. I found, upon examination of the materials submitted by complainant's counsel, that they were so woefully deficient that it was impossible to analyze them under the criteria which the courts have established for determining attorneys' fees. Therefore, I issued an order on December 30, 1980, explaining in considerable detail what the deficiencies were which I had encountered and requesting that complainant's attorneys submit the supplemental data which were described in five paragraphs set forth at the end of the order. Additionally, I stated in the order that I would not hold a hearing or conference unless counsel for the parties specifically requested a hearing, but I indicated that I would hold the hearing or conference prior to January 10, 1981, since complainant's counsel would be out of the country after that time.

The supplemental data requested in my order were submitted by complainant's attorneys on January 16, 1981, and on page 12 of those data, complainant's counsel stated that "No hearing in this matter is necessary, since Respondent has not disputed any of the factual representations made by Complainant."

One final example of indifference shown by complainant's counsel to matters which occurred in this case was associated with the filing on January 9, 1981, by respondent's counsel of a request that I issue a subpoena requiring an MSHA employee to make available to respondent's counsel an investigative

report regarding the complaint filed by complainant's attorneys in this proceeding. Although MSHA's attorney filed a prompt reply opposing the granting of the request for a subpoena, complainant's attorneys did not file any reply to the request for subpoena even though I waited for the expiration of the 15-day period provided for in sections 2700.8(b) and 2700.10(b) of the Commission's Rules before issuing an order on January 16, 1981, denying the request for a subpoena.

I believe that the foregoing discussion supports my conclusion that the representation of complainant in this proceeding has in no way precluded complainant's counsel from accepting other business available to them, regardless of whether such business involved trips inside or outside the boundaries of the United States.

8. Time limitations imposed by the client or the circumstances. The eighth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the case involved priority work which delays a lawyer's other legal work. If such time limitations exist, the court seemed to think that they might entitle the attorneys to a premium.

The discussion under the seventh criterion above shows that complainant's counsel failed to give this case the kind of diligent attention which it deserved. A few time limitations existed, but they occurred entirely because complainant's attorneys sought delays in the convening of a hearing. For example, when I orally advised the parties prior to the hearing that I intended to issue a bench decision after the hearing was concluded, they insisted on filing prehearing briefs which I did not particularly want and which did not assist me in determining the issues. The request by complainant's attorneys for a continuance after the first hearing was scheduled was brought about by the fact that complainant's attorneys were involved in other matters and could not give this case the attention it merited. My granting of the postponement then made the date of the continued hearing fairly close to the time when the next training classes were to be held. The parties asked me to issue my decision by October 3, 1980, and to consider supplemental arguments between the time my bench decision was issued and the time the new training classes were scheduled to be held. Although complainant's attorneys filed a posthearing brief, the important issues in the case had already been decided in complainant's favor in the bench decision and their brief was of no assistance to me in dealing with the additional issues raised by respondent's posthearing brief because all briefs were filed simultaneously and complainant's brief did not deal with the arguments contained in respondent's posthearing brief. The primary point raised in complainant's posthearing brief was the issue of determining attorneys' fees which they misleadingly claimed could be determined in the "relief stage" of the proceeding.

After the Commission issued its order on November 12, 1980, holding that I had jurisdiction to determine attorneys' fees, I was under the erroneous impression that complainant's attorneys wanted a prompt disposition made of

that question. Therefore, my order issued November 14, 1980, required the submission of materials in support of the requested attorneys' fees within a period of 10 days. According to the supplemental data filed by complainant's attorneys on January 16, 1981, their statement of costs and expenses had already been completed on October 27, 1980. Therefore, my order requiring that those data be submitted by November 24, 1980, was certainly no time constraint that should have caused any problem. Moreover, as I have already pointed out above under the discussion of the seventh criterion, complainant's attorneys sought and were given an extension of time to December 15, 1980, within which to strive to settle the issue of attorneys' fees.

The discussion above shows that there were no time limitations in this case which were so demanding that complainant's attorneys should be given a premium for work done under time constraints. The court explained in the Johnson case (488 F.2d at 718), that the premium would be awarded primarily if doing work for the client in this case would have interfered with performance of work for other clients in other cases. Since I granted all requests for extensions of time so that complainant's attorneys could perform work for other clients in and out of the United States, they were never deprived of an opportunity to do work in other cases because of any deadlines established in this case.

9. The undesirability of the case. The ninth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the undesirability of representing clients in such proceedings as civil-rights cases might be unpleasantly received by the community in which the attorneys practice with the result that acceptance of civil-rights cases might have an economic impact on the attorneys' business. The fear expressed by the court with respect to the ninth criterion does not apply in the circumstances which exist in this case.

In the supplemental data provided by complainant's counsel, it is stated that complainant's counsel work for the Center for Law and Social Policy which was founded as an educational and charitable organization and that one of its purposes is the "conduct of litigation and other legal activity on behalf of the poor and under-represented." A special Mining Project was established at the Center for the sole purpose of representing "under-represented interests under the federal mine safety and strip mining control laws." Inasmuch as the Center was specifically established for the purpose of representing entities in mine-safety cases, the Center would not be concerned about whether its agreement to represent complainant in this case would have an adverse economic effect on its ability to attract other clients. Therefore, I find that complainant's counsel are not entitled to any increase in legal fees under the court's ninth criterion.

10. The novelty and difficulty of the questions. The tenth criterion which the court in the Johnson case, supra, requires judges to consider in determining attorneys' fees is whether the issues raised in a given case are so novel and complex that the attorneys are required to perform more than a normal amount of work so that they should be specially compensated for

accepting the challenge. The issue in this case is unusually simple in that the only question raised by the complainant's lengthy complaint is whether respondent's refusal to allow complainant's representative to enter mine property for the purpose of monitoring training classes was an implied violation of the Act and, if so, whether that violation was also a violation of section 105(c)(1) by having interfered with a statutory right impliedly given complainant under the Act. The aforesaid issue was novel, but not complex. The only research which complainant's attorneys had to do was to examine the Act to determine what rights the Act gives to miners and their representatives. It should be recalled from my discussion of the first criterion above, that complainant's counsel are specialists in interpreting the Act and that the senior attorney participated in the rulemaking which followed passage of the present 1977 Act containing provisions pertaining to the training and retraining of miners and their representatives. Consequently, complainant's counsel were not required to perform an unusual amount of research or effort in order to deal with the issues raised by the complaint.

The pretrial brief filed by complainant's attorneys was voluminous and cited several court decisions which had no specific bearing on the real issues. As I stated at the hearing (Tr. 11), the brief was "very excellent" in the sense that it displayed the attorneys' ability to engage in an academic exercise expounding on esoteric legal principles, but the brief failed to come to grips with the provisions of the Act--as was done, for example, by the Commission in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980),--for the purpose of helping me determine whether refusal to allow complainant's representative to monitor classes was an implied violation of the Act. Therefore, I find that the issues in this case were not so novel or complex that complainant's attorneys are entitled to any special compensation because they agreed to represent complainant in this proceeding.

11. Whether the fee is fixed or contingent. The eleventh criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the attorney expected to receive a large fee when he agreed to accept the case. The court, in discussing the eleventh criterion pointed out that the criterion for the judge to consider "is not what the parties agreed but what is reasonable". The court added that "[i]n no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount" (488 F.2d at 718 for both quotations).

No contract existed between the client and its attorneys in this proceeding. The supplemental data submitted by complainant's counsel state as follows (p. 6):

> As in most public interest litigation, the Council has not agreed to pay the Center legal fees. */ The Center's receipt of legal fees for its representation of the Council in this matter, therefore, has been wholly contingent on the

Council's prevailing on the merits and the consequent entitlement to an award of attorney fees under §105(c) of the Act. [Second footnote omitted.]

*/ As a §501(c)(3) non-profit organization, the Center legally cannot accept fees from its clients. It may receive only court awarded or approved legal fees, or it will lose its tax-exempt status. Rev. Rul. 75-76, 1975-1 C.B. 154.

The fee arrangement between complainant and its attorneys in this case shows that the attorneys took the case without expecting to be paid anything, other than out-of-pocket costs, unless they were successful in winning the case. In the event they won, as they have pending possible reversal of my decision by the Commission, they expect only to obtain whatever is found to be reasonable under section 105(c)(3) of the Act. Some courts have awarded incentive fees just to encourage attorneys to continue representing persons in public-interest class actions. See, for example, Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), where a 10-percent incentive fee was awarded in a case where the court denied the attorneys the fee they had anticipated in receiving.

In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261 (S.D.N.Y. 1978), the issue was very similar to the issue raised in this case because the attorneys won the right to go on the property of an employer to assist migrant workers with their problems. The court awarded the attorneys $31,945 in legal fees and held that the fact that the action involved legal work of a non-profit or public-interest nature did not bar the attorneys from being paid reasonable fees, but the court did not award the attorneys any incentive fees.

In Lindy Bros. Builders, Inc. of Phila. v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973), the court held that an incentive fee award might be appropriate, but that such an award is unnecessary if the number of hours worked is a large proportion of the total recovery so that adequate compensation is awarded for the type of work done. In Lindy Bros. Builders, Inc. of Phila. v. American R. & S. San. Corp., 540 F.2d 102 (3d Cir. 1976), the court majority was highly critical of a judge's allowance of a 100 percent incentive award. The majority affirmed the judge's award because it found that the "* * * lengthy proceedings at bar--now in their fifth year--" should be brought to an end. The court expressly added that although it was not reversing the judge's award, "* * * it should be apparent that we do not necessarily endorse the methods or the reasoning employed to reach its result" (504 F.2d at 118). The dissenting opinion disagreed with the majority's allowing the doubling of fees and stated, among other things, that "[t]he case is old, but appellate judges cannot operate on the premise that what was unacceptable on the first appeal becomes palatable by attrition" (540 F.2d at 125).

The response filed by respondent's attorney argues that complainant's attorneys are not entitled to a special incentive fee because they are employed by a nonprofit organization whose sole function is to bring public-interest litigation. That argument must be rejected because several courts

have held that the fact that attorneys agree to undertake public-interest litigation without expecting to be paid does not affect their right to be awarded reasonable fees for their services. Such rulings were made in Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975), and in Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974). Although the courts ruled that attorneys for nonprofit organizations should be paid reasonable compensation, they did not indicate that a special incentive fee should be awarded simply because the plaintiffs were represented by public-interest organizations which did not expect to be paid fees by the plaintiffs. In the Tillman case, the court held that (417 F.2d at 1148):

> * * * when an allowance of attorneys' fees is justified, it should be measured by the reasonable value of the lawyer's services. It should not be diminished because the attorney has agreed to contribute the money, in whole or part, to a civil rights organization whose aims have stimulated him to work voluntarily.

In my evaluation of the second criterion, supra, and in my evaluation of the twelfth criterion, infra, I have allowed an ample amount of time at the rates proposed by complainant's counsel. I believe the caliber of representation discussed under the seventh criterion, supra, would make it inappropriate in this proceeding to allow any special incentive fee merely because complainant's counsel undertook the instant litigation without expecting to receive any fees if they failed to win the case.

I find no merit to a final argument contained in the response filed by respondent's attorney. That argument is that allowance of an incentive fee is improper in a proceeding under section 105(c)(3) of the 1977 Act because section 105(c)(3)'s provision for payment of attorneys' fees is different from 42 U.S.C.A. §2000e-5(k) of the Civil Rights Act under which incentive awards were made in such cases as Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976). Section 105(c)(3) provides as to award of attorneys' fees as follows:

> * * * Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. * * *

The comparable provisions of section 2000e-5(k) of the Civil Rights Act read as follows:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the

Commission and the United States shall be liable for costs the same as a private person.

In both Acts, the only provision with respect to attorneys' fees is that the Commission or the court is authorized to award reasonable attorneys' fees. The courts have awarded special incentive amounts upon various grounds, but all such awards have been based on a finding by the court that the attorneys have performed in some outstanding manner. In the Parker case, supra, for example, the court awarded an incentive fee of 25 percent after noting that the case had taken nearly 3 years to complete, that the senior attorney had done extensive work throughout that period, and had demonstrated great diligence, persistence, and dedication. I believe that a bonus or incentive award should be based on the performance of the attorneys in each case on an individual basis. My extensive discussions of the work performed by complainant's attorneys in this proceeding show that they were not required to do legal work over an extended period of time and that they did not display any unusual diligence which would entitle them to a special incentive award.

12. The time and labor required. The twelfth and final criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is an evaluation of the hours claimed or spent on the case. The court stated that "* * * [t]he trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities" (488 F.2d at 717). In my discussion of the second criterion, supra, I have evaluated the work done by complainant's attorneys and law students and have fixed specific time periods for such work as well as the hourly rate. Those findings will hereinafter be summarized in this section of my decision.

One final aspect of the number of hours claimed has not, however, yet been reviewed. That final aspect of the hours claimed by complainant's counsel relates to time spent in making phone calls and in engaging in conferences. The court in the Johnson case stated that non-legal work should be carefully scrutinized because the dollar value of such work "* * * is not enhanced just because a lawyer does it" (488 F.2d 717).

The summary of activities located between pages 9 and 10 of the supplemental data submitted by complainant's attorneys shows that the senior attorney spent 5 hours in making phone calls and that the junior attorney spent 8.25 hours in making phone calls. The summary shows that the senior attorney spent 14.25 hours in conferences, that the junior attorney spent 15 hours in conferences, and that all five law students spent a combined total of 5 hours in conferences.

In the Kiser case, supra, the court discounted from 30 to 35 percent the amount of time spent on phone calls and conferences (364 F. Supp. at 1318-1320). In the Parker case, supra, the court discounted the double-time nature of conferences by 20 percent and the time spent on making phone calls by 20 percent (411 F. Supp. at 1067).

Out of the total of 77.25 hours claimed by the senior attorney, he spent 19.25 hours or 25 percent of his time in making phone calls or engaging in conferences. At the hourly rate of $85 claimed by the senior attorney, complainant would have to pay $1,636.25 solely for the time he engaged in phone calls and conferences. That is an inordinate amount of time to claim for phone calls and conferences at an hourly rate of $85. I shall, therefore, discount the senior attorney's time spent on phone calls and conferences by 35 percent or by 6.75 hours. Out of the 150 total hours claimed by the junior attorney, 23.25 hours were spent in making phone calls and engaging in conferences. Despite the large number of hours spent on phone calls and conferences by the junior attorney, his time in such activities amounted to only 15.5 percent of the total number of hours claimed. Consequently, the junior attorney's time for making phone calls and conferences will be reduced by 25 percent or by 5.8 hours. All five law students claim total time of 81.5 hours. Of that time, only 6 percent or 5 hours were used for conferences and no time was spent on phone calls. Since those conferences were necessary for the law students to obtain guidance from the junior attorney or senior attorney whose time will be discounted as indicated above, I believe that no discount should be applied for the time the law students spent in conferences, particularly since their time is valued at only $25 per hour.

In my discussion of the second criterion, supra, I ruled that the senior attorney's time should be reduced by 1 hour for the time spent on the complaint and by 10 hours for the time spent on discovery. I have just determined in the preceding paragraph that the senior attorney's time spent on phone calls and conferences should be reduced by 6.75 hours. Therefore, the total reductions in the senior attorney's time should be 17.75 hours.

In my discussion of the second criterion, supra, I ruled that the junior attorney's time should be reduced by 3 hours for time spent on the complaint, by 1 hour for time spent on the motion for permission to file a motion for summary decision, by 1.25 hours for time spent on the letter again asking for a summary decision and other relief, by 19.5 hours for the time claimed by the junior attorney for his unjustified trip to Pikeville, and by 6.5 hours for time claimed for the preparation of the deficient statement of costs and expenses. I have just determined in my discussion of this twelfth criterion that the junior attorney's time should be reduced by 5.8 hours for the time claimed for phone calls and conferences. Therefore, the total reductions in the junior attorney's time should be 37.05 hours.

In my discussion of the second criterion, supra, I ruled that the time of one law student should be reduced by 2 hours for the time spent in preparing the complaint. Therefore, the total time which should be deducted from the time claimed for work done by law students should be 2 hours.

The summary sheet located between pages 9 and 10 in the supplemental data submitted by complainant's attorneys makes the hourly claims listed below under the words "Hours Claimed". The above-described reductions of 17.75, 37.05, and 2 hours, for the senior attorney, junior attorney, and law

students, respectively, have been applied to the claimed hours to produce the hours appearing below under the words "Hours Allowed". Application of the hourly rates of $85, $55, and $25 claimed by the senior attorney, junior attorney, and law students, respectively, produces the amounts appearing below under the words "Approved Amount".

	Hours Claimed	Hours Allowed	Approved Amount
Senior Attorney	77.25	59.50	$ 5,057.50
Junior Attorney	150.00	112.95	6,212.25
Law Students	81.50	79.50	1,987.50
Total Attorneys' Fees			$ 13,257.25

The direct costs and expenses claimed by complainant's attorneys total $864.57. Those claims appear to be reasonable and will be allowed, except that I have already ruled in my discussion of the second criterion, supra, that the cost of one round-trip plane fare to Huntington, West Virginia, the cost of lodging for one person, and the meals for one person must be deducted from the total of $864.57 claimed by the attorneys as direct costs and expenses. I have already determined under the heading of "Actual Expenses Incurred by Complainant", supra, that complainant is entitled to recover $626.69 for the time and costs expended by complainant in connection with the complaint filed in this proceeding. Therefore, respondent will be ordered to pay complainant for those costs and expenses.

I have explained in great detail in my discussions of the fifth, seventh, and eleventh criteria why complainant's attorneys are not entitled to a bonus for their representation of complainant in this proceeding.

Respondent's Claim that No Attorneys' Fees Can Be Awarded

Thirteen days after complainant's attorneys had submitted supplemental data on January 16, 1981, in response to my order of December 30, 1980, respondent's counsel sought permission to file an additional brief in opposition to the request for attorneys' fees. I granted the motion in my order issued February 2, 1981, and respondent's attorney filed on February 9, 1981, the supplemental brief or "Martin County's Response to Complainant's Submission of Supplemental Data". I have essentially disposed of the arguments raised in respondent's brief of February 9 in my discussion of the eleventh criterion, supra, but I shall reconsider the arguments again in this section of my decision because my discussion of the eleventh criterion also explained why complainant's counsel are not entitled to a bonus or special incentive award.

In the brief of February 9, respondent argues that section 105(c)(3) allows a complainant to be reimbursed for attorneys' fees only if such fees are awarded as part of the costs and expenses actually incurred by complainant in filing and prosecuting its complaint. In support of chat argument, respondent cites the Supreme Court's opinion in Alyeska Pipeline Service Company v.

The Wilderness Society, 421 U.S. 240 (1975), in which the Court held that, under the "American Rule", in the absence of a statutory provision awarding attorneys' fees to be paid to the prevailing party, the prevailing party may not recover attorneys' fees as costs or otherwise (421 U.S. at 245).

Respondent argues that all the cases cited by complainant's counsel in their supplemental data (p. 6) in support of their argument, that they are entitled to attorneys' fees even though they undertook the case without expecting to be paid by their clients, are civil-rights cases in which the courts awarded attorneys' fees to be paid because the attorneys were acting as private attorneys general and it was held that they were entitled to be paid reasonable fees regardless of the altruistic principles which may have motivated the attorneys when they agreed to file complaints on behalf of the persons whose civil rights had been curtailed.

Respondent also argues that since both the complainant and the Center for Law and Social Policy were incorporated as charitable organizations for the purpose of obtaining interpretations of the Mine Act which are favorable to their point of view, they are merely carrying out their corporate purposes when they bring actions such as those in this case and that they are not entitled to be paid for doing that which they were organized to do. Respondent claims further that the "private attorney general" theory relied on by some courts for awarding attorneys' fees was rejected by the Supreme Court in the Alyeska case and that complainant's attorneys may not rest their claim for attorneys' fees on cases involving that theory.

Respondent's counsel has misapplied the Supreme Court's opinion in the Alyeska case. In that proceeding, some lawyers for the Wilderness Society and other environmental groups brought an action to enjoin the Secretary of the Interior from issuing permits under the Mineral Leasing Act of 1920 which would grant Alyeska rights-of-way needed to construct a pipeline to transport oil from Alaska to the lower 48 States. After the action was brought, Congress amended the Mineral Leasing Act and ruled that no other action was necessary under the National Environmental Policy Act of 1969 before construction of the pipeline could proceed. Since the merits of the environmentalists' case had been disposed of by Congress, the D.C. Circuit turned to the question of an award of attorneys' fees sought by the environmental groups' attorneys. There was no statute providing for an award of attorneys' fees, so the court relied on the "private attorney general" theory and awarded attorneys' fees on the ground that the attorneys had brought the action to vindicate important statutory rights of all citizens. The Supreme Court reversed the D.C. Circuit's award of attorneys' fees solely because, under the "American Rule", the losing party cannot be made to pay attorneys' fees as part of the cost of an action unless there is a statute permitting the winning party to be paid attorneys' fees.

Since there is a statute in this proceeding and in the cases cited by complainant's counsel on page 6 of their supplemental data providing for an award of attorneys' fees, the Alyeska case has no bearing whatsoever on the request for attorneys' fees which is before me in this proceeding. The Supreme Court

in the Alyeska case specifically noted that its decision did not apply to cases brought under the Civil Rights Act (421 U.S. at 261). Therefore, the cases cited by complainant's attorneys in support of their contention that they are entitled to recover attorneys' fees, even though their client did not agree to pay them anything if they did not prevail, are still the applicable law with respect to the request for attorneys' fees in this proceeding.

In one of the cases cited by complainant's attorneys, Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 517 F.2d 1141 (4th Cir. 1975), the court held that (517 F.2d at 1148):

> * * * An award that ultimately is donated to a civil rights organization that opposes such discrimination can do much to further this goal [of seeking judicial redress for unlawful discrimination]. Litigation to secure the full measure of the law's protection has frequently depended on the exertions of organizations dedicated to the enforcement of the Civil Rights Acts. Consequently, when an allowance of attorneys' fees is justified, it should be measured by the reasonable value of the lawyer's services. It should not be diminished because the attorney has agreed to contribute the money, in whole or in part, to a civil rights organization whose aims have stimulated him to work voluntarily.

Another case cited by complainant's counsel in support of their claim that they are entitled to be paid even though they work for a nonprofit organization is Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976), in which the court cited the Tillman case above, among others, in holding that attorneys' fees should be awarded in cases involving attorneys who work for civil rights organizations or have undertaken cases without exacting a fee. The court stated that award of attorneys' fees to nonprofit, public-interest organizations "* * * promotes their continued existence and service to the public" (538 F.2d at 13).

Even though the Center for Law and Social Policy agreed to represent complainant in this case without an agreement that it would be paid anything by complainant for its services except out-of-pocket costs, the award of reasonable attorneys' fees in the amount provided for in this proceeding will promote the Center's efforts in providing legal assistance to miners or their representatives in future situations where discriminatory treatment is alleged to have occurred.

Having disposed of respondent's preliminary challenges, it is now possible to turn to the final objection to awarding attorneys' fees raised by respondent in its brief filed February 9, 1981. That objection is that the statutory provision, or section 105(c)(3) here involved, does not give a judge authority to award attorneys' fees because section 105(c)(3) permits an award of attorneys' fees to be made only when such fees have been incurred as a cost or expense "* * * by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of

* * *" the complaint. In other words, respondent claims that since complainant did not specifically incur any attorneys' fees as a part of its costs or expenses, I am barred from awarding any attorneys' fees to the counsel who did bring the action on complainant's behalf. I believe that respondent seeks an overly narrow interpretation of the statutory language. While it is true that complainant did not have a contract with its attorneys under which it specifically agreed to pay attorneys' fees, complainant knew that it could not hope to prevail without being represented by attorneys with a knowledge of the Act. Therefore, it cannot be denied that expenditures of time and effort by attorneys were made "* * * in connection with, the institution and prosecution of" this proceeding. The supplemental data (p. 6) submitted by complainant's attorneys clearly show that they expected to seek an award of attorneys' fees if they prevailed. Consequently, although complainant did not expect to pay any attorneys' fees, the attorneys who represented complainant clearly expected to be paid for their services if their client turned out to be the prevailing party in this proceeding. For the foregoing reasons, I reject the arguments advanced by respondent's counsel in his "Response to Complainant's Submission of Supplemental Data" filed February 9, 1981.

EPILOGUE

In Lindy II, supra, the court stated (540 F.2d at 116):

> We find it necessary also to observe that we did not and do not intend that a district court, in setting an attorney's fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief. * * *

Despite the foregoing observation, the court stated that the judge should consider the quality of the attorneys' work and should inquire separately into various factors, such as contingency fees, which have been considered in my opinion. Judges have been reversed for failing to explain in detail why they have increased or decreased the hourly rates or number of hours claimed by attorneys in the cases before them. Therefore, regardless of what a court's intention may be, the determination of attorneys' fees is a difficult and complex task which requires weeks of work when each claim by complainant's attorneys is contested by respondent's counsel.

The unfortunate aspect of my decision on the issue of attorneys' fees in this proceeding is that the Commission may reverse my original decision on the merits of the case. If the Commission reverses my finding of an implied violation of the Act, the weeks of work which were devoted to determining attorneys' fees will be completely wasted because complainant's attorneys will not be entitled to an award of any fees.

A means exists for avoiding the time-consuming and distasteful chore of determining attorneys' fees, pending completion of review proceedings. It is

obvious from the objections raised by respondent's counsel to the fees claimed by complainant's attorneys that he would have been willing to agree on a settlement of the matter, pending review, if complainant's attorneys would have agreed to charge no more than he did for an hour's work, that is, $70 instead of the $85 hourly figure claimed by complainant's senior attorney. The other primary objection raised by respondent's counsel to the fees sought by complainant's attorneys was their claim for a bonus of 15 percent. In such circumstances, there is no reason whatsoever that, pending the Commission's decision on appeal, respondent could not have been ordered to pay legal fees based on $70 per hour and other hourly rates which respondent's counsel was willing to accept, pending the outcome of his appeal. If that procedure had been followed in this instance, my original decision could have awarded an amount based on reduced hourly rates and deletions of the request for a bonus until such time as the Commission had ruled on the issues raised on appeal. Thereafter, if respondent's attorney and complainant's attorneys were still unable to reach a satisfactory stipulation with respect to attorneys' fees, assuming my decision had been affirmed, a proceeding could then have been held or pleadings could have been filed, as they were in this case, and the question of attorneys' fees could have been determined on a final basis.

As this case now stands, if the Commission affirms my decision, there will still have to be another phase in this proceeding which will require me to write another lengthy decision dealing with the claims for legal fees and expenses to be submitted by complainant's attorneys for the work they have already expended, or will expend, on behalf of complainant for the period after October 31, 1980.

In all future cases, I intend to follow the procedure outlined above so as to avoid the possible waste of weeks of work in determining attorneys' fees in any case in which the parties have indicated that they intend to file a petition for discretionary review at the time a determination as to contested attorneys' fees has to be made.

WHEREFORE, it is ordered:

For the reasons hereinbefore given, paragraph (C)(3) of my decision issued October 3, 1980, in the proceedings in Martin County Coal Corporation, et al., Docket Nos. KENT 80-212-R, et al., is amended to read as follows:

> (3) To reimburse the Council of the Southern Mountains, Inc., for expenses directly incurred by the Council in the amount of $626.69 and to pay the Center for Law and Social Policy an amount of $13,257.25 in attorneys' fees plus an amount of $846.57 for expenses claimed by the Center's attorneys less (a) the cost of one round-trip plane fare from Washington, D.C., to Huntington, West Virginia, (b) the cost of one person's lodging associated with the trip to Pikeville,

and (c) the cost of one person's meals associated with the trip to Pikeville.

Richard C. Steffey

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

Distribution:

Jack W. Burtch, Jr., Esq., Attorney for Martin County Coal Corporation, McSweeney, Stutts & Burtch, 121 Shockoe Slip, Richmond, VA 23219 (Certified Mail)

L. Thomas Galloway, Esq., and Richard L. Webb, Esq., 1/ Attorneys for Council of the Southern Mountains, Inc., Center for Law and Social Policy, 1751 N Street, NW, Washington, DC 20036 (Certified Mail)

Edward H. Fitch IV, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

1/ Mr. Webb filed on February 3, 1981, a motion that he be permitted to withdraw as assistant counsel in this proceeding since he is terminating his employment by the Center for Law and Social Policy. The motion was acted upon in a separate order after the 15 days for the filng of replies had expired.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ISAAC FIELDS, Complainant	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. VA 80-99-D
v.	:	No. 1 Mine
UNITED CASTLE COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Complainant;
Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, Atlanta, Georgia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order issued July 28, 1980, a hearing was held in the above-entitled proceeding on September 10, 1980, under sections 105(c)(2) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(2) and 815(d).

At the conclusion of the hearing, the parties asked that they be permitted to file posthearing briefs prior to the rendering of a decision. Counsel for respondent filed a 44-page brief on November 12, 1980, and counsel for complainant filed a 10-page brief on November 12, 1980.

At the hearing, counsel for the Secretary and complainant stated that when the complaint had been filed, there was attached to it as Exhibit A a copy of a complaint submitted to the Mine Safety and Health Administration (MSHA) on the basis of facts which were different from the facts which support the complaint filed in this proceeding. Therefore, the Secretary's counsel requested that he be permitted to amend the complaint to substitute, as Exhibit B, the correct complaint (Tr. 5-6). Respondent's counsel did not object to having the complaint amended by attaching to it the proper complaint, but he objected to my allowing the erroneous complaint, or Exhibit A to the complaint, to remain as a part of the complaint (Tr. 5). Inasmuch as respondent has chosen to refer to both complaints in its brief (p. 11), I

believe that a copy of both Exhibit A and Exhibit B should remain attached to the complaint in order that the record will be complete. It is understood, of course, that Exhibit B constitutes the complaint which initiated the cause of action before MSHA which ultimately culminated in the filing of the complaint in this proceeding in Docket No. VA 80-99-D.

The issues raised by respondent's brief are (1) whether complainant sustained his burden of proof on the question of whether Isaac Fields was discharged for activity protected under section 105(c)(1) of the 1977 Act, and (2) whether I have jurisdiction to assess a penalty under section 110(i) of the Act if a violation of section 105(c)(1) is found to have occurred.

The following findings of fact will be the basis for my decision in this proceeding:

Findings of Fact

1. United Castle Coal Company, respondent in this proceeding, produces approximately 200,000 tons of coal on an annual basis at its No. 1 Mine (Tr. 6-7). The company also owns a coal-processing facility which is operated under the name of Virginia Coal Processing Corporation and employs about 90 employees at both operations (Tr. 7-8).

2. Complainant in this proceeding is Isaac Fields who worked for United Castle from the fall of 1977 to September 5, 1979, when he was allegedly discharged for insubordination based on an incident which occurred on August 30, 1979 (Tr. 26; 136-137; 196; 198; 200; 205).

3. The alleged act of insubordination resulted from events which occurred on August 30, 1979, as hereinafter described. On August 30, 1979, Isaac and five other employees rode an S&S mantrip into the No. 1 Mine (Tr. 26; 72). An axle broke on the mantrip about one-third of the way to the working section and the men refused to walk the remaining distance to the section because they would have been left with no means of emergency transportation out of the mine in case someone should have been injured (Tr. 27; 54; 105-106; 117; 148; 160). When the section foreman learned that the miners had refused to walk to the working section, he sent a Kersey tractor into the mine to pull the disabled mantrip from the mine (Tr. 27; 74-75; 113).

4. When the miners reached the surface, the superintendent, Fuller Helbert, retained about four of them for the purpose of extending a conveyor belt and told the remaining miners that they would not be needed again until Tuesday, September 4, 1979. Monday, September 3, 1979, was a holiday and no one worked that day (Tr. 27; 29; 117-118; 144; 160-161; 184; 210-213).

5. After Isaac learned that he had been laid off until Tuesday, he became upset and charged that the company always retained the same people to work when incidents like the broken axle occurred (Tr. 27; 104-105). As Isaac was leaving the mine site, he remarked, while walking past Denver Cooke,

the mine administrator, that this place sucks (Tr. 27; 55; 125; 143; 175; 190; 194-195). Denver heard the remark and stated that Isaac did not have to work there and that if Isaac did not like working there, he should get his ass out of the hollow (Tr. 28; 56; 144; 147; 210). Isaac's reply to Denver was that he could not deal with him on company property, but that if he would leave the mine site, they could settle things (Tr. 28; 55-56; 125; 143-144; 175; 196).

6. Denver Cooke reported Isaac's remarks to the superintendent, Fuller Helbert, who in turn reported the remarks to respondent's president, Michael Fourticq (Tr. 176; 196). Michael Fourticq asked them to make a written report regarding the incident and that was done as is shown by Exhibit 4 in this proceeding (Tr. 176-177). Although Exhibit 4 is an Employee Warning Form, Michael Fourticq testified that Denver Cooke had simply chosen to write an account of Isaac's remarks of August 30 on that form. Although Exhibit 4 has a section which is supposed to reflect the employee's version of the facts set forth on the form, Isaac was never shown the executed form and Michael Fourticq stated that it was not his intention to use the form as a warning because he had already decided to discharge Isaac for his insubordinate conduct rather than to give him a warning (Tr. 180-183; 185-190; 217-220).

7. Isaac returned to work on Tuesday, September 4, 1979, following the August 30 interchange between him and Denver Cooke (Tr. 29-30; 111-112). No mention of the August 30 event was made on September 4 because Michael Fourticq had not yet had an opportunity to discuss the events of August 30 with Denver and other persons at the mine (Tr. 29-30; 64-65; 177; 198).

8. On September 5, 1979, the day of Isaac Fields' discharge, Isaac reported to work as usual and rode to the working section as usual (Tr. 112). Shortly after Isaac and the other men on the crew arrived on the working section, an MSHA inspector took an air reading and found that the mean air velocity was 35 instead of 60 as required by 30 C.F.R. § 75.301-4 (Tr. 12; 21; 154). The inspector wrote Citation No. 683058 at 9:30 a.m., alleging a violation of section 75.301-4 (Tr. 18). The inspector asked the men on the section if the air was often as low as he had found it and Isaac stated that it was often low but that the company ignored his complaints about ventilation (Tr. 12; 30).

9. Isaac also claims that he asked the inspector if the amount of oil on the continuous-mining machine was excessive (Tr. 30). The inspector gave a statement to an MSHA investigator on December 26, 1979, in which he stated that Isaac had asked him about excess oil on the continuous-mining machine (Tr. 12; 13-20; 30). When he testified at the hearing on September 10, 1980, however, the inspector could not recall that Isaac had mentioned the oil to him, but the preponderance of the evidence shows that Isaac did ask the inspector about the oil because Fourticq said that Isaac's statements to the inspector about inadequate air and excess oil had been reported to him before

he discharged Isaac, but that those reports had nothing to do with the discharge because he had decided to discharge both Isaac and his brother, Joe, because of their insubordination which had occurred on August 30, 1979 (Tr. 12; 14; 214; 217).

10. The discharge of Joe Fields was related to a threat made by Joe to the section foreman, E. O. Salyer, Jr., to the effect that Joe would whip Salyer's ass if Salyer assigned someone else to operate the roof-bolting machine, normally operated by Joe, on August 30 after Joe had been sent home that day with other miners who had refused to walk to the section after the axle on the mantrip broke (Tr. 159; 163). Joe did not file a discrimination complaint with respect to his discharge on September 5 because he found work at another coal mine within 3 days after his discharge and did not feel that he would gain much by filing a complaint (Tr. 103).

11. Isaac testified that when the slack in the trailing cable of the shuttle car operated by Gary Smith was suddenly taken up on September 5, 1979, the cable caught his feet and threw him against the rib (Tr. 31; 56-57; 88-90; 144-146). Gary Smith claims that the cable could not have hit Isaac because Isaac was standing in an entry where the cable could not have touched him (Tr. 127). Jerry Sargent, the operator of the continuous-mining machine, testified that he saw Isaac sitting against the rib or getting up from that position (Tr. 145-146; 149; 156). Jerry had given a written statement to management saying that the cable did not touch Isaac, but at the hearing, he agreed that it was possible that the cable could have struck Isaac and he also disputed Gary Smith's claim that Gary could have seen Isaac's position in the mine because Gary's position on the left side of the shuttle car would have prevented Gary's being able to see Isaac at all (Tr. 152-153; 155-156). Jerry did not look in Isaac's direction until after the cable was jerked loose from the shuttle car's reel so as to cause the lights on the shuttle car to go off (Tr. 146-147; 157).

12. Isaac said that his being thrown against the rib only bruised his shoulder and he declined to allow anyone to examine him for injuries (Tr. 57; 164; 199-200). On the other hand, as Isaac was leaving the mine on September 5, he reminded his section foreman that an accident report should be made concerning his trailing-cable encounter because he was going to the hospital to obtain an examination (Tr. 165).

13. E. O. Salyer, Jr., Isaac's section foreman, testified that Isaac was a troublesome employee and that he had remarked more than once that he would like to have had Isaac eliminated from his crew (Tr. 148-149; 169-170; 214-215). When Salyer was asked for examples of the types of acts committed by Isaac which caused him trouble, he said that Isaac would have the continuous-mining machine to stop until the curtains could be replaced or he would complain about the mean air velocity being lower than it should have been. Salyer agreed that such things needed to be done (Tr. 170-171).

14. Michael Fourticq, respondent's president, is a lawyer and a member of the Texas bar (Tr. 203). He said that he laid the ground work for

Isaac's discharge very carefully because he knew that Isaac is the type of person who, if discharged, would claim that his rights had been violated (Tr. 196-197). Fourticq said that he was familiar with section 105(c)(1) of the Act and that it is such an abused provision of the law, that it is hardly possible to discharge a person without having a complaint filed alleging discrimination in violation of section 105(c)(1) (Tr. 202-203).

15. The miners were called out of the mine on the afternoon of September 5, 1979, because the inspector found that certain respirable dust samples had not been taken (Tr. 25; 67). After Isaac had reached the surface, he was asked by Fuller Helbert, the superintendent of the mine, to report to Michael Fourticq at the tipple office which is located about a half mile from the underground mine (Tr. 58; 67). When Isaac reported, he stated that Fourticq asked him how he was and then asked him if he had complained to the inspector about inadequate air and excess oil on the continuous-mining machine (Tr. 32; 63-64). Isaac answered "Yes." Then Isaac states that Fourticq told him that he was being discharged for insubordination (Tr. 32; 63-64). Isaac claims that Fourticq did not explain what the acts of insubordination were and that Fourticq promised to give him the reasons in a discharge slip when Isaac picked up his check, but no such slip was ever given to Isaac even though he asked for it on three different occasions (Tr. 96-97; 159; 200-201).

16. Fourticq denies that he mentioned anything about Isaac's conversation with the inspector on September 5, and states that he must be given credit for having sense enough as a lawyer not to refer to safety complaints at the time he is discharging an employee for insubordination (Tr. 203; 213-214). Fourticq defended his failure to provide Isaac with a written statement of discharge on the ground that he did not have to do so under company policy (Tr. 201).

17. There was an inconsistency between Fourticq's answers to interrogatories and testimony in that Fourticq's answer to Interrogatory No. 11 stated that there was no written policy providing for discharge for insubordination, but stated at the hearing that the company did have such a written policy at the time of Isaac's discharge on September 5, 1979 (Tr. 201-205). Fourticq explained the inconsistency in redirect testimony by stating that the company's written disciplinary policy did refer to insubordination, but that he did not think the written policy's reference to insubordination constituted a written insubordintion policy, per se (Tr. 210-211).

18. There was a place in the mine called the "swamp," as well as other places, which were difficult to traverse on foot and which made it difficult, if not impossible, to carry an injured person from the mine (Tr. 106-107). On August 30, 1979, there was a Kersey tractor which was used to pull the inoperative S&S mantrip out of the mine, but the chief electrician told Isaac that it was not dependable on August 30, 1979, and could not be used to transport men in or out of the mine (Tr. 112-113). The superintendent stated that if anyone who had walked into the mine on August 30, 1979, were

to be injured, he would be carried out of the mine (Tr. 115). No one disputed Isaac's claim that carrying a person out would either have been impossible or would have taken so long and would have exposed the injured person to so much stress that he would have been likely to die from shock (Tr. 107). Isaac cited as an example of the consequences of failing to have an emergency means of transportation, an incident involving a miner named Roscoe Anderson whose hand was badly injured while he was working underground. He was too large a man to be carried out on a stretcher through mud and water by other miners, and the scoop became mired in mud when they tried to use it for transportation. Therefore, Anderson had to walk out of the mine; as a result of the accident, he lost a finger, but Isaac claimed that if Anderson had had a serious leg injury which would have prevented his being able to walk out of the mine, he would have died from shock before he could have been removed from the mine (Tr. 106).

CONSIDERATION OF PARTIES' ARGUMENTS

RESPONDENT'S CONTENTIONS

Respondent's Opening Argument

Respondent's brief (p. 14) begins its arguments by citing a decision issued by the former Board of Mine Operations Appeals in Smitty Baker Coal Co., 1 IBMA 144 (1972), in support of its claim regarding complainant's burden of proof in a case initiated under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. The portion of the former Board's decision cited by respondent refers to the Federal Coal Mine Health and Safety Act of 1969 and to procedural rules which are no longer applicable to our proceedings. Moreover, the Board's Smitty Baker case has been the subject of so many reversals and remands, that I no longer consider the former Board's statement in that case to be particularly pertinent to cases brought under section 105(c)(2) of the 1977 Act.

The portion of respondent's brief beginning on page 16 faces up to the realization that the testimony of all witnesses supported complainant's contention that his discharge had resulted from the fact that respondent wanted to eliminate complainant from respondent's work force because of his complaints about health and safety matters in respondent's mine (Finding Nos. 8-9, 13-14, supra). Respondent's brief seeks to avoid the impact of testimony showing that complainant consistently complained about hazardous conditions by arguing that most of complainant's case is fatally deficient because the chief witness who appeared in support of complainant's case was the complainant himself and that the evidence shows that complainant is not a credible witness.

The Question of Complainant's Credibility

The Discharge Conversation. Respondent's brief (p. 17) claims that it is preposterous to think that Michael Fourticq, respondent's president, who discharged complainant, Isaac Fields, would have mentioned Isaac's complaints

about health and safety in the conversation which had been initiated by Fourticq with the sole purpose of advising Isaac that he was being discharged for insubordination. Respondent's brief (p. 17) notes that Fourticq is a lawyer, a member of the Texas bar, and was at the time of the discharge fully aware of the provisions of section 105(c)(1) of the Act (Finding Nos. 14-16, supra).

One would normally agree that a lawyer would avoid referring to an employee's complaints about health and safety during the conversation which had been initiated for the sole purpose of discharging the employee. The testimony of Fourticq in this proceeding, however, contains admissions and inconsistencies with which one would not expect a lawyer to become embroiled. For example, Fourticq stated unequivocally that Isaac was a troublesome fellow who was always complaining about all sorts of things and that it was Fourticq's intention to discharge Isaac without running afoul of the provisions of section 105(c)(1). Despite Fourticq's declared intention of finding a reason for discharge which would not be subject to a successful appeal under section 105(c), Fourticq picked an insubordination charge which would not normally be considered a good reason for discharging anyone (Finding Nos. 3-6, supra).

One would also expect a lawyer to answer questions during direct and cross-examination in a manner which would be consistent with the answers given in response to interrogatories. Yet, Fourticq stated during cross-examination that respondent has a written policy regarding the disciplinary action which should be taken for insubordination, but in answer to interrogatory No. 11, he had previously stated that no such written policy existed (Tr. 204-205). On redirect, Fourticq sought to rehabilitate himself by claiming that respondent has no written policy regarding insubordination per se, but that respondent has a written policy in general which includes a discussion regarding insubordination (Tr. 211).

The other aspect of Fourticq's testimony which one would have expected a lawyer to avoid was the fact that Fourticq stated during cross-examination that it was unlikely that he had talked to Jerry Sargent, one of the witnesses to Isaac's alleged act of insubordination, prior to discharging Isaac (Tr. 207). Fourticq had, however, answered interrogatory No. 6 by stating unequovically that he had talked to Jerry Sargent as a part of his investigation of the alleged act of insubordination (Tr. 208).

The record shows that Fourticq spurned the offer of his lawyer to be present during his discharge conversation with Isaac (Tr. 42). Therefore, the lawyer who wrote respondent's brief in this proceeding is in no position to state for certain whether Fourticq also stumbled into another error by having inadvertently referred to Isaac's complaints about inadequate air and excess oil on the continuous-mining machine. In any event, I am unwilling to conclude that complainant was necesarily mistaken when he alleged that Fourticq referred to his complaints about health and safety at some time during the discharge conversation with Isaac. Fourticq talked to Isaac for 15 to 20 minutes before Isaac was allowed to call his witnesses (Tr. 136). Neither Fourticq's nor Isaac's description of the discharge conversation

explains why 15 or 20 minutes would have been required if the subjects mentioned by Fourticq and Isaac had been the only subjects discussed during the discharge conversation (Tr. 59-60; 199-200).

The Failure to Call Joe Fields as a Witness. Isaac Fields' brother, Joe Fields, was discharged at the same time that Isaac was discharged (Finding No. 10, supra). Respondent's brief (p. 18) claims that an adverse inference should be drawn from the fact that the Secretary's counsel failed to call Joe Fields as a witness for the purpose of corroborating Isaac Fields' statement that Fourticq had mentioned Isaac's safety-related complaints during the discharge conversation.

During the hearing no one asked either Isaac or the Secretary's counsel why Joe Fields was not called as a witness in support of Isaac's case. Some reasons why Joe was not called may be that Isaac apparently does not communicate with his brother very often because Isaac did not even know the status of Joe's case filed with NLRB in connection with the incidents which occurred on August 30, 1979, and which are described in Finding Nos. 3 and 4, supra (Tr. 103). Additionally, it may well be that the Secretary's counsel did not want to expose Joe to being cross-examined regarding the incidents of August 30, 1979, prior to the completion of Joe's case against respondent which is apparently still pending before NLRB. For the foregoing reasons, I am unwilling to make a conclusion that the Secretary's counsel failed to call Joe Fields as a witness because he knew that Joe could not truthfully make statements in support of Isaac's claim that Fourticq referred to Isaac's safety-related complaints during the discharge conversation.

Isaac's Alleged Inconsistent Statements Regarding Witnesses to the Discharge Conversation. Respondent's brief (pp. 19-20) claims that Isaac's testimony was disputed by miners who were witnesses to the discharge conversation. Respondent states that three miners (Donnie Poston, Gary Smith, and Tony Cardon) were witnesses to the discharge conversation and that the two miners (Gary Smith and Tony Cardon) who testified in this proceeding stated that Fourticq told them that he had discharged both Isaac Fields and his brother solely for insubordination. Respondent's brief argues that it does not make sense to claim that Fourticq would tell Isaac and Joe that he had discharged them for making safety complaints and then tell the miners who were called as witnesses by Isaac that Fourticq had discharged Isaac and Joe for insubordination.

There are several flaws in the foregoing argument. Respondent has overlooked some facts about the discharge conversation which are important when it comes to placing the discharge conversation into proper perspective. When Isaac asked Fourticq if he could have his selected fellow miners as witnesses at the beginning of his discharge conversation, Fourticq stated that that would not be necessary (Tr. 32; 64). Therefore, the three miners who allegedly heard Fourticq give insubordination as his reason for discharging Isaac and Joe were not present at the beginning of the discharge conversation and are therefore in no position to testify about what occurred during the

first part of the discharge conversation (Tr. 32; 64; 136; 200). Indeed, the three miners referred to in respondent's brief were called into the inner office where Fourticq was seated only after Fourticq had finished his conversation informing Isaac and Joe that they had been discharged. At that time, they heard Isaac ask Fourticq if he wanted his miners to violate safety laws when they were working underground. That question was naturally answered "No" by Fourticq. After the miners had heard Isaac's question answered, Isaac and Joe were dismissed and then Fourticq explained to the miners, out of Isaac's and Joe's presence, that he had discharged both of them for alleged acts of insubordination which occurred on August 30, 1979 (Tr. 201).

In view of the fact that the two miners who testified in this proceeding regarding the reason Fourticq gave for discharging Isaac were not present during the actual discharge conversation, I am unwilling to make any conclusions on the basis of their testimony about whether or not Isaac is a credible witness.

Another alleged inconsistency in the testimony which respondent's brief (pp. 19-20) claims to be proof of Isaac's lack of credibility is that for some inexplicable reason, Isaac claimed that although he had asked Tony Cardon to be a witness, Tony had declined to be one. Respondent's brief quotes Isaac's testimony to the effect that Tony did ultimately go into Fourticq's office to talk to him and that Tony did so after Isaac had left. Respondent's brief alleges that Tony Cardon did not know anything detrimental to Isaac's case and that Isaac's deliberate misstatements concerning Cardon's presence can only be another example of Isaac's total lack of credibility (Brief, p. 21).

If respondent's counsel will read Cardon's testimony again, he may not be so certain that Isaac is the witness who lacks credibility. As I have noted above, not one of the three miners who were asked to be witnesses to Isaac's discharge conversation actually heard the discharge conversation. Cardon claims that he came into the office at the time Isaac asked them to witness his question to Fourticq about compliance with safety laws. Isaac stated that Cardon did not want to be a witness and that when he called in the two men who were willing to be witnesses, he "looked at" only Smith and Poston because he knew Cardon did not want to be a witness. It should be noted that Cardon rode back and forth to work with Isaac. Cardon therefore had an opportunity to hear Isaac talk about his conversation with Fourticq in greater detail than the other three miners who allegedly witnessed Isaac's question about compliance with safety laws. Cardon is the only one who claims that Fourticq told Isaac that he could pick up a discharge slip on Friday when he picked up his check. Fourticq denies that he agreed to give Isaac a discharge slip, but Isaac says Fourticq promised to give him such a slip. If Cardon is to be given absolute credibility with respect to his having been a witness to Isaac's question regarding compliance with the safety laws, then Cardon should also be given absolute credibility with respect to Cardon's statement that Fourticq did agree to give Isaac a written discharge slip.

I believe the foregoing discussion justifies a refusal by me to find that Isaac necessarily misstated the fact that Cardon declined to be a witness as to Isaac's question regarding compliance with safety laws. Isaac's claim that Cardon went into Fourticq's office after Isaac's question regarding compliance with safety laws and after Isaac left is just as credible as Cardon's claim that he was present in Fourticq's office at the same time that Smith and Poston were present.

Isaac's Inconsistent Statments Regarding Identity of Person Who Discharged Him. Respondent's brief (pp. 21-22) claims that Isaac's credibility is further eroded by the fact that in his original complaint filed with the Mine Safety and Health Administration (MSHA), he alleged that he had been discharged by respondent's mine superintendent, Fuller Helbert, rather than by its president, Michael Fourticq. Respondent concedes that Isaac justified the mistake at the hearing by explaining that he had been out of work for a considerable period when he made the statement to the MSHA investigator and that he was under so much emotional stress because of unpaid bills piling up, that he did not realize that he had used Fuller Helbert's name instead of Michael Fourticq's and that he had signed the statement without realizing the use of the incorrect name until he was asked about it by MSHA investigators at a subsequent time.

Isaac explained at the hearing that he normally talked to the mine superintendent and received instructions from the mine superintendent and that the superintendent's name came readily to mind when he was filing his original complaint with MSHA. He stated that he was not in any doubt about the fact that it was Michael Fourticq who had discharged him and that his original statement was otherwise correct. Respondent's counsel refuses to accept Isaac's explanation that the mistake was the result of emotional stress and alleges that the mistake in names occurred "* * * because the entire matter was fabricated by Fields to gain the protection of the Act and this was simply the first of the two lies" (Brief, p. 22).

Although respondent's counsel refuses to accept Isaac's explanation for the mistake in names, he asks me to overlook Fourticq's inconsistent statements as to whether Fourticq talked to Jerry Sargent prior to discharging Isaac and whether respondent had a written policy pertaining to discharge of employees for insubordination (Brief, pp. 33 and 34). If a lawyer and a member of the Texas bar can be excused for inadvertently stating one fact at one time and a different fact at another time, then surely Isaac cannot be considered a completely incredible witness simply because he used an incorrect name when he was filing his original complaint in this case. There could have been no possible advantage in Isaac's having named Fuller Helbert as the person who discharged him instead of Michael Fourticq. Therefore, I am accepting Isaac's explanation for his mistake in names just as I am accepting Fourticq's explanation for his mistakes in factual statements.

Denver Cooke's Role as Administrator. Respondent's brief (pp. 22-23) claims that Isaac's propensity for altering facts to suit his needs is further evidenced by Isaac's claim that he did not consider Denver Cook to

be a part of management. Although Isaac recalled that Denver had set some spads underground and that Isaac had gone to Denver to ask for corrections in days erroneously charged to Isaac as sick leave, respondent's counsel claims that Isaac overlooked the fact that Denver had initially interviewed Isaac when he filed his application for employment, that Denver had recommended that Isaac be hired, and that Denver had assigned Isaac a self-rescuer when Isaac first came to work at respondent's mine. It is additionally argued by respondent that when employees Smith and Sargent were testifying, they clearly stated that they considered Denver to be a part of management. Respondent concludes from the foregoing claims that Isaac downgraded Denver to his own level so that he could justify having threatened to deal with Denver in some unspecified way if Isaac caught Denver off of company property.

There are several defects in the foregoing argument insofar as they relate to an attack on Isaac's credibility. First, employees Sargent and Smith, in addition to stating that they thought of Denver as a part of management, stated that they considered him to be a clerical employee (Sargent, Tr. 155) and that Denver had worked underground doing acts such as applying rock dust just as any other hourly employee would do (Smith, Tr. 142). Thus, the preponderance of the evidence shows that Denver was at most an administrative assistant who had no supervisory powers whatsoever over the miners who worked underground. Therefore, Isaac's claim that he responded to Denver's suggestion that Isaac get his ass out of the hollow by answering with a similar retort, whereas he would have filed charges instead, if such a remark had been made by a true supervisor such as the mine foreman or superinendent, is a reasonable explanation for what occurred. In any event, Isaac's response was at least as much justified as Denver's inflammatory statement was. If management personnel expect to receive respect from their employees, they should address their employees in acceptable terms in the first instance.

The Events of August 30, 1979

Respondent's Position Regarding Events of August 30. Respondent's brief (p. 23) begins its discussion of the events of August 30, 1979, with a statement that respondent's position on the events of that day is clear in that the only events of that day which are related to Isaac's and Joe's discharge are their conversations with Denver Cooke and E. O. Salyer, respectively. That claim is contrary to the testimony of respondent's president, Michael Fourticq, who testified that all of the events which occurred on August 30 are interrelated. Fourticq stated that he was distressed because no coal had been produced when the men followed Isaac's example of refusing to walk to the section (Tr. 196; 209). Fourticq stated that it was obvious that if Isaac had agreed to walk to the section, the whole crew would have walked and coal would have been produced in a normal manner. Fourticq's testimony shows without doubt that Isaac's refusual to walk to the section was responsible for the fact that the miners all came to the surface and the alleged acts of insubordination all resulted from the fact that Isaac had refused to walk to the section (Tr. 211).

I am not willing, in view of Fourticq's testimony discussed above, to find that respondent's position about the events of August 30 is as stated on page 23 of respondent's brief because Fourticq was respondent's policy witness and his testimony must be considered as a statement of respondent's position regarding the events of August 30 until such time as Fourticq asks that the record be opened so that he can retract his statements to the effect that all of the events of August 30 are interrelated (Tr. 209-210; 212).

The Merits of Isaac's Fears. Respondent's brief (p. 24-25) claims that there was no justification for Isaac's claim that it was hazardous to work in the mine without having a means for transporting miners from the mine in the event of an emergency. Respondent first contends that there is no Federal law requiring transportation in event of an emergency except for surface transportation from the mine itself to the nearest hospital. Such an argument is logically incorrect because it would do an injured miner no good whatsoever to have an ambulance waiting for him on the surface if he could not be quickly transported out of the mine. Respondent's argument is also contrary to the requirements of 30 C.F.R. § 75.1704 which requires each operator of a coal mine to maintain two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, to the surface. The last sentence in section 75.1704 provides as follows:

> * * * Escape facilities approved by the Secretary or his authorized representative * * * shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency. [Emphasis supplied.]

Respondent made no attempt through any of its witnesses or otherwise to disprove Isaac's claim that there was so much mud and water in respondent's mine that it would have been impossible to transport a large man from the mine by his being carried manually on a stretcher (Findings No. 18, supra.) Moreover, as the Commission held in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), a miner has a right to refuse to work in a hazardous situation and Isaac's testimony to the effect that a hazard existed stands unchallenged and unrebutted in the record. Therefore, respondent's claim that no hazard existed and that no law required a means of emergency transportation under the conditions described by Isaac, is rejected as being contrary to the preponderance of the evidence and the mandatory safety standards.

Respondent's brief (p. 26) also contends that the evidence shows that Isaac incorrectly claimed that an emergency means of transportation was unavailable. In support of that argument, respondent's brief states that a Kersey tractor was available to pull the mantrip out of the mine or transport an injured person. It is said that the Kersey was used to pull the mantrip with the broken axle out of the mine and that it could have been used to transport an injured person out of the mine if he had been injured after having walked to the working section after the S&S mantrip broke down. Respondent acknowledges the fact that Isaac testified that the chief electrician, Bill Holbrook, told Isaac that the Kersey was unreliable and could not

be used to transport the men to or from the working section. Respondent argues that Bill Holbrook was not a part of management and that "* * * it is ridiculous to assert that Fuller Helbert, the general superintendent, would deny the use of equipment to an injured miner and respondent submits that this is simply more fabrication on the part of Fields in an attempt to justify his insubordination on August 30" (Brief, p. 26).

Contrary to the arguments in respondent's brief, Isaac's claim that the Kersey would not be used for emergency transportation is supported by the preponderance of the evidence. First, it should be noted that Isaac controverted that very argument during cross-examination by pointing out that when Roscoe Anderson was injured, the Kersey tractor was not used as an emergency means of transportation (Finding No. 18, supra; Tr. 114). Isaac also testified that he was willing to ride the Kersey to the working section on August 30, but the chief electrician refused to let them use the Kersey for that purpose (Tr. 113). In view of the fact that respondent's president expressed distress because the miners had failed to produce coal on August 30 (Tr. 196), the record supports a conclusion that the chief electrician's ruling about the undependability of the Kersey tractor was unchallenged by the mine superintendent. Otherwise, the miners would surely have been allowed to ride to the section on the Kersey tractor so that coal could have been produced.

Respondent's brief (p. 26) additionally claims that Isaac's alleged fears were shown to be unfounded by the fact that Isaac stated that he walks to the working section at the mine where he now works (Tr. 105). Respondent chooses to ignore the fact that Isaac distinguished the reason he will walk to the working section where he now is employed, as opposed to walking in respondent's mine, by stating that his present employer promptly repairs any equipment which may be broken down, whereas respondent made no effort to repair equipment promptly (Tr. 105).

Respondent's brief (p. 27) also expresses the belief that Isaac took a cavalier attitude about refusing to walk to the working section because it is alleged that Isaac stated that he did not feel like walking on August 30 and laughed when he said it. The claim that Isaac laughed was made by Gary Smith (Tr. 122) who obviously resented having been subpoenaed by the Secretary's counsel as a witness and whose testimony is almost entirely hostile toward Isaac and almost wholly supportive of respondent's position in this proceeding. Smith's bias in support of respondent's position is understandable when it is realized that Smith still works for respondent and that respondent's president was sitting only a few feet from him while he was testifying. On the other hand, another employee, Jerry Sargent, who also still works for respondent, did not appear to be as fearful of retaining his position, and he specifically stated that Isaac refused to walk to the working section beause there was no means of transportation out of the mine in case of an emergency (Tr. 148). The miners agreed with Isaac and all of them refused to walk to the working section (Tr. 148).

Although respondent's brief (p. 27) states that the question of whether respondent discriminated against some miners on August 30 by retaining some

to work while sending the remainder home is not an issue material to this proceeding, respondent proceeds to argue that the selection process was entirely free of discrimination against those who refused to walk to the section. Respondent claims that its employee witnesses throughly explained how the men who were retained to work were selected. It cites the testimony of Smith who claimed that the miners' willingness to walk to the section had nothing to do with the selection (Tr. 124). It also cited the testimony of Cardon who said he did not know who worked because he had planned a long weekend for Labor Day and left for home immediately after the miners came to the surface (Tr. 161). While respondent claims that its president capably explained how the miners who were retained to work were selected (Tr. 212), it is a fact that Fourticq agreed that the miners who were retained to work were also necessarily miners who had agreed to walk to the working section because that is where the miners had to work to extend the conveyor belt. Fourticq frankly stated that there was some prejudice to his having selected Jerry Sargent to work because Sargent knew how to operate the Kersey tractor which was used to drag the conveyor belt parts to the site where they were needed. 1/ Thus, the explanation of Fourticq as to how the men were selected was inconsistent with Smith's testimony to the effect that the miners' willingness to walk to the working section had nothing to do with their selection.

Respondent's brief (p. 27) also notes that Isaac filed a complaint with MSHA with respect to alleged discrimination by respondent in having sent Isaac home on August 30 and claims that Isaac filed that complaint in a further attempt to bring himself under the protection of the Act to avoid being discharged for what he knew was insubordination. The evidence shows that both Isaac and his brother, Joe, filed complaints with respect to the events of August 30, but Joe filed a complaint with NLRB and put Isaac's name on it along with his own. Isaac did not know that Joe had put Isaac's name on Joe's complaint when Isaac filed his complaint with MSHA. When MSHA thereafter advised Isaac that he could not file a complaint with two different Federal agencies regarding the same incident, Isaac withdrew the complaint he had filed with MSHA (Tr. 37). Respondent's brief correctly states that the issue of whether respondent discriminated against Isaac for sending Isaac home on August 30 is not an issue to be determined in this proceeding. Therefore, I express no views on whether respondent's selection of men to work on August 30 constituted a violation of section 105(c)(1) of the Act.

The Act of Insubordination. The last portion of respondent's brief (pp. 28-30) dealing with the events of August 30 answers the argument of the Secretary's counsel to the effect that Isaac's alleged act of insubordination in his heated conversation with Denver Cooke on August 30 was not sufficiently serious to warrant Isaac's discharge. Respondent directs a large part of its argument to demonstrating the importance of Denver Cooke's position with

1/ Another reason that management may have refused to use the Kersey tractor for transporting men may have been that management had decided to reserve the Kersey solely for the purpose of dragging conveyor belt parts into the mine.

emphasis upon the fact that if Isaac considered Denver to hold a position no more important than that of a fellow employee, Isaac was the only employee who was unaware of Denver's position as a part of management. That contention has previously been discussed and I have found that Denver's role as time-keeper, receiver of employment applications, issuer of self-rescuers, and supervisor of secretaries and spare-parts personnel, would, at most, warrant his being called an administrative assistant. Isaac claimed that he would have filed charges if a truely recognized supervisor, such as a mine foreman or superintendent, had ordered him to get his ass out of the hollow if he did not like the way he was being treated. Since Isaac had, in fact, filed a complaint against one of respondent's former superintendents who cursed him, Isaac was truthful when he stated that he differentiated between the way he responded to Denver from the way he would have responded to Fuller Helbert who was the mine superintendent on August 30.

The difficulty with respondent's efforts to demonstrate the seriousness of Isaac's response to Denver's comments on August 30 (Finding No. 5, supra) is that respondent's justification for discharge begins with an administrative assistant who departed from the kind of acceptable and restrained language which one would expect management to use and then seizes upon the reaction of an angry and frustrated miner as a excuse to discharge him. Since neither Denver nor Isaac conducted himself in a desirable fashion, management has a very poor basis for its claim of gross insubordination. The evidence shows that the section foreman, the superintendent, and the president of the company all considered Isaac to be a source of irritation and all of them wanted to eliminate him from the work force (Tr. 123; 148-149; 196; 202-203; 215). Fourticq says he was trying to find a reason for discharging Isaac which would not run afoul of the protective provisions of section 105(c)(1). The reason given by Fourticq for the discharge is just not persuasive in the circumstances and he showed poor judgment in discharging Isaac on the basis of an alleged insubordination which was nothing more than an exchange of heated words by two miners and which should have been ignored by Fourticq until he had a really justifiable reason for discharging an emloyee he alleges was unsatisfactory.

Additional comments will be made about Isaac's alleged insubordination at a later point in my decision. The above comments are sufficient at this point to show why I feel there is no merit to the argument set forth by respondent on pages 28 to 30 of its brief.

The Events of September 5, 1979

Isaac's Questions Regarding Adequate Air and Excess Oil. Respondent's brief (p. 31) claims that an MSHA inspector checked the mean air velocity in the vicinity of the continuous-mining machine on his own volition and issued a citation for a violation of section 75.301-4 before Isaac ever raised any question about respondent's failure to provide an adequate amount of air at the working face. Respondent also states that if Isaac did ask the inspector about an excess amount of oil on the continuous-mining machine,

it is obvious that the inspector found no excess accumulation because he did not issue a citation in connection with any accumulation of combustible materials on the continuous-mining machine.

The evidence shows that the above-described statements in respondent's brief are correct, but respondent's brief misses the point because Fourticq admitted in his testimony that the mine superintendent had told him about Isaac's complaints to the inspector about lack of adequate air on the working section and excess oil on the continuous-mining machine before he had his discharge conversation with Isaac, but Fourticq denied that Isaac's safety-related complaints on September 5 had any effect on Isaac's discharge because Fourticq had already decided before hearing about Isaac's safety-related complaints to discharge Isaac for insubordination (Finding No. 9, supra). If the superintendent had not thought Isaac's complaints significant or annoying, he would hardly have bothered to advise Fourticq that Isaac had made the complaints. Therefore, Isaac's complaints on September 5 can hardly be ignored because they were, in fact, known to Fourticq prior to the time that Isaac was discharged. They become just one more factor to be considered in the overall evaluation of the evidence in this case.

Isaac's Injury on September 5, 1979. Respondent's brief (p. 32) claims that Isaac fabricated the fact that the shuttle car's trailing cable had knocked him against a rib during the morning of September 5 (Finding No. 11, supra). The grounds for respondent's claim that Isaac invented the trailing-cable incident are that Isaac refused to allow the first-aid man to check him for injury because Isaac said that it was not serious enough to warrant any treatment. When Isaac was leaving the mine on September 5, he told the section foreman to turn in an accident report about the incident because Isaac was going to the hospital to obtain an examination. Respondent claims that Isaac knew he was going to be discharged for his alleged insubordination on August 30 and that Isaac fabricated the trailing-cable injury to gain sympathy from Fourticq in the hope that Fourticq would not discharge him.

There is little logic to the above allegation. Respondent notes that immediately after the trailing cable had allegedly knocked Isaac against the rib, Isaac ran down to where the section foreman was talking on the phone and told the section foreman not to send any more shuttle cars down the crosscut until Isaac had signaled that he was ready for them to come. Respondent claims that that is another example of Isaac's insubordinate attitude toward his superiors. If, as respondent claims, Isaac suspected that he was going to be discharged for an act of insubordination which occurred on August 30, it is not logical that Isaac would deliberately produce yet another alleged act of insubordination by addressing his section foreman in a manner which showed that he was upset by the fact that the trailing cable had thrown him against the rib.

It is generally true that when a person is unexpectedly knocked down, but not actually injured, he becomes irritated at that moment by the realization that he could have been seriously injured by the occurrence which knocked him down. If Isaac did not feel that he had been injured enough to

break the skin or a bone, there is nothing strange, contrary to respondent's claims, about the fact that Isaac declined to have the first-aid man examine him. Moreover, there is nothing extraordinary about the fact that Isaac later told the section foreman to fill out an accident report because Isaac was planning to go to the hospital to obtain a checkup. Isaac has worked long enough to know that compensation and hospital bills are more likely to be paid when actual injury is documented immediately after an accident occurs. Moreover, the section foreman never did check to ascertain if Isaac went to the hospital (Tr. 165). Therefore, respondent's claims that Isaac fabricated the injury are not supported by the record.

Finally, it should be noted that Jerry Sargent, the continuous-mining machine operator, first wrote a signed statement about the trailing-cable incident and gave the statement to management. In that statement, Sargent alleged that the trailing cable did not touch Isaac. At the hearing, however, Sargent said he did not see everything that occurred and retracted his unequivocal statement to the effect that the trailing cable did not touch Isaac (Tr. 156-157).

One of the witnesses at the hearing was Gary Smith, the operator of the shuttle car whose trailing cable threw Isaac against the rib. Smith claimed that he saw Isaac shortly before Isaac claims to have been hit by the trailing cable and Smith contended that the trailing cable could not possibly have hit Isaac (Tr. 127-130).

Sargent, on the other hand, stated that it would have been impossible for Smith to have seen Isaac because Isaac was on the right side of Smith's off-standard shuttle car (Tr. 150-153). Additionally, Sargent said that Isaac was in direct line with the shuttle car's trailing cable (Tr. 153) and that the trailing cable was jerked "* * * like pulling a rubber band and letting it go" (Tr. 144).

Sargent's testimony largely corroborates Isaac's claims regarding the trailing-cable incident. I believe that Jerry Sargent was a very credible witness. Despite the fact that respondent's president was sitting just a few feet from Sargent when he testified, he gave a great deal of very damaging testimony about respondent. He stated, for example, that management personnel had stated in his presence that they would like to get rid of Isaac because he was an instigator and kept the men stirred up (Tr. 148-149). Sargent also stated that respondent frequently failed to provide adequate ventilation in the mine, that the curtains were too short to be effective on September 5, and that he would have cut coal on September 5 without seeing that the ventilation was adequate if the inspector had not forced the miners to establish proper ventilation by writing a citation for the lack of ventilation (Tr. 147; 154).

Respondent's brief (pp. 32-33) defends the inconsistencies between statements made by Fourticq in interrogatories and those made by Fourticq in his testimony at the hearing. I have already discussed those inconsistencies and need not give them further consideration at this point.

The Reason Given by Respondent for Discharging Isaac Fields

Isaac's Alleged Unsatisfactory Record as an Employee. Respondent's brief (pp. 34-38) argues that the Secretary's counsel has failed to demonstrate that Isaac Fields was other than a disruptive employee whom management justifiably wanted to eliminate from its work force for reasons having nothing to do with complaints about safety. Respondent relies on the testimony of Gary Smith for its claim that Isaac was a disruptive employee who would do such things as lie on the continuous-mining machine so that it could not be operated (Tr. 119). Respondent concedes that Smith also testified that he had heard respondent's superintendent state that he would like to get rid of Isaac because he gave him a lot of headaches. Respondent used that testimony as a basis for claiming that Isaac was simply an uncooperative employee who disrupted production activities for reasons having nothing to do with health or safety (Brief, p. 36).

I agree that there is testimony in the record showing that Isaac was not always a shining knight in every incident involving compliance with the health and safety standards. For example, Isaac admitted that he had not added a piece to the bottom of the curtain on September 5 although he knew the curtain was too short to provide an adequate volume of air at the working face (Tr. 80-81). Isaac also stated that it was not normal practice to add a piece to the bottom of curtains when high coal was encountered, whereas Jerry Sargent stated that he had added such extensions to the curtains (Tr. 81; 155).

It is difficult, however, to place the sole blame for lack of ventilation on September 5 entirely on Isaac's shoulders. It must be recalled that the inspector found the lack of adequate ventilation before any production had begun. Jerry Sargent was the operator of the continuous-mining machine, while Isaac was only his helper. In the first instance, it was the responsibility of the section foreman, E. O. Salyer, to have observed the excessively short curtain and to have had the curtain extended before any production was begun. Secondly, it was Sargent's responsibility next to have made sure that there was adequate ventilation, but he candidly stated that he had not done so and would have produced coal without extending the curtain if the inspector had not forced them to correct the problem. Isaac defended his failure to do anything about the curtain by claiming that the curtains were erected by other personnel and that all he was required to do before the continuous-mining machine entered a working place to cut coal was to drop down the curtains which had been rolled up by the men who cleaned up the place in preparation for the continuous-mining machine to resume production of coal. Again, it should be noted, that Isaac was the one who advised the inspector that respondent frequently failed to provide adequate ventilation and asked about excessive oil on the continuous-mining machine. It is significant that the section foreman thought that Isaac's comments were sufficiently noteworthy to be reported to respondent's president prior to Isaac's discharge.

Even though several witnesses were asked to give examples of Isaac's uncooperative attitude, the examples given almost without exception showed

that they related to matters of health and safety. Smith's testimony regarding Isaac's safety-related complaints is 50 percent in favor of Isaac and 50 percent against him because Smith stated that he had heard Isaac make safety complaints and he had seen him do things that were unnecessary like lying down on top of the continuous-mining machine. On the other hand, the section foreman, who was one of the management personnel who wanted to get Isaac dismissed, gave examples wholly involving Isaac's insistence that an adequate amount of air be provided and that curtains be hung properly before Isaac would allow the continuous-mining machine to operate (Tr. 169-170). Although Smith criticized Isaac for doing unnecessary things, he also stated that he would expect to lose his job if he should report a safety violation to MSHA instead of making his complaints directly through channels, that is, first to the section foreman, then to the superintendent, and then to the president before going to MSHA (Tr. 120).

Smith said that if they reported safety hazards to their section foreman, they would be corrected nine time out of 10 "if an imminent danger" was involved (Tr. 122). Respondent's president, Michael Fourticq, confirmed that Smith had correctly stated respondent's policy with respect to having miners report safety hazards directly to management before reporting them elsewhere because, for one thing, that enabled management to take care of such complaints quickly (Tr. 215).

Fourticq gave examples of Isaac's complaints. He said that they ranged from complaints about the soda in the Coke machine to the contention that the softball team was not being given the right uniforms. Fourticq also stated that Isaac complained because hammers were not provided for the roof-bolting machine for the purpose of sounding the roof. Fourticq said that the hammers kept disappearing from the machine, so management proposed to solve the problem by having the miners sign for the hammers, but Isaac refused to do so because he believed that would be a violation of his rights (Tr. 216). Since Isaac was a helper on the continuous-mining machine, there appears to be no good reason why he should sign for a hammer to be placed on the roof-bolting machine.

Jerry Sargent, as an example of an act by Isaac which kept the men stirred up, cited the event on August 30 when Isaac refused to walk to the working section when the S&S mantrip broke an axle. Sargent said the men would have walked to the section if Isaac had not refused to do so, after stating that there was no provision for transportation out of the mine in case of an emergency. Smith also cited Isaac's refusal to walk on August 30 and added that "What [Issac] usually said, we went along with him" (Tr. 122).

The foregoing review of the witnesses' testimony shows that the preponderance of the evidence supports a finding that Isaac had a reputation as a leader and that he was the foremost person among to the miners to complain about safety problems as well as other problems which were somewhat unimportant. It is not possible for me to conclude that management wanted to dismiss Isaac because he complained about the soda in the Coke machine or the softball team's uniforms. Fourticq stated that he was distressed by the fact

that the men had not produced coal on August 30. The evidence unequivocally shows that the men would have walked to the section and would have worked if Isaac had not objected. I have no alternative but to conclude that the evidence shows that management wanted to dismiss Isaac because of the annoyance associated with his safety-related complaints.

Pretext for Discharge. The remainder of respondent's brief (pp. 37-38) on the discrimination issue is devoted to defending its decision to discharge Isaac because he was "grossly insubordinate" on August 30, 1979.

I do not like to see the provisions of section 105(c)(1) abused any more than Michael Fourticq does (Tr. 202-203). I believe that Congress placed section 105(c)(2) in the Act so that the Secretary can ferret out at the threshold those complaints of discharge which he thinks are totally without merit. I believe that an employer should be able to discharge unsatisfactory workers without being subject to the unpleasantness of a hearing where the employer has to defend each step he took before determining to discharge a miner. I have found in the employer's favor in several discrimination cases when the employer's reasons for discharge were soundly based on meritorious considerations.

As respondent argues in its brief (p. 37), "* * * it is not the function of the Mine Safety and Health Act to protect employees from errors in judgment by management. The function of the Act is to prevent discrimination toward employees who engage in activity protected by the Act." The Commission's decision in the Pasula case, supra, however, requires a judge to examine the reason given by a respondent for discharge to determine whether respondent has carried its burden of demonstrating that complainant was discharged for the reason given by respondent or whether complainant was discharged because of his safety-related complaints.

In this proceeding, respondent's reason for discharging Isaac Fields will not stand close scrutiny. The sole reason given by Fourticq when he discharged Isaac was that Isaac had been insubordinate on August 30, 1979, when Isaac replied in an irascible fashion to inflammatory comments made by Denver Cooke. All of the witnesses who heard the remarks knew that Isaac's complaints about the company's releasing some men and retaining others to work were not specifically addressed to Denver Cooke. Yet Denver took it upon himself to address Isaac in language which could have been expected to inflame Isaac because Isaac had justifiably refused to walk to the section at a time when management had no method to transport men out of the mine if someone had been sufficiently injured to require that he be taken out on a stretcher. Isaac's stand for safety had cost him that day's work as well as the next day because management, after Isaac's stand for safety had prevented the men from walking to the section, had decided to advance an extension of the belt conveyor, previously planned for the coming weekend, to that day and the following day.

With those facts as background, it is understandable that Isaac would have reacted strongly to Denver's remarks by telling him that they could

settle the matter when Denver left mine property. When Denver saw Isaac off mine property at a subsequent time, Isaac made no further threats or showed any inclination to assault Denver (Tr. 191). Moreover, as I have discussed at some length above, Isaac had reason to believe that Denver was not a person cloaked with supervisory powers over underground employees.

Fourticq claims that he made a thorough investigation of the facts before he decided to discharge Isaac. Yet Fourticq did not interview one of the witnesses to the conversation between Denver and Isaac and Fourticq did not interview Isaac to obtain his version of the incident even though the written report provided to him by Denver Cooke fails to mention the inflammatory language which Denver had used in the first instance and which Denver admitted at the hearing had been used. If the company expects its employees to be docile and polite in addressing management, management should conduct itself in an exemplary fashion in the first instance.

Moreover, there is considerable doubt as to whether Isaac's remarks to Denver were properly categorized as "insubordinate." Webster's Dictionary defines "insubordinate" as not being obedient or not submitting to authority. When a supervisor suggests to an employee that if he does not like the way his employer is treating him, he should "get his ass off" the company's property, the supervisor is not really asking the employee to do an act which is a part of his assigned job. If the employee becomes angry at such a remark and suggests that a fight might be an appropriate way to settle the matter, the employee is not really refusing to do any act for which he was hired. When Denver made his report to Fourticq on the Employee Warning Record, he appropriately checked the box for "Conduct" rather than the box for "Disobedience;" consequently, Denver himself recognized that he was not reporting Isaac's statement on August 30 as a case of "insubordination."

As I have indicated above, my review of the entire record shows that respondent's management wanted to remove Isaac Fields from its payroll because he was a constant problem. Yet nearly all of the examples of the problems caused were related to situations involving complaints about safety. Respondent's president acknowledged that he wanted to find a way to discharge Isaac without running afoul of the language of section 105(c)(1). Nevertheless, the president came up with a very unconvincing episode in which an administrative assistant used insulting language in addressing Isaac and received similar language in return. I find that such a flimsy excuse for discharging Isaac is unconvincing and that the real reason Isaac was discharged was to eliminate from the company's payroll a miner whose safety-related complaints had become intolerable. Therefore, I find that respondent violated section 105(c)(1) when it discharged Isaac Fields on September 5, 1979, because Isaac had been engaged in activities protected under section 105(c)(1) of the Act. For the foregoing reason, Isaac is entitled to the affirmative relief requested in his complaint.

At the hearing, Isaac stated that he has a job at another coal mine and that he did not want to be reinstated. The amount of back pay to which he is entitled was agreed upon in the event a decision adverse to respondent should

be rendered (Tr. 38). My order will hereinafter require that sum to be paid to Isaac Fields with interest at the rate of 9 percent requested in the complaint. Since the wages accumulated over a period of 20 weeks, the total amount did not accrue until the 20-week period had expired. Therefore, to avoid a complicated calculation, the interest may be computed on the entire amount beginning at the end of the first 10 weeks, unless respondent would prefer to calculate the interest on a daily basis from the first day to the last day in the 20-week period. Of course, interest is due on the full amount after the 20-week period ends to the day the payment is made to Isaac Fields. It is also assumed that normal deductions for tax, etc., will be made. Assuming that deductions for hospitalization are normal, they should be made, and Isaac Fields should be reimbursed for any medical expenses incurred during the 20-week period which would have been paid under his medical coverage if he had not been unlawfully discharged.

Respondent's Opposition to Assessment of a Civil Penalty

The Right to a Second Hearing. In my order issued July 28, 1980, scheduling this case for hearing, I gave respondent notice that the hearing would involve all civil penalty issues associated with the alleged violation of section 105(c)(1). That order carefully explained that the civil penalty would not be assessed until the Secretary had filed a Petition for Assessment of Civil Penalty and until that Petition had been assigned to me for disposition on the basis of the record which would be developed at the hearing in this proceeding. Respondent had notice that the hearing would comprise the usual issues which are considered in a civil penalty proceeding, that is, whether a violation of section 105(c)(1) had occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Therefore, respondent's brief (pp. 39-40) improperly argues that it is entitled to another hearing regarding the violation of section 105(c)(1) which I have found occurred. Respondent correctly argues that a Petition for Assessment of Civil Penalty will have to be filed by the Secretary and an answer to that Petition must be filed by respondent before the case will be in a procedural posture for assessment of a penalty. Of course, if respondent's counsel, in his answer to the Petition, could show that another hearing is needed for introduction of facts which he could not have presented at the hearing held in this proceeding, I would grant such a hearing. I do not believe that respondent can demonstrate a need for a second hearing, however, because the primary question at the first hearing in the discrimination case and on the civil penalty issues was whether a violation had occurred. I have found, after review of all of respondent's and the Secretary's evidence, that a violation of section 105(c)(1) occurred. It is certain that respondent is not entitled to a second hearing on the question of whether a violation occurred.

Section 105(c)(3) states that when a violation of section 105(c)(1) has been found to have occurred, the civil penalty provisions of the Act become applicable. Therefore, the only issues which could be considered at a

second hearing would be evidence pertaining to the six criteria. Facts were introduced at the hearing regarding the size of respondent's business and it stated at the hearing that there was no history of previous violations to be considered in view of the information provided by the Secretary's counsel (Tr. 9-10). The evidence already in the record is ample for making findings as to the two remaining criteria, that is, whether the violation was associated with negligence, and whether the violation was serious. The criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance will be dependent upon whether respondent carries out the affirmative relief provisions of the order accompanying my decision. A hearing should not be required for respondent to advise me as to whether it has complied with those provisions, but if a hearing is required for that purpose, a second hearing will be scheduled if respondent should file a request for hearing demonstrating that a hearing is required. Likewise, if respondent should change its position that payment of a penalty for the violation of section 105(c)(1) would not cause it to discontinue in business (Tr. 8), a second hearing will be scheduled for that purpose if respondent should be able to demonstrate a need for a hearing for that purpose.

The Reference in Section 105(c)(3) to Section 110(a). Respondent's brief (pp. 41-43) claims that an administrative law judge cannot apply the provisions of section 110(i) of the Act to a violation found to have occurred under section 105(c)(1) of the Act. In support of that argument, among other things, respondent cites Baker v. The North American Coal Co., 8 IBMA 164 (1977), in which the former Board of Mine Operations Appeals held that a judge could not find violations of the substantive provisions of the mandatory health and safety standards on the basis of evidence received in a discrimination proceeding and then, sua sponte, impose civil penalties for such violations. The former Board at no time held that a judge lacked the power and authority to assess civil penalties for violations of the discrimination provisions of the 1969 Act. Therefore, the North American case cited by respondent is inapplicable to the question of whether a judge has authority under the 1977 Act to assess civil penalties for violations of section 105(c)(1) of the 1977 Act.

It is obvious from the language of section 105(c)(3) that once a violation of section 105(c)(1) has been found to have occurred, that the civil penalty provisions of the Act become applicable for that violation just as they are applicable to all other violations of the Act or the mandatory health and safety standards promulgated under the Act. Therefore, when and if a Petition for Assessment of Civil Penalty has been filed by the Secretary for the violation of section 105(c)(1) found in this decision to have occurred, I have the authority to assess a civil penalty for that violation once respondent has filed its answer to the Petition and I have determined whether respondent has demonstrated a need for a second hearing regarding any of the six criteria set forth in section 110(i) of the Act.

COMPLAINANT'S BRIEF

The brief filed by the Secretary's counsel in this proceeding is well written, concise, and contains references to the legislative history of the

1977 Act in support of the Secretary's arguments. Inasmuch as my decision has already found in the Secretary's and complainant's favor, I do not believe that any purpose would be served by further extending this lengthy decision to comment on the Secretary's arguments.

WHEREFORE, it is ordered:

(A) The complaint filed by the Secretary in Docket No. VA 80-99-D is granted because a violation of section 105(c)(1) did occur when respondent discharged Isaac Fields. Therefore, respondent is ordered to provide the following relief:

(1) Respondent shall, within 30 days from the date of this decision, pay to Isaac Fields a sum of $3,326.96 in back pay plus 9 percent interest calculated as hereinbefore explained on pages 21-22 of my decision.

(2) Respondent shall remove from Isaac Fields' personnel file all references to his unlawful discharge on September 5, 1979, including removal of the Employee Warning Sheet which was admitted in evidence as Exhibit 4 in this proceeding.

(B) When and if the Secretary files a Petition for Assessment of Civil Penalty for the violation of section 105(c)(1) found to have occurred in this proceeding, I shall, when that case has been assigned to me, determine whether respondent is entitled to a second hearing regarding the civil penalty issues upon the basis of the pleadings filed in that proceeding. The civil penalty issues are severed from this proceeding for decision as described in the preceding sentence and in my decision.

(C) The motion made at the hearing by the Secretary's counsel for amendment of the complaint to add Exhibit B as an attachment to the complaint is granted (Tr. 5-6).

Richard C. Steffey

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

Distribution:

James H. Swain, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael L. Lowry, Esq., Attorney for United Castle Coal Company, Ford, Harrison, Sullivan, Lowry & Sykes, 1400 Harris Tower, 233 Peachtree Street, NE, Atlanta, GA 30303 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WEST 80-314-M
Petitioner	:	A.C. No. 02-00151-05016
v.	:	
	:	San Manuel Mine
MAGMA COPPER COMPANY,	:	
Respondent	:	

DECISION

Appearances: Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
N. Douglas Grimwood, Esq., Twitty, Sievwright and Mills, Phoenix, Arizona, for Respondent.

Before: Administrative Law Judge Charles C. Moore, Jr.

This case was heard December 2, 1980, in San Manuel, Arizona, pursuant to the Federal Mine Safety and Health Act of 1977 ("the Act"). 1/ A violation of 30 C.F.R. § 57.19-100 was alleged 2/ and Petitioner proposed a $170 penalty. It was stipulated that the San Manuel Mine is large, producing over 4 million tons of copper in 1979, and that its prior history is moderate, consisting of 113 assessed violations during the 2 years preceding this citation, and that Respondent demonstrated good faith by abating the citation 4 hours after it was issued. 3/

Inspector Alvarez conducted a regular inspection of the San Manuel Mine on November 14, 1979, and issued a citation to Respondent for failing to have a substantial safety gate in front of one of the shaft compartments at the 3A shaft landing. The 3A shaft landing is on the "1055" level, or the highest level of the mine, 1,055 feet below the surface. The landing consists of a

1/ 30 U.S.C. §§ 801 et seq.

2/ Section 57.19-100 reads:

"Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances."

3/ There is a dispute as to whether the citation was abated in 4 hours as per stipulation [Hearing Transcript, page 4 (Tr. 4)] or in 4 days, as shown by the date of the abatement order (Tr. 29). I will dispose of this matter by finding that Respondent demonstrated good faith in either case.

shaft divided into four compartments, across from which is a set of railroad tracks with a dump pocket located between the tracks [Petitioner's Exh. 1 (PX-1) and Respondent's Exh. 3 (RX-3)]. Eight-ton cars loaded with muck dump their contents into the dump pocket. The muck falls into conveyances inside two of the shaft compartments and is raised to the surface (Tr. 51). Miners work in the shaft-landing area dumping the cars and loading and unloading supplies from the shaft (Tr. 31).

Shaft compartment 1, the subject of this citation, is between 15 and 18 feet tall and 5 feet wide (Tr. 24, RX-4), and the shaft is equipped with an elevator used to transport men and supplies to various levels of the mine (Tr. 16). Two chains stretch across the compartment opening at heights of 3 and 4 feet, respectively, joined together by two vertical chains to form a Roman numeral "II" (PX-1 and RX-4). Witnesses for Respondent testified that a toeboard, a piece of backlagging or wood, 3 inches by 6 inches, was in place along the bottom of the shaft opening (Tr. 56). The inspector did not remember a toeboard (Tr. 32), and testified that had a toeboard been in place, he would have issued an additional citation for a tripping hazard (Id.).

Before issuing the citation, the inspector observed a piece of muck (rock) fall from a passing car onto the shaft landing and roll within 2 feet of the open shaft (Tr. 36). In his opinion, rolling pieces of muck posed a hazard to miners at lower levels, if pieces fell down the shaft and out of similarly unguarded openings, as well as to miners at the 1055 level, if muck fell from the surface. He had a brief discussion with an accompanying employee of Respondent regarding the situation, and issued Citation No. 380078. 4/

Respondent's defenses are: that the gate in place at the time the citation was issued, together with the toeboard, satisfied the standard; that experiments conducted by Respondent showed no muck could possibly roll into the shaft; and that Petitioner's case is limited to showing the hazard of muck rolling into the shaft, as no mention was made of the possibility of muck falling out of the shaft when the citation was issued (Tr. 37). An additional issue was whether the tracks curved on their way past the shaft.

4/ Respondent claims the inspector fabricated the rock incident and asserts further that the inspector would have informed Respondent of this hazard had he actually seen anything (Respondent's posthearing brief at 2). Aside from the question of the inspector's veracity, whether rock actually ever fell down the shaft, and the significance of what Inspector Alvarez told Respondent's employee when the citation was issued, are discussed, post. Respondent further notes (at Brief, pp. 2-3) that the inspector's drawing of the 3A shaft landing is dated October 28, 1980, almost 1 year after the citation was issued, whereas he testified at the hearing that he drew the diagram 1 to 2 months after he wrote the citation (Tr. 10). The time for Respondent to raise this inconsistency was at the hearing. Since it did not, I do not know if there was an explanation. In any event, if the drawing was accurate the contradiction's sole significance is as an unsuccessful attack on the inspector's credibility.

Respondent concedes in its posthearing brief that whether or not the railroad tracks curved in front of the shaft is a minor issue (Brief at 4). At the hearing, Respondent claimed that the tracks were straight (Tr. 62), contradicting PX-1 which shows a curve in the tracks. Petitioner obviously thought a curve in the tracks would jostle the muck cars and cause greater spillage onto the landing and into the shaft. Although there was no testimony at the hearing about the speed of the muck cars, if they stopped to empty their contents into the dump pocket opposite the shaft landing, they had to be traveling at such a slow speed that a curve in the tracks would not appreciably affect the amount of muck falling from the cars nor the force at which it would fall. For this reason, I agree with Respondent that whether the tracks curved is not a material issue.

Respondent's second contention is that Petitioner was barred from proving that muck falling down and out of the shaft from the surface into the landing area was part of the hazard posed by the gate, as the inspector had failed to inform Respondent of this when he issued the citation. Both the standard and the language of the citation state that gates shall be constructed so that materials cannot go through them. 5/ The word "through" obviously means materials falling into as well as out of the shaft. I know of no case limiting the Secretary to proving whatever was alleged by the inspector at the time the citation was issued. There may be situations in which an inspector is unaccompanied so that nothing is said to the operator when the citation is issued. This does not mean that nothing may later be proved by the Secretary at a hearing.

Further, both the standard and the citation sufficiently apprise Respondent of the violation with which it is being charged so that it may prepare an adequate defense. A noncriminal statute will only be found impermissibly vague where, "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127 70 L.Ed. 322 (1926). The provision before me is not such a statute. 6/

Respondent also conducted a series of experiments which it maintains prove that muck could never fall from loaded cars into the shaft. The experiments consisted of two employees of Respondent standing between the railroad tracks and tossing pieces of muck in the direction of the shaft. They found that the pieces would shatter on impact and fall short of the shaft. At most, these experiments establish that the probability of muck falling into the shaft is low. They do not prove that muck would never fall into the shaft

5/ See n. 2, supra, for the language of the standard. The citation reads as follows:

"There were no safety gates of substantial quality, that materials or rocks would not go through through [sic] them at the 1055 3A shaft landing. This landing was [approximately] 12 feet from a dump pocket being used to dump 10-ton cars full of muck."

6/ See n. 2, supra.

or that pieces of muck falling from the surface would never fall out of the shaft. Just before issuing the citation, the inspector saw a piece of muck fall from a car and roll within 2 feet of the shaft (Tr 36). Respondent's witness who accompanied the inspector did not remember seeing this (Tr. 55, 63). The inspector countered that the witness had been looking away from the shaft at the time, talking to a contractor's employee (Tr. 79). This assertion was not contradicted at the hearing. The inspector also stated that he had seen pieces of muck accidentally fall down the shaft from the surface (Tr. 40). The same witness for Respondent, Richard Skelton, a safety engineer for Magma Copper Company, testified that he had never seen muck fall down shaft compartment No. 1 from the surface (Tr. 54). It is not crucial that pieces of muck actually be seen falling down the shaft before a violation can be found. It is enough that there is testimony to that effect and that the possibility of falling muck exists. From the description at the hearing of the activities which routinely take place at shaft landing 3A, it seems possible that muck has fallen down shaft compartment No. 1 in the past and that it will in the future. The Act is remedial in nature, its primary objective being "to assure maximum safety and health of miners." UMWA v. Consolidation Coal Co., 1 FMSHRC 1300, 1302 (September 1979). As such, it does not require the eventuality it is designed to prevent to actually occur before a citation may issue. MSHA v. Ace Drilling Coal Co., Inc., 2 FMSHRC 790, 791 (April 1980).

Respondent's final defense is that the gate, including the toeboard, complied with the standard. The presence of the toeboard is in dispute. Respondent testified that it was in place when the citation was issued (Tr. 56). Inspector Alvarez, however, does not recall the toeboard and bolstered his recollection by testifying that he would have issued an additional citation for a tripping hazard had the toeboard been present (Tr. 31-32).

Because the standard requires a type of gate which would prevent the passage of materials through or under it this gate, with or without the toeboard, did not meet the standard. The toeboard only covered the bottom 6 inches of a shaft 15 to 18 feet tall, and the chains would not impede most materials.

The standard describes the function a gate must serve without specifying its structure. The inspector declined to state what constituted a substantial gate, saying that he had been instructed to refrain from telling operators what they must do to comply with standards (Tr. 24). The standard was not so vague as to make compliance difficult since the operator successfully abated the citation. Mr. Skelton testified at the hearing that the gate in place when the citation was issued was sufficient (Tr. 61). However, the gate failed to perform the functions required by the standard. I find that the gate in place when the inspector issued the citation was inadequate.

The violation was moderately grave, the operator was negligent, and I find the proposed penalty will not prevent the operator from continuing in

business. Respondent is hereby ORDERED to pay to MSHA $170 within 30 days of the date of this DECISION.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 36017, San Francisco, CA 94102 (Certified Mail)

N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, 1700 Townehouse Tower, 100 West Clarendon, Phoenix, AZ 85013 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 25 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 80-235
Petitioner	:	A.O. No. 15-02055-02022 I
	:	
v.	:	Docket No. KENT 80-236
	:	A.O. No. 15-02055-02023 I
SCOTIA COAL COMPANY,	:	
Respondent	:	Docket No. KENT 80-237
	:	A.O. No. 15-02055-02024 S
	:	
	:	Docket No. KENT 80-238
	:	A.O. No. 15-02055-03006 S
	:	
	:	Docket No. KENT 80-239
	:	A.O. No. 15-02055-03009 S
	:	
	:	Docket No. KENT 80-240
	:	A.O. No. 15-02055-03014 F
	:	
	:	Scotia Mine

DECISION AND ORDER

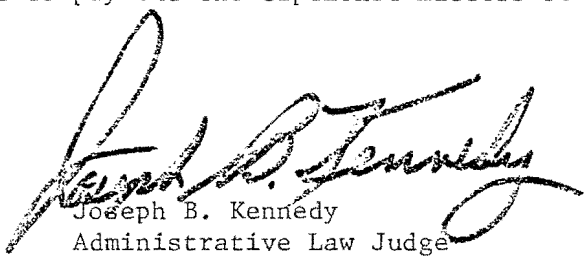
The parties move for approval of a settlement of the captioned civil penalty matters in the amount of $36,400. The amount originally assessed for the 43 violations charged was $35,904.

The operator's proposal was made as a lump sum. Thereafter, it was allocated to the violations charged by counsel for the Secretary in a commendably lucid and comprehensive motion to approve settlement. Through the cooperation of the parties, the Department of Justice, and the United States District Court for the Eastern District of Kentucky (Judge Hermansdorfer), the motion was supplemented by the Department of the Interior's investigative report concerning the Scotia disaster as well as the Secretary of Labor's Verified Statement and Scotia's exceptions thereto. This supplemental material was received under seal and is not a part of the public record of these proceedings.

Based on an independent evaluation of all the material submitted and a de novo review of the circumstances relating to each violation, I find the settlement proposed, as amended, is in accord with the purposes and policy of the Act.

Much has been written and remains to be written as we approach the fifth anniversary of the twin disasters of March 9 and 11, 1976 at the Scotia Mine in Oven Fork, Kentucky. But for the purposes of this motion it suffices to say that justice, however slowly, is being done.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $36,400, on or before Monday, March 16, 1981 and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Lawrence W. Moon, Jr., Esq., Thomas A. Mascolino, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Robert I. Cusick, Jr., Esq., M. Stephen Pitt, Esq., Richard C. Ward, Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202 (Certified Mail)

Randall Scott May, Craft, Barrett & Haynes, 113 Lovern Street, Drawer 1017, Hazard, KY 41701 (Certified Mail)

President, Scotia Employees Association, P.O. Box 447, Cumberland, KY 40823 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 26 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-302
Petitioner	:	A.C. No. 12-01599-03009
v.	:	
	:	J & R Mine
J & R COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Thomas Lennon, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
John Stachura, Jr., J & R Coal Company, Bicknell, Indiana, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Evansville, Indiana, on December 9, 1980. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred during argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions, and rationale appears below as it appears in the record aside from minor corrections. This decision covers three of the four alleged violations remaining in this docket. The fourth, Citation No. 776820 was settled by the parties at the hearing for $55. The original assessment therefore was for $78. I approved this compromise settlement based on MSHA's indication that it initially over-evaluated the degree of Respondent's negligence and because Respondent abated the alleged violation in good faith and there were no injuries or fatalities resulting therefrom.

> The initiating pleading, the Secretary of Labor's so-called "Proposal for Penalty," was filed on July 10, 1980, and originally listed five citations for which penalties were sought. One of those citations, No. 1002184, dated March 27, 1980, was vacated prior to hearing. At the hearing, the Secretary was represented by counsel and Respondent was represented by one of its officers, Mr. John A. Stachura.

1/ Transcript pages 69-76, 155-157, and 187-191.

With respect to the statutory penalty assessment factors, the parties initially stipulated as to several of them. Based thereon, it is found that Respondent at all times material herein employed 50 miners as defined in the Act and, for fiscal year 1980, ending September 30, 1980, Respondent's annual tonnage of coal was 272,000 tons. I find that Respondent is in the upper range of "small" operators in terms of size.

Respondent has a history of 23 violations which occurred prior to October 31, 1979, which was the date of the first of the four violations in question and which occurred within the 24-month period prior to said date. With the exception of Citation No. 1002182, which will be discussed specifically hereinafter, I find that after being informed of the alleged violation Respondent proceeded in good faith to achieve rapid compliance with the allegedly violated standard involved. As to each of the remaining citations, I also find that any penalty that I will assess in this proceeding will not result in placing the Respondent in an adverse economic position so as to jeopardize it's ability to continue in business as a coal mine operator.

Accordingly, there remain for discussion with respect to each citation the questions whether or not a violation did, in fact, occur as alleged by the Government, and, if so, whether the violation resulted from any degree of negligence on the part of Respondent and if the conditions resulting from the violation were serious in the sense of posing a hazard to the health, welfare, or life of miners.

CITATION NO. 772654

Specifically, with respect to Citation No. 772654, the record consists primarily of the testimony of John Duncan, the Federal coal mine inspector who issued the citation on October 31, 1979, and John W. Pirtle, the Respondent's mine manager. In terms of documentary evidence, Respondent's Exhibit R-1, a belt inspection book, has also been considered.

Based on the inspector's testimony, I find that the condition described in the citation, to wit, "the battery for the belt sensor system was discharged; when replaced the unit indicated a short circuit on the line" did exist. The inspector cited 30 C.F.R. § 75.1103 as having been violated by this condition. This regulation, which is also a mandatory safety standard provided in the Act itself, provides, inter alia, that, "devices shall be installed on all such belts which will give a warning automatically when a fire occurs on or near such belt." Respondent's contention is that, as I divine

it, no violation occurred because it did have a belt sensor system in place on the date the inspector cited the alleged violation and that it was in compliance with a related regulation, i.e., 30 C.F.R. § 75.1103-8(a), which provides that "automatic fire sensor and warning device systems shall be inspected weekly and a functional test of the complete system shall be made at least once annually." The instant regulation also provides that inspection and maintenance of such systems shall be by a qualified person.

Turning now to the evidence, the Respondent does admit that on October 31, 1979, the battery for the belt sensor system was dead when it was observed by the inspector. There is no question that when the battery was replaced this unit indicated a short circuit on the line. I therefore find that the conditions described by the inspector in the citation occurred.

The belt in question is approximately 2,400 feet in length and the belt sensor system which monitors the belt is kept in a shed which is not subject to the constant supervision of any employee or management personnel of Respondent. To test the system, a button is provided which when pressed indicates a warning if the system is inoperable. According to evidence provided by Respondent, it checked the system and made the test of the battery approximately three times a day and, specifically, as indicated in Exhibit R-1 on October 30 in its belt inspection book it logged in an entry that would indicate the belt sensor system was working properly. That entry, signed by "T. Emmons," indicates "okay."

From Mine Manager Pirtle's testimony, I find that the Respondent did comply with the provisions of 75.1103-8 in that it made such a test on October 30 and made tests of the system within the specific requirements of the regulation. The question remains, however, whether the evidence establishes a violation of 75.1103. The inspector indicated that after he had issued the citation Respondent replaced the battery and the system did become workable. Respondent's evidence indicated that the short circuit detected by the inspector may have been caused by a falling rock from a roof fall which severed the wire in question and that the severance would have occurred on October 31 on the midnight to 8 a.m. shift. The company's evidence in this connection established that the October 30 entry in Exhibit R-1 indicated the battery was operating on the 4 to 12 midnight shift and that the battery was found dead sometime on the morning of October 31, 1979, during the inspector's inspection which commenced on or about 8:15 a.m. Thus, the falling rock would presumably have caused the short circuit sometime between midnight and 8 a.m. on October 31, 1979. This evidence, of course, would mandate

a finding that the Respondent was not negligent should I find a violation of the cited regulation which, in turn, calls for an interpretation of the regulation.

Turning to that issue, I find preliminarily that the belt sensor system, when observed by the inspector, was not in such a condition that it would give a warning automatically when a fire occurred on or near the belt. The regulation requires that devices be installed on such belt which will give a warning automatically when a fire occurs on or near it. Although the regulation which is relied upon by the Respondent, section 75.1103-8, sets forth a period of time during which the mine operator must inspect the fire sensor and warning device systems, i.e., weekly, compliance with that does not excuse the fact that a technical violation did occur on October 31, 1979. The violation is that the device itself was not working because it had a dead battery. This condition occurred even though there was no negligence on the part of the Respondent. It is a technical violation and technical violations are nevertheless violations in mine safety law. The Health and Safety Act passed by Congress imposes upon mine operators a high degree of care to ensure the health and safety of persons in a mine. Violations can occur without the fault of the mine operator within the scheme of this Act. 2/ The Respondent's evidence does have great relevance, however, with respect to the amount of any penalty which should be imposed.

Before assessing a penalty, I have to consider one last penalty assessment factor and that is the gravity of this violation. This is a very serious violation since it involves, in the context of the facts of this case, whether or not a fire would be detected should it break out along the belt line. A fire in this case could cause serious injuries and perhaps fatalities. Fires in mines are one of the primary reasons why the 1969 Health and Safety Act for coal mines was enacted. Considering the factors that (1) this is a relatively small mine, that (2) Respondent abated the condition promptly, (3) that the violation occurred totally without any knowledge on the part of the Respondent, and (4) that it was a technical violation in the circumstances--even though the consequences could create quite a hazardous condition--I find that the $15 penalty initially proposed by MSHA is appropriate. Accordingly, the respondent is assessed that penalty.

In Kaiser Steel Corporation, DENV 78-31-P, decided by the Federal Mine Safety and Health Review Commission on

2/ Heldenfels Brothers, Inc. v. Marshall and MSHRC (5th Cir., January 15, 1981, No. 80-1607, Summary Calendar).

August 3, 1979, the Commission specifically indicated its position that the Mine Safety Act imposes on the operator a high degree of care to ensure the health and safety of persons in the mine. Had I found with respect to this citation that the operator had been negligent or had not exercised a high degree of care, the penalty would have been quite a bit higher. I have take into consideration the operator's evidence that it had employees in the vicinity of the belt who might have observed and extinguished a fire and, also, the uncertainty that any degree of care that it might have taken with respect to the battery was no 100 percent guarantee that the battery would not have been dead as a result of shelf life or the life that it had in service prior to October 31, 1979. The nature of a battery, unlike other types of equipment, is such that it could have discharged itself at the wrong time even though the operator exercised a high degree of care. I am also obliged to consider the well established principle of law applicable to what is called remedial statutory legislation, such as the Mine Safety Act, which principle is that such legislation is to be liberally construed in light of the prime purpose of the legislation. In this case, considering the purpose of the regulation, a belt sensor unit that did not work even though there was technical compliance with an implementing regulation for checking it on a weekly basis constitutes a violation. The essence of the standard must be held to be that the unit be in a workable condition even though there is no fault on the part of the mine operator. As previously noted, liability without fault is a peculiarity of the law in this field. 3/

CITATION NO. 100281

The violation cited involves the mine operator's alleged infraction of a provision of the roof-control plan, which at page 5 of Exhibit P-9, provides that permanent stoppings will be made up to and including the third connecting crosscut outby the faces of entries. Violations of a provision of a ventilation plan or other plans which are approved by MSHA constitutes violations of the Act itself. Affinity Mining Company v. MESA, et al., 6 IBMA 100 (1976), holds that if a violation of the plan has been established, a violation of the Act must be found. The violation charged is that "the approved MSHA ventilation plan was not being followed by the company inasmuch as the last three open crosscuts outby the last open crosscut in the line of pillars that separated the intake from the return air were not provided temporary or permanent stoppings."

3/ United States Steel Corporation v. Secretary of Labor, Docket Nos. PITT 76-160-P and 76-162-P, decided by the FMSHRC on September 17, 1979.

The inspector testified that at four places there were no stoppings, temporary or permanent, in the return air course which points were designated A, B, C, and D, on MSHA's Exhibit P-10. Respondent's witness, Mine Manager Pirtle, denied that there were no stoppings at points C and D represented on Exhibit P-10. Thus, a clear conflict of testimony occurred in this record as to whether there were stoppings at the points designated between B and C and C and D. The matter ultimately boils down to whether the inspector's testimony with respect to this alleged violation is to be accepted or not. The inspector, in my judgment, is an honest man and, I am sure, sincere in his testimony; however, I did not feel that there was a certainty or a confidence which I acquired in listening to him testify here today which would overcome the relatively certain and clearcut testimony of Respondent's witnesses. As between the inspector and the mine manager and Mr. Stachura, it is clear that Respondent's witnesses are much more familiar with the geographic area of this mine and that is one of the criteria upon which the quality of testimony must ultimately rest. The inspector admitted that the map of the area which was prepared by Respondent (Exh. R-4), was a more accurate depiction of the area than Exhibit P-10. A time or two, he indicated that his memory of the events at the time the citation was issued was such that he could not definitely recall certain things. These disclaimers are factors which I must consider in evaluating which version of facts to accept.

The burden of proof is on the Government in a case like this to prove by substantive evidence the commission of a violation. In this sense, or in this aspect of the case, a strong showing must be made. It cannot be of a low quality or based on lukewarm presentation of evidence in the face of a clear-cut denial.

A further voucher of the position taken by the Respondent company is the fact that there was "good air" at a point at the face designated "X" on Exhibit R-4-meaning that the air exceeded the ventilation plan's requirement of 9,000 CFM at that point. The inspector did indicate that there was a sufficient velocity to the air, and also that even had there been insufficient stoppings at the point, a volume of air in excess of the standard might exist in the last crosscut. Even so, this is a piece of evidence which indicates that there were sufficient stoppings, particularly in view of the wavering and uncertain quality of his other testimony.

The evidence presented by Mr. Pirtle and particularly Mr. Stachura is found to be more persuasive. I thus resolve the dispute as to the existence of two of these permanent

stoppings in favor of Respondent. I conclude that the Government has failed to provide by a preponderance of the evidence that the violation charged occurred and, accordingly, Citation No. 1002181, dated March 19, 1980, is vacated.

CITATION NO. 1002182

The Respondent is charged with violating the approved ventilation plan (Exh. P-9) because check curtains outby the last open crosscut were not installed across Nos. 2, 3, 4, 5, 6, and 7 rooms as shown on the plan. The requirement for such curtains is shown on the sixth page of Exhibit P-9 in a diagram.

Briefly, Respondent admits the existence of the condition described in the citation, that is, that the curtains in question were not installed. However, Respondent contends that it had, in fact, installed a plan which provided a higher level of safety and that for a period of some 20 months prior to the issuance of the citation it had not been cited for a violation of the ventilation plan for failure to install these check curtains, even though there had been some three occasions when inspectors had inspected the mine.

The dispositive issue involved is a legal one. The question arises whether or not the Government is estopped from enforcing the Act or mandatory safety and health standards contained in approved plans or the safety standards themselves by the failure of inspectors to issue citations for violative conditions observed prior to the time a citation is issued for such conditions. Evidence establishing estoppel would necessarily be of a quality to establish the various elements thereof. One thing that would have to be established is the fact that an inspector on a prior inspection did actually observe the curtains not being in place and noting the same. There may be many violations present in a mine that are not observed by an inspector going through the mine. The circumstances under which these prior inspections were conducted and what occurred would have to be sufficiently described to indicate that the Government did, in fact, waive or ignore its responsibility to enforce the Act and therefore lead the respondent mine operator into a sense of security wherein it would be induced to proceed in a nonlegal manner as a result thereof. 4/ Lack of enforcement above does not constitute an authoritative interpretation by MSHA of its standards. Secretary v. Burgess Mining, Docket No. SE 79-42 (February 9, 1981).

4/ Estoppel is an equitable remedy which is available against the government-but only where the misconduct of an agency or of its officials acting strictly

I thus find that there is no factual basis upon which to apply the concept of estoppel in this case.

The evidence of Respondent with respect to the fact that its modification of the January 5, 1978, ventilation plan (shown by Exhibit P-9) even though not approved by the district manager of MSHA as required by 30 C.F.R. § 75.316-2 was in fact of a higher degree of safety than the original plan is relevant in terms of the seriousness of the violation but it does not constitute an excuse for the failure to follow the ventilation plan in effect. The Respondent is obliged to follow roof-control plans, ventilation plans and the like which are approved by MSHA, as the same are approved. Before a deviation or modification can be effectuated by a mine operator, the approval of the district manager, who is the person charged with the public interest, must be obtained. Otherwise, the principle might spread where operators go their own way in the belief-and perhaps sincere belief-that what they are doing is in effect better than that which has been approved. Therefore, the principle is exceedingly important that a modification cannot be implemented unilaterally by mine operators. Otherwise, human nature being such as it is, there would be a diminution of the standards nationwide. * * * The principle of going through the approval process and obtaining the upfront, fully-informed, approval of the MSHA District Manager is important. Respondent admits that it did not obtain this approval prior to March 19, 1980, and that the violative physical conditions, i.e., the lack of the curtains in question, did exist. Accordingly, I find a violation of the regulation as cited and described in the citation.

I have previously found Respondent to be a coal mine operator in the upper ranges of smallness when viewed through a three-spectrum scale of small, medium, and large. The previous history of only 23 violations during the 24-month period

---

fn 4 (continued)
within the scope of lawful authority threatens to work a serious injustice against a person who has reasonably relied upon such conduct to his detriment. Immigration Service v. Hibi, 414 U.S. 4, 94 S. Ct. 19, 38 L. Ed. 7 (1973). Here, there was no showing of misconduct on the part of any government official or agency, nor of the working of a serious injustice against Respondent. Respondent failed to establish that it was reasonable for it to rely upon the rather vaguely alleged failure of inspectors to issue citations for similar conditions on earlier inspections. A governmental agency will not be bound by ordinary errors or omissions in the conduct of its employees because there is generally a prevailing public interest in correcting erroneous interpretations of policy. American Training Services, Inc. v. Veterans Administration, 434 F. Supp. 988 (1977).

prior to the issuance of this citation is a factor which demonstrates that the operator is attempting to follow the safety standards. It is not a factor which should go to increase the amount of a penalty or to lower the amount of a penalty, all other factors being equal. On the basis of the Government's evidence that the Respondent did not proceed to immediately comply and at first disdained from abating the condition, I am inclined to view the same as strong evidence of bad faith on Respondent's part in proceeding to achieve rapid compliance with the standards after notification of a violation. On the other hand, there are some inequities from the standpoint of Respondent which go into the mix. Respondent followed the system which it believed to be more safe than the standard for some 20 months prior to the issuance of the citation. The matter was straightened out the following day. Respondent then proceeded to get its modification approved by the district director. On the other hand, the modification did contain the provision that curtains would be installed "if necessary." This provision would apply to the factual situation in this proceeding. Thus, I will upgrade, but only to a moderate degree, the penalty based upon the operator's tardy reaction to the obligation to achieve abatement after being served with a citation.

In terms of negligence, I do not find gross negligence or intentional or willful conduct-based upon the Respondent's representation that it overlooked the obligation to file for a modified plan.

I do not find this to be an extremely grave or very serious violation, but rather one of a moderate degree of seriousness.

Considering all these factors, a penalty of $100 for Citation No. 1002182 is assessed.

ORDER

1. Respondent, if it has not previously done so, is ORDERED to pay to the Secretary of Labor the sum of $170 5/ within 30 days from receipt of this decision.

2. Citation No. 1002181 is vacated.

5/ For Citations numbered 776820 ($55.00), 772654 ($15.00), and 1002182 ($100.00).

3. All proposed findings of fact and conclusions of law not expressly incorporated herein are rejected.

Michael A. Lasher, Jr., Judge

Distribution:

Thomas Lennon, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, IL 60604 (Certified Mail)

John A. Stachura, Jr., J & R Coal Company, Rural Route No. 1, Bicknell, IN 47512 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 27 1981

W. R. GRACE AND COMPANY, Contestant	:	Contest of Citation and Orders
v.	:	Docket Nos. SE 80-98-RM SE 80-99-RM SE 80-100-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation/Order No. 091430; 5/7/80 Order No. 091432; 5/7/80 Citation No. 091433; 5/7/80
INTERNATIONAL CHEMICAL WORKERS UNION, Respondents	:	Bonny Lake Mine

ORDER OF DISMISSAL

These consolidated contests were scheduled for hearing in Tampa, Florida, February 3, 1981. However, the hearing was continued to afford respondent MSHA an opportunity to furnish additional information concerning certain enforcement actions taken against an independent contractor who allegedly was responsible for the violations which prompted the filing of these contests by the contestant. This additional information has been filed by MSHA and it reflects that the independent contractor has paid the full assessment for two of the citations which it did not contest, and the remaining citation was not assessed because MSHA is of the view that the alleged violation did not involve a mandatory standard. Further, MSHA asserts that it considers the contractor who has paid the assessments in question to be solely liable and responsible for the violations and it seeks no further action or sanctions against the contestant.

Order

In view of the foregoing, and in light of a full disclosure of all of the circumstances presented in these proceedings, MSHA's motion to dismiss these contests is GRANTED, and they are DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Lucius M. Dyal, Esq., Shackleford, Farrior, Stallings & Evans, Box 3324, Tampa, FL 33601 (Certified Mail)

Kenneth Welsch, U.S. Dept. of Labor, Office of the Solicitor, 1371 Peachtree St., NE, Rm. 339, Atlanta, GA 30309 (Certified Mail)

International Chemical Workers Union, Local No. 39, Box 348, Mulberry, FL 33860 (Certified Mail)

(Editors Note: Previous order dated January 21, 1981, is attached)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 21, 1981

W. R. GRACE AND COMPANY, Contestant	:	Contest of Citation and Orders
	:	Docket Nos. SE 80-98-RM
v.	:	SE 80-99-RM
	:	SE 80-100-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Bonny Lake Mine
INTERNATIONAL CHEMICAL WORKERS UNION, Respondents	:	

ORDER DENYING MOTION TO DISMISS

and

ORDER OF CONTINUANCE

These consolidated proceedings concern two imminent danger withdrawal orders and one citation served to contestant W. R. Grace and Company by an MSHA inspector on May 7, 1980. The dockets have been scheduled for hearings on the merits in Tampa, Florida, during the term February 3-5, 1981, and the parties were so informed by notice of hearing issued by me on December 29, 1980.

On January 19, 1981, the Secretary, with the asserted concurrence of contestant's counsel, filed a document styled "Notice of Dismissal", whereby the Secretary purports to withdraw from this proceeding as a party respondent and to dismiss his answer to the contest. Although the document is not styled as a motion I will treat it as such for the purpose of my ruling in this matter. As grounds for its motion, the Secretary asserts that "the evidence now available does not appear to sustain the violations as alleged". The Secretary also asserts that the contested orders and citation have been reissued to the independent contractor (Pop's Painting of Lakeland) in accordance with MSHA's present policy concerning independent contractors, a copy of which is attached to the motion.

Exhibit "D" attached to the motion is a copy of an October 31, 1980, memorandum from MSHA's Administrator Robert B. Lagather, setting forth the "new" independent contractor policy, and paragraph three advises

that in the case of citations pending before this Commission, counsel may either dismiss the case against the operator or move to join the contractor as a party. In view of the Commission's October 7, 1980, decision in Climax Molybdenum Company v. MSHA, et al., DENV 79-102-M through DENV 79-105-M, the Secretary may not dismiss any cases pending before this Commission or its Judges. In Climax, the Commission clearly stated that once an operator contests a citation the Secretary cannot deprive the Commission of jurisdiction by vacating the citation. Accordingly, any attempts by the Secretary to summarily dismiss these proceedings on his own initiative without my prior approval is rejected.

With regard to the "new" independent contractor policy, Mr. Lagather's memorandum makes reference to a policy which became effective June 23, 1980. However, a copy of that policy is not attached to the motion, and I have no independent recollection as to what it may be. The present independent contractor regulations found in Part 45, Title 30, Code of Federal Regulations, became effective July 31, 1980, 45 Fed. Reg. 44494, et seq., and I assume these are controlling.

In a recent contest proceeding concerning an order and three citations issued by MSHA inspectors on February 9 and 11, 1980, the operator defended on the ground that at least one of the citations and the order should have been served on the independent contractor rather than on the contestant mine operator-owner, Harman Mining Corporation v. MSHA, Dockets VA 80-94-R through VA 80-97-R, decided January 2, 1981. In those proceedings, MSHA took the position that since the citations were issued before the effective date of the new independent contractor regulations on July 31, 1980, the then prevailing policy of citing only the owner-operator was controlling, and no mention was made of any June 23 or October 31, 1980 policies. In the instant cases, even though the orders and citation were also issued prior to the effective date of the newly promulgated contractor regulations, MSHA opted to apply its new policy rather than the "owners only" argument advanced in the Harman Mining cases.

The Secretary states that the contested orders and citation have been reissued substituting Pop's Painting of Lakeland as the responsible independent contractor mine operator, but that Pop's Painting has not contested the modified orders and citations. I take note of the fact that copies of the "modified" orders and citations simply make reference to the fact that they are modified to reflect the change in the named respondent and there is no change in the issuance date of the orders or citations, and there is no information as to when these citations may have been actually served on the contractor.

The Secretary's motion to dismiss these proceedings is DENIED at this time and the scheduled hearings are CONTINUED. Further, in order to clarify several matters raised by the motion, and to resolve the somewhat inconsistent enforcement actions taken against operators and contractors, MSHA's counsel is directed to furnish me with the following information within twenty (20) days of the date of this order:

1. A statement clarifying the asserted June 23, 1980, contractor policy referred to in the October 31, 1980 Lagather memorandum.

2. Whether the statement that "the evidence now available does not appear to sustain the violations as alleged" is based on the fact that the contractor, rather than W. R. Grace and Company, is solely liable and responsible for the orders and citation issued in these proceedings.

3. The date and method of service of the orders and the citation on the contractor Pop's Painting of Lakeland, and whether there is any indication that the contractor intends to contest the citations.

George A. Koutras
Administrative Law Judge

Distribution:

Lucius M. Dyal, Jr., Esq., Shackleford, Farrior, Stallings & Evans, Box 3324, Tampa, Florida 33601 (Certified Mail)

Kenneth S. Welsch, Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree St., NE, Rm. 339, Atlanta, GA 30309 (Certified Mail)

International Chemical Workers Union, Local No. 39, Box 348, Mulberry, Florida 33860 (Certified Mail)

*U.S. GOVERNMENT PRINTING OFFICE: 1981-0-341-638/4152