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Commission Decisions

FEBRUARY

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

Secretary of Labor, MSHA v. Westmoreland Coal Company, Docket No. WEVA 82-152-R, WEVA 82-369. (Judge Melick, January 18, 1983)

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

Secretary of Labor on behalf of George Mateleska v. Shannopin Mining Co., Docket No. PENN 81-209-D. (Judge Fauver, January 6, 1983)

Charles J. Frazier v. Morrison-Knudsen, Inc., Docket No. WEST 81-329-D. (Judge Morris, January 19, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 1983

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. PITT 77-15
ADMINISTRATION (MSHA)	:	PITT 77-16
	:	PITT 77-17
v.	:	PITT 77-18
	:	PITT 77-19
FLORENCE MINING COMPANY	:	PITT 77-23
HELEN MINING COMPANY	:	
ONEIDA MINING COMPANY	:	IBMA 77-32
NORTH AMERICAN COAL CORPORATION	:	

DECISION

I.

This case is before us upon grant of a petition seeking reconsideration of our decision in this matter issued on August 31, 1982. 4 FMSHRC 1486. Pursuant to that reconsideration oral argument was heard and the record and arguments of the parties fully reviewed. As a result of our further review, our previous decision in this matter has been modified. For purposes of clarity, we vacate the previous decision and issue the following as our decision in this case.

II.

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq (1976)(amended 1977)("the Coal Act"). 1/ The issue is whether the administrative law judge erred in concluding that 30 C.F.R. § 75.1405 does not apply to certain mine haulage equipment that travels both on and off tracks. For the reasons that follow, we reverse the judge's decision.

The standard at issue essentially reiterates section 314(f) of the Coal Act and provides:

> All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be so equipped within 4 years after March 30, 1970.

1/ On March 8, 1978, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals ("the Board"). Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted in the caption for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

In this case review was sought of an unabated notice of violation. For the reasons stated in our decision in Eastern Associated Coal Corp., 4 FMSHRC 835 (May 1982), we will review the merits of the notice at this time.

30 C.F.R. § 75.1405-1, which delineates the scope of the above standard, provides:

> The requirement of § 75.1405 with respect to automatic couplers applies only to track haulage cars which are regularly coupled and uncoupled (emphasis added).

The six notices of violation at issue allege that the operators (all subsidiaries of the North American Coal Company at the time the notices were issued) failed to equip "rubber-rail" mine cars with automatic couplers. 2/ The issue is whether the standard applies to "rubber-rail" equipment.

This case has an involved procedural history. Litigation of the issue began on April 3, 1974, when the companies filed separate petitions for modification of § 75.1405 under section 301(c) of the Coal Act. The petitions alleged that the standard was inapplicable to rubber-rail equipment or, in the alternative, that application of the standard would diminish safety. The petitions for modification were consolidated. On March 26, 1976, the administrative law judge ruled that the rubber-rail vehicles were not "track haulage cars" within the meaning of § 75.1401-1. He made no findings with respect to the diminution of safety argument. The Secretary appealed this decision to the Board of Mine Operations Appeals.

Thereafter, the Board ruled in a different case that a petition for modification alleging that a mandatory safety standard was inapplicable did not state a claim upon which relief could be granted under section 301(c) of the Coal Act. Itmann Coal Co., 6 IBMA 121, 128 (1976). Subsequently, the Board reviewed the judge's modification decision in light of its holding in Itmann and concluded: (1) the applicability of § 75.1405 to rubber-rail equipment was not a proper issue under section 301(c) of the Coal Act, but (2) the issue could be litigated if the companies were issued notices of violation of § 75.1405 and applied for review of the notices under section 105 of the Coal Act. Oneida Mining Co., 6 IBMA 343, 349-350 (1976).

The Secretary then issued the presently contested notices of violation. The companies filed for review and the case was assigned to the same judge who had heard the modification case. The parties stipulated that the issue before the judge was whether § 75.1405 was applicable to rubber-rail vehicles and that this issue should be decided on the basis of certain specified exhibits and specified portions of the testimony from the previous modification proceeding.

2/ Rubber-rail equipment can be used both on and off track. When operating on track, a rubber-rail car is pulled by a small locomotive and moves along the track on steel wheels similar to traditional railroad equipment (Tr. 149). When the car reaches the end of the track, the rubber tires, which are suspended along the side of the car, are dropped and they "literally lift the vehicle up off the rail" (Tr. 149). The car is then pulled by a battery powered vehicle and can move along the mine floor or in the supply yard where there are no tracks.

On April 20, 1977, the administrative law judge rendered a decision, the substance of which was virtually identical to his decision in the modification case, finding that the regulation was not applicable to the company's rubber-rail cars. Prior to his discussion and resolution of the issue, the judge set forth those findings of fact he believed to be essential. The findings which are relevant for purposes of our decision are those pertaining to the equipment, the method of coupling and uncoupling the equipment, and MESA's history of enforcement of the automatic coupler standard.

The judge found that approximately 600 rubber-rail cars were operating at the six mines. The cars are coupled and uncoupled manually by the draw bar and pin method (Dec. at 3). The draw bar is a steel bar 1-1/2 inches thick, 4 inches wide and 30 to 36 inches long (Tr. 179-180). It serves as the horizontal link between two cars and is secured by steel pins which are inserted vertically through holes in "pockets" at the end of each car. Coupling takes place when the pocket holes are aligned with holes at each end of the draw bar and the pins are dropped through the holes in the pockets. The process is reversed for uncoupling (Tr. 168). Alignment of the draw bar holes with the pocket holes and insertion of the pins are done manually.

The judge found that the rubber-rail cars are used solely to transport men, equipment and supplies. 3/ He also found that the cars are used intermittently and that 2 to 3 times as many couplings and uncouplings are performed off track as are performed on track (Dec. at 3-4).

The judge found that the rubber-rail cars are loaded on the surface (in the supply yard) and moved on track into the mine in trips of 5 to 15 cars (Dec. at 4 and Tr. 151-155). The trips are pulled by locomotives (Tr. 150). He found that once in the mine the trips are broken down into small groups of 1 to 5 cars, the wheels are lowered and the small trips are pulled by tractors to the section where the supplies are needed (Dec. at 4). The process is reversed after the supplies are unloaded. 4/

At the time the evidence was taken below, MESA was divided into 9 administrative districts. Each district was headed by a district manager responsible for enforcement of the Act in his district. The mines in this case were located in District 2, with headquarters in Pittsburgh. The judge found that from the passage of the Coal Act until

3/ Coal is moved out of the mines on conveyor belts.

4/ After the cars are uncoupled, a tractor picks up the empty cars, one by one, and takes them back to the track. The locomotive goes from section to section picking up cars which have been put on the track. Once the locomotive has about 15 cars it pulls the trip back to the supply yard. After a complete return trip is assembled underground, no further coupling or uncoupling occurs until the trip reaches the supply yard (Tr. 154-155).

February 1974, § 75.1405 was not enforced with respect to rubber-rail cars in District 2 (Dec. at 4). He also found that, in a memorandum dated November 21, 1973, the district manager indicated that when the regulation was written, § 75.1405 was not intended to apply to rubber-tired haulage cars and was intended to apply only to track haulage cars (Dec. at 5). The judge also found that during this period of non-enforcement the companies, relying on this policy of non-enforcement, purchased 230 rubber-rail cars not equipped with automatic couplers (Dec. at 4). The judge further found that the Secretary at one time proposed to amend § 75.1405 to specifically include rubber-rail cars (Dec. at 6). 5/ Finally, he found that MESA's enforcement policy changed on February 7, 1974, and the Secretary began applying the automatic coupler requirement to rubber-rail vehicles in District 2.

The judge's ultimate conclusion was that rubber-rail cars are not "track haulage cars" within the meaning of § 75.1405-1. He noted that § 75.1405 applies to "all haulage equipment." He found that the phrase "all haulage equipment" is not ambiguous, that the word "haulage" as used in mining parlance refers to the hauling of men and supplies as well as ore, and that the word "equipment" is very broad. Thus, he found that if the statutory language had been literally applied, there would be little doubt that rubber-rail haulage equipment would be required to have automatic couplers (Dec. at 5-6). However, in implementing § 75.1405, the Secretary promulgated § 75.1405-1 which states that § 75.1405 applies "only to track haulage cars." (Emphasis added.) The judge attempted to determine whether Congress had intended that section 75.1405 apply "only to track haulage cars." He first examined the legislative history. The sole reference in the legislative history to section 314(f) is contained in a letter from the Director of the Bureau of Mines to Congressman John Dent. Congressman Dent had asked the Director to conduct a technological review of safety standards which had been proposed as amendments to the House bill. The automatic coupler provision was one of those amendments. The Director stated "[t]he provisions relative to coupling mine cars ... will make a positive contribution to safety." The judge found this reference to be uninstructive (Dec. at 6).

Next, the judge examined the structure of section 314 itself and found this to be persuasive:

> Perhaps the best indication of what Congress intended can be obtained from viewing section 314 of the Act in its entirety. It consists of six subsections, "a" through "f" and is headed "Hoisting and Mantrips." Subsections "a," "b," "c," and "d"

5/ The proposed amendment stated:

> § 75.1405-1 automatic couplers, haulage equipment. The requirement of § 75.1405 with respect to automatic couplers applies only to track haulage cars, including rubber-rail cars, which are regularly coupled and uncoupled.

The proposal was one of many contained in a February 10, 1975, MESA memorandum which was addressed to all underground coal mine operators (Exhibit 12). The memorandum stated that hearings would be conducted on the proposed changes and requested the operators to submit comments. The change with respect to rubber-rail cars was never adopted nor was the change ever formally proposed in the Federal Register.

> deal specifically with hoists and generally with the transportation of men and material. However, in "e" locomotives and haulage cars are mentioned for the first time in connection with the requirement that they have automatic brakes. Next follows 314(f) and its reference to "all haulage equipment." I believe subsections "e" and "f" are generally different than the preceding four subsections and should be read together. Following this approach, the phrase "haulage equipment" would relate back to subsection "e" and its mention of locomotives and haulage cars. Since in customary coal mining jargon, the word "car" and the term "haulage car" has reference to vehicles used on railroad track, I would conclude that this is what Congress had in mind, even though the phrase "all haulage equipment" when taken out of context is not patently ambiguous outside the mining industry (Dec. at 7, fn. 12).

The judge stated that the Secretary in promulgating § 75.1405-1 had done what Congress intended--that is, had made the automatic coupler provision applicable to equipment which traveled on track (Dec. at 6-7). He also concluded that because the record showed rubber-rail cars at the 6 mines were used only intermittently, were primarily operated off track and represented a technological variant not contemplated by Congress, they were not "track haulage cars" within the meaning of § 75.1405-1 (Dec. at 6-7).

Finally, the judge found that MESA's enforcement practice for the first four years of the Coal Act limited the coverage of § 75.1405 to locomotives and haulage cars which traveled on track, and concluded that this constituted a "binding construction of the statute" (Dec. at 7).

The Secretary asserts that the rubber-rail vehicles are "track haulage cars" which are "regularly coupled and uncoupled" and therefore come within the purview of § 75.1405. He first argues that the judge's decision effectively modifies § 75.1405-1 to apply to haulage cars that operate exclusively on track. He asserts such an interpretation is erroneous because the Coal Act was remedial and regulations adopted thereunder should be given a liberal construction. He states that the purpose of section 314(f) of the Coal Act and § 75.1405 is to prevent accidents while track haulage equipment is coupled and uncoupled. In his view, it makes no difference if the cars are coupled and uncoupled on the track only some of the time. In short, the Secretary argues that interpreting the standard so as to include rubber-rail equipment best effectuates its purpose.

The Secretary next argues that the rubber-rail vehicles are "regularly coupled and uncoupled." According to the Secretary the proper test for regularity should be whether the equipment is coupled or uncoupled in the normal course of routine operation or on a cyclic basis. The Secretary

argues that in testifying about rubber-rail procedures the companies' safety manager described routine on track couplings and uncouplings both in the supply yard and the point of track nearest the working sections (citing to Tr. 150-155).

The Secretary also argues that the agency cannot be estopped from enforcing § 75.1405-1 if it applies to rubber-rail equipment. An agency, the Secretary states, can change its interpretation of a regulation if that change is within the scope of the regulation. 6/

The operators maintain that, although the language of section 314(f) requires automatic couplers on "all haulage equipment," the judge and the parties agree that Congress never intended the standard to be applied literally. They also assert that the parties agree that § 75.1405-1 attempts to make explicit the limitation intended, but not stated by

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6/ The Secretary makes two other arguments which do not warrant extended discussion. First, he argues that the judge erred in admitting the testimony of the then district manager of District 2, Robert Barrett, concerning his understanding of the proper interpretation of § 75.1405. Barrett had a dual role with regard to the regulation. He was assigned by the director of the Bureau of Mines to coordinate the efforts of those writing the Coal Act's implementing regulations--including § 75.1405-1 (Tr. 40, 46). Moreover, as district manager for District 2 he was responsible for enforcing all standards in the district. Barrett testified as to his opinion concerning the type of equipment the drafters of section 75.1405-1 intended to cover. He also testified concerning the enforcement policy he pursued while district manager (Tr. 49-56, 59-63, 81-88, 91). The Secretary asserts the testimony of a participant in the drafting of a regulation cannot be admitted to prove regulatory intent. He asks that any findings or conclusions based upon Barrett's testimony be rejected. A review of the judge's decision, however, fails to indicate any findings of fact or conclusions of law based upon Mr. Barrett's testimony concerning his view of the drafters' intent or his understanding of Congressional intent in enacting section 314(f). (Finding of fact No. 12 relates to a memorandum issued by Barrett). Thus, even if we were to assume that admission of Barrett's testimony regarding intent was erroneous, it was harmless error.

Second, the Secretary asserts that the Board of Mine Operations Appeals in Canterbury Coal Co., 6 IBMA 276 (1976), affirmed a judge's decision disallowing a modification of § 75.1405 for several types of track equipment, including rubber-rail equipment, and refused to stay its decision with respect to rubber-rail equipment until the instant case was decided. The Secretary views this as de facto recognition by the Board that the standard applies to rubber-rail equipment. However, the Board's refusal to stay the part of the proceeding relating to rubber-rail equipment was based on factual differences it perceived between the Canterbury case and this case. 6 IBMA at 286. Moreover, the validity of the application of the standard to rubber-rail equipment could not have been at issue in the modification case, the Board having ruled that such an issue could only be raised in an enforcement proceeding.

Congress. They assert the original intent of section 75.1405 was to apply the automatic coupler requirement only to coal haulage equipment that operates solely on track and that this original intent must control. They argue this intent may be derived from the legislative history, i.e., the letter to Congressman Dent, and from the structure of section 314. Moreover, they assert that the Secretary's consistent policy from 1971 to 1974 of excluding rubber-rail equipment from coverage under § 75.1405 is the type of contemporaneous construction of the regulation by those charged with its enforcement to which deference should be accorded. They view this consistent administrative interpretation over a period of four years as compelling evidence of the original intent underlying the statutory and regulatory provisions. They also view the Secretary's proposal to amend § 75.1405-1 so as to include rubber-rail vehicles as evidence that such equipment was not originally covered.

In short, the operators argue that because of the legislative history, the Secretary's contemporaneous construction of the standard, the four year enforcement policy of not requiring automatic couplers on rubber-rail equipment and the proposal to amend § 75.1405-1, the judge correctly concluded that the Act and regulations do not require automatic couplers on rubber-rail equipment. The companies state that if the Secretary wishes to change a regulation he should follow the promulgation procedures set forth in the Act, rather than legislate through interpretation. 7/

Our resolution of this case begins with an examination of the words of the statute and standard. The judge and parties agree that section 314(f) and § 75.1405 on their face apply to "all haulage equipment." They also agree that Congress could not have intended literal application of the standard to all haulage equipment because there are many types of equipment used to transport coal, men and supplies (e. g., shuttle cars, battery powered tractors, and battery powered personnel carrier) which travel alone and upon which automatic couplers would serve no purpose. The judge and the parties also agree that in order to clarify Congressional intent and to narrow the overly inclusive language of the statutory standard the Secretary promulgated § 75.1405-1 limiting the automatic coupler requirement to "track haulage cars which are regularly coupled and uncoupled."

The word "track" indicates that the regulated cars travel on rails as opposed to free moving vehicles. All parties agree the rubber-rail cars travel on rail from the supply yard into the mine to the point on the track nearest the section where the supplies are to be used (Tr. 150-152, Dec. 4). Thus, the rubber-rail vehicles qualify, at least in this facet of their operation, as "track" equipment. The term "haulage

7/ The operators insist that they are not raising an estoppel argument. Rather, they are arguing that the original interpretation of the standard is the correct interpretation and must be followed. They state that the agency "is free to change the regulation despite reliance on the old regulation so long as [the agency] pursues the proper procedures." (Brief at 17.)

cars" in mining parlance indicates cars which carry either ore, equipment, supplies or personnel. 8/ The rubber-rail vehicles are used for the transport of men, equipment and supplies. Thus, we conclude that, based on a plain reading of the standard and the nature of the use of the equipment at issue, the rubber-rail vehicles involved are a type of "track-haulage car." 9/

The Secretary's inconsistent enforcement of the standard against the operators involved is troubling, but it does not lead us to a different result. The prior practice in District 2 of not enforcing section 75.1405-1 against rubber-rail equipment was contrary to the plain language of the standard. Further, although an agency's contemporaneous interpretation of a regulation can be given weight, the interpretation must be a consistent practice implemented by the agency as a whole. See 2 Davis, Administrative Law Treatise, § 7.14 at 66-69 (2d ed. 1979). The record indicates confusion among agency personnel regarding enforcement of the standard and it cannot be determined what interpretation, if any, had been adopted as the official agency position on the standard.

This leaves the question of whether the cited rubber-rail vehicles are "regularly coupled and uncoupled" within the meaning of the standard. The adverb "regularly" suggests a practice or implies uniformity or a method of proceeding. It excludes isolated or unusual occurrences. We believe that the record reflects a uniform method and practice of on-track coupling and uncoupling. The judge's finding that the rubber-rail cars are used only intermittently and are not regularly coupled and uncoupled is difficult to explain. None of the sources cited by the judge states or infers that the use of the equipment was only intermittent or that on-track coupling and uncoupling are not routine practices.

8/ Haulage cars. Rail haulage cars for surface or mine shaft operations are used to carry ore and equipment to and from the digging site. They may be of the trailer type or self-propelled, and include dump cars, flat cars, personnel cars, etc. Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior at 530 (1968).

9/ There is a great deal of discussion by the parties as to whether Congress intended section 314(f) to apply to rubber-rail vehicles. The judge concluded that the Secretary "correctly divined Congressional intent" when he promulgated § 75.1405-1 (Dec. 6). Our attempt to determine Congressional intent is inconclusive. We have found no indication that Congress in drafting section 314(f), or the Secretary in promulgating § 75.1405-1, considered rubber-rail equipment. See 35 Fed. Reg. 17890 (Nov. 20, 1970). At most section 314(f) and the legislative history indicate that automatic couplers are required on mine cars which run on track and which carry loads. Thus, we perceive no definitive indication from the legislative history, or the context of section 314, as to whether automatic couplers are to be installed on such cars that run only part of the time on track.

We therefore find that the rubber-rail cars are track haulage equipment that are regularly coupled and uncoupled on track and, therefore, that the standard applies to the on-track facet of their operation. The standard, however, does not apply to off-track operation and no other standard to which we have been cited, or that we are aware of, requires the use of automatic couplers on this equipment when it is used off-track.

Accordingly, if the Secretary wishes to require use of automatic coupling devices on rubber-rail vehicles at all times, he should amend § 75.1405-1 to expressly so provide. See Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976). In the course of the rulemaking process set forth in section 101 of the Mine Act (30 U.S.C. § 811), 10/ the technology, feasibility and safety considerations so important to miners and the industry could be developed and a rational result reached. It is of parenthetical interest to note that there is testimony in the record that any attempt to adopt automatic couplers to rubber-rail vehicles operating off-track could be dangerous to the safety of miners (Tr. 67-68; 202). Vertical movement of the automatic coupling on the uneven mine floor, together with the difficulty of lateral alignment in off-track operation, lends considerable force to this testimony.

Having made the foregoing observations as to the standard at issue, we are now faced with the disposition of this case. The record supports the finding that the equipment here was not equipped with automatic couplers while it was operated on-track. Accordingly, the operators were in violation of the standard. In this regard the judge erred in his finding.

We are not unaware that the facts also pose an issue which transcends the applicability issue resolved in this forum. This additional question concerns whether, given the asserted safety problems associated with automatic coupling systems off-track and potential practical problems with a requirement that the vehicles have two coupling systems so that they can be used safely both on and off-track, the standard should be enforced by the Secretary in accordance with its literal terms in the situation here. Section 301(c) of the Coal Act and section 101(c) of the Mine Act, however, provide a separate means of addressing this concern. As we have held previously, it is "important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e., a modification proceeding." Penn Allegh Coal Co., 3 FMSHRC 1392, 1398 (June 1981)(emphasis added). Cf. General Electric Co. v. Secretary of Labor, 576 F.2d 558, 561 (3d Cir. 1978). This Commission was established as fully independent of the Secretary by the 1977 Mine Act. As a result, we do not have jurisdiction, as did the Board of Mine Operations Appeals, to rule on petitions for modification based on diminution of safety. 30 U.S.C. § 811(c)(Supp. V 1981).

10/ Similar provisions existed in section 101 of the Coal Act.

From our review of the previous decisions of the administrative law judge and the Board in this matter, it appears that the question of diminution of safety never has been finally resolved. In light of our reversal of the judge on the applicability issue, both parties now have a present incentive to finalize the previously instituted modification proceeding. In the event that this avenue is pursued, we observe that all parties would be well-served by updating the time-worn record presently available in order to better conform the issue posed with the state of present technology.

Conclusion

Accordingly, we reverse the judge's conclusion that 30 C.F.R. § 75.1405 does not apply to the haulage cars at issue and reinstate the notices of violation. 11/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

11/ The present case arose from an application for review filed by the operators, rather than a petition for assessment of penalties filed by the Secretary, and only the question of the applicability of the standard is being resolved herein. Therefore, we need not explore in this case the effect that a previously instituted modification proceeding should have on a subsequently filed action seeking civil penalties for noncompliance with the standard sought to be modified. See Sewell Coal Co., 3 FMSHRC 1402, 1414-15 (June 1981). Our conclusion concerning the applicability of the standard to only one facet of a two facet operation is based on the particular standard and the particular type of equipment involved in this case.

Distribution

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

Richard McMillan, Jr., Esq.
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Michael Lasher
FMSHRC
5203 Leesburg Pike, 10th Fl.
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 10 1983

KITT ENERGY CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 83-65-R
	:	Citation 2020054; 12/1/82
SECRETARY OF LABOR,	:	Order No. 2020054-1; 12/22/82
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Kitt No. 1 Mine
Respondent	:	

DECISION

Appearances: B. K. Taoras, Esq., Meadow Lands, Pennsylvania, appeared for Contestant;
Howard Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, appeared for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Contestant filed a notice of contest on December 10, 1982, contesting a citation issued on December 1, 1982, by MSHA charging a violation of 30 C.F.R. § 75.1722. The notice contended that the Contestant did not violate the standard as alleged, that the violation charged could not have significantly and substantially contributed to the cause and effect of a mine health or safety hazard and that it was not caused by the unwarrantable failure of the operator to comply with the standard. Contestant filed a motion for an expedited hearing with its notice of contest. Respondent filed a statement in opposition to the motion for expedited review, but the parties subsequently agreed that a hearing be called for January 12, 1983. Pursuant to notice, the case was heard in Washington, Pennsylvania on January 12 and 13, 1983.

On January 12, 1983, prior to the commencement of the hearing, Contestant filed a supplement to its notice of contest challenging the "modification" of the contested citation on December 22, 1982, (the supplement erroneously states that the modification was issued December 28, 1982), whereby the citation was changed to an order of withdrawal issued under section 104(d)(2) of the Act. The order was itself modified on January 10, 1983, to delete the "significant and substantial" finding. The parties agreed that this case now involves the propriety of the order of withdrawal.

John Paul Phillips, a federal mine inspector, Michael Niggemyer, and James Lloyd Davis testified on behalf of the Secretary-Respondent. Joseph D. Mock, Kirby Smith, and Robert McAtee testified on behalf of the Operator-Contestant. Two miners at the subject mine, Franklin D. Raddish and Gregory A. Riley, filed requests prior to the hearing that they be recognized as parties to this proceeding. At the hearing they explained that they wished to be present for the hearing but did not wish to take part in examining witnesses or introducing evidence. Contestant moved for the sequestration of witnesses. In granting the motion, I permitted one of the above miners to remain in the hearing room as a representative of the miners at the subject mine, even though the Solicitor stated he might call them as witnesses. Contestant objected, but since neither miner was in fact called as a witness, the objection is moot. The parties waived their right to file written briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Kitt Energy Corporation was the owner and operator of a coal mine in Barbour County, West Virginia, known as the Kitt No. 1 Mine.

2. The operation of the subject mine affects interstate commerce.

3. MSHA began a complete quarterly inspection ("AAA inspection") of the subject mine on July 2, 1982, and completed it on September 28, 1982. Another quarterly inspection was begun on October 14, 1982. This inspection continued until December 17, 1982. During the former inspection a withdrawal order was issued under section 104(d)(2) of the Act on July 14, 1982, alleging a violation of 30 C.F.R. 75.1704.

4. A special technical inspection ("CEF investigation") was commenced on July 19, 1982 and completed on August 6, 1982.

5. All the active sections of the mine were visited by MSHA inspectors (in either the regular inspection or the technical inspection) between July 19, 1982 and September 28, 1982.

DISCUSSION

The operator's safety supervisor, Robert McAtee, testified that a new regular inspection was commenced on July 19, 1982, and completed ("closed out") on September 28, 1982. It appears from Inspector Phillip's testimony that McAtee is mistaken. The regular inspection which commenced on July 2, 1982, was not completed until September 28, 1982. The inspection which began on July 19, 1982, was a technical inspection. During such an inspection the inspector can issue citations for any violation he encounters. However, he is concentrating on the technical problems which prompted the investigation.

6. The bin area of the subject mine contains a large bin holding many tons of coal into which the belts coming from the face-areas dump. A vibrator screen starts the flow of coal and a scalping screen separates the smaller from the larger pieces. The former area sent to the slope belt and thence to the surface; the latter are fed into a crusher. The vibrating machine has an "eccentric," also called a balance wheel, which turns and is attached to a shaft which causes the vibrating machine to vibrate. There was an on-off switch in the bin area, but the scalping screen can be turned on from the preparation plant even though the switch in the bin area is off.

7. The belt drive between the motor and the eccentric was covered with a guard -- an 8 inch wide sheet metal frame on top and on both ends to which a screen was attached on the front (away from the eccentric). The right upper corner of the screen was torn away from the frame as of December 1, 1982, and the screen, which had been welded to the frame, was loose. It was not anchored to the floor.

8. The lower frame of the guard was 23 inches above the floor, and the upper frame was 49 inches from the floor, on December 1, 1982. Thus, there was an area of 23 inches from the floor not covered by the screen.

9. The floor in question consisted of metal grating.

10. On December 1, 1982, the eccentric did not have a guard affixed to it. The eccentric turns at approximately 735 revolutions per minute. On December 1, 1982, its highest point when turning was approximately 4 inches above the top of the frame of the belt drive guard.

DISCUSSION

Inspector Phillips and Mr. Niggemyer both testified that the eccentric came above the belt drive guard when it revolved. I found their testimony more persuasive on this point that the contradictory testimony of Mr. Mock.

11. A guard had been attached to the eccentric but was damaged and loosened in approximnately September, 1982. The operator fabricated a replacement in its shop and installed it on October 2, 1982. The guard lasted less than one day. A replacement was made and reinstalled but it too did not last. On October 25, 1982, a wire or rope was stretched around the scalping screen area and a guard was ordered from the equipment manufacturer. This wire was present 4 or 5 days prior to December 1, 1982, but was not present on December 1. The wire did not contain a "danger" sign and there is no indication that the people working in the bin area were instructed by the operator to avoid the area.

12. Normally, three men work in the bin area--one on each shift. The duties of a bin man include cleaning up coal spillage. There is generally some spillage in the area of the screen and it often extended under the guard screen in front of the pulley. The bin man was required to shovel fine coal spillage from under the screen.

13. The preshift examiners report book ("fireboss book") maintained at the subject mine contained references to the shaker balance wheel beginning on November 19, 1982. On November 20, there is a notation that it was "guarded and cleared." On November 22, the absence of a guard was noted on the day shift and afternoon shift. On November 23, 24, 25, 26, 27, 28, 29 and 30, it was noted on all three shifts that the balance wheel needed a guard. On the midnight shift, December 1, the absence of a guard was also noted.

14. A preshift examiner is a certified employee and in the subject mine is a member of the Union and not considered part of management. He is required to note in the preshift report all health and safety violations and other hazardous conditions. He has the authority to "danger off" an area which he deems hazardous.

15. The chairman of the Union Safety Committee told the operator about the unguarded eccentric on a number of occasions in September and October, 1982.

16. On December 1, 1982, Federal coal mine electrical inspector John Paul Phillips inspected the bin area of the mine accompanied by Joseph D. Mock, the operator's chief electrician, and Michael Niggemyer, the union walkaround representative. Niggemyer was told by the fireboss about the guard being missing from the eccentric and so informed the inspector. Niggemyer was employed as an electrical trainee and had worked as a bin man in the area in question.

17. On December 1, 1982, Inspector Phillips issued a citation under section 104(d)(1) charging a "significant and substantial" violation of 30 C.F.R. § 75.1722(a) because a guard was missing from the eccentric on the scalping screen and the guard over the belt drive was not adequate. The citation was terminated by the erection of a screen and barrier preventing employees from entering the area. This was accomplished the same day. Later in early December the eccentric guard was received from the manufacturer and installed the same day. The screen in front of the pulley was extended to the floor and bolted to the frame.

18. Inspector Phillips issued a citation because he was not aware that a 104(d) series was in effect at the subject mine. He was not the regular inspector and was apparently misinformed by the regular inspector.

19. After returning to his office Inspector Phillips learned that the mine was on a "(d) series." He then "modified" the citation to a 104(d)(2) order and, apparently under instructions from his superiors, deleted the significant and substantial finding.

20. On December 1, 1982, the eccentric or balance wheel in the subject mine was unguarded. This was a moving machine part. Since it turned above the belt drive screen it was such that it might be contacted by employees in the bin area and cause injury. The belt drive screen had a broken area in its upper right corner and did not extend to the floor. The screen did

extend to the bottom of the belts and pulleys. However, it is possible that an employee could contact the belt or pulley if he shovelled under the screen. The broken area in the upper right hand corner did not directly expose the belts or pulleys but an employee could accidently reach through this area and contact the moving machinery. This resulted in the possibility of employees contacting the belt drive through the opening or under the screen and sustaining injuries. Further, the screen was loose and could have been pushed into the moving pulley.

STATUTORY PROVISIONS

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 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 find 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.

REGULATORY PROVISION

30 C.F.R. § 75.1722(a) provides as follows: "(a) 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."

ISSUES

1. Was the 104(d)(2) order challenged in this proceeding invalid because it was not issued "promptly?"

2. Was there an inspection of the mine disclosing no similar violations between the 104(d) order issued July 14, 1982, and the order challenged herein?

3. Was a violation of 30 C.F.R. § 75.1722(a) established as of December 1, 1982?

4. If the answer to question 3 is affirmative, was the violation caused by the unwarrantable failure of the operator to comply with the applicable safety standard?

CONCLUSIONS OF LAW

1. Contestant was subject to the provisions of the Federal Mine Safety and Health Act in the operation of Kitt No. 1 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The withdrawal order issued under 104(d)(2) of the Act which is challenged in this proceeding is not invalid becuse it was not issued "promptly."

DISCUSSION

Section 104(d)2) of the Act provides that when a withdrawal order has been issued under 104(d)(1), another withdrawal order "shall promptly be issued" if an inspector finds a violation similar to that which resulted in the first order. The inspector here found what be considered such a violation on December 1, 1982. He issued the withdrawal order (by a "modification" of a citation) on December 22, 1982. The delay was occasioned by the fact that the inspector (a special electrical inspector) was unaware on December 1 that the mine was under a "(d) series." He therefore issued a citation. He later (after this proceeding was instituted) checked the records and found that the mine was on a "(d) series," and issued the modification. The condition had long since been abated and there was in fact no withdrawal or closure of any part of the mine. The modification was a bookkeeping matter, and, although the government has not shown why it took 3 weeks to determine the true facts, Contestant has not shown that the delay prejudiced it in any way.

3. A complete inspection of the mine showing no "similar violations" had not occurred between the withdrawal order issued under 104(d)(2) on July 14, 1982, and the finding of the violation on December 1, 1982, which resulted in the order challenged in this proceeding.

DISCUSSION

The antecedent 104(d)(2) order was issued on July 14, 1982, during the course of a regular inspection which took place between July 2, 1982 and September 28, 1982. Another regular inspection was begun October 14, 1982. It was completed on December 17, 1982. Although the order contested herein was issued after that date, it resulted from conditions found (and cited) prior to that date. Therefore, there was no intervening complete inspection between the conditions resulting in the two orders. I conclude that the fact (Finding of Fact No. 5) that all of the sections of the mine were visited by inspectors, regular or technical, between July 14, 1982 and September 28, 1982, does not establish "an inspection of such mine" as that term is used in section 104(d)(2). I conclude that the term contemplates a regular inspection of the entire mine.

5. The condition cited in the bin area of the subject mine on December 1, 1982, the absence of a guard on the eccentric and the inadequate guard on the belt-drive, constituted exposed moving machine parts which might be contacted by persons and cause injury to persons. Therefore, a violation of 30 C.F.R. § 75.1722(a) was established.

DISCUSSION

I accept the inspector's testimony that the eccentric, in the course of its revolution, extended above the screen guarding the belt drive. An employee in front of the screen could accidently reach over the frame and be struck by the eccentric. Should he do so he would certainly sustain injury. It would be less likely but not impossible, that an employee shovelling under the screen or falling against the damaged part of the screen could contact the belt drive with his hand, foot or shovel, and sustain injury. At least one miner was in the area each shift. The rope or wire stretched across the area was not adequate to keep employees away from the scalping screen and, in any event, it was not there on December 1, 1982 (Finding of Fact No. 11).

6. The violation referred to in conclusions of law No. 5 was caused by the unwarrantable failure of the operator to comply with the standard.

DISCUSSION

There is no doubt that Contestant was aware of the absence of a guard on the eccentric, since attempts were made to repair it, and finally a replacement was ordered. Further the absence of the guard was continually noted in the fireboss book. The placing of a wire across the walkway to the area was too ambiguous a signal to keep miners out, but does show that

Contestant recognized the danger. The area should have been dangered off to prevent miners from approaching the exposed moving machine parts. The inadequate guard on the belt drive was not noted in the fireboss book but was clearly visible and Contestant, whose chief electrician visited the area monthly, should have been aware of it. If a violation results from an operator's failure to correct conditions or practices which it knew or should have known existed, the violation is caused by the operator's unwarrantable failure to comply with the standard. Zeigler Coal Company, 7 IBMA 280 (1977); Cleveland Cliffs Iron Company v. Secretary, 4 FMSHRC 171 (ALJ).

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that the contest is DENIED and the order contested is AFFIRMED.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

B. K. Taoras, Esq., Kitt Energy Corporation, P.O. Box 500, 455 Race Track Road, Meadow Lands, PA 15247

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

Gregory A. Riley, Chairman Safety Committee, Local 2095, U.M.W.A., 1306 Penn. Ave., Fairmont, WV 26554

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

ROGER BENTLEY, Complainant	:	Complaint of Discrimination
	:	Docket No. KENT 82-75-D
v.	:	
WAMPLER BROTHERS COAL CO., Respondent	:	

DECISION

Appearances: Harold D. Bolling, Esquire, Whitesburg, Kentucky, for the respondent; Roger Bentley, Jackhorn, Kentucky, pro se.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed pro se after the complainant was advised by MSHA on March 30, 1982, that its investigation of his complaint disclosed no discrimination against him by the respondent. Respondent filed a timely answer denying that it had discriminated against the complainant, and pursuant to notice, a hearing on the merits of the complaint was held in Pikeville, Kentucky, November 23, 1982, and the parties appeared and participated fully therein.

The basis of Mr. Bentley's discrimination complaint in his assertion that mine foreman Larry Wright discharged him because of his belief that Mr. Bentley had complained to an MSHA inspector about certain roof and rib conditions at the mine, which resulted in an inspection of the mine sometime during the period of November 17 to December 3, 1981. In addition, in his initial MSHA complaint, filed on January 18, 1982, Mr. Bentley asserted that he had not been paid for a day of first aid training which he took on a Saturday, and he had not received a copy of his training certificate.

Issue

The critical issue presented in this case is whether Mr. Bentley's discharge was in fact prompted by any protected activity under section

105(c)(1) of the Act. Specifically, the crux of the case is whether Mr. Bentley's discharge on January 7, 1982, was in retaliation for any safety complaints made by him to MSHA, or whether his discharge was justified because of absenteeism, as claimed by the respondent.

Applicable Statutory and Regulatory Provisions

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

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

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

Complainant's testimony

Roger Bentley testified that he was hired by the respondent on September 15, 1981, as a roof bolter and was paid $8.75 an hour, or $70 a shift. The normal work shift was eight hours a day, five days a week, and the mine is a non-union mine. He was discharged on January 7, 1982 (Tr. 6-8).

Mr. Bentley stated that when he filed his discrimination complaint with MSHA, he included the matter of not being compensated for a day's training which he took on a Saturday in October, and not receiving his training certificate. However, he confirmed that after his discharge, the respondent paid him for his training and that his training certificate was mailed to him (Tr. 10).

Mr. Bentley confirmed that sometime during the period of November 7 to December 3, MSHA conducted a mine inspection, inspectors were there periodically, and that at least on one occasion as a result of a complaint about certain mine roof and rib conditions (Tr. 12).

Mr. Bentley stated that the day before his discharge he was having an electrical problem with the wiring in his home which necessitated his taking off work. He indicated that he and his wife called the mine and advised them of this, and the next day when he reported for work he was fired by Mr. Larry Wright, the mine superintendent. Mr. Wright told him that he was firing him because he missed too much work (Tr. 17).

Mr. Bentley indicated that MSHA's mine inspections may have resulted in some citations being issued, or at least an order to correct certain roof and rib conditions. He also indicated that he performed some roof bolting work to correct some of the conditions. He identified one of the inspectors who participated in the inspection as Rob Fleming, and stated that Mr. Fleming is a friend and neighbor who he had known for some four years. Mr. Fleming was the regular MSHA inspector assigned

to the mine, and Mr. Bentley recalled one past incident when Mr. Fleming was at the mine when Mr. Bentley could not make it because of heavy snow, and Mr. Fleming asked some of the miners about the whereabouts of "his neighbor" (Tr. 19).

Mr. Bentley testified that he never mentioned the training incident to Mr. Fleming. He also indicated that Mr. Fleming was not the inspector who may have inspected the roof and rib conditions which he worked on, but that Mr. Fleming was involved in the inspection of a loader that another miner had reported (Tr. 21).

Mr. Bentley confirmed that Larry Wright never said anything to him that would lead him to believe that Mr. Wright suspected him of being the person who complained to MSHA inspectors. However, Mr. Bentley stated that loader operator Warren Bentley, who is not related to him, told him that "they said that I was the one that called the inspectors on them, and they was going to get rid of me" (Tr. 22). Mr. Bentley testified further that after he was discharged, Warren Bentley told him that Larry Wright had said that "he (complainant) was the one that called the inspectors and they was going to have to get rid of me. Or, something pertaining to that" (Tr. 23).

Mr. Bentley stated that during his period of employment with the respondent he "got along good" with Mr. Wright (Tr. 24). He also confirmed that subsequent to his discharge he applied for and received unemployment benefits (Tr. 26). Mr. Bentley stated further that he filed his discrimination complaint because he felt that Mr. Wright believed that he had complained to the inspectors and fired him over it to get back at him (Tr. 27).

Mr. Bentley testified when Mr. Wright fired him he told him that he would have to let him go for missing too many days. Mr. Wright made no mention about any complaints, and there was no discussion about any "rumor" that Mr. Bentley may have been the person who complained to the inspectors. Mr. Bentley confirmed that he said nothing to Mr. Wright at that time and simply left the mine (Tr. 29). Mr. Bentley also confirmed that he was paid two salary checks which he had coming and indicated that the respondent had always paid him for his work and that he never had any trouble over pay (Tr. 30). He also confirmed that Mr. Wright came to his house and personally paid him for the day of training in question, but that they did not discuss his discharge and Mr. Bentley never spoke with again about getting his job back (Tr. 31).

On cross-examination, Mr. Bentley confirmed that he worked as a roof bolter, and also did some work as a shuttle car operator. He confirmed that he is an experienced miner, and that his roof bolter's job is an important job at the mine (Tr. 33). He confirmed that the training in question was given by a private company off mine property, and that company is responsibile for certifying that he received the training. He also confirmed that the training issue is no longer a part of his present complaint (Tr. 35).

Mr. Bentley believed that the inspection which resulted from the complaint filed with the MSHA inspectors took place sometime in November, and that no one said anything to him about the inspection. He confirmed that he continued working at the mine through the month of December following that inspection, and up to the time when he was discharged (Tr. 37). He confirmed that mine management never complained about his work, that the working conditions "were pretty good", and that he never felt that the day-to-day operations of the mine endangered his life. He did not know whether any citations were ever issued while he was on the job (Tr. 38-39).

Mr. Bentley stated that mine management never threatened to fire him over his work habits, and he denied that management had ever mentioned the fact that they could not tolerate his missing work (Tr. 40). He also denied that he had several absences subsequent to the inspection which prompted the "rumor" that he was the one who had complained, and was not fired (Tr. 41). He did confirm that he had two days of sick leave for which he had a doctor's excuse, and he estimated that he only missed work for a total of six days during his employment with the respondent, but denied that he ever missed four days' in a row in November or any other time (Tr. 43). He stated that "I never took off nary day without calling" (Tr. 43). He also indicated that when he did take off work, he would call in the morning of the day he was off, and the calls would usually be made at 6:00 a.m. He also confirmed that there were one or two days when he left work early due to inclement weather, but was still paid for a full shift, and he "guessed" that this was after the inspection in question. He confirmed that the respondent "was a good company to work for", that management never asked him to perform any dangerous work, had never made any abnormal demands to him as an employee, never threatened him for reporting safety infractions to MSHA. He also confirmed that the respondent "ran a good mine", had a good safety record, that "it was one of the best places I ever worked", and that he had "no reason to call the inspectors on them" (Tr. 46).

In response to one of my questions concerning his discrimination complaint, Mr. Bentley responded as follows (Tr. 48-49):

> Q. Mr. Bentley, if this company is so great to work for, and they were an enlightened employer, with a good safety record, and they treated you fine, and they paid you well, and they paid you even a couple of days when you went home early because of weather or what-have-you; what leads you to conclude -- why did you -- why do you put any stock in these rumors that they got you because they feel you were the guy that blew the whistle on them?
>
> A. Well, that's just the way --
>
> Q. You just feel that way?

A. Yes. Just the way everything looks to me. I don't know. You know, just the way everything looks to me.

Q. * * Other than the rumor that you had heard, was there anything concrete, or anything that you can put your finger on as to --

A. No.

Q. Do you know of any other employees out there that have filed complaints, that have been treated the same way you have?

A. No.

Q. Or, the way you claim to have been treated here.

A. See, I wasn't going to file any complaint against them.

Q. You weren't going to do what?

A. I wasn't going to file a complaint against them.

Mr. Bentley explained that when he initially went to the MSHA office after his discharge, his intent was to try to find out the identity of the miner whose complaint prompted the inspections which he believed triggered his discharge. He assumed that he could find out who complained, and that he could then go to Mr. Wright and inform him that it was not him (Tr. 50). Mr. Bentley also explained that while at the MSHA office "they said I probably had a pretty good case against them" and that the "MSHA people" talked him into filing his discrimination complaint against the respondent. He confirmed that MSHA would not tell him who filed the safety complaint against the company, and that other than the letter he subsequently received from MSHA advising him that MSHA's investigation of his discrimination complaint did not disclose any violation by the respondent, he was never specifically advised as to why MSHA concluded that the respondent had not discriminated against him (Tr. 49-50). He did not know whether Inspector Fleming participated in his discrimination investigation, nor does he know whether any investigators went to the mine to speak with anyone there (Tr. 52). He confirmed that Warren Bentley no longer works at the mine (Tr. 53).

Warren Bentley, testified that he first contacted Larry Wright at the mine while looking for a job, and that Mr. Wright told him that Roger Bentley was missing work and that he (Wright) may have to lay him off, and that if he did, he (Wright) would hire Warren. Mr. Bentley confirmed that during that conversation with Mr. Wright, Mr. Wright made some mention of the fact that he was having "trouble" because someone had "called the inspector" (Tr. 55). Mr. Bentley confirmed that

he quit his job with the respondent on November 20, 1981, to go to work for another coal company, but that he became dissatisfied with his new job and contacted Mr. Wright to get his old job back, and that is when the purported conversation took place (Tr. 56). He did not go back because Mr. Wright was looking for a roof bolter, and Mr. Bentley did not like to roof bolt (Tr. 58).

Mr. Bentley indicated that at the time he worked at the mine, some 15 miners worked there, and he confirmed that Robert Fleming was the MSHA inspector assigned to the mine in question (Tr. 60). He also confirmed that he had "heard" that someone had complained to an inspector sometime in November about someone getting hurt, but that no one knew who had complained (Tr. 62). When asked whether he had ever told the complainant that Mr. Wright believed the complainant called in the inspector's and that was why he was fired, Mr. Bentley stated as follows (Tr. 66-68):

> Q. Did Mr. Wright ever say anything to you, either directly, or indirectly, that he knew who had called the Federal inspector on him, and that the next time that fellow fouled up, he was going to get rid of him?
>
> A. Not that I recall.
>
> Q. Why would Mr. Rogert Bentley, sitting right here next to you at that table, say that you made that statement, then?
>
> A. I don't have any idea.
>
> Q. You never told Roger Bentley that Mr. Wright had said to you that he knew --
>
> A. Now the only thing -- I'll put it to you, I understand what you are getting to -- I told him, I said, he was talking to me about it, and I told him, I said, well, it soulds like, you know, that -- me and him both was together, just talking like me and you would meet up friends -- and I said, well, it kinds sounds like that maybe that's it. But, now as far as definitely stating, uh-uh.
>
> Q. Did you hear from any of the other members -- any of the other miners, rather -- or any of the crew men out there, was there any rumor going around the mine that Mr. Wright knew who had complained, and who had called the Federal inspectors out there, and that Mr. Wright was going to see to it that the next time the fellow that did it, was going to get it?

A. No, for I wasn't back -- when I quit him, I wasn't back to the mines but one time. I went up there to get my W-2 forms, and that's the only time. In fact, I went to his house, I think, to get them, I believe.

Q. Have you ever known Mr. Roger Bentley to file any complaints with MSHA, or to complain about safety conditions, or that sort of thing?

A. Not since I have known him.

Q. Do you have any idea who complained about the conditions at the mine that caused the inspector to go there in November?

A. I don't know (INAUDIBLE).

Mr. Bentley stated that there is no mine safety committee, and that if anyone had a safety problem they would go to Mr. Wright, mine owner Wampler, of foreman Ernest Mullins, and that Mr. Mullins would take care of the problem (Tr. 70). In response to further questions, Mr. Bentley stated that the respondent always treated him fairly, and he confirmed that he was not at the mine when the complainant was discharged (Tr. 73). He also indicated that mine management never threatened him for complaining about safety matters, and did was expected to take care of such problems (Tr. 76).

After the testimony of Warren Bentley, the complainant indicated to me that he did not wish to pursue the matter further, and his reason for this was his belief that Warren Bentley's testimony was contrary to what Mr. Bentley had previously told him. The complainant indicated that he filed his discrimination complaint on the basis of Warren Bentley's prior statement that Mr. Wright told him that he had fired the complainant because he believed that his complaint to the inspector had prompted the mine inspection (Tr. 77). In view of the fact that Mr. Wright was present for testimony, the complainant's request not to pursue the matter further was denied (Tr. 77).

Respondent's testimony and evidence

Larry Wright testified that he is the mine superintendent and that he also has an ownership interest in the mine. He indicated that mine foreman Ernest Mullins takes care of the day-to-day operation of the mine, and that he (Wright) spends half his time underground. He confirmed that the complainant was hired on September 15, 1981, and that the only problem he had with him was that he missed work. He confirmed that the complainant Roger Bentley was a good roof bolter and worker, and that from the time he was hired he began missing work "one or two days a week". Since the roof bolter is important to his mining operation, this

necessitated finding a replacement for him when he missed work, and he would have to reassign another miner to that job, and that he did not believe that this was a good safety practice (Tr. 81-83).

Mr. Wright confirmed that the complainant was terminated on January 6, 1982. Upon review of his personnel records, he confirmed that the complainant worked a total of 70 days before his discharge and that he was absent from work a total of 11 full work days during that time (Tr. 84). In addition, he confirmed that his records reflect that the complainant worked two hours one day, four hours another day, and went home, but was paid a full days' wages. There were an additional two days in which he did not put in a full day, and the total time beyond the 11 days which he did not complete a full days' work was four days (Tr. 85).

Mr. Wright testified that he never accused the complainant of instigating any MSHA inspection and he identified the miner who did as Tammer Waggoner. He stated that the complaint was over a bad top and ribs, and when the inspectors came to the mine the complainant was not there. Some of the miners concluded that since the complainant was not at work that he was the one who called in the inspectors. In fact, Mr. Wright stated that Mr. Waggoner came to him and told him that the mine would be inspected that day, and he confirmed that the inspectors did in fact issue a citation which required some overhanging ribs to be cut down, and compliance was immediate. He confirmed that Mr. Waggoner is still employed at the mine. Mr. Wright denied that he ever made a statement that he would fire the complainant for having complained to the inspectors, and stated "I never fired nobody over that. That's their own right" (Tr. 87-88).

Mr. Wright testified that he told the complainant that his missing work was causing him problems and that if he continued he would have to do something about it. He also informed the other miners about this and indicated that it was becoming costly and expensive, and he also indicated that absenteeism was not a problem at that time, but in the past it was a problem (Tr. 89). He confirmed that present mine policy is to terminate miners if they consistently miss work (Tr. 89).

Mr. Wright identified the inspectors who conducted the inspection which resulted from Mr. Waggoner's complaint as Carl Smith and Reed Castle, and that Inspector Fleming was not with them. He also confirmed that Mr. Fleming had never complained to him about any miner complaints over safety (Tr. 90). Mr. Wright also confirmed that loader operator Johnny Ison was injured in a rib roll, but that this occurred a week before the MSHA inspection in question. He denied ever telling Roger Bentley that he fired the complainant because of any complaint to an inspector, and he denied ever telling Roger Bentley that he would hire him because the complainant was missing work. He did confirm that Warren Bentley called him three or four weeks after he quit trying to get his job back, but that he informed him that he had already hired a loader operator but would consider him for a repairman's job if anyone quit (Tr. 91).

Mr. Wright confirmed that MSHA and state inspectors routinely inspect the mine, that he has never had any problems with them, and that it did not bother him if any employee saw fit to complain to any inspector or to report him to MSHA (Tr. 92).

In response to bench questions, and after referring to his attendance records, Mr. Wright detailed the specific days on which the complainant missed work. He testified that out of a total of 11 days of missed work, he could only recall one day on which the complainant called to inform him he would not be at work. On that day, the complainant called him and told him he had his truck stuck in a ditch and would be late, but he never showed up at all (Tr. 95).

Mr. Wright confirmed that it was possible that the complainant called someone else at the mine on the days he did not show up for work, but he also confirmed that his pay was docked for the 11 days he was absent. He also stated that mine policy is such that miners are only paid for the days they work, and even if they bring a doctor's excuse, they are not paid. However, in such circumstances, it would be an excused absence (Tr. 95-96). A miner would not be paid if he could not get to work because of road conditions (Tr. 98).

Mr. Wright stated that he has fired other miners for absenteeism, and that he considered the 11 days which the complainant missed to be excessive absenteeism, and that he had spoken with the complainant about the matter before he dismissed him, and that he had warned him a week or so before his dismissal (Tr. 100). He denied that the complainant ever called him about the problems with his house wiring (Tr. 100), and he confirmed that he spoke with mine owner Wampler before discharging Mr. Bentley, and stated Mr. Wampler is his (Wright's) uncle.

Mr. Wright stated that he did not know that Inspector Fleming was a neighbor of the complainant, and Mr. Fleming never mentioned that fact to him (Tr. 102), and that he found out that this was true after the discrimination complaint was filed (Tr. 103). Mr. Wright also related that he employs 14 or 15 miners, that absences cause production problems and are costly to his mine operation, and that when the complainant missed work someone had to replace him (Tr. 105). He also indicated his safety concern over replacing an experienced bolter such as the complainant with someone who is not as experienced (Tr. 106).

The complainant was given the opportunity to call Mr. Wampler as a witness, but declined to do so. The complainant indicated that the only reason he filed his complaint was that Warren Bentley told him he had been fired for complaining to the inspectors. When asked why Warren Bentley would make such a statement, the complainant stated that he did not know. Further, while he has known Warren Bentley for four years, he "never had that much dealing with him", but that he had heard others say that Warren Bentley was known to exaggerate or take things our of context (Tr. 108).

Mine operator Larry Wampler was called as the Court's witness, and he confirmed that the mine rules were that "anybody that didn't work regular, we had them terminated" (Tr. 109). Mr. Wampler confirmed that Mr. Bentley missed eleven days of work when he was employed at the mine, and could only recall one phone call which he received from Mr. Bentley at his home advising him that he couldn't come to work. Mr. Wampler stated that he did not discuss the absences with Mr. Bentley, and he left such matters to Mr. Wright (Tr. 111).

Mr. Wampler denied that Mr. Bentley was discharged for complaining to MSHA, and stated that he was terminated for "irregular work" (Tr. 112). Mr. Wampler stated further that the mine employs 14 to 16 miners, that it is a non-union mine with daily production of 200 to 400 tons, five days a week (Tr. 113). He also indicated that personnel turn-over at the mine is not a problem (Tr. 113). He confirmed that he is a "working owner" at the mine, but that Mr. Wright "runs the show", with full authority to hire and fire employees. To his knowledge, Mr. Wright has never fired a miner for reasons other than missing work, and he had no knowledge that Mr. Bentley had ever complained to MSHA inspectors about the mine (Tr. 114).

Complainant produced his payroll check receipts covering his employment period September 18, 1981 through January 1, 1982, and by agreement of the parties, copies were made a part of the record and the originals were returned to Mr. Bentley (Tr. 116). When asked if he disputed Mr. Wright's references from respondent's payroll records indicating that he had missed eleven days of work, Mr. Bentley said that he questioned one day when the loader was down on November 6th. He confirmed that he took off the following day, November 7, when "they said the loader was down" (Tr. 117).

Findings and Conclusions

In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). It is clear that a miner has the right to file a safety complaint or to summon MSHA inspectors to the mine site for an inspection if he believes that safety hazards exist in his work environment. It is clear that any retaliation by the mine operator against the miner for making any safety complaints is a violation of the Act.

Complainant Bentley claims that he was fired by Mine Foreman Larry Wright because Mr. Wright believed that Mr. Bentley had complained to an MSHA inspector about certain safety conditions at the mine. Mr. Bentley's "belief" concerning Mr. Wright's motivation for discharging him is based on what he was purpotedly told by former employee Warren Bentley after the discharge. Warren Bentley purportedly told the complainant that he had heard that Mr. Wright fired him because he believed that the complainant had complained to an MSHA inspector about certain safety conditions at the mine.

In a recent case decided by the Commission on August 31, 1982, it was held that a miner is protected from retaliatory discharges by a mine operator even "for the suspected exercise of a statutory right", Elias Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (1982). In that case, the Commission stated at 4 FMSHRC 1480, that "the complainant establishes a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by that suspision".

In the instant case, the respondent mine operator contended that the complainant was discharged for absenteeism, and in support of this defense presented the testimony of Larry Wright, the mine foreman who fired Mr. Bentley. Mr. Wright had with him at the hearing his attendance records for the miners working at the mine during the time in question, and that those records, coupled with Mr. Wright's testimony, establish to my satisfaction that Mr. Bentley was absent from work for a total of 11 days during his tenure at the mine. Further, with the exception of one instance when Mr. Wright recalled a telephone call from Mr. Bentley at his home, respondent established through the credible testimony of Mr. Wright, that Mr. Bentley did not advise mine management that he would be absent from work and this necessitated a replacement for him. For a small mine operation such as that carried out by the respondent, this presented a problem for management since Mr. Bentley was a skilled roof bolter whose presence at the mine was crucial.

Although the complainant denied that he had been warned about his absenteeism, I find Mr. Wright's testimony that he cautioned Mr. Bentley about his absences and warned him that he could be terminated if he continued missing work to be credible. Further, aside from the discharge, there is no evidence that mine management treated Mr. Bentley badly or that he was ever harrassed or intimidated for exercising any protected rights during his rather short employment tenure at the mine. As a matter of fact, Mr. Bentley conceded that the mine operator treated him fairly, paid him well, and that the mine was a good place to work.

Complainant subpoenaed Warren Bentley to testify in his behalf at the hearing. Warren Bentley no longer works at the mine in question, and he denied that he ever told the complainant that mine foreman Wright had told him that he fired the complainant because of his belief that the complainant had complained to an MSHA inspector. The inspector in question is a neighbor of the complainant's, and the complainant surmized that foreman Wright may have believed that this impacted on Mr. Wright's asserted "belief" that the complainant may have told the inspector about certain unsafe roof conditions at the mine.

No MSHA inspector was called by the complainant to testify in his behalf. Further, the complainant states that when he visited MSHA's district office after he was fired, he did so in an attempt to learn the identify of the individual who may have complained to the inspectors. The complainant asserted that while MSHA would not reveal the identity of the person who may have complained, someone in MSHA's district office suggested that the complainant filed a discrimination complaint and helped him fill out the necessary paperwork.

Mr. Wright denied that he fired the complainant for filing any complaints, and he denied ever telling Warren Bentley that he suspected the complainant. As a matter of fact, Mr. Wright testified that he knew who had complained, identified him for the record, and indicated that he was still employed with the company. This testimony was not rebutted by the complainant.

I conclude and find that on the basis of the preponderance of the evidence in this case, respondent has established that it discharged Mr. Bentley for absenteeism, and there is no credible evidence to support a conclusion or finding that mine foreman Larry Wright suspected or knew that Mr. Bentley had filed any safety complaints and fired him for that reason rather than for missing too much work. In short, I cannot conclude that Mr. Wright fired Mr. Bentley because of any belief that he had exercised a protected right to file safety complaints.

The question concerning Mr. Bentley's first aid training and the receipt of a certificate for that training is not an issue in this case. The record shows that Mr. Bentley was paid for the day of training and that he apparently received the certificate from the company who provided the training.

ORDER

In the view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Bentley, and that his rights under the Act have not been violated. Accordingly, his discrimination complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Harold D. Bolling, Esq., 4-5-6 Bank Building, Whitesburg, KY 41858 (Certified Mail)

Roger Bentley, Box 87, Jackhorn, KY 41825 (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 15 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 82-52
	:	A.C. No. 01-00758-03132 V
v.	:	
	:	No. 3 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: Deborah Greene, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Robert W. Pollard, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 40 U.S.C. § 801 et seq., the "Act," for one violation of the regulatory standard at 30 C.F.R. § 75.503. The general issue before me is whether Jim Walter Resources, Inc. (Jim Walter) has violated the cited regulatory standard and if so, whether that violation was "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822. If it is determined that a violation has occurred, it will also be necessary to determine the appropriate penalty to be assessed. Hearings on these issues were held in Birmingham, Alabama, on November 30, 1982.

The order at issue, No. 758262, reads as follows:

> A non-permissable three-phase filter capacitor was installed on the outside of the No. 50 Joy shuttle car reel housing and not in an explosion proof compartment. Car was observed hauling coal out of the face of No. 4 working place.

The cited standard, 30 C.F.R. § 75.503, requires, in essence, that all electric face equipment operating inby the last open crosscut be "permissible". Permissible electric face equipment, as defined in 30 CFR § 75.(2)(i), is equipment in which the electrical parts, including associated electrical equipment, components, and accessories, are designed, constructed, and installed in accordance with specifications of the Secretary, to assure that the equipment will not cause a mine fire or mine explosion.

There is no dispute in this case that the three-phase filter capacitor here cited was an electrical component of electric face equipment and was not installed in an explosion and fire proof compartment as required by the cited standard. John Trusik, an electrical engineer employed at the Jim Walters No. 3 Mine, conceded that it was not "permissible" to have the filter capacitor installed as it was in this case and that indeed it constituted a safety hazard. The cited violation is therefore proven as charged. The only issues remaining then are whether that violation was "significant and substantial" and the amount of penalty to be assessed.

A violation is "significant and substantial" if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. National Gypsum, supra, 3 FMSHRC at 825. The test essentially involves two considerations: the probability of resulting injury, and the seriousness of resulting injury. MSHA resident coal mine inspector at the No. 3 Mine, Bobby Horton, issued the order in question on March 17, 1982. A "resident inspector" was required at the No. 3 Mine because of its history of mine accidents and high methane liberation. MSHA records show that as of January 9, 1981, the No. 3 Mine was liberating over nine million cubic feet of methane daily. Moreover, the evidence shows that there had been over twenty methane ignitions at the No. 3 Mine since it began operations in 1975 or 1976. Although Inspector Horton found only .5% to .8% methane concentrations in tests performed ten to twenty minutes before his discovery of the violation cited in this case, he opined that the possibility of sudden inundations exceeding the 5% explosive range always existed at a gassy mine such as this. According to Horton, methane concentrations in the 5% range combined with an ignition source such as the non-permissible phase filter in this case presented a serious explosion hazard. He thought it reasonable to infer that all 200 miners working on the shift could receive fatal injuries in such an explosion.

MSHA Inspector Claude Lutz further opined that coal dust and powdered coal were explosive even in the absence of methane if ignited by electric spark or arc such as could occur from the non-permissible phase filter. While Inspector Horton conceded that the methane sensor mounted on the cutting machine on which the cited filter was located was designed to cut off electrical power if the level of methane reached 2%, he noted that such monitors have been known to malfunction. In addition, Horton explained that methane concentrations in excess of 5% regularly occur in the immediate vicinity of the face as coal is cut.

On the other hand, electrical engineer John Trusik opined that the odds were "high against failure" of the non-permissible filter. He conceded, however, that there had been failures in a number of smaller filters formerly used at the mine. Under all the circumstances, I find that there did indeed exist a reasonable likelihood that the hazard of an explosion or fire would occur if the condition cited had remained uncorrected, and that if, indeed, an explosion occurred in the No. 3 Mine, it could very well lead to the death of up to 200 miners. The violation was, accordingly, "significant and substantial". For the same reasons, I also find a high level of gravity associated with the violation.

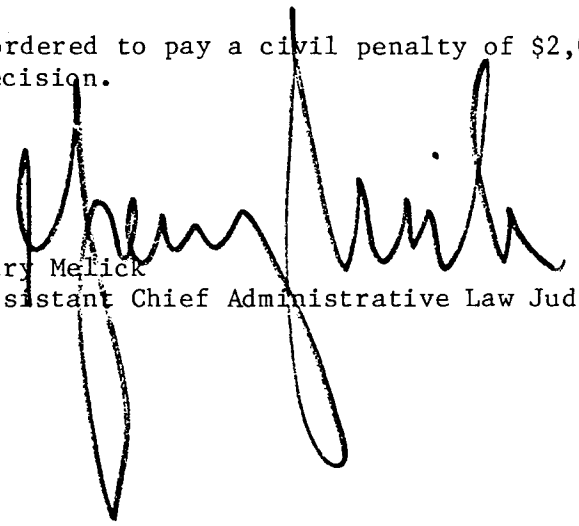
It is also apparent from the record in this case that the operator was "grossly negligent" in allowing this known violative condition to exist. The uncontradicted evidence shows that as early as 1979, an MSHA inspector had advised Jim Walter officials of the problems relating to the use of impermissible phase filters on their electric face equipment. Two citations had been issued at the No. 3 Mine on November 18, 1981, and again on January 20 and January 21, 1982, for the same violation as cited in this case. Moreover, MSHA officials met on November 16, 1981, with officials of Jim Walter's, including company Vice President Don Schlick and the chief of maintenance for several Jim Walter's mines including the No. 3 Mine, concerning the use of impermissible phase filters. There is no dispute that the operator was then clearly informed that the use of impermissible phase filters on electric face equipment was a violation of the cited standard. In any event, electrical engineer Don Trusik admitted that the use of these filters had always been known by mine personnel to be a safety hazard. Trusik candidly admitted that, in spite of that knowledge, it was management's position that coal production was more important than the correction of that hazard. He testified in this regard that "with the amount of coal we run and the people we have down there, they will do what they have to do to move coal".

Management's attitude is further illustrated by the uncontradicted evidence that maintenance foreman Douglas Sergeant told Inspector Horton that the violations would be corrected only so long as Horton was present. Within this framework of evidence, it is clear that the operator's agents had been warned of the violation at issue and had been repeatedly cited for continuing violations in spite of such warnings. The operator has shown blatant disregard for the safety of its miners by allowing the admitted safety hazard to continue uncorrected.

In determining the amount of penalty to be assessed in this case, I am also taking into consideration that the operator is large in size and has a history of repeatedly violating the standard at issue herein. Under all the circumstances, I find that a penalty of $2,000 is appropriate.

ORDER

Jim Walter Resources, Inc., is ordered to pay a civil penalty of $2,000 within 30 days of the date of this decision.



Gary Melick
Assistant Chief Administrative Law Judge

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Distribution: By certified mail.

Robert W. Pollard, Esq., Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283

Deborah Greene, Esq., Office of the Solicitor, U.S. Department of Labor, 1929 9th Avenue, South, Birmingham, AL 35256

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR,	:	Complaint of Discrimination
on behalf of	:	and Application for Temporary
WILLIAM E. FITZWATER, III	:	Reinstatement
Applicant	:	
	:	Docket No: YORK 82-23-D
v.	:	MORG CD 82-23
	:	
METTIKI COAL CORPORATION,	:	Mettiki General Mine
Respondent	:	

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104, for the Applicant; Barbara Krause, Esq., and Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, 1110 Vermont Ave., NW., Washington, D.C. for the Respondent

Before: Judge Moore

I have heard a number of discrimination cases and I can not recall any where the government has presented such a devastating prima facia case. In August of 1981 Mr. William Fitzwater and others made safety complaints to MSHA. Mr. Fitzwater did so indirectly by informing his father and brother with the successful expectation that one of them would call MSHA's hot-line. Transcripts of the hot-line recordings during that time period concerning this Mettiki mine were received in evidence as government exhibit No. 5. An objection to the admissibility was taken under advisement, but the objection is overruled.

Shortly thereafter the supervisors held a series of closed door meetings at which George Kutchman the mine superintendent stated that he knew the Fitzwaters and Tichnells were making these complaints and he wanted to get rid of them. He wanted them harrassed and even considered at one point laying off a number of miners and then rehiring everybody except the Fitzwaters and Tichnells. Two former supervisors and two present supervisors testified at the trial and three of them stated that Mr. Kutchman had said that he was out to get the Fitzwaters. The other supervisor who testified, Mr. Visniski, was for some reason not questioned concerning the closed door meetings.

One of the reasons that former preparation plant foreman Chapman left Mettiki Coal Company was that he thought they were being unfairly harsh and mistreating some of the miners including Mr. Fitzwater. Two welders, Mr. Tichnell and Mr. King both testified they were reprimanded and criticized for bringing up safety matters at a safety meeting. Miners who brought up safety matters were considered trouble makers.

I will not summarize the testimony of each witness, but the testimony of Randy Chapman and Ted Uphold is of such a nature that I think that at the risk of some repetition, it is necessary that their testimony be emphasized. Randy Chapman was once the preparation plant foreman and as stated, one of the reasons he left the Mettiki mine was his concern about the mistreatment of Mr. Fitzwater. He stated that he kept a diary and the diary was in the courtroom and shown to counsel. After refreshing his memory by looking at the diary, he stated that on August 25, 1981 George Kutchman the superintendent said "we have got to get rid of the Fitzwaters and Tichnells." They were troublemakers according to Mr. Kutchman. The foremen were told to harass them when they could and only to talk to them when they were alone. He said "we could get in trouble if there were witnesses." Regardless of the quality of the work they did, the foremen were told to make these miners redo it. Mike Burch and Ernie Uphole were present and were told by Mr. Kutchman not to breathe a word to anyone else because they could get in trouble if anyone found out. Mr. Chapman said that on August 27, 1981, Rich Visniski told Mr. Burch to harass Fitzwater. At an August 28, 1981 meeting between George Kutchman, Ted Uphold, Mike Burch, Rich Visniski, Ernie Uphole and Randy Chapman, George Visniski said someone had called in safety complaints to MSHA and he knew Fitzwater and Tichnell reported it. They had to be fired or some of the supervisors might lose their jobs. And then there came a time when George Kutchman said that he did not want Fitzwater harassed at that particular time because MSHA inspectors were on the scene. At another meeting, according to the testimony of Mr. Chapman and his diary, on August 31, 1981, with most of the supervisors present, there was a discussion about laying off as many as twenty miners and gradually hiring other men back but leaving the Fitzwaters and Tichnells out. It was stated that they had to get rid of William Fitzwater and his brother Ralph. One of the suggestions was that the Fitzwaters be placed in a position where they were working alone in a quiet area, hoping they might catch them asleep. (Tr. 186-187).

As to cleaning under the breaker screens, one of the matters that will be discussed later, Chapman said that it was always done when the rotary breaker was not in operation and that it was never a practice to clean under the screen while the rotary breaker was operating. He thought it would be unsafe to do so because of the noise, dust and the hazard of falling rocks.

Ted Uphold was the other former foreman who testified for the government in this case. He was present at one of the 1981 supervisor's meetings when George Kutchman (Sr.) mentioned the Fitzwaters and said that he wanted them fired. He discussed the coming trial in this matter with Mr. Rich Visniski and according to him, Mr. Visniski stated that he would testify as he needed to. Mr. Uphold told him that if he was subpoenad he would tell the whole truth concerning the meeting and what Kutchman said about the Fitzwaters. Mr. Uphold was terminated after 4-1/2 years as a foreman on September 27, one week prior to the trial in Cumberland.

Foreman Mike Burch also testified, but he testified as the only witness for respondent. While he differed in many respects from the version of the actual details of the firing and other matters with the other witnesses,when questioned as to whether he heard George Kutchman say that the Fitzwaters were trouble makers and would have to be fired, he admitted that he had heard that; he qualified it somewhat by saying that he thought it had to do with dealings other than working at the mine. But there has been no dispute or denial by any witness of the matters set forth by Mr. Chapman and Mr. Uphold in their testimony. I find that the company was looking for an excuse to fire Mr. Fitzwater (all three of them in fact) and that the reason Mr. Kutchman wanted to get rid of the Fitzwater's was because of safety complaints.

For some reason the real hard questions were not asked while Mr. Burch and Mr. Visniski were on the stand. I suspect, that insofar as Mr. Burch is concerned, the government did not think his testimony had been damaging and therefor did not choose to pursue the matter. I think government counsel was correct in this assumption. As to Mr. Visniski, I wonder why he was called as a witness if he was not going to be put to the test as to why he upbraided and reprimanded the two welders, Mr. King and Mr. Tishnell for bringing up safety matters at a safety meeting as had been alleged. The particular matter that was involved in one of these reprimands was a request that a discrete frequency be available for the walkie-talkies used between the engineer and a man on the rear car when the train was backing into an area where other cars were parked or when they were trying to connect other cars. According to the testimony of Mr. Tichnell and Mr. King, they were accused of being rowdy for bringing up this safety complaint. Mr. Burch did recall the complaint. Mr. Visniski was not questioned about the matter.

Joint exhibits 1, 2 and 3 are photographs of the rotary breaker building from two angles and a picture of the lower end or bottom of the grizzly and shaker screen. The latter picture shows some accumulation of debris near two doors or gates in the screen assembly. The exhibit does not purport to show conditions as they were at the time of Mr. Fitzwater's firing but it is the area and the debris that had accumulated was similar but more extensive.

The rotary breaker receives coal from three silos and the operator of the rotary breaker chooses which silos he wishes to draw coal from. The coal is fed in at the top of the breaker, goes through the grizzly and shaker screen, and then to the rotary breaker and then is dumped on a conveyor belt where it goes to some other part of the preparation plant. The operator's main station is in a control room where he has gauges that indicate to him the extent of the coal in each of the three silos he is drawing from. One of his duties is to make sure that none of the silos gets too full because if the depth exceeds around sixty feet in any silo there would be an automatic shutting of a gate which would cause coal spillage. When the levels in the three silos are low, however, the operator can leave the control room for short periods of

time. When the breaker building is in operation, it is noisy and dusty. Also there is a hazard from falling rocks as testified to by Mr. Fitzwater, former preparation plant superintendent Mr. Chapman, Mr. Tichnell and electrician Harvey. One rock had fallen from the shaker and had hit with sufficient force to shear the door off an electrical box that was attached to one of the girders. On the deck where the grizzlies were, there was another hazard in that the upper end of the grizzlies and shaker boxes were held in place by cables which could, and had, broken. When such cables broke the grizzly would not fall all the way to the floor but it would fall approximately a foot and they weigh 5 or 6 tons each. Both former preparation plant superintendent Chapman and William Fitzwater thought it was hazardous to clean under the grizzlies while the preparation plant was in operation. Accordingly, it was Mr. Fitzwater's practice, and when Mr. Chapman was superintendent it was the entire plant's practice, to clean only when the rotary breaker was not in operation.

Mr. Fitzwater testified that he always used a mask (sometimes referred to as a filter) when working outside the control room when the rotary breaker was in operation. Foreman Burch denied that it was hazardous to be on the rig when it is in operation and says that he has seen Mr. Fitzwater on the rig while the breaker was in operation and that Mr. Fitzwater did not have a dust mask. He only sees Mr. Fitzwater out of the control room about twelve times a year, however. But for all of his time as breaker operator Mr. Fitzwater had not been cleaning and had not been asked to clean under the grizzlies while the machine was in operation.

The automotive dust respirator No. 06983 distributed by the Automotive Trades Division of the 3-M Company is the mask ordinarily used by Mr. Fitzwater. It is both MSHA and NIOSH approved (see Government Exhibit 4). The masks that foreman Burch delivered to Mr. Fitzwater were designated 8500 non-toxic particle mask and are also manufactured and distributed by the 3-M Company.

The box that the 8500 comes in does not contain any statements that it is approved by NIOSH or MSHA. (See Government exhibit 3). Mr. Fitzwater was unfamiliar with the 8500 mask and during a preshift conference with his counterpart on the previous shift, Mr. Decker, Mr. Decker pointed out that the 8500 was not MSHA approved, and not near as thick as the 06983 or the Dust-Foe 88 which he, himself, wore. When Mr. Decker was getting ready to leave the breaker he left three of the 06983 masks in the general locker but forgot to say anything to Mr. Fitzwater about it, and Mr. Fitzwater had no way of knowing they were there. 1/. I accept foreman Burch's statement that he did not deliberately deliver

1/ I fail to see how anyone could agree with respondent's proposed finding to the effect that Mr. Fitzwater "had every reason to know" the filters were there.

the wrong type of filter to Mr. Fitzwater. Mr. Fitzwater had requested the filters on April 15 and sometime shortly thereafter foreman Burch delivered them. But the two boxes are very similar and I find that the mistake was not deliberate. It was made, however. The only masks that Mr. Fitzwater thought were available to him were the non-approved 8500's.

On April 20, 1982 Mr. Burch came by and told Mr. Fitzwater to clean under the grizzly. Mr. Fitzwater testified that he had every intention of doing so at the end of the shift. He did not get a chance to do so, however, because he was told to run late, and in fact the 9,000 tons run through the breaker on April 20 was a record high for Mr. Fitzwater. He had no time to clean after the run was over. On the 21st he had no down-time on the rotary breaker and ran late again because he was told to. On the next day, April 22, 1982, Mike Burch came by and looked at the breaker building and wanted to know why Fitzwater had not cleaned the material that had accumulated under the grizzlys. When Mr. Fitzwater explained that he had not had any down-time in two days Burch said that he wanted the area cleaned while the rotary breaker was in operation. Mr. Fitzwater responded that if he was going to have to clean while the rotary breaker was in operation, he wanted a proper dust mask. He did not mention the safety hazard that he thought existed because it was his opinion that a miner who had complained about safety, a Mr. Arnott, had been fired because of it, and because his own father after making safety complaints had been assigned outside shovelling work in the winter where the temperatures were sometimes as low as 30 degrees below zero. That was his stated reason for not mentioning safety, but mentioning only the fact that he wanted a properly approved mask. Mr. Burch reminded Mr. Fitzwater that he was refusing a work assignment, and Mr. Fitzwater responded that he was not refusing, that he just wanted the proper mask before performing the task. The details of the events following are not important, but when Mr. Fitzwater left the mine property he was not sure of whether he had actually been permanently fired or temporarily suspended. After a few telephone calls he found out that he had been fired. This experience is somewhat similar to what happened to his brother who had been accused of sleeping on the job. His brother, who at the time was under medication testified that he became dizzy and sat down on a panel box when of the supervisors came by and accused him of being asleep. A fellow miner who was a witness to the fact that Fitzwater was not asleep he did not want to get involved in a dispute with the foreman. When Mr. Ralph Fitzwater was fired it was similar to his brother's firing in that he left the property not knowing whether he was suspended or fired. He later got written notice that he was fired.

While it was not explained in detail how it happened, the father was somehow laid off; so the direction of Mr. George Kutchman had been complied with to the extent that the foremen had now gotten rid of the Fitzwaters.

The breaker has since been fitted with some type of guard that eliminates the hazard from falling rocks when the machine is in operation. I find however, that as of the time when this case arose, it was hazardous to work in the area that Mr. Fitzwater had been assigned to clean while

the breaker building was in operation. Since he did not voice that hazard however, even though the failure to voice the hazard was motiviated by a fear of reprisal, I am not sure that a refusal to work in the hazardous area was a protected activity. Certainly refusal to go in to a dusty area without a proper mask is a protected activity. I find that Mr. Fitzwater was discharged because he made safety complaints and because he was engaged in a protected activity of refusing to work in a dusty area without an approved 2/ dust mask.

He is entitled to reinstatement to his former position with back pay and benefits plus interest. He is also entitled to reasonable expenses in connection with prosecution of this case. See the Commission decision in Secy. ex. rel MICHEL ET AL v. NORTHERN COAL CO. 4 FMSHRC 126, 143.

The Commission has before it the question of whether it is proper to assess a penalty in a discrimination case in which the 3 CFR 100 procedures have been bypassed. Until the Commission decides to the contrary, I am not going to assess such penalties.

All proposed findings inconsistent with the above are rejected.

PENDING A FINAL ORDER

The Secretary shall have 15 days from the date of this decision to submit a proposed order granting relief for the violation found above, with service of a copy on Respondent. Respondent shall have 15 days from receipt to reply to the proposed order.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution: By Certified Mail

David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104

W. H. Thompson, Jr. President, Mettiki Coal Corporation, 1800 So. Baltimore Street, Tulsa, OK 74119

David J. Kutchman, Safety Director, Mettiki Coal Corpn., Route 3, Box 124-A, Deer Park, MD 21550

Mr. William E. Fitzwater, III, Star Rt. 1/Box 110-A, Oakland, Md. 21550

Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, 1110 Vermont Avenue, NW., Washington, D.C. 20005

2/ See 30 CFR. Part II

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

LYNN DONOVAN, Complainant	:	Complaint of Discharge, Discrimination and Interference
v.	:	Docket No. WEST 82-92-DM
BROWN & ROOT, INC., Respondent	:	Tenneco Soda Ash Project

DECISION

Appearances: Lynn Donovan, Denver, Colorado, pro se; Peter R. McLain, Esq., Houston, Texas, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant with the Commission on January 22, 1982. His complaint is dated January 19, 1982, and states as follows:

> There is reason to believe that there was discrimination. And the uses of drugs on the job. I know for a fact the drug user's are still on the job. There for I am asking the commission for an appeal.

Mr. Donovan's complaint of discrimination was investigated by MSHA, and by letter dated June 26, 1981, MSHA advised Mr. Donovan that its investigation did not substantiate his charges of discrimination, and that a violation of section 105(c) of the Act did not occur. The record also reflects that due to a change of address and residence by Mr. Donovan, he did not receive actual notice of MSHA's determination until January 4, 1982. Mr. Donovan then retained counsel, and in an amended complaint filed March 15, 1982, counsel itemized the specific alleged facts of discrimination against Mr. Donovan.

In his amended complaint, Mr. Donovan asserted that in January 1981, while he was in the employ of the respondent, a contractor performing construction work with Tenneco Oil Company, Green River, Wyoming, constructing a mine and mill at Tenneco's Soda Ash Project, he was required to work on and around trucks hauling diesel fuel and gasoline at the project site. In summary, the amended complaint states that while employed with the respondent, Mr. Donovan made several complaints to respondent's management, as follows:

> -- the trucks in question were not maintained in a safe condition in that they leaked quantities of fuel, and Mr. Donovan believed in good faith that such leaks constituted a danger or threat to his safety and the safety of other miners because of the possibility of fire or explosion started by sparks from cigarettes or other equipment, such as welders.
>
> -- during the time Mr. Donovan was employed by the respondent, the person who normally drove the truck on which he (Donovan) worked, a man known to him as "Dave", and the leadman, known as "Doc", smoked marijuana in one of the trucks used on the job, often during their lunch time.
>
> -- Mr. Donovan believed that the smoking of marijuana on the job constituted a danger to himself and others, in that the judgment and ability to react of those persons smoking would be impaired. Mr. Donovan also asserted that those persons drove trucks and operated other equipment which he believed, if done under the influence of marijuana, could result in accidents threatening the safety of himself and others on the site. He was afraid for his safety while the truck was being operated by someone smoking marijuana, or who had been smoking marijuana on the job.

In regard to his complaints concerning the alleged leaky fuel trucks, Mr. Donovan asserts that when he made his complaints known to the leadman "Doc", and to a foreman, Joe Erger, they were "hostile" and told him "don't worry about it, just get back in the truck and go back to work", or words to that effect. Further, Mr. Donovan asserted that rather than repairing the condition resulting in the unsafe leaking of fuel from the trucks, the respondent allowed the condition to continue, and he asserted that on at least one occasion he heard Joe Erger order "Doc" to "hide your trucks" from MSHA inspectors who "Doc" believed were coming for an inspection. Mr. Donovan claims the trucks were then driven off so that they could not be inspected.

With regard to his marijuana smoking allegations, Mr. Donovan asserted that he complained about this to his immediate superior, leadman "Doc", and that "Doc" did not attempt to cease and prevent the smoking of

marijuana. Rather than taking corrective action, Mr. Donovan stated that "Doc" responded to his complaints by increasing his hostility toward him by undertaking an effort to discredit him with his supervisor, Joe Erger. In support of this claim, Mr. Donovan asserted that "Doc" followed him around the job unjustifiably, complaining about his work performance to the supervisor, Joe Erger, and calling him derogatory names and starting arguments with him. Mr. Donovan claims that these actions by "Doc" were motivated in large part by his complaints about the unsafe condition of the trucks and the smoking of marijuana.

Mr. Donovan complained that the conduct of "Doc" and Joe Erger was intended to intimidate him and to prevent him from taking his complaints to any other person, to discredit him in the eyes of those to whom he might complain, and to make his working conditions so difficult that he would not be able to continue in his job. Mr. Donovan also asserted that in addition to the alleged harrassment, his wages were reduced by $2.50 per hour, even though his duties remained the same, and that this reduction in wages was part of the discrimination against him for his complaints about safety.

Mr. Donovan stated that several days before the termination of his employment with the respondent, the harrassment became so severe that he went to Dave Warhol respondent's personnel officer, to request a meeting with John Murray, respondent's equipment superintendent and immediate supervisor of Joe Erger. Mr. Donovan claims that a meeting was arranged for the following Monday, but when he returned to work that day, Mr. Erger told him that he would not be permitted to meet with Mr. Murray, and that Joe Erger told him that he (Erger) would just as soon see him "drag up" or quit. Since he believed he was prevented from meeting with Mr. Murray, and since he believed that the unsafe conditions would continue unabated, Mr. Donovan claims that he was afraid that taking his complaints elsewhere would present a danger to himself, and he therefore left his job on or about March 17, 1981. Mr. Donovan stated further that he subsequently filed a written complaint regarding his alleged discrimination with MSHA's Green River field office on March 25, 1981.

Respondent filed an Answer to the complaint on April 6, 1982, denying Mr. Donovan's allegations of discrimination. Respondent maintained that Mr. Donovan voluntarily terminated his employment on March 19, 1981. Further, respondent asserted that in his original complaint filed with MSHA on March 25, 1981, the only colorable allegation of protected activity was Mr. Donovan's assertion that "during my employment I complained of safety violations and dangerous practices", and that after an extensive investigation by MSHA, it decided that Mr. Donovan had not been discriminated against in violation of the Act. Further, respondent asserted in its Answer that Mr. Donovan chose to renew his complaint with the Commission after respondent refused to comply with an alleged extortion demand by Mr. Donovan requesting $5 million in exchange for the destruction of certain tapes allegedly in Mr. Donovan's possession showing respondent's employees using controlled substances and other narcotics during their course of employment.

By Order issued by me on May 24, 1982, I denied the respondent's motion for summary decision for failure by Mr. Donovan to state a cause of action, and I also denied respondent's motion to dismiss the complaint as untimely filed. I also denied the respondent's motion to strike an affidavit filed by the respondent in support of its alleged claim of extortion, and the parties were directed to finalize any discovery so that the matter could be scheduled for a hearing on the merits at a site convenient to all parties.

On September 7, 1982, I granted Mr. Donovan's counsel's motion to withdraw as his representative in this case, and Mr. Donovan was advised that he could retain new counsel or proceed with his case pro se. At the conclusion of discovery, and after the issuance of certain subpoenas requested by the parties, a hearing was held in Green River, Wyoming, during the term October 20-21, 1982. Respondent appeared with counsel, and Mr. Donovan appeared pro se, and the parties participated fully in the hearing, and they both filed post-hearing arguments which I have considered in the course of this decision.

Issue

The crucial issue presented in this case is whether or not Mr. Donovan's claims of harrassment and intimidation on the job by mine management because of his safety complaints, including his claim that his wages were reduced because of these complaints, all of which he claims resulted in his leaving his job, constituted a "constructive discharge" and illegal discrimination under the Act. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following (Tr. 7-11):

Mr. Donovan was employed by the respondent from January 28, 1981, to March 17, 1981. Respondent during this time was performing contractual work at the Tenneco Soda Ash Project, a mining operation owned and operated by Tenneco Corporation, and the product being mined was trona.

Mr. Joe Erger, Mr. John Murray, and Mr. Dave Warhol, were during all times relevant to the complaint in this case supervisory or managerial

employees of respondent at the mine construction site in question. These individuals had the authority to hire, fire, to recommend such action, and were otherwise authorized to direct the work force and discipline employees.

The individual identified as "Doc" in Mr. Donovan's complaint is in fact one James Kauss. However, the parties could not agree whether Mr. Kauss was in fact a "leadman", or supervisor or manager.

Mr. Donovan had a meeting with Mr. Warhol at his office in Green River. However, the date of the meeting is in dispute. Respondent believes that meeting took place on or about March 6, 1981, and Mr. Donovan believes the meeting was later.

Mr. Donovan's employment with the respondent ceased on March 17, 1981. However, respondent believes that Mr. Donovan voluntarily quit his job on that date, and Mr. Donovan does not consider it a voluntary quit.

Service of subpoena

The local sheriff's department was unable to effect service on three potential witnesses sought by Mr. Donovan. Mr. Donovan identified them as Duane Baker, Floyd Chacon, and Delmer Fiscus, and he stated that they were former oilers and co-workers who worked at the construction project in question. Mr. Baker's whereabouts were unknown, Mr. Chacon was purported to be residing in Granger, Wyoming, and Mr. Fiscus was purported to be "in the Pinedale area looking for work". In view of the unavailability of these witnesses, I requested Mr. Donovan to make a proffer as to what they would testify to so as to unable me to make a judgment and ruling as to whether their absence would be prejudicial or critical to Mr. Donovan's case.

Mr. Donovan stated that Mr. Baker would testify as to the use of drugs at the construction site and would confirm his efforts to arrange a meeting between Mr. Donovan and the former project equipment superintendent John Murray. Mr. Murray was not subpoenaed, but is reportedly working for the respondent in Springerville, Arizona (Tr. 8). Mr. Donovan stated that Mr. Chacon could testify to the use of drugs by leadman "Doc" on the job, and "maybe some safety conditions" (Tr. 9). As for Mr. Fiscus, Mr. Donovan stated that he could testify as to the use of drugs by "Doc" (Tr. 10).

After consideration of this matter, I concluded and ruled that the absence of these witnesses were not critical to Mr. Donovan's discrimination complaint. Aside from the fact that efforts to locate them and to serve them with the subpoenas were not successful, I ruled that the question of the alleged smoking of marijuana on the job site is one that was raised by Mr. Donovan, and even if it were an established fact, the question of discrimination and retaliation against Mr. Donovan by mine management personnel for these complaints would be the crucial question for decision. As for the efforts by Mr. Baker to arrange a meeting, Mr. Donovan testified

that these efforts came after his employment terminated, and Mr. Donovan testified that during the week after he left his job, and before filing his complaint with MSHA, he made several attempts to call Mr. Erger, but was unable to reach him. He did not know why he did not go to the mine to try and see him, but indicated that a friend, Duane Baker, tried to set up a meeting with Mr. Murray but could not arrange it. After that Mr. Donovan "forgot about it", and filed his complaint with MSHA (Tr. 141).

During the course of the hearing in this matter, MSHA's Denver Regional Solicitor's Office, through attorney James Barkley, made a limited appearance at the hearing to file an objection to a subpoena which had been served on the inspector who investigated Mr. Donovan's discrimination complaint. The subpoena was served on him by respondent's counsel, and MSHA's opposition stemmed from the fact that the subpoena had been served the day before the hearing, and MSHA's counsel indicated that MSHA had no opportunity to review the investigative files and other material sought by the subpoena. After further bench discussion, and in view of the fact that Mr. Donovan had in his possession a copy of MSHA's investigative report, respondent's counsel agreed to release the inspector from the subpoena, and the parties agreed that the inspector, Jerry Thompson, had no personal knowledge concerning Mr. Donovan's complaint, but that three pages from his report could be admitted as part of the record in this case. Further, Mr. Thompson confirmed that he issued no citations to the respondent during his inspections at the mine. In short, he confirmed that he issued no citations for any leaky fuel trucks, or for employees smoking marijuana (Tr. 47-56).

Complainant's testimony and evidence

Mr. Donovan testified that three weeks before the termination of his employment he complained to leadman "Doc", Mr. Erger, and his fellow co-worker Dave Barnhouse about the leaky fuel truck condition. Although Mr. Erger did temporarily repair the truck on one occasion, the problems persisted and Mr. Erger's response to Mr. Donovan was for him "not to worry about it, just get back to work". Mr. Donovan also stated that he complained to Dave Barnhouse and to "Doc" about their smoking marijuana in the trucks while on the job, and that he let them them know that this was not safe. The complaints were oral, and were made two weeks before his employment ended. He also indicated that "Doc" and Mr. Barnhouse advised him that it didn't matter because they smoked marijuana on their lunch hour (Tr. 13-15). He did not complain to Mr. Erger about the asserted marijuana smoking because he did not know who else may have been involved and was afraid that "I might get hurt" (Tr. 16).

Mr. Donovan confirmed that he and Mr. Barnhouse were both classified as "oilers" and were expected to do the same work, but that because of a "lazy eye" condition, Mr. Donovan was not permitted to drive the fuel truck, and Mr. Barnhouse did the driving. On one occasion, Mr. Barnhouse nearly backed over him while driving the truck under the influence of marijuana, and Mr. Donovan stated that he had to signal him three times to stop the truck (Tr. 18).

Mr. Donovan described his duties as an oiler and he believed that "Doc" was in some supervisory position because he went around "checking on all of our work and to tell us certain things that needed to be done" (Tr. 18). Mr. Donovan confirmed that the extent of his safety complaints had to do with the leaky fuel trucks and the smoking of marijuana on the job by "Doc" and Mr. Barnhouse, and that these activities took place during the time he worked on the day shift. Mr. Donovan stated that after he made a mistake and put some gas in a diesel truck, and also put a half quart of oil too much in a welding machine, Mr. Erger informed him that he was going to cut his pay by $2.57 an hour. At that time, Mr. Donovan was making $10.57 an hour, and he confirmed that at the time his employment ended, he was making the same wage and that Mr. Erger had not cut his pay as of that date (Tr. 20-23).

Mr. Donovan confirmed that he had been "written up" by respondent's safety department for refueling some welding machines while welders were working nearby, and he also confirmed that he did not bring any of his safety complaints to the attention of MSHA because he "didn't know they existed". He also related an incident where he claims that Mr. Erger instructed Mr. Barnhouse to hide some leaky fuel trucks from some MSHA inspectors who were on the property, and that Mr. Barnhouse took the trucks out of service and parked them. Mr. Donovan confirmed that the inspectors did not inspect the trucks, and he also confirmed that he did not tell the inspectors about the leaky condition of the trucks (Tr. 24-37).

Mr. Donovan admitted that he had smoked marijuana "a time or two" in the past, but denied that he ever did so while on the job (Tr. 37-38). He knew that Mr. Barnhouse smoked marijuana on the job, because he observed him "light up" while actually driving the truck and his "responses or reflexes were real slow", and on at least two occasions when he signaled Mr. Barnhouse to stop the truck "he kept on coming", and he had to fall out of his way. He again discussed the matter with Mr. Barnhouse, but did not complain to Mr. Erger or to respondent's management about the marijuana smoking. However, he did say that he visited the office of respondent's personnel manager, Mr. Warhol, in Green River, but simply advised him that there were "safety problems on the job". Mr. Warhol advised him to consult the safety department, and also suggested that he take a couple of days off. Mr. Donovan indicated that Mr. Warhol had arranged a further meeting for him to discuss the matter with management, but that when he returned to work, Mr. Erger stated to him that there would be no meeting, and that Mr. Erger also stated to him that as far as he was concerned he didn't care if Mr. Donovan worked there anymore (Tr. 41).

Mr. Donovan stated that after the abortive meeting with Mr. Warhol, Mr. Erger and "Doc" "teamed up to get rid of him" (Tr. 41). He indicated that "Doc" would follow him around the job site, checking on his every move, and that Mr. Erger threatened to cut his pay. He also indicated that "Doc" worked for Mr. Erger, but he conceded that "Doc" had no office at

the site (Tr. 60). He stated further that he complained to Mr. Erger about "Doc's" treatment, and that Mr. Erger stated that "he didn't care" (Tr. 61). Mr. Donovan believed that "Doc's" treatment of him stemmed from his complaints about his smoking marijuana, and Mr. Donovan stated that "Doc" was employed by the respondent, but he did not know if he was still employed with them (Tr. 61). When asked to explain the circumstances of his departure from his employment with the respondent, Mr. Donovan stated as follows (Tr. 62-64):

> Q. March 17, 1981. What prompted you to leave work, not to go back? Just tell me in your words whether or not you believe -- Just tell me how it came to pass that your employment was terminated there.
>
> A. Well, when they refused the safety meeting with me on a Monday, at that point the harrassment kept on and I think it was on a Wednesday I quit. I just felt like they weren't going to help me with any of my complaints so I left on a Wednesday, I believe.
>
> Q. Now Wednesday -- March 17 according to my calendar would have been a Tuesday.
>
> A. It could have been Tuesday.
>
> Q. So it could have been either Tuesday or Wednesday, the 17th. Did you give the company any notice or did you tell anyone you were leaving?
>
> A. Well, after he told me he was cutting my wages I decided there wasn't -- There was nothing more I could do there so I just quit. I told the time office people -- They asked me why I was quitting, what my reason was for quitting and I told them I was under a lot of harrassment. They didn't give me no layoff slip or nothing. I didn't get no kind of a layoff slip.
>
> Q. Were you paid for the services that you performed out there up to the time you quit?
>
> A. No, I had to come back and get my check.
>
> Q. But you were eventually compensated?
>
> A. Yes.
>
> Q. Did anything transpire when you went back? Did you make any attempts to go back or did you contact anyone from the company?

A. A friend of mine, Mr. Baker, which was working out there, he tried to line up a meeting with Mr. Murray and by the time he had that lined up I had already went to MSHA. So Mr. Murray was willing to talk to me about it after so many days had went by.

Q. What made you decide to go to MSHA after you left the job?

A. Well, I figured MSHA was a safety program for the people and if I let this thing go that more people who were involved with the drugs on the job and more people would be exposed to either getting hurt or getting killed on the job so I decided I wouldn't let this go, that it would be taken care of.

Q. How did the fact that MSHA was in existence, or was available to you, come to your attention? Did someone tell you they were available or how did you come to file a complaint with them?

A. I don't really remember for sure how I did that.

Mr. Donovan stated that a month or so after he left employment with the respondent after he filed his discrimination complaint with MSHA, he was told "by some friends" that "dozens of people were either fired or run off their job for using drugs" (Tr. 66). When asked why he had simply not refused to work around any hazardous fuel trucks, he responded "I was kind of paranoid. I didn't want to get in any trouble. I wanted to keep my job. I just tried to live with the conditions as long as I could" (Tr. 70). He also confirmed again that the only time he complained to MSHA was "after I had quit. Then I later found out that I could do something about it, I could go to MSHA and they would do something about it. This was after I quit" (Tr. 71).

On cross-examination, Mr. Donovan reviewed his prior employments with other mine operators and construction companies, and confirmed that for the exception of the issuance of safety glasses and boots by the respondent, he received no safety training and that there were no safety meetings during the day shifts which he worked on. However, he did confirm that safety meetings were held while he was on the night shift (Tr. 75). He also confirmed that he worked on the night shift for two or three weeks before being switched to the day shift, and denied that his work was ever questioned (Tr. 78). He also denied that the night shift came to an end because the men on that shift were drinking and did not do their work (Tr. 80).

Mr. Donovan confirmed that he complained to Mr. Erger about the leaky fuel trucks on two or three occasions (Tr. 83), but he could not recall whether he had first complained to "Doc" and Mr. Barnhouse about their

smoking marijuana (Tr. 84). He conceded that he didn't complain to Mr. Erger at first about the leaky truck when he first noticed it, but did so after the leak "began gushing" (Tr. 84). He also confirmed that he did not complain to any mechanics about the leaky truck when he first noticed it (Tr. 86). He explained that the leaks came directly from the pump on the truck as well as the hose nozzle, but that he personally never attempted to fix the leaks (Tr. 87). He later stated that he did not have the proper tools to fix any leaks (Tr. 88). He also confirmed that he brought the leaky truck condition to the attention of "Doc", and when he failed to do anything about it, he complained to Mr. Erger (Tr. 91). The first time he complained to Mr. Erger, the truck was tagged out by respondent's safety personnel, and Mr. Erger had it fixed, and that Mr. Erger told him not to worry about it and that he would have it fixed (Tr. 92-93). Mr. Donovan also indicated that one of his co-workers Keith, whose last name he does not recall, also complained to Mr. Erger about the leaky truck (Tr. 95).

Mr. Donovan indicated that "it was probably common knowledge throughout many, many people on the job" that miners were smoking marijuana, and that other oilers commented to him when he was getting off work that "they were going out to smoke a joint" (Tr. 100), and that this was still during working hours (Tr. 101). Although Mr. Donovan claims he was concerned about the safety aspect of this marijuana smoking, he said the other workers with whom he discussed the matter "didn't care" (Tr. 102). He confirmed that he did not bring this to the attention of Mr. Erger or to respondent's management because "he was scared", and he confirmed that he did not notify any of respondent's safety personnel about the marijuana smoking (Tr. 105).

Mr. Donovan stated that after the incidents where he put gas in a diesel truck and over-filled a welder with oil, "Doc" began harrassing him over these incidents and that he (Donovan) "blew up at him", and the two exchanged words. At that point, Mr. Donovan left the job site to seek out Mr. Warhol. Before leaving, he told Mr. Erger that he was upset over "Doc" harrassing him and told Mr. Erger that he was going to see Mr. Warhol. When he met with Mr. Warhol, he simply told him about "safety problems on the job", but told him nothing specific, and he told him nothing about the leaky trucks or marijuana smoking. Mr. Warhol informed him that while safety problems were not his concern, he would arrange a meeting with superintendent Murray, Mr. Erger's superior (Tr. 114-124).

Mr. Donovan stated that after his employment ceased and when he went back to pick up his final pay check, he was asked to sign a paper, and he identified it as exhibit R-1. He indicated that he did not remember telling anyone why he quit his job when he returned to get his check (Tr. 129). He could not recall receiving a copy of the paper which he signed (Tr. 131).

Mr. Donovan denied ever making video tapes of anyone smoking marijuana on the job, and he denied ever calling any official employed by the respondent to inform them that he had such tapes. He also denied ever calling any management official threatening to "go public" with the tapes unless he was paid five million dollars or given his job back (Tr. 133-135).

Mr. Donovan testified that he never heard "Doc" or Dave Barnhouse tell Mr. Erger about his safety complaints, and Mr. Erger never told him that "Doc" or Mr. Barnhouse had informed him about these complaints (Tr. 136). Mr. Donovan also conceded that Mr. Erger told him he intended to cut his wages because of the fueling mistakes which he had made, and that he did not directly state that he was cutting his wages because of his safety complaints (Tr. 138). He confirmed that his visit to Mr. Warhol's office was his last attempt prior to quitting that he made to communicate his safety concerns to respondent's management personnel (Tr. 143-144). He also confirmed that "Doc" never told him that he was "harrassing him" because of any complaints concerning the leaky fuel truck or the marijuana smoking (Tr. 145).

During further testimony at the hearing, Mr. Donovan stated that the last day he worked he was informed that his pay would be cut and that he "was just so discouraged I didn't want to stay any longer" (Tr. 137). He stated further that at the time he picked up his last pay check, he did not call Mr. Erger or Mr. Warhol to advise them that he was quitting his job. He identified a copy of the "termination paper", exhibit R-1, stated that the signature which appears thereon "looked like his signature", but he could not recall receiving a copy of the document at the time he visited the site trailer office to pick up his check and "sign out". He also stated that when he picked up his check he told the time clerk that he was leaving his job because he was being harrassed by "Doc" and had an agrument with him (Tr. 77, 79, 84-85). Mr. Donovan also identified exhibit R-8, as his final pay check in the amount of $167.74 (Tr. 90).

Mr. Donovan stated that after he returned to work on Monday, March 9, he asked Mr. Erger about the meeting with Mr. Murray. "Doc" was present at that time, and Mr. Erger "implied or told" Mr. Donovan that there would be no meeting and that Mr. Donovan and "Doc" were to "work this out between us" (Tr. 143). Mr. Donovan stated further that he did not at that time tell Mr. Erger about the smoking of marijuana, but simply told him that "there were problems" which needed to be discussed (Tr. 146). Mr. Donovan confirmed that he never saw Mr. Erger smoke marijuana, and that he never saw Mr. Erger observe anyone else smoke marijuana and do nothing about it (Tr. 147). Mr. Donovan summed up his desire to meet with Mr. Murray as follows (Tr. 148-149):

MR. DONOVAN: I wanted everybody to be there when I exposed all this, and then there was no meeting. I had figured that all this could be exposed that morning in which I was planning on doing that, but there was no meeting at all.

THE COURT: Okay. What if Mr. Murray had been there and you told him all about this?

MR. DONOVAN: I would think the problem would have been corrected.

THE COURT: What kind of corrective action would have been taken?

MR. DONOVAN: I would imagine he would have investigated all these problems.

THE COURT: Okay.

MR. DONOVAN: And the man was a very intelligent man in my estimation, I believe he would have brought some justice to these problems.

THE COURT: And that wouldn't have given you any cause to leave the site, you still would have sat there and worked?

MR. DONOVAN: Yes.

THE COURT: And what if Mr. Erger said that's fine, but you're still going to be making $7.85 an hour because we don't think you're cutting the mustard. Then what could have happened?

MR. DONOVAN: Well, I'd have a choice to stay or leave.

THE COURT: But you don't think you'd have a discrimination complaint?

MR. DONOVAN: Well, it would be much lesser without this.

THE COURT: So, you're saying now, you're suggesting that the fact that you weren't given an opportunity to talk to somebody higher up in the hierarchy of Brown & Root to tell them about these problems so corrective action would be taken, that that is what caused you to just leave the mine site?

MR. DONOVAN: That and the harrassment I was going through with the foreman.

David A. Barnhouse, confirmed that he presently works for Tenneco Corporation, but that he did work as an oiler for the respondent and was Mr. Donovan's co-worker. He denied that "Doc" ever told him or Mr. Donovan to "hide the trucks" from any MSHA inspectors, and stated that he was told to check the trucks and "watch what you're doing" (Tr. 160). He confirmed that their fuel truck leaked "small amounts of fuel on and off", but he could not recall the truck ever being "tagged out" for any safety reasons (Tr. 162), but did recall that it was cited one day because the parking emergency braked slipped and would not hold the truck (Tr. 163).

Mr. Barnhouse denied that "Doc" ever claimed that he and Mr. Donovan were written up for driving a truck into an area where welding was going on, and he denied that he witnessed any arguments between Mr. Donovan and "Doc" (Tr. 164). Mr. Barnhouse denied that he and "Doc" ever smoked marijuana on the job, and he also denied that on occasion, he smoked marijuana with Mr. Donovan in the truck (Tr. 165).

When asked if he knew what this case was all about, Mr. Barnhouse replied as follows at Tr. 166:

> THE WITNESS: All I know is he's wanting money off Brown & Root for quitting the job. That's about all I know about these proceedings.

Mr. Barnhouse also confirmed that Mr. Donovan subpoenaed him to appear at the hearing, and that he has not seen nor spoken with Mr. Donovan prior to the hearing and since he left his job (Tr. 167). He denied any "harrassment" of Mr. Donovan by "Doc", and stated that "Doc" "Just tried to get the job done is all I can say" (Tr. 168). Mr. Barnhouse confirmed that "Doc" was always around the job site checking their work, indicated "that was his job" (Tr. 168), but denied that "Doc" constantly followed them around (Tr. 169).

Mr. Barnhouse recalled the incident concerning Mr. Donovan's putting gas into a diesel truck, and confirmed that Mr. Donovan himself told Mr. Erger about the incident (Tr. 169). Mr. Barnhouse also confirmed that there were occasions when he complained about leaky fuel on the truck due to excessive fuel from the pump, but that the conditions were always fixed (Tr. 171). He confirmed that he had rumors about some people leaving the job because of using drugs, but denied any personal knowledge of any of the details (Tr. 171).

Mr. Barnhouse recalled one day when Mr. Donovan left the job "in a very upset manner", but could recall none of the details (Tr. 172). He conceded that during the time he worked with Mr. Donovan he considered him to be "an honest person" (Tr. 174).

On cross-examination, Mr. Barnhouse confirmed that he went to work at the site in question in February of 1980 or 1981, and started working with Mr. Donovan a month or two later (Tr. 175). During the time he

worked with Mr. Donovan, there were complaints about his work in that he was "lax in the way he done things. He didn't wash things quite the way it should be done. Sometimes it was hard to explain to him some things like the difference between diesel welders and gas welders and so on" (Tr. 177). Mr. Barnhouse denied speaking with any MSHA officials after Mr. Donovan left the respondent's employ (Tr. 177).

Mr. Barnhouse indicated that when he was employed by the respondent he attended safety orientation classes while on the job, and that safety meetings were held every two weeks and that the leadman met with the crew once a month. He never heard anyone complain about marijuana smoking during any of these safety meetings (Tr. 179-180), and he stated that he never observed "Doc" smoke marijuana on the work site (Tr. 180). He confirmed that Mr. Donovan did complain about the leaky fuel trucks during safety discussions, and that these complaints were about certain pumps on the trucks. However, the pumps were taken off and fixed and he was never required to use a truck with a defective pump (Tr. 182). He also confirmed that he was never directed to fuel any welding machines while welders were working above them, and that had this been the case he would have refused to work (Tr. 183).

Respondent's testimony and evidence

David Warhol, respondents group personnel manager, Houston, Texas, confirmed that he was respondent's personnel manager for the Tenneco Soda Ash Project at the time of Mr. Donovan's employment. He explained the procedure for hiring for the project, and explained the employee orientation program (Tr. 49-56).

Mr. Warhol stated that there are "lead men" for each basic craft, and while the lead man is also a worker, he has the responsibility for insuring the quality of the work being performed. However, the leadman has no authority to hire, fire, or to independently give an employee time off (Tr. 57, 58). He does not have the authority to increase or decrease an employee's wages (Tr. 59). However, a leadman could direct the work of other employees as long as it has been previously outlined by the foreman, and in effect would be carrying out the foreman's orders (Tr. 61).

Mr. Warhol stated that the respondent had an "open door" policy at the construction project in question insofar as employee complaints or grievances were concerned, and employees were advised of the policy and procedures when they were hired and notices to this effect were posted on employee bulletin boards (Tr. 62).

Mr. Warhol confirmed that he first met Mr. Donovan when he applied for a job at the construction project. He was recommended by project superintendent John Murray, and he was hired as an oiler. Since Mr. Donovan had an eye problem, it took the project manager's approval to hire him (Tr. 63).

Mr. Warhol testified that on Friday, March 6, 1981, sometime after lunch, Mr. Donovan came to his office and stated that he had an argument with James Kauss, who was also known as "Doc". The meeting was brief, and Mr. Donovan informed him that he and Mr. Kauss had called him an S.O.B. Mr. Donovan indicated that "he just wanted to get away from it and so he left". He was concerned that he didn't lose his job for walking off the project (Tr. 65).

Mr. Warhol stated that after speaking with Mr. Donovan, he called Mr. Murray, and rather than terminating Mr. Donovan, Mr. Murray indicated that they would meet with him on the following Monday "to work this thing out". Mr. Warhol then advised Mr. Donovan to "get away from it for the weekend, calm down, and go back Monday morning." Mr. Murray told Mr. Donovan the same thing and that was the extent of the meeting (Tr. 66).

Mr. Warhol confirmed that he was the custodian of Mr. Donovan's personnel file, and he identified his record, and he confirmed that Mr. Donovan was first hired as an oiler on the night shift on January 28, 1981, and his pay was $10.50 an hour. He identified a notation that he made to the file concerning his meeting with Mr. Donovan on March 6, 1981 (Tr. 69-70; exhibit R-4). He also identified an "assignment authority" form and a "termination form", both from Mr. Dojovan's personnel file (exhibits R-5 and R-1).

Mr. Warhol testified that when he met with Mr. Donovan on March 6, he did not mention that employees were smoking marijuana on the job, nor did he mention that he had voiced safety complaints to Joe Erger, or to "Doc", or that he was being harrassed because of any safety complaints or any work action that he was taking (Tr. 104). After his meeting with Mr. Donovan, he spoke with Mr. Murray and Mr. Erger, and they assured him that there would be a meeting with Mr. Donovan on Monday. However, during that time and March 17, when Mr. Donovan left the job, Mr. Warhol had no knowledge of Mr. Donovan's safety complaints or his complaints concerning the smoking of marijuana, and he learned of the matter after Mr. Donovan's termination and after he filed his discrimination complaint (Tr. 105).

Mr. Warhol stated that respondent employed approximately 800 people at the site in question and that Tenneco had less than 50 employees (Tr. 106). He confirmed that after the night shift was laid off, Mr. Donovan and one other miner were retained and transferred to the day shift, and this decision would have been made by Mr. Murray and Mr. Erger (Tr. 110). Mr. Warhol also confirmed that two people were terminated for smoking marijuana on the job site, and that these are the only two incidents he was aware of (Tr. 112). He deined any wholesale layoffs, and has heard no rumors that 40 or more miners were laid off for smoking marijuana (Tr. 113).

On cross-examination, Mr. Warhol confirmed that he was simply the "go-between" Mr. Donovan and Mr. Murray in attempting to set up the Monday meeting in question. After his conversation with Mr. Donovan of Friday, he told him to go home and to return to work on Monday. Mr. Warhol did not know why the meeting never took place and he did not know that Mr. Donovan had been terminated until later when his "termination interview" came back to his office. Mr. Warhol also indicated that he was not scheduled to be at the meeting and that Mr. Donovan never contacted him again after Friday to advise him that the meeting did not take place (Tr. 120), and the instant hearing is the first time he has seen him since he left his job (Tr. 139).

Mr. Warhol stated that respondent had a good safety record during the Tenneco project and had no fatalities. He also alluded to an intensive safety program at the job site by respondent and Tenneco to insure a safe project (Tr. 124). Mr. Warhol confirmed that he had no knowledge that Mr. Donovan's pay would be cut until after he left the job. After receiving his "termination interview", he learned that there was talk of demoting him to a 2d class helper (Tr. 138).

Joseph Erger testified that he was the mechanic general foreman at the Tenneco construction project site during Mr. Donovan's tenure at that facility and that he was responsible for the supervision of all equipment repairs and servicing, and that Mr. Donovan and approximately 22 other workers worked under his supervision. He identified "Doc" as James Kauss, and confirmed that Mr. Kauss worked as a mechanic under his supervision, and had worked for him before Mr. Donovan was hired. Mr. Erger confirmed that Mr. Donovan worked initially as an oiler's helper, and was promoted by him to mechanic and oiler (Tr. 157). Although Mr. Kauss was never formally classified as a "lead man", Mr. Erger confirmed that he instructed Mr. Kauss to "oversee the oilers" to make sure they were doing their tasks, and that he gave Mr. Kauss daily instructions in this regard (Tr. 158).

Mr. Erger confirmed that Mr. Kauss, Mr. Donovan, and the other oilers worked the 9:00 a.m. to 6:30 p.m. shift, and he confirmed that he (Erger) had the authority to initiate any demotion, promotion, or termination of employees, and he also had the authority to grant employees leave. Mr. Kauss had none of this authority (Tr. 160).

Mr. Erger confirmed that he observed the night shift crew after he had some problems, and that Mr. Donovan appeared to be the only one doing any work. When the crew was layed off, he decided to retain Mr. Donovan and to reassign the night shift foreman to another job (Tr. 163-164). Mr. Donovan was placed on the day shift, and while he did not supervise him closely there came a time when Mr. Donovan admitted that he had fueled a welder with gas rather than with the required diesel fuel. A second incident occurred when Mr. Donovan put too much oil in a welder, and the machine had to be repaired. As a result of these incidents, he told Mr. Donovan that "I didn't think he was the oiler that he was or said he was" (Tr. 166).

With regard to the "shouting match" between Mr. Kauss and Mr. Donovan, Mr. Erger stated that while he was not present, he could hear them arguing, and when he inquired as to what was going on, Mr. Donovan was upset and told him that he was "going to the office" and that he (Erger) told him "it would be fine". By "office", Mr. Erger meant the administrative office on the site where Mr. Murray, the project manager was located, and he explained the events which followed as follows (Tr. 168-169):

> Q. (BY MR. McLAIN, continuing): No, okay. Anything else occur that day in regard to this argument?
>
> A. Yeah, there was plenty I guess that happened, and apparently Mr. Warhol called Mr. Murray and told him that Mr. Donovan come down there and, you know, was all upset and everyting. And him and Doc had an argument or something. And I didn't know what the full thing was on it. And Mr. Murray told me to go ahead and pick up a phone, call him back and find out what went on, and this was, I assume Donovan was probably still down there. And I talked to Mr. Warhol, I found out a little bit more about it because when Mr. Warhol first called I was in the office with Mr. Murray. And Mr. Murray, while he was getting his call, kind of pulled the phone down, looked at me and he says, do you know your oiler walked off the job. And he was kind of concerned about it that he walked off the job. And well, he was upset about himself, I should say. And I told him, I says, I'm not going to do nothing about it because he stated to me he was going to the office. And like I say, that's why I called it a lack of communication.
>
> THE COURT: You thought he was going to the office right there on the site? He didn't tell you he was going down to Mr. --
>
> A. I didn't pursue that. He could be terminated for walking off the job, because I didn't feel he was really at fault at all. And after talking to Mr. Warhol on the phone, he said that, you know, we could get together Monday and straighten this all out.

Mr. Erger testified that when Mr. Donovan returned to work the following Monday, he spoke with him and Mr. Kauss just outside his office at the site, and Mr. Donovan told him that "he could work this out with Doc and it would be all right" (Tr. 170). No one described the precise problem, and Mr. Erger stated that he had heard that the two had gotten

into a "personality conflict or whatever there was supposed to have been some cuss words between them", and Mr. Erger confirmed that he never heard anymore disagreements or arguments between the two, and if there were, none were ever brought to his attention. He also confirmed that at no time during the conversation on Monday with Mr. Donovan did he ever request to meet with Mr. Murray, and at no time did he ask where Mr. Murray was and gave no indications that he expected Mr. Murray to be there. Mr. Erger believed that the matter had been resolved (Tr. 171).

Mr. Erger conceded that leaky fuel trucks were a problem, and that the pumps and packing glands would go bad, but that the normal procedure called for the trucks to be brought to the shop for repairs and he would not always be aware of the conditions. On one occasion, Mr. Donovan brought a leaky truck to the shop for repairs after the safety department stopped it and took it out of service, but Mr. Erger could not recall when this happened (Tr. 172).

Mr. Erger testified that the incidents in which Mr. Donovan put gas rather than diesel in a vehicle and over-filled a welder with oil occurred during the Friday after the Monday meeting with him and Mr. Kauss. He discussed the matter with Mr. Donovan on the Monday before he left the job, and explained to him that he was going to "cut him back to helper". He also stated that he explained to Mr. Donovan that "this would give him an opportunity to work and learn, and he would still have his job". Mr. Erger claims that Mr. Donovan implied to him at that time "that he was glad I was doing that rather than just turning him loose" and "he implied to me that he was glad to keep his job" (Tr. 174). At that time, Mr. Donovan gave no indication that he was having problems with anyone, and in fact, at no time during his employment did Mr. Donovan ever indicate that he was having any problems on the job (Tr. 174).

Mr. Erger denied any "witchhunt" against Mr. Donovan, and denied that he made it a point to observe his work for reasons other than those which were work related. He also denied any "grudges" against Mr. Donovan, and at no time did he observe any employees smoking marijuana on the job. He also indicated that he was never advised of Mr. Donovan's attempts to "correct" Mr. Kauss or Mr. Barnhouse (Tr. 175). He confirmed that the decision to demote Mr. Donovan to an oiler's helpers was his decision alone, and at no time did Mr. Kauss ever advise him to demote or fire Mr. Donovan (Tr. 176).

Mr. Erger confirmed that during his employment at the site the respondent received one safety citation for a broken front spring on a truck, and he denied ever instructing any of his personnel to "hide" the fuel trucks from the inspectors. He confirmed that he did instruct them to be aware of the fact that inspectors were at the site and "to straighten up their act, you might say to make sure that they checked their wheels and such" (Tr. 178).

Mr. Erger identified exhibit R-1 as the "assignment termination" form which he signed on March 19, 1981, in which he rated Mr. Donovan's job performance as "fair". He explained his rating as "judging from the man's performance I had really nothing against his willingness to work and, you know, be a hand, but he was not an oiler as such as to be a journeyman" (Tr. 179). He also indicated that he had no knowledge that Mr. Donovan quit his job until he received the form and received a phone call at his office that Mr. Donovan had quit (Tr. 179). Although the form shows that Mr. Donovan signed it on March 17th, Mr. Erger stated that he kept it until he signed it on March 19, because he thought that Mr. Donovan may have had some second thoughts about quitting and would come in to see him. When he heard nothing further from Mr. Donovan, he went ahead and signed the form (Tr. 180).

Mr. Erger denied that he ever told Mr. Donovan that he no longer needed him, and he asserted that if this were the case he could have fired him. He decided to keep him because "it's a whole lot better to make a hand rather than run one off" (Tr. 180). He confirmed that he took no further steps to formally demote Mr. Donovan because he wanted to discuss the matter with him further, but had no opportunity to do so when he quit (Tr. 182).

On cross-examination, Mr. Erger denied that Mr. Kauss ever "came running to him" complaining about Mr. Donovan's work performance (Tr. 183). During further cross-examination of Mr. Erger by Mr. Donovan, Mr. Donovan's recollection of the Monday meeting with Mr. Erger and Mr. Kauss is that Mr. Erger stated that he and Mr. Kauss could "work it out" and if that was not possible, Mr. Erger didn't care if he worked there or not (Tr. 189). Mr. Donovan conceded that Mr. Murray may have been in his office at the site, and he explained that he did not seek him out because Mr. Erger told him that a meeting was not necessary, and that he should go back to work and "work it out" with Mr. Kauss and that Mr. Murray need not be involved (Tr. 190). Mr. Erger denied that this was true (Tr. 190).

In response to further questions, Mr. Erger stated that he advised Mr. Donovan that he was going to "cut him back to helper and cut his pay" on Monday, March 16, the day before he quit on Tuesday, March 17, and when he told him that he had no indication that Mr. Donovan would leave his job (Tr. 196-197). Mr. Erger confirmed that after Mr. Donovan left the job, Mr. Barnhouse told him that everytime Mr. Donovan checked the oil in the machine "he had to go behind him and check it", but he denied that Mr. Barnhouse ever commented about Mr. Donovan's work before he left (Tr. 199). Regarding any "harassment" of Mr. Donovan by Mr. Barnhouse or Mr. Kauss, Mr. Erger stated as follows (Tr. 200-201):

> Q. Mr. Donovan seems to imply here that Barnhouse and Doc and you sort of conspired to run him off the job. What say you to that assertion?

A. It's not true.

Q. Okay. Is it possible that Barnhouse and Doc, without your knowledge or, you know, gave him such a rough time that they ran him off the job? And if I can believe that, would you have been aware of that situation?

A. No, I wouldn't have been aware of it, I wouldn't have put up with it.

Q. So, Mr. Donovan never came to you and told you that Doc and Barnhouse were giving him a hard time?

A. No.

Q. He never came to you and told you that Barnhouse was more or less tailgating him all the way around, and I mean that Doc was following him around checking up on him, trying to find things wrong with his performance and all that?

A. No, sir.

Q. Did you ever make a statement to Mr. Donovan on that Monday that you'd just as soon he drag up?

A. No. sir.

Mr. Erger confirmed that routine safety meetings or "safety chats" were held among the different crafts on the job, and that a general safety meeting was held in each Monday (Tr. 204-206). Since the oilers and mechanics came in at different hours, each group was responsible for their own daily safety sessions (Tr. 206-212).

James Kauss, mechanic, confirmed that his nick name is "Doc". He confirmed that he worked for the respondent until June 12, 1982, when he was laid off (Tr. 213). He described his duties while employed at the construction site in question, and confirmed that he reported to Mr. Erger (Tr. 214). He denied that he was ever classified as a "leadman" or ever performed the duties of a leadman. He stated that he had no authority to hire, fire, promote, or demote any employee, but that if he believed an employee deserved a raise he "could put in a word for him" with Mr. Erger (Tr. 215). He confirmed that he received instructions from Mr. Erger in the morning as to the equipment which needed to be serviced, and he confirmed that either he or Mr. Erger held safety meetings for the equipment people (Tr. 216).

Mr. Kauss stated that he began working with Mr. Donovan when he was assigned to the day shift, and that when he first worked with him on the fuel truck a couple of times, he needed some help with checking the oil and water in the radiator. He confirmed that he had one argument with Mr. Donovan about two weeks after he started work on the day shift and the argument was over his failure to properly wash down a diesel fuel island (Tr. 218, 220). He confirmed that the argument "was midly hot", but he denied swearing at Mr. Donovan (Tr. 220).

Mr. Kauss confirmed that he and Mr. Donovan met with Mr. Erger for about ten minutes on the Monday after Mr. Donovan had gone to see Mr. Warhol, and he believed their problems had been worked out (Tr. 221). He denied that he and Mr. Barnhouse ever smoked marijuana on the project, and he denied ever observing employees doing so. He also denied that Mr. Donovan had ever complained to him about any marijuana smoking on the job (Tr. 221-222).

Mr. Kauss identified exhibit R-12 as his "reduction in force" form, confirmed that it indicates his job classification as "heavy duty mechanic", and he confirmed that this was his job during his entire employment period with the respondent (Tr. 223). Mr. Kauss confirmed that he was currently unemployed and was never offered any employment by Tenneco, nor has he applied for a job with them (Tr. 223).

Mr. Kauss confirmed that he checked on all of the oiler's work while he was employed and he denied that he ever went out of his way to check up on Mr. Donovan's work. He indicated that it was his responsibility to repair leaky fuel trucks, and denied that he ever refused to repair any called to his attention by Mr. Donovan (Tr. 225). He denied any promises or threats for his testimony in this case (Tr. 226).

On cross-examination, Mr. Kauss confirmed his experience and education as a mechanic, and he also confirmed that while he has smoked marijuana, he never did it on the job (Tr. 234). Mr. Kauss denied that he called Mr. Donovan an "S.O.B." on March 6, at the time of their argument over the spilled fuel at the diesel island, and he confirmed that this is when Mr. Donovan told him "he was going to the office" over that encounter (Tr. 237). He denied that he and Mr. Donovan argued again on the subsequent Monday when they met with Mr. Erger (Tr. 238).

In response to further questions, Mr. Kauss stated that safety meetings were held every Monday morning at the mechanic shop and that he would go over a "safety check sheet" with the men, and that Mr. Donovan was usually present at these meetings, which took about five minutes (Tr. 249). Mr. Kauss denied that he had ever threatened or harassed Mr. Donovan in any way, and he was not aware of any safety complaints made by Mr. Donovan (Tr. 251).

Findings and Conclusions

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act these complaints are protected activities which may not be the motivation by mine management in any adverse personnel action against an employee; Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1891), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Further, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

The thrust of Mr. Donovan's discrimination complaint in this case is that he complained to certain mine management personnel about certain leaky fuel truck conditions and the smoking of marijuana on the job by miners while engaged in their work. He alleges that the smoking of marijuana jeopardized his safety, as well as the safety of other miners in that the smoking of marijuana and the use of drugs on the job resulted in at least one incident where he claims a fellow worker nearly backed over him with a truck while under the influence of drugs. With regard to the leaky fuel trucks, Mr. Donovan claims that rather than taking corrective action to insure that the conditions were repaired, certain mine management personnel directed the work force to "hide the trucks" from MSHA inspectors who were on the scene.

In his amended complaint, as well as in a pretrial deposition taken by respondent's counsel, Mr. Donovan claimed that his safety complaints were made to equipment supervisor and foreman Joseph Erger, personnel manager David Warhol, and a "leadman" known to him only as "Doc" (James Kauss). Mr. Donovan also claimed that Mr. Kauss, as well as Mr. Donovan's co-worker, David Barnhouse, smoked marijuana on the job, and that he complained to them also in an effort to get them to cease and desist.

Mr. Donovan claims that as a result of his safety complaints, he was harassed and intimidated by Mr. Kauss and Mr. Barnhouse on the job, and that Mr. Kauss became hostile and sought to discredit him by complaining about his work, calling him derogatory names, and provoking arguments with him, all of which made it difficult for him to continue working.

Mr. Donovan claims further that rather than taking corrective action with regard to his complaints, Mr. Erger encouraged him to seek work

elsewhere or to quit his job, ignored his complaints, and denied him access to, or an opportunity to meet with superintendent John Murray, all in an effort to prevent complete disclosure of his complaints. In addition, Mr. Donovan claimed that his wages were cut by $2.50 an hour, with no change of duties, because of his safety complaints. In short, Mr. Donovan claimed that the actions taken against him by Mr. Erger and Mr. Kauss were motivated in large part by his safety complaints concerning leaky fuel trucks and the smoking of marijuana.

The crucial question in this case is whether the respondent, acting through or by any of its supervisors or managers, violated Section 105(c) of the Act by demoting, harassing or otherwise intimidating Mr. Donovan, and/or firing or constructively discharging him for engaging in protected activities. The parties stipulated that Joseph Erger, David Warhol, and John Murray were supervisors and/or managerial officials employed by the respondent at the time of Mr. Donovan's employment, and that these officials had the authority to hire, fire, discipline and independently direct the work force. Accordingly, as to these individuals, the issue is whether the record supports findings or conclusions that they individually, or collectively, violated any of the protections afforded Mr. Donovan by the law. A further issue is whether purported "leadman" James Kauss, was in fact a supervisory or managerial employee or agent of the respondent during the period in question, and if so, whether he also discriminated against Mr. Donovan, either individually or collectively.

Mr. Donovan's Safety Complaints

Employee's Use of Drugs

With regard to Mr. Donovan's allegations concerning the smoking of marijuana on the job, Mr. Donovan was not shy about discussing this with the individuals whom he claims were using drugs. Although I can understand his concern for his own personal safety, I find it strange that he made no attempts to inform the local authorities at that time about such a problem, particularly in a situation where he claims "dozens" of persons were involved. As a matter of fact, during the course of the hearing in this case, Mr. Donovan contacted the local police department in Green River and requested someone from that department to come to the hearing. A "plain clothes" police lieutenant walked into the courtroom during the trial and testimony in this case, and after identifying himself to me he stated that Mr. Donovan had requested someone to come. After a brief conference with this individual in private, I was convinced that he had no personal knowledge of Mr. Donovan's discrimination complaint, and did not even know who he was. After a further conference with Mr. Donovan, the police representative departed.

Mr. Donovan's claims concerning the use of drugs at the construction site in question escalated into a most serious pretrial allegation by the respondent that Mr. Donovan attempted to extort money or his job

back from the respondent in exchange for a promise by Mr. Donovan that he would not "go public" with certain video tapes which he claimed he had showing miners using drugs on the job. Although respondent supported its pretrial allegation in this regard with a sworn affidavit from the individual with whom Mr. Donovan purportedly had a telephone conversation with, and presented testimony and other documentation in support of its allegations of extortion, Mr. Donovan denied that he made the call in question and I find it unnecessary to make any findings on this question, particularly in light of the serious criminal implications of such an allegation (Tr. 106-107; 125-128; exhibits R-6 and R-10).

Mr. Donovan and Mr. Kauss admitted smoking marijuana in the past, but Mr. Barnhouse and Mr. Kauss denied they ever used it on the job, and Mr. Erger denied that he ever used drugs or observed others smoking marijuana while at work. Respondent's counsel conceded that the use of marijuana or other drugs by employees on the job presents a serious safety hazard and concern. However, even if I were to accept Mr. Donovan's assertions and testimony as true, the critical issue is whether his safety concerns were in fact communicated to mine management, and in return, rather than taking corrective action, management harassed and intimidated him to the point where he was forced to leave his job. In short, the issue is whether Mr. Donovan's safety complaints, once communicated to mine management, resulted in his "constructive discharge".

Mr. Erger and Mr. Warhol denied that Mr. Donovan ever mentioned the use of drugs or marijuana by anyone during their conversations and meetings, and I find them to be credible witnesses and believe them. I seriously question Mr. Donovan's credibility. In light of Mr. Donovan's prior assertions and subsequent denials regarding the question of whether he communicated his marijuana smoking allegations to mine management, I seriously question his credibility on this question.

In his deposition, at pages 12-15, Mr. Donovan stated that he specifically advised Mr. Erger, on at least two occasions, that Mr. Kauss and Mr. Barnhouse were smoking marijuana on the job in the truck and that he had observed them doing so. He also stated that he specifically told Mr. Erger that their smoking of marijuana endangered the lives of himself and other miners, and that Mr. Erger assured him "he would take care of it". Mr. Donovan also stated in his deposition that "there were a lot of people using dope on the job", and that this was a "daily occurrence". He claims that he "could get no satisfaction on the job" and went to complain to personnel manager Dave Warhol about the situation, deposition, pg. 15.

During the hearing in this case, Mr. Donovan recanted his prior statements made in his deposition and confirmed that he never told Mr. Erger or Mr. Warhol about the alleged smoking of marijuana on the job. When the deposition was received in evidence (Tr. 35; 46), Mr. Donovan alluded to certain statements therein which he claimed "were incorrect".

He was given an opportunity to review his prior statements and to explain or correct any statements which he believed were inaccurate (Tr. 36-46). After doing so, he recanted his prior statements that he had advised Mr. Warhol and Mr. Erger about the marijuana smoking on the job (Tr. 36-37; 43).

With regard to Mr. Donovan's asserted marijuana smoking "safety complaint" to James Kauss, I conclude and find that there is no credible evidence to support a finding that Mr. Kauss was in fact part of mine management. The fact that Mr. Donovan may have believed he was, doesn't make it so. Thus, I find respondent's testimony and evidence that Mr. Kauss was not in fact a "leadman", a manager, or an agent of the respondent credible.

During his cross-examination of Mr. Kauss, Mr. Donovan stated that to his knowledge, Mr. Kauss was not a mechanic. Mr. Donovan stated that he considered him to be a "leadman" because "he would come around and tell us what to do every day and here and there and chew on people whenever he felt like, so apparently he was the leadman" (Tr. 228). However, respondent has rebuted Mr. Donovan's assertions and has established by a preponderance of the probative and credible testimony that Mr. Kauss was in fact a mechanic and not part of mine management.

Even if I were to conclude that Mr. Kauss was part of mine management, I find no credible evidence to support a finding that he harassed or intimidated Mr. Donovan. Mr. Kauss had no authority to hire or fire anyone, and the fact that Mr. Donovan saw fit to leave his job over his somewhat heated arguments with Mr. Kauss does not *per se* mean that Mr. Kauss "ran him off the job" or otherwise conspired to "get him" for complaining about his marijuana smoking.

There is nothing in the record to suggest that during his employment tenure with the respondent Mr. Donovan made any safety complaints to MSHA with regard to any alleged use of drugs by miners on the job. In addition, in view of the above findings and conclusions, I conclude and find that Mr. Donovan did not communicate any safety complaints concerning the use of marijuana or other drugs by miners on the job to anyone in mine management during his employment at the work site in question.

The Leaky Fuel Trucks

It seems strange to me that at no time during his employment at the mine in question did Mr. Donovan make any safety complaints to any MSHA inspectors about the leaky fuel conditions on his truck or the fact that mine management was "hiding the trucks from the inspectors". Mr. Donovan's assertion that he didn't know of MSHA's existence until he filed his discrimination complaint is inconsistent with his allegations implying that management hid the trucks from inspectors when they were on the property. It is also inconsistent with Mr. Donovan's assertions

that while on the property, the inspectors never inspected the trucks. Further, since Mr. Donovan testified that he had several "encounters" with respondent's safety personnel at the job site, he could have complained to them about the leaky truck conditions.

Mr. Donovan's assertions of being "unaware" of MSHA is further contradicted by his own testimony that during his employment at the site an MSHA inspector asked him about a front-end loader which had apparently been involved in a fatality which MSHA was looking into (Tr. 185-186). In my view, Mr. Donovan had ample opportunity to bring to MSHA's attention any conditions concerning the trucks which he believed threatened his safety. In addition, he had an absolute right to refuse to work under such conditions, and at least on one occasion he did bring to Mr. Erger's attention a malfunctioning fuel pump which was corrected and repaired.

While the record in this case does suggest that there were some problems with leaky fuel pumps on the trucks, respondent has established through the credible testimony of Mr. Erger, Mr. Barnhouse, and Mr. Kauss that these matters were attended to and that the trucks were either taken out of service or repaired. Further, there is no evidence that the respondent had ever been cited by MSHA or any state inspectors for any leaky fuel truck conditions. Further, while the record also suggests that there were some problems with the fueling of welders in the vicinity where men were working, these matters were apparently attended to by respondent's own safety department, and at least on one or two occasions, Mr. Donovan may have himself been involved in those incidents.

I conclude and find that Mr. Donovan's asserted "safety complaints" concerning any leaky fuel trucks amounted to nothing more than his calling these conditions to the attention of management, and that the conditions were ultimately corrected. Further, Mr. Donovan conceded that he never specifically brought these so-called safety complaints to the attention of Mr. Erger or to Mr. Warhol, and even if he did, I cannot conclude that they retaliated against him in any way for voicing these safety concerns. I make these same findings with respect to any such complaints that Mr. Donovan claims he made to Mr. Kauss.

The Alleged Harassment and Intimidation

The record in this case reflects that Mr. Donovan was hired at the project by Mr. Erger upon the recommendation made to Mr. Murray by Mr. Donovan's friend Duane Baker. After some personnel problems developed with the night shift crew, problems which apparently did not directly involve Mr. Donovan, all of the night shift, with the exception of Mr. Donovan and another employee, were apparently dismissed, and the night shift was disbanded. Mr. Donovan was retained on the day shift, and the decision in this regard was made by Mr. Erger and Mr. Murray. Further, even though Mr. Donovan had an eye condition which resulted in his failure to pass an initial physical examination, he was still retained in his capacity

as an oiler making more money than his co-worker Dave Barnhouse, who drove the truck to which he and Mr. Donovan were assigned, and Mr. Barnhouse also continued doing the work of an oiler.

Mr. Warhol testified that when Mr. Donovan came to his office in an obviously agitated and irritated state on Friday, March 9, over his encounter with Mr. Kauss, Mr. Warhol suggested that he take the weekend off to "cool down" and to return to work the next Monday. Mr. Warhol testified further that he was concerned that Mr. Donovan's leaving work would result in his termination, and he acted as an intermediary in an attempt to set up a meeting with management to resolve Mr. Donovan's problems. At that point in time, Mr. Warhol had no knowledge of any specific complaints by Mr. Donovan, and he heard nothing further from Mr. Donovan until he later learned that he had left his job.

I find nothing in the record to support a finding or conclusion that Mr. Warhol did anything to violate Mr. Donovan's rights. Mr. Warhol impressed me as a most honest and credible witness, and there is no evidence to show that he was ever informed or made aware of Mr. Donovan's alleged safety concerns. With regard to the abortive meeting with Mr. Murray, I find that this was outside Mr. Warhol's control, and I accept his testimony that once he told Mr. Donovan to take some time off to "cool down" and never heard from him again, he assumed that any problems which he may have had were resolved. In short, there is no credible testimony or evidence to suggest that Mr. Warhol harassed, intimidated, or otherwise acted to intimidate Mr. Donovan. Nor is there any evidence that he violated any of Mr. Donovan's rights under the Act, or was part of any "conspiracy" or "witch hunt" to force Mr. Donovan to quit his job. I make these same findings and conclusions with regard to Mr. John Murray.

I agree with the respondent's argument that Mr. Erger's decision to demote Mr. Donovan was based entirely on nondiscriminatory and non-retaliatory reasons and would have occurred regardless of any purported protected activity. I find Mr. Erger's testimony that he considered lowering Mr. Donovan's wages and reassigning him as a helper to be credible. I also conclude that Mr. Erger's decision in this regard was prompted by the two incidents concerning Mr. Donovan's putting gas in a diesel piece of equipment and putting too much oil in a welder. Although Mr. Donovan characterized these incidents as "honest mistakes", they did result in damage to the welder, and required Mr. Kauss to drain the gas out of the diesel tank. Under these circumstances, I conclude that Mr. Erger was justified in believing that Mr. Donovan's work performance was not what he expected it to be. Further, as the record in this case establishes, at the time Mr. Erger informed Mr. Donovan that he was going to demote him, Mr. Erger had no knowledge of Mr. Donovan's complaints.

While I recognize the fact that Mr. Donovan may have made an "honest mistake" when he put gasoline in a diesel piece of equipment, and overfilled a welder with oil, and that these two incidents came shortly after his Monday meeting with Mr. Erger and Mr. Kauss, there is nothing to suggest that Mr. Donovan was harassed by Mr. Erger over this incident. The over filling of the welder caused the machine to be taken out of service for repairs, and I can understand Mr. Erger's concern about Mr. Donovan's ability to perform his job as an oiler. I can also appreciate and understand the concern that Mr. Kauss may have had over these incidents, particularly in a situation where Mr. Erger apparently relied on Mr. Kauss to make sure that his men were doing their job right. Further, from the record in this case, it appears to me that any differences between Mr. Kauss and Mr. Donovan preceded the two incidents in question, and their "shouting match" took place the week before. Given the fact that Mr. Erger testified that he could have fired Mr. Donovan over the two incidents in question, his decision to retain him does not indicate to me that Mr. Erger was "out to get" Mr. Donovan. It seems to me that Mr. Erger could have done that by simply firing him on the spot rather than deciding to keep him, and that fact that Mr. Erger advised him that he probably would reduce his pay and reassign him as a helper is a management decision that Mr. Erger had a right to make.

Mr. Donovan testified that when he put too much oil in a welder Mr. Kauss spoke to him in a "hasty type" way, was agitated over the mistake he had made, but did not curse him at that time(Tr. 239). During the incident when Mr. Donovan put gas in the diesel truck, Mr. Kauss went to find the tools to drain it, and Mr. Donovan stated that he "come back out and was cussing this and that" (Tr. 240). When asked whether Mr. Kauss was cursing at him, Mr. Donovan stated "he was cussing because he said, you guys are not doing your job correctly when you put the gas in a diesel rig" (Tr. 240). When asked whether Mr. Kauss was cursing at him or simply "over the situation", Mr. Donovan stated that Mr. Kauss said "you son-of-a-bitches ain't doing the job right" (Tr. 241), and Mr. Donovan indicated that Mr. Kauss was "apparently" referring to both him and Mr. Barnhouse (Tr. 241).

Mr. Donovan testified that "the dope issue" which he discussed with Mr. Kauss was prior to the time that he went to see Mr. Warhol, and that when he complained to Mr. Kauss about his use of drugs Mr. Kauss called him "a hick" or "something to that effect". When asked whether Mr. Kauss cursed him at that time, Mr. Donovan replied "the word he used, I can't think of right now" (Tr. 243).

Mr. Donovan confirmed that Mr. Kauss "used such words" when something went wrong to agitate him, and he also confirmed that when they argued on March 6, he too "said a few things" but did not swear at Mr. Kauss (Tr. 244). These were the only instances that Mr. Donovan could recall Mr. Kauss using "strong words" with him (Tr. 244).

After careful consideration of the entire record in this case, including my observations of Mr. Donovan and Mr. Kauss during the course of the hearing, I believe that Mr. Donovan's "frustrations" stem from his obvious dislike of Mr. Kauss. Aside from the allegation that Mr. Kauss smoked marijuana, that dislike obviously flows from Mr. Donovan's opinion that Mr. Kauss was not a particularly competent worker, his resentment of Mr. Kauss for questioning his work, and the ensuing arguments which resulted from Mr. Kauss' calling Mr. Donovan's shortcomings to his attention. As a matter of fact, in his two-page post-hearing statements Mr. Donovan states "I feel I was discriminated against by the respondent in that they allowed an unqualified person, James Kauss, to supervise other employees, and allowed this man to discriminate against me and to report untrue statements on my working abilities".

In his deposition of October 8, 1982, at page 17, Mr. Donovan states that after the Monday meeting with Mr. Erger, he made three or four attempts to see Mr. Murray, but that Mr. Erger "was in the way and would not let me go in and talk to him". However, during the hearing, he testified that after Mr. Erger told him to resolve his differences with Mr. Kauss, and that there was no need for a meeting, he made no further attempts to see Mr. Murray. Accordingly, there is nothing in this record to suggest that Mr. Murray was even aware of Mr. Donovan's "problems", and there is absolutely no evidence that Mr. Murray did anything in violation of any of Mr. Donovan's protected rights.

In view of the foregoing findings and conclusions, I find no credible testimony or evidence to support any findings or conclusions that anyone connected with mine management, either singularly or collectively, took any action against Mr. Donovan in retaliation for his engaging in any rights protected by the law.

Mr. Donovan's Employment Termination

I conclude and find that the preponderance of the evidence in this case suggests that Mr. Donovan voluntarily quit and abandoned his job on or about March 17, 1981, and that he did so for reasons unrelated to any purported "conspiracy" on the part of mine management to "get rid of him" for making safety complaints. Exhibit R-1, a copy of an "assignment termination" document from Mr. Donovan's personnel records, and which contains Mr. Donovan's signature, and which he acknowledge is his, reflects that he left his job "to work elsewhere", and coupled with the testimony of respondent's responsible officials, which I find credible, support my findings and conclusions that Mr. Donovan voluntarily quit his job. Although his quitting may have been precipitated by his impending demotion and disputes with Mr. Kauss, the record in this case strongly suggests that Mr. Donovan himself had something to do with these matters, namely his own work related mistakes and encounters with Mr. Kauss.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the record in this proceeding does not establish by a preponderance of any reliable, credible, or probative evidence that the respondent discriminated against the complainant because of any protected safety activities on his part. Under the circumstances, the complaint IS DISMISSED, and the relief requested by the complainant IS DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

Lynn Donovan, 841 South Raritan, Denver, Colorado 80223 (Certified Mail)

Peter R. McClain, Esq., Brown & Root, Inc., P.O. Box 3, Houston, TX 77001 (Certified Mail)

William Zosel, Esq., Bianchi & Zosel, 4908 Rainer Avenue South, Seattle, WA 98118 (Certified Mail)

James H. Barkley, Esq., U.S. Department of Labor, Office of the Solicitor, 1961 Stout St., Denver, CO 80294 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

FEB 28 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 82-174
v.	)	MINE: Dutch Creek No. 1
MID-CONTINENT RESOURCES, INC.,	)	
Respondent.	)	

Appearances:

Alan H. Yamamoto, Esq.
Office of the Solicitor, United States Department of Labor
Arlington, Virginia
for the Petitioner

Edward Mulhall, Jr., Esq.
Delaney & Balcomb
Glenwood Springs, Colorado
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Mid-Continent Resources, Inc., (Mid-Continent), with violating safety regulations adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing was held in Carbondale, Colorado on October 19-20, 1982.

The parties filed post trial briefs.

ISSUES

The issues are whether respondent violated the regulations, and, if so, what penalty is appropriate.

SUMMARY OF THE CASE

In this civil penalty proceedings the Secretary alleges respondent violated three safety regulations.

The initial citation concerns a defective monitor. It is claimed to be defective because it did not deenergize add on lights and because a warning light could not be seen when the remote control unit was in use. The first allegation is affirmed and the second is vacated.

The second citation concerns electrical work performed by a non-qualified person in installing a switch box cover in April 1981 and in wiring a light switch in 1978. The first allegation is affirmed and the second is vacated.

The third citation concerns a methane monitor maintenance program. This citation is vacated.

A broad overview of the explosion at this mine may be seen in MSHA's official report received in evidence as Exhibit P 1.

For convenience the decision summarizes the relevant evidence as it relates to each citation. The evidence may relate to more than one citation.

Very few credibility issues arise in the case. When they do their resolution will be apparent in the text of the decision.

CITATION 802484

This citation, alleging a violation of 30 C.F.R. 75.313, provides as follows:

> The methane monitor installed on the 12CM continuous mining machine, Serial No. JM2228, located in the 102 Section was not installed in a manner to deenergize automatically the continuous miner in that the lighting system of the machine remained energized when the concentration of methane reached 2.0 percent. The methane monitor also was not installed so as to give a warning automatically at all times when the concentration of methane reached 1.0 percent while the machine was being operated by remote control. The warning light is located in a position that cannot be seen at all times. These conditions were observed on April 25, 1981, during an inspection as part of the accident investigation of the April 15, 1981, explosion.

The standard allegedly violated, duly promulgated in Title 30 Code of Federal Regulations, is likewise contained in Section 303(1) of the Act. The standard provides as follows:

> § 75.313 Methane monitor [STATUTORY PROVISIONS]
>
> The Secretary or his authorized representative shall require, as an additional device for detecting concentrations of methane, that a methane monitor, approved as reliable by the Secretary after March 30, 1970, be installed, when available, on any electric face cutting equipment, continuous miner, longwall face equipment, and loading machine, except that no monitor shall be required to be installed on any such equipment prior to the date on which such equipment is required to be permissible under sections 75.500, 75.501, and 75.504. When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary. The sensing device of such monitor shall be installed as close to the working face as practicable. Such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane. An authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage determined by such representative which shall not be more than 2.0 volume per centum of methane.

SECRETARY'S EVIDENCE

Clarence J. Daniels, James Smith, and Cecil Lester, all MSHA supervisors who investigated the electrical system at the Mid-Continent mine, testified for the Secretary (Tr. 11, 26).

On April 15, 1981, at 4:10 p.m. a devastating methane and coal dust explosion shattered the 102 section Mid-Continent's Dutch Creek Mine No. 1 (Tr. 11, P1).

The last completed MSHA inspection at this mine took place January 5, 1981 through January 19, 1981. A subsequent general inspection, began March 30, 1981, was in progress at the time of the explosion (Tr. 72-73, P1). MSHA Coal Mine Inspector Louis Villegos was in the 102 section on two occasions on the day of the explosion. He left the section at 11:30 a.m. and was the first MSHA official to return to the mine, at 5:55 p.m.

There have been five ignitions and two previous explosions over the years in this mine (Tr. 125).

From the positions of six of the victims the investigators concluded that at the time of the explosion the miners were attempting to remove methane from the face area by winging the line curtain across the face (P1 at 31).

MSHA investigated the mine, including the entire electrical system in the 102 section, beginning April 22, 1981 and concluding May 8, 1981 (Tr. 11, 12, P1 at 28). The purpose of the investigation was to determine the cause of the explosion, to create an awareness of the hazards for the industry, and to attempt to prevent future occurrences (Tr. 11). Pursuant to Section 103(a) of the Act, 30 U.S.C. 813(a), the Secretary issued a comprehensive detailed report concerning this incident. The report, received in evidence, is Exhibit P1.

MSHA investigated the continuous miner and its methane monitor system. In this decision the continuous miner is also referred to as the miner, the CM, the 12CM, and the Joy 12CM.

Sixteen citations were issued. Four of the citations related to the explosion and three of the citations are in contest (Tr. 12, 46).

The high voltage system was well installed and maintained (Tr. 12).

The electrical power to the 37 foot long continuous miner comes from a transformer and power center through a trailing cable to a point onboard the 12CM. From there the power goes to a control unit for the various components on the machine itself (Tr. 29, 317).

When the methane monitor was tested at the two percent methane level it was found that the add-on McJunkin lights on the continuous miner (Joy 12CM) would not deenergize (Tr. 13, 27). The lighting system was not properly connected to the relay (Tr. 13).

The methane monitor operates in this fashion: when the sensor detects a two percent level of methane in the atmosphere a red light goes on and the monitor automatically cuts off the 12CM at the trailing cable onboard the miner (Tr. 14, 17, 29, 113, 114). The monitor system, manufactured by BACHARACH, 1/ consists of a relay, a power supply, a readout system, sensor heads, and cables (Tr. 34, 35).

The McJunkin lights were connected in parallel with the existing monitor relay instead of being in a series as the wiring diagram of the add-on system required (Tr. 13, 29, 41). The hookup of lights to the controller is a matter of an electrician following the diagram inside the compartment and making the proper connections (Tr. 29). It would be simple for a knowledgable electrician (Tr. 30-31).

1/ BACHARACH INSTRUMENTS: UNITED TECHNOLOGIES BACHARACH.

It is important that the methane monitor deactivate as much of the machine as possible (Tr. 110). This helps eliminate ignition sources (Tr. 110, 111). MSHA policy requires the monitor to deenergize all possible moving parts and ignition sources (Tr. 112). Only that part of the power keeping the monitor activated remains energized (Tr. 113). The methane monitor itself remains functional to give an indication of the presence of methane and to prevent the reactivation of the continuous miner (Tr. 113).

In the great majority of instances the methane monitor shuts off the power on the machine and the trailing cable stays energized (Tr. 120). On the 12CM the trailing cable goes into the junction box on the right hand side next to the operator's cab. The left rear controller box controls the various devices on the miner (Tr. 120). The controller is the large explosion proof compartment containing the electrical components, wiring, relays, and transformers that control the motors.

The methane monitor originates in a control compartment from the existing voltage on the left side of the machine (Tr. 28). The trailing cable (550 volts) remains energized up to the first protective device on the machine, that is, up to one of the controllers. If the trailing cable leading up to the machine has any defects then MSHA considers it part of the continuous miner (Tr. 47, 48).

MSHA's regulations require the machine itself, excluding trailing cables, shall be deenergized up to the methane monitor leaving the methane monitor energized. All lights on the CM would be deenergized (Tr. 53).

According to MSHA inspector Lester, the defect was that the McJunkin add-on lights stayed on when the methane monitor reached a two percent concentration of methane (Tr. 398).

The Secretary's regulations further require that if the monitor senses a methane concentration of one percent then a warning light goes on. When this occurs the operator is required to make changes to reduce the methane concentration (Tr. 19).

The wiring of the add-on lighting system on the miner, installed in 1978, did not conform to the wiring diagram approved by the MSHA sub-district manager (Tr. 13, 15, 17, 407). The wiring diagram shows a two pole lighting switch but there was, in actuality, only a one pole switch connection (Tr. 15). The two pole switch to turn the lights "on" and "off" was not included in the secondary circuit of the lighting transformer (Finding of Fact No. 21, P1 at 51). MSHA's approval of the add-on light installation was in accordance with the manufacturer's instructions (Tr. 17). If a system is maintained as directed a fire or explosion will not occur (Tr. 16). The remote control system and methane monitor system were both approved by MSHA; however, after installing the add-on lights Mid-Continent was not required to have the system inspected before placing the miner back in operation (Tr. 17). Properly the add-on lights should have been installed in sequence behind the methane monitor system (Tr. 29).

The MSHA national policy relating to processing field changes for installing illumination systems on permissible equipment was issued under date of December 16, 1977 (Tr. 388, P6). Witness Lester formulates and drafts such national policy (Tr. 388).

When the add-on lights were installed MSHA National Policy was the same as the local policy. It allowed an adopting company to make the installation and put the machine in service if the operator obtained prior MSHA approval (Tr. 49, 408, MSHA letter P1 at Appendix M).

Mid-Continent officials discussed the methane monitor with MSHA inspectors, but had not advised MSHA that the methane monitor was improperly connected (Finding of Fact No. 26, P1 at 52).

In the inspection after the explosion, other than the add-on lights, nothing was found to have been changed on the 12CM continuous miner from the way it had been manufactured (Tr. 407). Further, there were no other defects in the monitor itself, except for some difficulty in zeroing it in (Tr. 104).

A methane readout, or indicator, mounted on the dashboard of the monitor (activated at a concentration of one percent) is a two inch circular dial with an eraser size warning light (Tr. 19, 32, 34, 35). The one percent warning light is observable from directly behind the cab of the miner. But if the operator was behind the machine itself he could not see it (Tr. 115). It is an important requirement for the operator to know when the methane concentration reaches one percent. The operator can then shut down the machine and do whatever needs to be done to eliminate the hazardous condition (Tr. 17, 19, 114)). The explosive range of methane is between 5 to 15 percent (Tr. 116). When operating the remote control device in certain positions the continuous miner operator cannot see the warning light (Tr. 17, 18, 20, 22, 32).

The miner operator often stands in a crosscut 30 to 40 feet outby the face to operate the remote control (Tr. 21, 36-37). Generally the operator would be operating the remote control from the crosscut where he could see the face of the coal he is cutting (Tr. 36-37). Section 313 requires a warning light on the monitor (Tr. 22). On Mid-Continent's machine, due to the cab and obstructions, it was not possible to see the dial from a point behind the miner (Tr. 115). However, the warning device, which has little illumination, came on at all times on the indicator when the methane concentration reached one percent (Tr. 36, 39).

MSHA approved the indicator gauge, its installation on the dashboard, and its intensity as well as the methane monitor (Tr. 41). The remote control and the BACHARACH monitor are parts included in the purchase order of the Joy 12CM (Tr. 33, 34, P1 at Appendix M). But MSHA does not specifically approve any method of using a remote control device but that does not mean the operator can use the device in any manner he likes (Tr. 18, 19). The regulations do not state whether the methane warning is to be oral or visual. Further, there is no line of site requirement in the regulation (Tr. 36). That is, the regulation does not require the operator to be in a "line of sight" behind the indicator. In his investigation the inspector found he couldn't see the headlights come on when he was beyond the tailpiece nor when he was 50 feet back (Tr. 40).

Mid-Continent's mine liberates about one and a half million cubic feet of methane in a 24 hour period. This is a gaseous coal seam (Tr. 20).

Mid-Continent's mine is in the 103(i) category [of the Act] and, as such, the mine must be inspected by MSHA every five working days (Tr. 42). These are spot inspections; in addition, there must be at least one quarterly inspection. The mine also has a resident MSHA inspector (Tr. 42-43, P1 at 4). During regular inspections the inspector will do a permissibility check on the equipment and other hazards. Electrical inspections are not done by an electrical expert. Electrical inspections usually involve a visual check of the power sensor, cables, and circuit breakers (Tr. 43-44). An MSHA inspector might also check the monitor. He does not have to be an electrical inspector to test the methane monitor with a test kit (Tr. 45).

RESPONDENT'S EVIDENCE

M. J. Turnipseed, manager of mine operations, Jesus Meraz, master mechanic, and John Jerome, a foreman, testified for Mid-Continent concerning this citation.

This mine is subject to bumps, bounces, outbursts, and pushes. These events cause various phenomena in a mining section and liberate methane (Tr. 148-151, 155, 317).

In looking at the 102 section after the explosion, Mid-Continent's manager and production foreman Jerome concluded that a very small push occurred. This affected the airflow. Further, there was a gas explosion 150 feet outby the face. This, in turn, triggered a dust explosion up the beltline (Tr. 158, 159, 309, 310, 326).

There were two very good production crews working the 102 section. One crew foreman was John Jerome. In the previous shift from 7 a.m. to 3 p.m. conditions were normal and 20 or 22 buggies of coal were mined in the upper entry (Tr. 303). The other production foreman was Ron Patch. His shift started at 3 p.m., and the explosion occurred at 4:08 p.m. (Tr. 290, P1). He died in the explosion with crew members Eugene Guthrie (mechanic/electrician), Kelly Greene (foreman in training), Glen Sharp, (CM operator), Terry Lucero (miner-helper), Thomas Vetter (shuttle car operator), Hugh Pierce (apprentice miner), Daniel Litweller (apprentice miner), Brett Tucker (apprentice miner). Also killed in the slopes section were Johnny Rhodes (crew foreman), John Azala (CM operator), Loren Mead (miner-helper), Kyle Cook (shuttle car operator). Robert Ragle (foreman) was also killed in the explosion (Tr. 163-165, 299, 300, 312, R19).

The mine manager recalls that Mid-Continent purchased several sets of add-on McJunkin lights which were manufactured about 1975 by Joy Manufacturing Company (Tr. 178-179, 202, 203). The addition of the add-on lights required a field change on each piece of equipment (Tr. 179).

The company would usually talk to MSHA and submit wiring and location diagrams (Tr. 179). MSHA would usually tell the company to go ahead with the installation and they (MSHA) would check it on the next inspection (Tr. 180, 181). But one of the first installations of the add-on lights was to this particular CM machine, No. 2228. This machine was originally in Bear Creek No. 4 mine. It was never taken out of service and it was in use in Section 102 on the day of the explosion (Tr. 181-182). Since there were problems on the first few installations, this continuous miner was inspected by MSHA before it was allowed to be put into service (Tr. 180-181). MSHA inspected the continuous miner to see that the lights were installed in an approved manner. This included checking the power source, cable glands, permissibility, routing of cables, and conformity to the wiring diagram submitted to MSHA for approval (Tr. 182). The continuous miner was never modified in any manner as far as the McJunkin add-on lights were concerned (Tr. 183). Mid-Continent's manager would not make a field modification without a written approval and an MSHA inspection (Tr. 184). The equipment in the 102 section was inspected during spot inspections as well as during quarterly inspections. MSHA sees that the machine remains as originally manufactured (Tr. 185).

It was no secret that when the methane monitor on the continuous miner cut the power it did not deenergize the lights. The add-on lights stayed on all the time unless the power was turned off at the power center. Foreman Jerome knew there was a switch to shut off the lights but he never used it. Someone at Mid-Continent had discussed this with MSHA (Tr. 183, 184, 319, 328). The miner stayed in that condition for three years (Tr. 188). To change it would require another letter to Price, Utah (Tr. 184).

The monitor has a sensing head called a Whetstone Bridge. The net result of its technical aspect is to show the percentage of methane in the air (Tr. 188-192, R20, P1 at Appendix M).

The monitor also shows an amber warning devise at a one percent concentration of methane. At a two percent concentration the monitor automatically shuts down the machine by disconnecting the power at the main control box (Tr. 194). The monitor itself and the 550 volts in the trailing cable to the machine are not deenergized (Tr. 193). With this continuous miner (CM No. JM 2228) the add-on lights did not deenergize (Tr. 193, 195).

When next to the shuttle car you can see the warning light on the methane monitor (Tr. 322). The miner operator does not have the duty to notify the foreman when he sees the warning light because the foreman is next to the operator (Tr. 323).

Mid-Continent's foreman Jerome would send someone back to the power center to cut the power when he'd see the one percent methane concentration light. Shutting off the energy at the power center de-energizes the auxillary lights, the trailer cable, and the methane monitor (Tr. 318-321).

The continuous miner as purchased contains a remote control device. The readout gauge was mounted in the cab of the CM and never changed (Tr. 192, 193). The remote control device permits the continuous miner to be operated by a worker in a safe remote location such as in a crosscut (Tr. 192, 314, 316). When mining from a crosscut you cannot see the warning light on the methane monitor (Tr. 320). That's why the miners check for methane after each buggy (Tr. 320-321).

The coal in the Dutch Creek No. 1 Mine liberates one and one half million cubic feet of methane (CH^4) in a 24 hour period (Tr. 203, 204). Ventilation is furnished by fans from fresh air producing 500,000 cfm (cubic feet air per minute) (Tr. 203). Methane would be .2% (Tr. 203-205). Brattice cloth directs the air to the working face (Tr. 205-207). The air return from the 102 section was 120,000 to 160,000 cfm. This is a large volume of ventilation air when compared with other mines (Tr. 208, 304, 323-324). The ventilation plan must be approved by MSHA. The law requires 9000 cfm. Mid-Continent's normal is 100,000 cfm (Tr. 211).

In addition to the monitors sensing for methane, miners also check at the working face with a hand held methanometer every 10 minutes and when the shuttle car goes to deliver its load to the belt conveyor. Further checks for methane are conducted in the return airways as well as in preshift and onshift examinations (Tr. 210, 211, 212, 304-305, 320).

As a result of the explosion, the power center, located in the crosscut some 450 feet from the face, was virtually demolished (Tr. 244-245, 307, 342). All of the brattice, usually ten feet from the face, was burned (Tr. 311, 318).

The State of Colorado Division of Mines investigated the explosion and issued an official report (Tr. 198, 199, R21).

DISCUSSION

This citation centers on two allegations. Initially, it alleges that the McJunkin lighting system on the continuous miner remained energized when the concentration of methane reached 2.0 percent. The second allegation is that the methane monitor was not installed in such a fashion as to give a warning automatically when the concentration of methane reached 1.0 percent when the machine was being operated by the remote control device.

For the reasons hereafter stated the initial allegation in the citation is affirmed. The latter allegation is vacated.

A portion of Section 75.313 requires "such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage ... which shall not be more than 2.0 volume per centum of methane." MSHA's evidence establishes that the McJunkin lights did not deenergize at the two percent methane concentration. The lights were inboard the main controller. If the add-on lights had been installed properly they should have been deenergized by the methane monitor. Mid-Continent's evidence confirms this portion of the citation (Tr. 193, 195).

Mid-Continent's brief, an extensive review of many facts in the case, addresses this citation (Brief at 70-83).

I agree with Mid-Continent that the citation as written is twofold but I do not agree that the citation is necessarily misleading.

Mid-Continent attacks MSHA's evidence that the hookup on the lights "would be simple to an electrician that knows what he is doing" (Tr. 31). Mid-Continent's comment adds that it is "simple to the electrician who knows what MSHA or the MSHA electrical inspector wants" (Brief at 72).

I am not persuaded. It was Mid-Continent that submitted the wiring diagram to MSHA. It was that wiring diagram that MSHA approved. Thereafter, different and incorrect wiring was installed. It is Mid-Continent's obligation and not MSHA's to make the actual installation. Exhibits R14 and R15 show the electrical leads for the McJunkin light system; R16 shows the circuit breaker for the methane monitor system (Tr. 142, 143, R17). I agree with MSHA that the proper hookup should have been simple for an electrician.

Mid-Continent further assails the failure of the MSHA inspectors between 1978 and April 15, 1981 to detect and require the correction of the allegedly defective hookup (Brief at 73). On this issue MSHA asserts that while Mid-Continent officials discussed the methane monitor system with MSHA they (MSHA) were never advised the monitor was improperly connected (Finding of Fact No. 26, P1 at 52). In addition, it could not be determined whether the wiring was inspected by MSHA because the records of inspections do not detail all of the inspectors' activities (Finding of Fact No. 22, P1 at 51). On the other hand Mid-Continent's manager asserts MSHA and Mid-Continent "did have discussions on it" (Tr. 184).

I credit MSHA's version that it did not know of the defective wiring. I base this on the obvious: MSHA at this mine has never been shown to be timid or hesitant in issuing citations. At the time of the general inspection, which was in progress at the time of the inspection, 21 citations and one withdrawal order had been issued (P1 at 3). This aggressiveness in enforcing the Act is further demonstrated by the 482 citations assessed in Dutch Creek Mine No. 1 alone in the two years beginning April 15, 1979 (P2, P3, as limited at Tr. 412). In short, on this record, I conclude that had MSHA known the wiring on the monitor was defective it would have promptly issued a withdrawal order. I further reject Mid-Continent's position because witness Turnipseed's testimony is somewhat vague. He didn't know the people who were parties to the discussion about the lights and it was, at best, his "understanding" (Tr. 183, 184).

But Mid-Continent's position, even if factually supported, would reverse the existing law. It would make MSHA rather than the operator responsible for complying with the regulations. To the contrary, the statute imposes the duty on the operator to comply, 30 U.S.C. § 817(c), Beckley Coal Company v. Secretary of Labor, 1 FMSHRC 1794 (1979).

Implicit in Mid-Continent's argument is the doctrine of estoppel. On this point the law is clear: Estoppel does not lie against the federal government, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), Secretary v. J & R Coal Company, 3 FMSHRC 591 (1981), Lasher, J.

Mid-Continent further argues that the evidence establishes "without equivocation or doubt", that the trailing cable from the section's power center to the continuous mining machine remains energized (citing Daniels, Tr. 47; Smith, Tr. 119; Jerome, Tr. 319; Turnipseed, Tr. 259), and the methane monitor system onboard the continuous mining machine stays energized as does the trailing cable (Turnipseed, Tr. 259; Daniels, Tr. 47). This was MSHA policy (Turnipseed, ibid)."

Mid-Continent argues that the foregoing clear evidence of MSHA's policy is glaringly inaccurate when contrasted with MSHA's written policy statement (R30). Mid-Continent cites the MSHA inspection manual (R30-II 264, 265) in support of its argument that MSHA requires that:

> The methane monitor shall be connected in such a manner so as to deenergize all electric circuits in the section when the concentration of methane reaches a maximum of 2.0 volume per centum of methane, except that the methane monitor may remain energized (R30, II at 264, 265).

I disagree. The MSHA policy statement relied on by Mid-Continent commences by referring to "longwall installations" (R30, page II - 264). This is clearly not such an installation. Further, I reject this view because in any event MSHA's inspection manual is not necessarily binding on the Commission, Secretary v. King Knob Coal Company, supra. The law is clear: The manual's instructions, even if they supported Mid-Continent's position, are not officially promulgated and do not prescribe rules of law binding on the Commission, Old Ben Coal Company 2 FMSHRC 2806, 2809 (1980). In general, as in this situation, the express language of a statute or regulation unquestionably controls over field manual material, H.B. Zachry v. OSHRC, 638 F. 2d 812, 817 (5th Cir 1981).

The primary duty of the operator is to provide for the safety of its miners. It is clear in this case that the methane monitor did not de-energize the add-on lights which were inboard the main controller. Hence a violation occurred.

Mid-Continent contends that another possible source of ignition was the damaged flame safety lamp found approximately 210 feet outby the face in the 102 section (Brief at 75-80).

On this record there are several possible sources of ignition. Mid-Continent's manager Turnipseed concedes that the failure to deenergize the lights could have caused the explosion (Tr. 290). Other possible sources include the defective switch box flange (discussed in the following citation); an electrical spark, which was the conclusion reached by the Bureau of Mines of the State of Colorado in their statutory investigation (R21, R31); a defective safety lamp; a torch igniter (P1 at 45); and a welder striker (P1 at Appendix N2).

The testimony of witness Turnipseed concerning the flame safety lamp is reviewed in connection with the following citation, infra, page 17. I agree with Mid-Continent that the evidence, including the documentary detail published by the Bureau of Mines (R29A, R29B), is interesting. But the existence of other sources of ignition would not relieve Mid-Continent of liability for a proven violation. Simply stated, the presence of multiple ignition sources would not constitute a defense when the operator violates a mandatory safety standard. In any event, concerning the safety lamp, I credit MSHA's evaluation that the safety lamps did not initiate the explosion (P1 at Appendix N-5 and N-6).

The second allegation in this citation focuses on the proposition that the methane monitor should give a warning automatically at all times when the concentration of methane reached 1.0 percent while the machine was being operated by the remote control unit.

The monitor did have such a readout, or indicator, in the cab. Exhibit R7 is a photograph of the gauge (Tr. 141). The amber warning light goes on when the concentration of methane reaches one percent. The gist of MSHA's theory of this portion of the citation is that the miner operator could not see the warning light while operating the remote control unit. The evidence establishes that the operator usually uses the remote control device for the continuous miner while standing in the crosscut. In that position the CM operator can avoid any outburst or push of coal which could possibly come as far back as to cover the front of the continuous miner.

The regulation on this point requires the monitor "to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane." There was such a functioning automatic device.

I find nothing in the regulation or in the legislative history of the Act that supports the Secretary's position. If the Secretary wants the warning device on the remote control unit itself or if he wants it mounted in a position on the cab of the continuous miner where it can be seen from all directions, then he should redraft his regulation and state that requirement. While mine operators are obliged to comply with every mandatory standard, the language of each standard must reasonably convey to the operator the nature of the practices or procedures required or forbidden, Diamond Roofing Company v. OSHRC, 528 F. 2d 645 (5th Cir. 1976); Phelps Dodge Corporation v. FMSHRC, 681 F. 2d 1189 (9th Cir. 1982).

The Secretary's brief (at 7-9) only addresses the desirability of locating the methane monitor warning light where it can be seen at all times. But the regulation fails to prohibit the practice of using the remote control unit when the operator is not in a position to see the warning light. Otherwise stated, the regulation does not require the warning light to be located where it can be seen at all times.

In sum, Citation 802484 as it relates to the failure of the methane monitor to deenergize the add-on McJunkin lighting system is affirmed. That portion of the citation relating to a warning light when the methane concentration reaches 1.0 percent is vacated.

CITATION 802486

This citation, alleging a violation of 30 C.F.R. § 75.511, provides as follows:

> Electric work performed on April 6, 1981, consisting of installation of a cover on an explosion-proof compartment and the wiring of a two pole light switch on the Joy 12CM continuous mining machine, Serial No. JM2228, in the 102 Section, was not performed by a qualified person nor under the direct supervision of a qualified person. This violation was determined during an inspection as part of the accident investigation of the April 15, 1981, explosion.

The standard allegedly violated, duly promulgated in Title 30, Code of Federal Regulations, is likewise contained in Section 303(12)(f) of the Act. The standard provides as follows:

> § 75.511 Low-, medium-, or high voltage distribution circuits and equipment; repair.
>
> [STATUTORY PROVISION]
>
> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

SECRETARY'S EVIDENCE

Clarence J. Daniels, James Smith, and Cecil Lester, all MSHA supervisors testified for the Secretary.

In investigating the Dutch Creek Mine explosion inspector Daniels was advised by Jesus Merez (master mechanic) and John Cerise (foreman) that the cover plate, (also called lid), to the light switch compartment on the 12CM was installed on the machine by the third (C) shift on April 6, 1981 (Tr. 56-57, 72, 389, 403). The actual replacement consisted of removing a compartment lid without an "on" and "off" switch and replacing with a compartment lid with an "on" and "off" switch (Tr. 51, 66). To make the installation it is necessary to connect two wires to a transformer, maybe three if there is a ground (Tr. 66-67). It would take 30 minutes to hook up, reassemble, and cleanup the box (Tr. 68). It could be done in less than two hours (Tr. 68). Cerise examined the box on April 6 to see if the switch worked but he did not examine the box for permissibility (Tr. 57-58). At the time of his investigation inspector Lester noted and drew a sketch showing that the switch located in the lid cover was in the "off" position (Tr. 390).

When asked about who installed the cover plate, foreman Cerise stated he didn't know but he thought it was Marge Thiel (Tr. 57-58). Marge Thiel, who is not a qualified person, was interviewed by MSHA. She stated to MSHA that she couldn't remember whether she put on the lid or not (Tr. 57-60, 390). All of the qualified persons, except those killed in the explosion, were asked about the lid. None of them could recall having installed it (Tr. 58-60, 63). John Ball, the other electrician, said he couldn't remember putting the lid on. But if he had, he would have checked it for permissibility (Tr. 58, 389-390). Since the qualified miners said they did not put the cover on the box then an unqualified person would have done it (Tr. 58).

The maintenance foreman on the "B" shift said his shift hadn't put on the cover (Tr. 59). Carl Heater, the "A" shift foreman, had no knowledge indicating it had been installed on his shift (Tr. 59-60).

The maintenance shift foreman thought it might have been installed on his shift but he couldn't recall the name of the worker who installed it (Tr. 59-60).

The installation of the cover was not satisfactory because a wire connecting the switch was too long. This resulted in the wire being trapped between two bolts of the explosion proof compartment (Tr. 61, 62, Exhibit P1 at Appendix L, Figures 1 to 6).

Inspector Smith noticed that the trapped wire between two bolts was mashed very flat. Although deformed, the wire was not bare (Tr. 123). The switch box was examined for arcing but none was seen (Tr. 123). The light switch compartment itself was not permissible 2/ because there was an opening in excess of 15/1000 of an inch between two bolts on the cover (Tr. 61, 343). The box was later removed and taken to the MSHA testing lab (Tr. 393, Testing results in P1 at Appendix N-4).

Mid-Continent's permissibility books reflected that a permissibility check was done on April 9, 1981. The records show the check was done by "E.G.". One of the Mid-Continent's electricians, Eugene Guthrie, was killed in the explosion (Tr. 73-75). On April 9 and 13, 1981 the 12CM was inspected for permissibility by MSHA inspectors. The captured wire defeated permissibility (Tr. 75).

On the night of April 13 Louis Villegos, an able and conscientious MSHA inspector, conducted an inspection of the continuous miner (Tr. 77-78). If the installation [of the cover] was improper it would have been picked up by MSHA's Villegos on April 13th (Tr. 83).

2/ There is no question but that a permissibility violation existed which was found during the investigation. This violation was the subject of Citation 802485 (P-1 MSHA Investigation Report, Appendix O). The citation was admitted and settled by Mid-Continent in Assessment Case No. 05-00301-03096F, (Tr. 346, Exhibit to Petition, Respondent's Brief at 87).

Usually permissibility is checked by taking a feeler gauge and moving it around the flange joint (Tr. 77-78). James Smith, an MSHA supervisor, discovered the non-permissible condition during the post explosion investigation. Lester and Meraz were present (Tr. 78, 79). Inspector Smith found the opening with a 5/1000 of an inch feeler gauge. Then he went to his largest feeler gauge, a 15/1000. He could still insert his largest gauge (Tr. 122). In Smith's judgment the opening was more than twice the 15/1000 of an inch opening. The largest opening allowed is 4/1000 of an inch (Tr. 128, 129, P1 at 41). Eventually the box was removed by MSHA for testing (Tr. 81).

If the box had been installed by a non-qualified person and there had not been a trapped wire, there would still be a violation (Tr. 84). A qualified person is necessary in an effort to insure that explosion proof compartments are put back in the same manner as they were originally approved (Tr. 61). This requires a qualified person trained in permissibility (Tr. 61). It is important that all electrical work be done by a qualified person. This is because equipment should not be left in an unsafe condition (Tr. 124). It is also vital in this mine which liberates a large amount of methane (Tr. 124).

The cover of the box is fourteen by fourteen by eight inches. It weighs approximately ten pounds (Tr. 62). The cover would most likely have been installed during the maintenance (C) shift (Tr. 65, 70).

Eugene Guthrie, a "B" shift mechanic/electrician worked for Arch Cardova (Tr. 65, 77). Cardova, the graveyard maintenance foreman, told MSHA that the cover had not been installed on his shift (Tr. 65, 75-76).

RESPONDENT'S EVIDENCE

M.J. Turnipseed, Jesus Merez, and John Jerome testified for Mid-Continent concerning this citation.

All workers appointed to the position of foreman at Mid-Continent are well qualified and have taken extensive examinations (Tr. 213-214). Mid-Continent also conducts classes for the mechanic/electrician job category (Tr. 215-216). On April 15, 1981 there was no scarcity of workers for the foreman/mechanic/electrician category (Tr. 216). The company training program arises out of a labor agreement dating back to 1978 (Tr. 216-218, R22).

Mid-Continent requires extensive qualifications and certification for an hourly employee to bid on the job vacancy known as an underground mechanic/electrician (Tr. 221, 224, 226, R23, R24, R25, R26, R27, R28). One classification of workers at Mid-Continent combines mechanic-electrician. The company does not have mechanic per se or electricians per se (Tr. 223).

Any of the qualified workers including Ambrose, Ball, Guthrie (deceased), Clark, Cordova, Cerise, and Heater could have worked on the switch box (Tr. 380-381). Carl Heater was the electrician/mechanic on Jerome's production shift. Eugene Guthrie held the comparable position on the other shift (Tr. 329).

It is custom and practice at Mid-Continent to comply with the law (Tr. 228). Its workers are well trained enough to know it is not permitted to have an uncertified person perform a job (Tr. 229, 315, 316).

If an uncertified person started to crawl into a flame proof electrical compartment, reaction could be slight to violent (Tr. 229-230). The switch box cover was ordered March 23 and arrived March 30, 1981. It was installed about April 6 by the graveyard crew (Tr. 370).

The mine manager was present when the investigation party discovered the impermissible main flange joint. Marks on the box indicated flame coke inside the box. There was some evidence this condition had entered into the explosion. It was felt no final determination could be made so he asked Robert A. Elam (MSHA's chief investigator) to remove the box for testing (Tr. 233-234, 340, 344). At the time of the investigation Master Mechanic Meraz had strong feelings about the switch box being the ignition source. At the time of the hearing he was baffled. Why would this box suddenly absorb this great amount of methane waiting for someone to light it (Tr. 370, 371).

The trapped wire was in a four and a half inch spacing. The wire was not bare when it was exposed but it was lying like a gasket between two bolts (Tr. 345, 374, 375, 380). Master mechanic Meraz felt that whoever put the cover on had been in a great hurry. It is Meraz's policy that when you remove such a cover you check for permissibility (Tr. 376, 377). On another occasion Meraz sought to have an electrician fired for performing unsatisfactory work (Tr. 378, 379). [That worker was not near this section in April, 1981 (Tr. 383)].

A copy of Mid-Continent's permissibility book reflects that "E.G." (Eugene Guthrie) examined the 12CM on April 9, 1981 (R1).

The full extent of the actual gap was never ascertained. That fact would make a difference in establishing whether or not the trapped wire was the source of ignition (Tr. 235, 236). MSHA tested the box (Tr. 236, P1 at Appendix N4). In the various tests no flames or external ignitions occurred up to a 50/1000 of an inch gap; at 62/1000 of an inch gap ignition occurred six out of six times (Tr. 237). At 40/1000 of an inch it was doubtful if the gap would propagate a flame to initiate an explosion outside of the enclosure (Tr. 239). In the manager's opinion everything [in MSHA's report] hinges on whether the switch box could cause an explosion (Tr. 242). There are various theories as to how the ignition occurred (Tr. 243-244). The MSHA report mentions and eliminates certain sources (Tr. 243).

The knob on the switch was new and turned easily (Tr. 348). In the investigation, according to Meraz, no one checked the position of the "on/off" handle as to whether it was "on" or "off" (Tr. 347).

A flame safety lamp could have ignited the methane (Tr. 245, 246). Many explosions are caused by improperly assembled flame safety lamps (Tr. 246). After the explosion a flame safety lamp was found 210 feet outby the face in the 102 section. The lower asbestos washer was broken. This defect destroys the integrity of the glass enclosure of the lamp (Tr. 247-251, P4). MSHA's report concluded that the force of the explosion damaged the flame safety lamp (Tr. 247-248, P1 at Appendix N-5).

DISCUSSION

Citation 802486 alleges that electrical work on the Joy 12CM was not performed by a qualified person nor under the direct supervision of a qualified person. It is further alleged that the electrical work consisted of the installation of a cover on an explosion proof compartment and the wiring of the two pole light switch.

From the record I conclude that the switch box cover was not installed by a qualified person. But no evidence supports the allegation that the wiring of the two pole light switch [in 1978] was not performed by a qualified person. Accordingly, that portion of the citation is vacated.

Mid-Continent's post trial brief addresses this citation (Brief at 84-89).

I agree with Mid-Continent that the burden of proof of this violation rests with the Secretary. That proof lies with the evidence that foreman John Cerise stated to MSHA inspector Cecil Lester that the cover "was probably installed by Mrs. Marge Thiel, who was not a qualified person" (Tr. 389). The foregoing evidence is uncontroverted. Mid-Continent's defense does not address it.

Mid-Continent argues that there were an adequate number of qualified maintenance personnel at its mine (Brief at 87). I agree Mid-Continent offered extensive evidence of that fact.

Mid-Continent's evidence further establishes that it is the custom and practice at Dutch Creek Mine No. 1 that only certified personnel perform occupational tasks which require special qualifications. Exhibits R23 through R28 clearly reflect those requirements. In many situations an operator's custom and practice could be persuasive.

Inasmuch as I rule this credibility issue against Mid-Continent, a detailed review of the evidence is in order. First of all is the uncontroverted evidence of the admission by foreman John Cerise to Inspector Lester as stated above. Namely, Cerise thought Marge Thiel installed the cover. Cerise stated nothing to MSHA about the custom and practice at Mid-Continent. The admission by Cerise to Inspector Daniels is similar but not quite as strong (Tr. 57-58). He stated to Daniels that he "didn't know but he thought it was Marge Thiel" (Tr. 57-58). The record here clearly establishes that Marge Thiel was not a qualified person to make this installation. When MSHA interviewed Marge Thiel she did not state something to the effect that the custom and practice at Mid-Continent required that only a qualified person perform such work. To the contrary she merely stated she "couldn't remember whether she put the lid on or not" (Tr. 57-58).

In view of the foregoing evidence I reject Mid-Continent's defense of custom and practice.

As previously indicated, the Secretary does not offer any evidence as to the identity of the person who wired the two pole light switch. His evidence, as discussed in the previous citation, establishes the fact that the wiring was defective. To restate the finding: The McJunkin add-on lights were not wired in accordance with the manufacturer's specifications. But the mere fact that the wiring was defective does not prove that the installer was not a qualified person. In other words, even a qualified person can make a mistake. Accordingly, the second allegation in the citation is vacated.

On this point the Secretary's post trial brief (at 9-11) does not advance any fact that would lead to a different conclusion.

CITATION 802487

This citation, alleging a violation of 30 C.F.R. 75.313-1, provides as follows:

> A definite maintenance program for keeping methane monitors operative was not established and adopted. A written description of such program was not available for inspection and had not been made available to the qualified persons responsible for maintenance of the methane monitors. This violation was determined during an inspection as part of the accident investigation of the April 15, 1981, explosion.

The standard allegedly violated provides as follows:

> § 75.313.1 Methane monitors, maintenance.
>
> The operator of any mine in which methane monitors are installed on any equipment shall establish and adopt a definite maintenance program designed to keep such monitors operative and a written description of such program shall be available for inspection. At least once each month the methane monitors shall be checked for operating accuracy with a known methane-air mixture and shall be calibrated as necessary. A record of calibration tests shall be kept in a book approved by the Secretary.

SECRETARY'S EVIDENCE

Clarence J. Daniels, James Smith, and Cecil Lester, all MSHA supervisors, testified for the Secretary.

During the investigation the inspectors asked Master Mechanic Jesus Meraz and three maintenance foreman whether Mid-Continent had a written maintenance program. Meraz and foreman John Cerise stated they did not have a written program but had adopted the program of the monitor manufacturer, BACHARACH (Tr. 86, 87 100, 395). Foreman Heater said he didn't know of any program. Foreman Cardova said the only program he knew was in the regulation (Tr. 86, 131, 132, 395).

Both Heater and Cerise further stated that while they didn't know of any written maintenance program they use the BACHARACH Manual in repairing and calibrating the monitor (Tr. 131-134). Maintenance is bigger than repair (Tr. 137).

All of the mechanics knew of the BACHARACH Manual and the testing kit (Tr. 103).

Mid-Continent now [at MSHA's insistence] has a good maintenance program (Tr. 88, 89, R2). Under the regulation there must be a program and it must be in writing to be examined (Tr. 95). The new program wouldn't help at all on repairing or calibrating the monitor (Tr. 89).

It is important to have a written program to know how the methane monitors are to be maintained (Tr. 87). Three of the maintenance supervisors were aware that when something went wrong they went to the BACHARACH instructions (Tr. 87).

The maintenance workers didn't use the manual for preventative maintenance but they used it as a troubleshooter guide (Tr. 101). The purpose of the methane monitor maintenance program is to let everyone know what is required of them to insure daily maintenance and to be sure they are doing what they are supposed to be doing (Tr. 96, 103-104).

If the MSHA inspector was working on the monitor he would use the BACHARACH instruction manual (Tr. 90) as evidenced by Exhibit R3. BACHARACH also furnishes a test kit including a bottle containing a methane mixture to apply to the sensor head of the system (Tr. 91, 92, 100, 101, R4, R4A).

RESPONDENT'S EVIDENCE

M.J. Turnipseed and Jesus Merez testified concerning this citation.

Mid-Continent has an extensive maintenance program (Tr. 331-332). Preventive Maintenance personnel cannot be diluted by other supervisors at Mid-Continent (Tr. 174, 332, 333).

In March, 1979, Mid-Continent published and distributed 200 copies of a booklet entitled "Mid-Continent Resources, Inc., Preventive Maintenance Program" (Tr. 173, R5). The booklet is broken down into several sections including the longwall, the miner, other equipment, and lubrication information.

The 12CM Miner section of Mid-Continent's book is broken down into subparts including daily maintenance and lubrication, points to be greased (with diagrams), points to be checked and filled as needed, and parts to be checked by operating. Monthly maintenance checks on the 12CM include lubrication, oil change, and various other checks including "calibrate methane monitors" (Tr. 168-172, R5). The charts in the maintenance book showing the work performed correspond with a larger record sheet posted in the master mechanic's office at each mine. There was such a chart as part of the preventative maintenance program on April 15, 1981 (Tr. 169, 175, 176, 353). It lists the daily preventative maintenance to be done for all the equipment in the mine (Tr. 351). Portions of the maintenance manual do not describe the action to be taken but do list the methane monitor as something to be checked daily, weekly, and monthly (Tr. 363).

The duties of the company preventative maintenance engineer is to carry out the maintenance duties. Bernie Fenton, who has three or four workers, is the Preventive Maintenance Engineer at the Dutch Creek No. 1 Mine (Tr. 170, 358).

Mid-Continent's preventative maintenance program was in effect on April 15, 1981 and was still in effect at the time of the hearing (Tr. 174).

As the various maintenance duties are performed the Preventative Maintenance Engineer marks the larger charts (Tr. 175). Weekly permissibility checks are kept in a separate book, as required by MSHA (Tr. 176, R1). The maintenance books were available at the time of the inspection (Tr. 176-177).

Mid-Continent also uses a BACHARACH kit to test the monitor. The back of the kit bottle has a complete set of instructions concerning its use. This was in use before April 15, 1981 (Tr. 177, 178, 336, 337). The test bottle injects gas into the monitor. In turn the machine reacts as if methane gas is present in the atmosphere (Tr. 186, 187).

Mine manager Turnipseed was present during the questioning of salaried employees Meraz, Cerise, Heater, and Jerome concerning the methane monitor maintenance program (Tr. 252-253). MSHA appeared to be spending a good deal of time attempting to prove that Mid-Continent fostered the proposition that someone tampered with the methane monitor (Tr. 252-253).

The questioning was confusing about what the foremen were being asked. Further, the workers were confused about what the government investigators wanted as a definite program. No questions were asked along the lines of how does Mid-Continent comply with the law in this particular section (Tr. 255).

Master mechanic Jesus Meraz keeps one BACHARACH manual in his desk and one in his files. The manual is wrapped around the BACHARACH test bottle (Tr. 336). Meraz taught his foreman Cardova and Heater how to adjust, check, and maintain the methane monitor. He used the manual to instruct them (Tr. 337). Mid-Continent's personnel would perform daily, bi-weekly, monthly examinations in accordance with the manuals instructions (Tr. 363).

At the time of the explosion Meraz kept a large maintenance chart for all of the equipment in the mine (Tr. 349-350). The equipment is listed in vertical columns with the dates for maintenance noted horizontally (Tr. 350, 351). If the chart would be behind, it would be obvious and Reeves, (Meraz's supervisor) would be irate (Tr. 151).

The BACHARACH book covers more maintenance detail than MSHA's program (Tr. 291, 292).

The BACHARACH methane monitor is represented by squares on the master mechanic's chart to show what work has been done and also to remind people to do monthly checks (Tr. 353). Monitor examinations would be done by various qualified and certified electricians (Tr. 364). The Mid-Continent maintenance program was in effect before the explosion (Tr. 356). It was a practice to use the books. Meraz taught Cardova and Heater how to use them. John Cerise knew how to use the book (Tr. 356-357). It never occurred to the master mechanic to show the manual to the investigator (Tr. 366).

DISCUSSION

The gist of the regulation, 30 C.F.R. § 75.313-1, requires the operator to adopt a definite maintenance program and to have such a written description available.

Mid-Continent fully complied with the regulation. At the time of the explosion I find that the program consisted of the Preventative Maintenance booklet (R5), the BACHARACH Manual (R3), the BACHARACH test kit (R4A), as well as the wall charts described in the evidence.

The Secretary's post trial brief addresses this citation (Brief at 11-14).

The Secretary contends he carried his burden of proof because his evidence shows that the maintenance foremen, one or more, didn't even know the company had a written program.

I am not persuaded. I credit the uncontroverted testimony of mine manager Turnipseed that there was confusion about what the MSHA investigators were seeking in their investigation (Tr. 230, 231). Further, and in resolving this issue, I note what is obvious in this record: Mid-Continent fully cooperated in MSHA's post explosion investigation. In short, I refuse to sustain the Secretary's position. It would amount to ruling that for some unknown reason Mid-Continent kept hidden its preventative maintenance book, its BACHARACH book, its test kit, and its wall charts.

The Secretary argues that the Mid-Continent program is not covered by the manufacturer's handbook or its preventative maintenance program. He contends Mid-Continent's materials do not contain the procedures contained in the present maintenance program. He asserts these materials are not a description of a maintenance program but merely aids to be used in carrying out the program.

The Secretary relies on what he considers to be a proper maintenance program. This was the program later adopted by Mid-Continent. The Secretary's methane monitor maintenance program contains five directives (R2). To answer the Secretary's contentions it is necessary to review what MSHA considers to be a proper program and compare those directives with Mid-Continent's program in effect at the time of the explosion. The Secretary's first directive:

> Check to assure that all system compartments and associated components are securely attached to the frame of the machine (R2).

Mid-Continent's program on this point uses different words to arrive at the same result. With the 12CM Miner daily duties include:

> 11.13 Check and operate as indicated:
>
> Visual inspection - Check Each Body of machine
> - all bolts tight
> - all guards in place and secured (R5 at 11.13).

The Secretary's second directive:

> Check meter assembly lenses protecting lights to assure that they are not cracked or broken and the lights are operating properly and in proper sequence (R2).

Mid-Continent's program on the electrical system states:

11.13 Check and operate as indicated:

Electrical System

All lights operating properly
All lights secure and properly sealed
All electrical connections in good shape
Check cable for damage or wear - from machine to power center
Operate cutter head motors
Operate high, medium, and low tram - forward and reverse
Operate conveyor - forward and reverse
Operate gathering arms
Check all motors for excessive heat, noise, or vibration
Check cable conduit at machine
Check that light conduit is secure and not damaged
Check methane monitor - zero and operation.
(R5 at 11.13).

The Secretary's third directive is that the operator should:

Check vent holes and filters of the sensing device to assure they are open to permit an adequate circulation of the atmosphere (R2).

The BACHARACH instruction book used by Mid-Continent specifically addresses the daily maintenance of the Detector Head. It provides:

7.1 DAILY MAINTENANCE

An excessive build-up of "fines" or float dust, in and around the Detector Head, may reduce the response of the sensing element. Free circulation of air, in and around the Detector Head is necessary for optimum performance. The main air path for convective flow which allows sensing of gas is located in the center of the base casting. Vent holes are also located in the top cover casting under the deflector plate, and in the sidewall. The opening in the center of the base casting also serves as a moisture drain hole and must be kept free of obstruction. The following maintenance schedule is recommended to prevent the buildup of float dust and "fines" around the Detector Head.

a. Remove any accumulation of materials around the Detector Head.
b. With the use of compressed air or medium water pressure, hose down the area around the Detector Head.
c. Use a small metal rod (or screwdriver) and check that the vent holes are free of obstruction.

After the Daily Maintenance has been performed, allow approximately 5 minutes for sensor temperature to stabilize. Then actuate the Test Switch at Remote Meter Housing to Check alarm lamp circuits and machine power cutoff relay. Adjust meter to zero (0%) with Zero Adjust Control if necessary.
(R3 at 7.1).

The Secretary's fourth directive requires the operator to:

> Actuate the test control device to assure the proper sequence of the alarm lamp illumination and the operation of the remote relay by the deenergization of the machine. (R2).

Only a minimal benefit can be derived by reciting it here in haec verba but the BACHARACH manual and the instructions on the BACHARACH calibrating gas container received in evidence address this subject in a much more comprehensive fashion than the Secretary's proposal (R3 at 11-12, R4A). In addition, one of the functions listed on the weekly 12CM chart concern the "remote control sequence of operation" (R5 at 11.20).

The Secretary's fifth directive is that:

> At least once each month the methane monitors shall be checked for operation accuracy with a known methane-air mixture and shall be calibrated as necessary (R2).

Mid-Continent's more stringent program requires that the calibration test with a known quantity of gas be performed "at least every 2 weeks and more often if experience and application conditions dictate" (R3 at 7.2).

On the basis of the foregoing facts I conclude that Mid-Continent did not violate 30 C.F.R. 75.313-1. The Secretary's position has required that the respective programs be weighed. As a collateral matter I necessarily reject the Secretary's evidence that the BACHARACH Manual does not include the requirements in MSHA's program as evidenced by R2 (Tr. 96). Mid-Continent had a definite maintenance program. It was written. It was available.

Citation 802487 and all proposed penalties should be vacated.

CIVIL PENALTIES

Concerning Citation 802484 and 802486, it is necessary to assess a civil penalty for the foregoing violations.

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. 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'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.

The record shows that respondent had 1701 violations assessed against it in five different mines from April 15, 1979 to April 15, 1981 (P2, P3 as limited by stipulation at Tr. 412). At the Dutch Creek No. 1 mine 482 violations were assessed against Mid-Continent between those dates (P2). This is obviously an adverse prior history of severe proportions.

As to the criterion of whether payment of penalties will affect Mid-Continent's ability to continue in business the record is silent. But existing case law indicates that where respondent fails to introduce any financial data a judge may presume that the payment of penalties will not adversely affect respondent, Secretary v. Buffalo Mining, 2 IMBA 226 (1973), Secretary v. Associated Drilling, Inc., 3 IBMA 164 (1974).

The facts arising in Citation 802484 (methane monitor did not deenergize McJunkin lights) would indicate respondent was negligent and the gravity was serious in that this condition permitted a source of ignition to exist in a gassy mine.

The facts arising in connection with Citation 802486 (non-qualified person performing electrical work) indicate respondent was negligent for permitting such an event to occur. The gravity of such a practice is particularly severe since it was permissible equipment upon which the work was performed. MSHA's policy requires that all equipment that goes inby the last open crosscut in the mine must be permissible (Tr. 119).

Considering all of the statutory criteria I conclude that the Secretary's proposed penalties respectively of $4000 and $10,000 for the violations of the first two citations are appropriate and I adopt said penalties on behalf of the Commission.

Since no violation of Citation 802487 occurred the proposed penalty of $4000 for that citation should be vacated.

The Solicitor and Mid-Continent's counsel filed detailed briefs which have been most helpful in analyzing the record, defining the issues, and deciding the case. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

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

ORDER

1. Citation 802484 for the violation of the Act and 30 C.F.R. 75.313, as modified herein, is affirmed and a civil penalty of $4000 is assessed.

2. Citation 802486 for the violation of the Act and 30 C.F.R. 75.511, as modified herein, is affirmed and a penalty of $10,000 is assessed.

3. Citation 802487 for the alleged violation of 30 C.F.R. 75.313-1 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Thomas A. Mascolino, Esq.
Alan H. Yamamoto, Esq.
Office of the Solicitor, United States Department of Labor
4015 Wilson Boulevard, Arlington, Virginia 22203

Edward Mulhall, Jr., Esq., Delaney & Balcomb
818 Colorado Avenue, Drawer 790
Glenwood Springs, Colorado 81602

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