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FEBRUARY 1989

Review was granted in the following case during the month of February:

Secretary of Labor, MSHA v. Pennsylvania Electric Company, Docket No. PENN 88-277. (Judge Melick, December 30, 1988).

COMMISSION DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 1, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 88-136
 :
AMBER COAL COMPANY :

BEFORE: Ford, Chairman, Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Chief Administrative Law Judge Paul Merlin issued an Order of Default on November 21, 1988, finding Amber Coal Co. ("Amber") in default and ordering Amber to pay a civil penalty of \$8,500. The default order was issued because Amber had failed to respond to an earlier Order to Show Cause. Subsequently, the Commission received from Amber a copy of a letter that Amber apparently had sent in response to the show cause order but had misdirected to the Department of Labor. For the reasons set forth below, we deem this letter to constitute a request for relief from a final Commission order, vacate the judge's default order and remand for further proceedings.

On November 12, 1987, following an investigation of a fatal roof fall accident at Amber's No. 7 mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Amber a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 75.200, the mandatory roof control standard for underground coal mines. On May 20, 1988, MSHA's Office of Assessments, under the special assessment procedures of 30 C.F.R. § 100.5, notified Amber that it proposed a civil penalty of \$8,500 for the alleged violation. On May 26, 1988, Amber filed its "Blue Card" request for a hearing before this independent Commission. On June 24, 1988, the Secretary of Labor filed a complaint proposing the assessment

of a civil penalty for the violation. The record indicates that Amber did not file an answer to the complaint with the Commission.

On September 8, 1988, approximately two and one-half months after the Secretary's complaint was filed, Judge Merlin issued a show cause order directing Amber to answer the complaint within 30 days or be found in default. When no answer was filed by November 21, 1988, Judge Merlin issued an Order of Default against Amber, directing it to pay the \$8,500 civil penalty proposed by the Secretary. See 30 C.F.R. § 2700.63 (summary disposition of Commission proceedings).

On December 1, 1988, the Commission received from Amber a copy of a letter dated September 15, 1988, addressed to the sub-regional office of the Solicitor of the Department of Labor, Nashville, Tennessee and signed by Amber's safety director. (The letter begins "[t]his is respectfully submitted as an answer to why we disagree with the penalty levied against us." and sets forth Amber's defense to the citation.) Amber's submission, on its face, raises the possibility that Amber's letter to the Department of Labor was meant as a response to the judge's show cause order but was erroneously filed with the wrong agency.

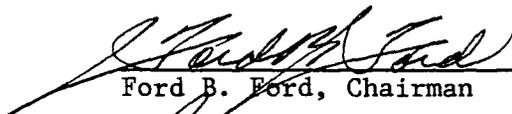
The judge's jurisdiction in this matter terminated when his default order was issued on November 21, 1988. 29 C.F.R. § 2700.65(c). Because the judge's decision has become final by operation of law, 30 U.S.C. § 823(d)(1), we can consider the merits of Amber's submission only if we construe it as a request for relief from a final Commission decision incorporating a petition for discretionary review. See 29 C.F.R. 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. P. 60(b) (relief from judgment or order).

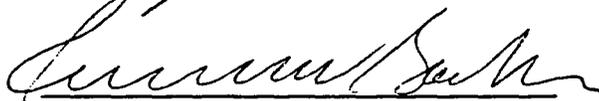
Amber appears to be a small coal company proceeding without benefit of counsel. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from final orders of the Commission where it appears that the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence or mistake. See Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269 (September 1986). Here, Amber may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. Amber's letter was apparently sent to the Department of Labor's Solicitor shortly after the judge issued the show cause order and well within the time provided for a response. Under these circumstances, we will accept Amber's submission as a request for relief from a final order incorporating by implication a petition for discretionary review.

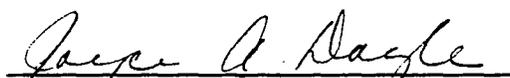
We have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. Kelley, 8 FMSHRC at 1869; Sundt, 8 FMSHRC at 1271. Although Amber's submission raises the possibility of a misdirected communication, we cannot make a determination with certainty on the basis of the present record. In the

interest of justice, we conclude that Amber should have the opportunity to present its position to the judge, who shall determine whether final relief from the default order is warranted. See Kelley, 8 FMSHRC at 1869.

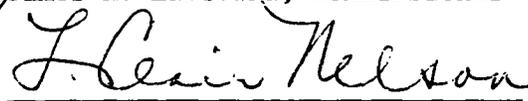
Accordingly, the default order is vacated, and the matter is remanded for proceedings consistent with this order. Amber is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 2, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
on behalf of JOSEPH GABOSI :
v. : Docket No. WEST 86-24-D
WESTERN FUELS-UTAH, INC. :

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

ORDER

BY THE COMMISSION:

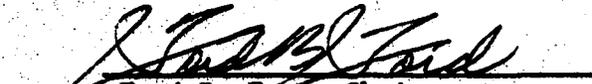
In this discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the parties have filed a Joint Motion to Approve Settlement and Dismiss. For the reasons set forth below, the motion is granted.

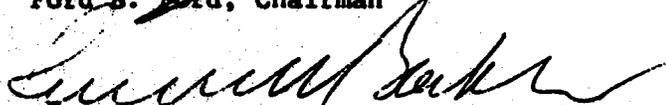
The Commission issued its prior decision on the merits in this matter on August 15, 1988, reversing Commission Administrative Law Judge John J. Morris' original decision and remanding the case to him for further proceedings. 10 FMSHRC 953 (August 1988). In his Decision After Remand issued on October 24, 1988, Judge Morris concluded that complainant Joseph Gabossi had been discharged in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and ordered Western Fuels-Utah, Inc. ("Western Fuels") to pay Mr. Gabossi \$39,560.06 in back pay and other expenses with interest. 10 FMSHRC 1462 (October 1988)(ALJ). (Gabossi had not sought reinstatement.) Western Fuels filed a petition for discretionary review, which the Commission granted in part and denied in part on December 2, 1988.

Western Fuels subsequently filed with the Commission a motion indicating that the parties had reached a settlement of the case and would be submitting a motion for approval of settlement and dismissal. On January 11, 1989, the Commission issued an order staying briefing and directing the parties to file their motion by January 31, 1989. The Joint Motion to Approve Settlement and Dismiss was received by the Commission on January 27, 1989. Attached to the parties' joint motion

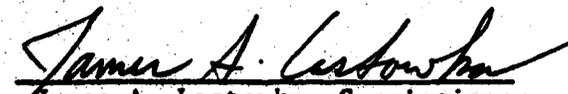
is a copy of the settlement agreement signed by the parties and by Gabossi.

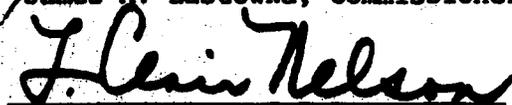
Upon consideration of the settlement agreement, motion, and record, we approve the settlement and grant the motion to dismiss. Accordingly, our direction for review is vacated and this proceeding is dismissed.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 3, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. CENT 87-65-M
 :
v. :
 :
MISSOURI ROCK, INC. :

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

DECISION

BY: Backley, Lastowka and Nelson, Commissioners

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982), involves three citations issued to Missouri Rock, Inc. ("Missouri Rock") alleging "significant and "substantial" violations of 30 C.F.R. § 56.9003 for using Caterpillar 631C tractor-scrappers ("scrappers") without adequate brakes at Missouri Rock's Plant No. 2. 1/ Commission Administrative Law Judge James A. Broderick determined that Missouri Rock violated section 56.9003 by failing to provide adequate brakes on the three cited scrapers and assessed civil penalties totaling \$2,000.00. 10 FMSHRC 583 (April 1988)(ALJ). We subsequently granted Missouri Rock's petition for discretionary review. For the following reasons, we affirm the judge's decision.

Missouri Rock's Plant No. 2 is a limestone quarry located in Clay County, Missouri. Missouri Rock uses three scrapers to remove the overburden (soil and unconsolidated rock) that overlies the limestone deposit. Each scraper is equipped with a large bowl, often called the pan, that scrapes the ground and scoops up the overburden into the bowl as the scraper moves forward. An empty scraper weighs approximately 35 tons, while a scraper with a bowl fully

1/ Section 56.9003, a mandatory safety standard for surface metal and non-metal mines, provides:

Mobile equipment brakes.

Powered mobile equipment shall be provided with adequate brakes.

loaded with overburden weighs over 70 tons. The scraper operator can raise and lower the hydraulically operated bowl and can exert positive pressure against the ground with the bowl by means of a lever in the operator's compartment. Each scraper is equipped with wheel brakes, often called service brakes, that are activated with a pedal in the operator's compartment.

On February 3, 1987, Eldon Ramage, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of Missouri Rock's Plant No. 2. During this inspection, Inspector Ramage requested that the operator of a scraper, identified by Missouri Rock as Unit No. 643, pull the machine forward and upon signal activate the brakes. The scraper operator dropped the bowl to the ground using the quick release lever and the scraper stopped. The inspector then directed the operator to stop the vehicle by using the wheel brakes. The scraper operator was unable to stop the scraper with the wheel brakes. This operator told the inspector that there was no air pressure to operate the wheel brakes. The inspector issued Citation No. 2846910 under section 104(a) of the Act, 30 U.S.C. § 814(a), charging a violation of 30 C.F.R. § 56.9003 for failure to provide adequate brakes on powered mobile equipment. The citation required that the service brakes be repaired by February 4, 1987. On February 20, 1987, the inspector modified the citation by changing the likelihood of an injury designation from "unlikely" to "reasonably likely" and designating the violation as being of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

On February 25, 1987, Inspector Ramage returned to the mine. He asked that scraper No. 643 be tested and again found that the wheel brakes did not stop the scraper. He issued a section 104(b) order of withdrawal for failure to abate the previously cited violation. ^{2/} He also requested that the wheel brakes on the other two scrapers be tested. He found the wheel brakes to be inadequate on each and issued Citation Nos. 2846916 and 2846917 under section 104(a) of the Act charging significant and substantial violations of the same safety standard.

2/ Section 104(b) of the Act , 30 U.S.C. § 814(b), states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

Before the administrative law judge, Missouri Rock admitted that the wheel brakes were not in working order on the three scrapers. It produced evidence to show that the bowl on each scraper serves as the primary brake and that such "brake" is fully adequate to stop the scraper in all operating situations. The inspector testified that the bowl will not adequately stop a scraper in all instances and that the safety standard requires that wheel brakes be adequate whenever the equipment is in operation.

In finding a violation of section 56.9003, Judge Broderick concluded that the term "brakes" in the standard refers to wheel brakes. 10 FMSHRC at 586-87. He held that the wheel brakes are required to be adequate (i.e., able to stop the equipment in a reasonable distance) and the fact that there are other effective means of stopping a scraper does not satisfy the safety standard. 10 FMSHRC at 587. He also determined that dropping the bowl is not a safe or effective means of stopping a scraper in all situations. Id.

On review, Missouri Rock contends that the bowl of a scraper is designed, manufactured and customarily used as the primary braking system on the scrapers at issue and is an adequate brake under the standard. It further contends that if a violation is found, the civil penalties ordered by the judge are excessive and should be reduced. The Secretary argues that the Commission should defer to its interpretation of the safety standard as expressed by the inspector and adopted by the judge. She states that the legislative history of the Act establishes that it was Congress' intention "that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 638 (1978). For the reasons set forth below, we conclude that substantial evidence supports the judge's finding that the scrapers were not provided with adequate brakes and that the civil penalties assessed by the judge are also supported by substantial evidence.

The testimony of Inspector Ramage affords substantial evidentiary support for the judge's determination that the term "brakes" in the standard refers to wheel brakes. Although the term "brakes" is not defined in the Act or the Secretary's regulations, it is clear that the Secretary's interpretation of that term was as expressed by the inspector. When he asked the scraper operators to test the brakes during his inspection, he demanded that the service brakes be tested not the pan of the scraper. Tr. 30-35 & 37. He did not consider the pan to have any bearing on the safety standard at issue. Tr. 83. When asked on cross-examination whether he had required that the pan be tested, he replied:

[W]hen we check a piece of equipment for brakes, we're checking for brakes. It [does not] say check the pan. The standard that I -- in the normal procedure that we do, it does not say check the pan.

Tr. 97. In addition, the Operator's Guide, 631 Tractor Scraper, published by Caterpillar Tractor Company and introduced at the hearing, instructs

scraper operators to test the brakes when checking the controls of the scraper. Exhibit P-4 at p. 4. It is obvious from the context that this guide is referring to the service brakes and not to the pan. Finally, Inspector Ramage testified that in his inspections of 50 to 60 quarries twice a year during the five preceding years, he had issued only one citation for inadequate brakes on scrapers and in his experience quarry operators usually keep such brakes in working condition. Tr. 44-47. 3/

The Secretary's interpretation of the term "brakes" in the standard to mean service brakes is a reasonable construction of section 56.9003. Because brakes are required to be "adequate" under the standard, it is an appropriate reading of the standard to direct this requirement to the service brakes as opposed to other parts of a scraper such as the pan. Under the interpretation proposed by Missouri Rock, the safety standard would not require that the service brakes designed and installed by the manufacturer function as an adequate brake if the vehicle could be stopped by other means. The standard does not require that powered mobile equipment be provided with an adequate stopping or braking method; it requires adequate brakes. It is also helpful to note that tractor-scrappers are a conventional type of powered mobile equipment manufactured and sold at the time this standard was promulgated. There is no evidence that the standard provides any exceptions for scrapers. We find the Secretary's interpretation of the standard to require adequate service brakes to be rational and reasonable notwithstanding the fact that, in some situations, other effective means may exist for stopping the equipment. 4/

On review, Missouri Rock has presented no compelling reasons why the Commission should not give weight to the Secretary's interpretation. It simply argues that because the pan will effectively stop the scraper, the pan is a brake under the standard. The administrative law judge rejected this argument. We believe it is appropriate to give weight to the Secretary's interpretation of the standard in this case because it is supported by the record and is a reasonable interpretation. See U.S. Steel Mining Company, 10 FMSHRC 1138 (1988).

Missouri Rock also challenges the judge's finding that dropping the pan is not a safe and effective means of stopping the scraper in all instances. The judge found that dropping the pan would not be a safe or

3/ Our dissenting colleague Chairman Ford states that Inspector Ramage personally had not operated a model 631 Caterpillar scraper. We note that personal experience in operating every model of every type of regulated equipment realistically cannot be expected and is not required of MSHA inspectors. We note also that in addition to his experience gained through formal training and 10 years of inspection activity, Inspector Ramage has, in fact, personally operated scrapers. Tr. 75.

4/ The Secretary does not take the position that the pan should never be used to stop a scraper or that using only the service brakes is always advisable. She argues, however, that the standard requires that the service brakes be available for use should the need arise. She maintains, for example, that situations will arise in which service brakes will be necessary for the supplemental braking effect they may provide when used in conjunction with the pan. Sec. Br. 9 & 11.

effective method of stopping the scraper (1) on hard packed surfaces, (2) if the scraper engine fails while ascending a hill or (3) if buried rock is present. Missouri Rock contends that substantial evidence does not support the judge's finding and points to the extensive evidence it presented that the pan will adequately stop the scraper in each of the above-described situations.

We find that substantial evidence was presented by the Secretary to support the judge's findings. Although there also is evidence in this record to the effect that the pan will stop the scraper in these situations, the judge credited the testimony of Inspector Ramage that the pan alone may not effectively stop the scraper in all instances including the situations relied upon by the judge. 10 FMSHRC at 587; Tr. 38, 49-50, 134-35. We find nothing in the record that would warrant overturning the judge's finding in this regard. The inspector's ten years of experience as a surface mine inspector provides a substantial level of experience to support his testimony as to the potential hazards of operating a scraper without service brakes.

Substantial evidence has been defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Taking into account the evidence in the record which detracts from the judge's findings, we conclude that the record supports the judge's conclusion that the pan will not effectively stop the scraper on all instances. The Commission may not substitute a competing view of the facts for an administrative law judge's reasonable factual determination. Universal Camera v. NLRB 340 U.S. 474, 488 (1951); Donovan ex rel. Chacon v. Phelps Dodge Corp., 709 F.2d 86, 94 (D.C. Cir. 1983).

Finally, Missouri Rock argues that the judge's decision should be reversed because the proposed penalties were improperly assessed under the Secretary's "special assessment" provision of 30 C.F.R. § 100.5 and are in any event excessive. In his decision, the judge held that the fact that the Secretary used her special assessment provisions to be irrelevant since the Commission possesses de novo authority in assessing civil penalties. 10 FMSHRC at 588.

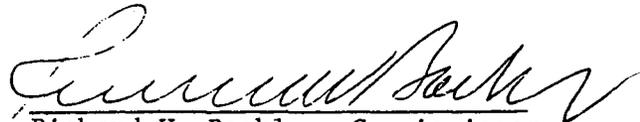
The Commission has previously determined that the Secretary's penalty regulations are not binding on the Commission. Sellersburg Stone Co., 5 FMSHRC 287 (1985), aff'd, 736 F.2d 1147 (7th Cir. 1984). The Commission has held that a mine operator may prior to hearing raise and, if appropriate, be given the opportunity to establish, that in proposing penalties the Secretary failed to comply with her Part 100 penalty regulations. Youghiogeny & Ohio Coal Company, 9 FMSHRC 673, 679-80 (1987). Given the Commission's independent penalty assessment authority, the scope of the inquiry would be whether the Secretary had arbitrarily proceeded under a particular provision of her penalty regulations.

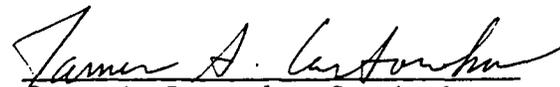
In the instant proceeding, Missouri Rock did not seek resolution of this issue prior to hearing. In its post-hearing brief, Missouri Rock simply asked that the proposed penalties be "reduced to nominal penalties under the regular assessment provision (without assessing respondent, as petitioner apparently proposed to do, with excessive or unwarranted points in the areas of negligence, good faith, likelihood of occurrence and gravity of injury)." Missouri Rock Br. to ALJ at 16. Since the judge independently assessed

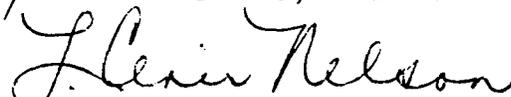
civil penalties taking into consideration the criteria set forth at section 110(i) of the Act (30 U.S.C. § 820(i)), the controlling issue is whether the judge did so properly rather than whether the Secretary failed to comply with her penalty regulations.

When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. Pyro Mining Co., 6 FMSHRC 2089, 2091 (September 1984). The judge considered the evidence relating to the violations and found that the violations were moderately serious, that the violations found on February 25, 1987 (Citation Nos. 2846916 & 2846918) were the result of Missouri Rock's gross negligence and the violation found on February 3 (Citation No. 2846910) to be a result of Missouri Rock's ordinary negligence. He also found that Missouri Rock showed good faith abatement with respect to the violations of February 25 but that it did not demonstrate good faith in attempting to achieve rapid compliance of the first violation until a section 104(b) order was issued. We find that the civil penalties totalling \$2,000 imposed by the judge for the violations of section 56.9003 are supported by substantial evidence, are consistent with the statutory penalty criteria and do not constitute an abuse of discretion by the judge.

For the foregoing reasons, the decision of the administrative law judge is affirmed.


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Chairman Ford, dissenting:

If the standard at issue required that "powered mobile equipment shall be provided with adequate service brakes", I would join the majority in affirming the judge's decision. Likewise, had this case arisen under the current brake standard which supersedes and clarifies the one cited by the inspector, a finding of violation would have been appropriate. 1/ Given, however, the vagueness of the brake standard, as manifested in the widely divergent interpretations advanced by the parties, and the unique design of the scraper-tractors cited, I do not believe the Secretary has met her burden of proving a violation. Therefore, I respectfully dissent.

The premise underlying the judge's decision is that 30 C.F.R. 56.9003, requiring that "powered mobile equipment shall be provided with adequate brakes", applies only to the service or wheel brakes of the scraper-tractors cited. While the judge found that the bowl or pan on a scraper-tractor could be used to effectively stop the equipment in many circumstances, he nevertheless found that the bowl by itself could not be considered a means of compliance with the standard. I would reverse the judge on the ground that his basic legal conclusion regarding the application of the standard is erroneous.

Section 56.9003 does not refer to "service brakes" nor is the term "brakes" defined in 30 C.F.R. Part 56. The Secretary offered no official interpretation of the standard, nor could she point to any Commission or court precedent that might shed light on the meaning and scope of section 56.9003. The Secretary does, however, urge upon the Commission the opinion of her inspector as to what the standard means and argues that the Commission should give deferential weight to his interpretation of the standard. Unfortunately

1/ 30 C.F.R. 56.14101, promulgated August 25, 1988 (53 FR 32496, 32522) provides in part:

"(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels...

(3) All braking systems installed on the equipment shall be maintained in functional condition.

(b) Testing. (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair."

for the Secretary, however, the inspector readily admitted: that he was "not a brake expert" (Tr. 125); that he had never operated a 631 scraper-tractor (Tr. 75-76); 2/ and that his training with respect to braking systems consisted of reviewing a demonstration board at MSHA's Training Academy which differentiated air brakes from hydraulic brakes (Tr. 24). I strongly disagree with the majority's view that the inspector's ten years' experience of inspecting 50-60 quarries qualifies him as an expert on "brakes" or as an expert on interpreting section 56.9003. 3/

2/ I believe the majority misperceives the basis for my reliance on this admission by the inspector. Obviously, a mine inspector need not be a qualified operator of every piece of mobile equipment he might have occasion to inspect. The issue, here, however, is the level of expertise the inspector brings to bear on interpreting the brake standard, generally, and on applying it to the components of the particular model of equipment he cited as not being in compliance with the standard. As to his "hands on" familiarity with the operation of the tractor-scrappers cited the complete testimony is as follows:

- Q. And I listened closely and I didn't hear you tell us that you had any training in 631 C-scraper operations, is that true?
- A. I am not a qualified operator, no.
- Q. Okay. Have you ever gotten on one of those 631 C-scrappers, and operated the wheel brakes?
- A. Not a 631. I have operated scrapers, but not 631's.
- Q. Okay. I'm not talking about any other scrapers, or any other equipment. I'm talking about 631 C-scrappers?
- A. We're not allowed to operate anyone's equipment.
- Q. Have you ever gotten on them even, and used the bowl, or the pan, or used that lever that operates the bowl, or the pan?
- A. We do not interfere -- or bother people's equipment. Tr. 75-76.

3/ The inspector's experience might qualify him to speak with some authority as to whether a particular braking system is adequate, i.e., capable of stopping equipment within a reasonable and safe distance, but, as will be shown, infra, his opinions as to the adequacy of the bowls on the scraper-tractors was highly speculative and lacking any empirical basis.

Poised in opposition to the inspector's testimony is that of: (1) representative of a large distributor of the equipment cited who had 12-14 years experience with scraper-tractors and extensive training in their operation and capabilities; (2) a quarry supervisor with ten years experience operating scraper-tractors; (3) a safety director with four years experience operating scraper-tractors; and (4) a mechanic with six to seven years experience both operating and repairing scraper-tractors. All testified that the pan or bowl constituted the primary braking system on the equipment. ^{4/} Mr. Messerli, territorial manager for the Caterpillar distributor that supplied the scraper-tractors, testified that the distributor's training and demonstration personnel taught customers to rely on the pan or bowl as the primary braking system on the equipment. Tr. 189-190. Furthermore, Respondent's Exhibit 1 clearly indicates that the local Operating Engineer's Union apprentice training program stresses use of the pan or bowl as the primary braking system on scraper-tractors. See also Tr. 251-252. One can assume that union members so trained are employed by mining and construction operations other than Missouri Rock's quarry.

This Commission has on numerous occasions applied what has come to be known as the "reasonably prudent person" test in determining whether vague or broadly drawn standards afford reasonable notice of what is required or proscribed. Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983).

In U.S. Steel, supra, the issue was whether or not berms along a mine roadway were "adequate" for purposes of the standard, 30 C.F.R. 77.1605(k). In essence, the Commission held that the adequacy of a berm must be determined "by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute." Id. 5. In setting an "objective standard" the Commission held it appropriate to consider "accepted industry standards ... considerations unique to the mining industry, and the circumstances at the operator's mine." Id.

Applying the reasonably prudent person test here, one could not avoid concluding that at Missouri Rock's facility and at facilities utilizing the type of scraper-tractor cited and employing trainees of the Operating Engineers program, the common practice was to utilize the pan or bowl as the primary braking system on the units. Furthermore, both the judge and the Secretary acknowledged that in certain instances the pan or bowl would be necessary to meet the objective of the standard -- safely stopping the equipment within a reasonable distance. Tr. 118, 128-129; Sec. Br. 9, fn. 8; 11, fn 12; 10 FMSHRC 587. I would therefore find as a matter of law that pans or bowls on the

^{4/} The record establishes that the bowl or pan can be applied as a braking mechanism in two ways. It can be gradually lowered against the ground with up to 82,000 pounds positive pressure to slow the scraper-tractor, or it can be "quick-dropped" to provide immediate stopping capability in the event of an emergency. The bowl is controlled by a lever readily at hand in the operator's compartment. Tr 177, 172-3, 201, 203. We are dealing here with a fairly sophisticated braking system not dependent upon the "ingenuity of the employee" or the "whimsical imagination of the operator" to stop the equipment. Secretary of Labor v. Brown Brothers Sand Co., 9 FMSHRC 636, 656-57 (March 1987).

scraper-tractors can appropriately be considered "brakes" for purposes of section 56.9003. With that established, the issue becomes whether or not those "brakes" are adequate for purposes of the standard. In that regard the Secretary has failed to show that the bowls were inadequate.

Once again the Secretary's case rests entirely on the testimony of the inspector which can be summarized as follows:

If you're maneuvering in an area where there -- you've got hard surface, or real dry hard packed surface, the dropping of the pan may not provide the immediate braking action that would be required, or may be necessary to stop -- keep from striking someone, or running into another piece of equipment."

[A]scending a steep grade or a grade, and the engine fails, dies, or anything, he has got no brake whatsoever if he don't have a service brake."

If the scraper was moving at any speed -- I'm saying five to ten miles per hour or maybe faster, then if they were in an area where there could be some rock buried below the surface, and you dropped the pan, that pan -- that scraper is going to come to a real abrupt halt, and if the operator don't have his seat belt on, he could suffer substantial injuries. Even with his seat belt on, he is going to be pitched forward with considerable force. Tr. 48-50.

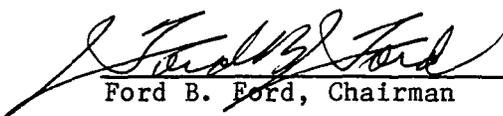
Generally speaking the testimony is speculative in nature -- interspersed with "may" or "could". Furthermore, at no time did the inspector verify his conjectures by asking the equipment operators to demonstrate the use of the bowls in such circumstances. More particularly, Missouri Rock clearly rebutted the inspector's testimony in each of the three cases.

First, Messrs Case, Gordon and McClanahan all testified that a test of the braking capacity of the bowl on a hard packed surface was undertaken at the mine site. Test results indicated that the bowl stopped the equipment at full speed in five to six feet while fully functioning wheel brakes required 12 feet. Tr. 316-17; 370-71. Masserli testified that if the engine died while the equipment was ascending a steep grade the wheel brakes would soon overheat so that only the bowl would be available as a brake. The hydraulic system for the bowl, however, continues to operate whether or not the engine is running. Tr. 172, 178. Third, Masserli and Ellis both testified that equipment operators are required to use seat belts at all times. Tr. 186, 254. Indeed, Masserli testified that since operators are subjected to a great deal of bounce while operating the equipment, they have to be belted into the seat in order to maintain control of the units. Tr. 187. Given the overwhelming rebuttal evidence presented by Missouri Rock, I conclude that substantial evidence does not support the judge's holding that operation of the bowl is not "safe or effective" in those circumstances speculated upon by the inspector. 10 FMSHRC 587.

One other aspect of the "adequacy" issue strikes me as contradictory. If one assumes that the standard applies only to the service or wheel brakes and not the bowl, then it appears that Missouri Rock would have been found in violation of the standard even if the wheel brakes had been well-maintained. All parties and the judge agree that the wheel brakes are limited by their design capability inasmuch as they will not safely and effectively stop a fully loaded unit going downhill on a steep grade; the bowl or pan is best utilized in such circumstances (Tr. 118-20, 177-78, 258, 372-3; Sec. Br. 9, fn. 8; 11, fn. 12; 10 FMSHRC 587). Thus, even fully operational wheel brakes could not be considered adequate for all purposes under section 56.9003. On the other hand, extensive and uncontroverted evidence establishes that the pan or bowl would be adequate in all off-road applications that might arise in the Missouri Rock quarry. 5/

In summary, I would reverse the judge with respect to his legal assumption that the standard applies only to the wheel or service brakes and not the pans or bowls of the scraper-tractors. I would also reverse his holding with respect to the adequacy issue since substantial evidence does not support his holding that the pans are not safe and effective.

Since the majority affirms the judge on both matters, I must respectfully dissent.


Ford B. Ford, Chairman

5/ Missouri Rock acknowledges that the wheel brakes would be necessary for transporting a scraper-tractor between jobs on public roads and would have to be fully operational in those circumstances. Pet. for Discr. Rev. at 3; Tr. 166-171.

Commissioner Doyle, dissenting:

In his decision, the administrative law judge examined the term "brake" as defined by two sources. He noted that the American Heritage Dictionary of the English Language defined brakes as "[a] device for slowing or stopping motion, as of a vehicle or machine, especially by contact friction" and that A Dictionary of Mining, Mineral and Related Terms defined the term in part as "[a] device (as a block or band applied to the rim of a wheel) to arrest the motion of a vehicle, a machine or other mechanism and usually employing some sort friction." He then found that the testimony in this case established that dropping the pan is the usual method of stopping the scrapers in issue and that in many cases that is the quickest and safest way to stop them. Based solely on the inspector's testimony, however, he found several instances in which the pan would not be effective in stopping the scrapers and then concluded that the term "brakes" in the standard refers only to wheel or service brakes. The majority finds that substantial evidence was presented by the Secretary to support the judge's findings of fact. I disagree.

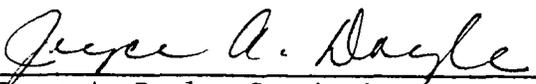
The only evidence of record to support the judge's finding that there were instances in which dropping the pan is not effective is the opinion testimony of a non-expert witness (Inspector Ramage). The inspector testified that his training with respect to brakes consisted of learning at MSHA's Training Academy to differentiate air and hydraulic brake systems (Tr. 24, 125) and he readily admitted that he was "not a brake expert." (Tr. 125). Yet the judge permitted him to testify, and credited his testimony, as to what he thought would happen if attempts were made to stop the scraper when operating on pavement or other hard surfaces, when the engine failed while ascending a hill, when traveling backwards downhill or in the case of buried rock or a limestone knoll. This testimony was not based on tests that the inspector had conducted, nor on tests he had observed. It was not based on his own experience in operating a scraper nor on his study of the subject. In fact, the record gives no indication that it had any basis at all. For that reason, the inspector's testimony should have been accorded no weight by the judge. Instead, the judge credited it and based his findings of fact and his subsequent conclusion that the standard refers to the wheel or service brakes on this testimony. I believe that he erred in relying on the opinion testimony of a nonexpert witness and that, without that testimony, his finding that there were instances when the pan would not be effective in stopping the scraper is without record support.

The majority accepts the Secretary's argument that her interpretation of the standard as meaning only service brakes is a reasonable one that should be accorded deference. I disagree.

This case is unlike Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) cited by the Secretary in support of her position. In that case the agency issued a regulation interpreting a statute and it was the agency's official interpretation of the statute as set forth in the regulation that was at issue. This case is also unlike U.S. Steel Mining Company, 10 FMSHRC 1138 (1988) cited by the majority. In that case the operator had longstanding notice of the Secretary's consistent enforcement of the standard. Here the Secretary introduced no evidence of consistent (or previous) enforcement of the standard to apply only to service brakes nor did she even advance this interpretation in her brief to the administrative law judge. The Secretary did not submit any official MSHA interpretations of the regulation, such as interpretive bulletins or policy manual positions on the subject. Rather than any official interpretation, the record before us presents only a personal interpretation of one MSHA inspector.

The majority states that "it is clear that the Secretary's interpretation of the term was as expressed by the inspector" and they then recount the inspector's actions and his testimony as to his state of mind ("[h]e did not consider the pan to have any bearing on the safety standard at issue") as evidence of the Secretary's interpretation. It is perhaps more accurate to say that the Secretary has subsequently fashioned her interpretation of the term to coincide with the inspector's actions and the judge's conclusions rather than the Secretary having arrived at her interpretation, the inspector having then acted on the basis of that interpretation and the judge having then properly given deference to it. Under the circumstances of this case, I do not believe that the Secretary's after the fact (and after the hearing) interpretation is a reasonable action to which deference is owed. To find otherwise permits the Secretary to adopt ex post facto any number of diverse interpretations and enforcement actions by her inspectors with no forewarning to operators of what those interpretations or enforcement actions might be. Safety is better served if operators know in advance what the law requires of them.

Accordingly, I would reverse the judge's finding of violation.


Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 3, 1989

ERNIE L. BRUNO :
 :
 v. : Docket No. WEST 88-157-D
 :
 CYPRUS PLATEAU MINING :
 CORPORATION :

BEFORE: Ford, Chairman; Backley, Doyle and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act"), Commission Administrative Law Judge John J. Morris issued a decision dismissing Ernie L. Bruno's complaint of discriminatory discharge on the grounds that the complaint was filed with prejudicial untimeliness and that Mr. Bruno would have been fired in any event for the unprotected activity of fighting. 10 FMSHRC 1649 (November 1988)(ALJ). The Commission did not grant Bruno's subsequently filed petition for discretionary review, and Judge Morris' decision became a final decision of the Commission on January 8, 1989, by operation of the statute. 30 U.S.C. § 823(d)(1).

In a letter to Judge Morris dated January 18, 1989, Bruno requested that this proceeding be reopened and that the judge's decision be reconsidered on the grounds of newly discovered evidence. (The newly discovered evidence was described in Bruno's letter.) Bruno's submission was received in the Commission's Denver, Colorado offices on January 26, 1989. By letter dated January 26, 1989, the judge informed Bruno that he did not have jurisdiction to entertain the request. See 29 C.F.R. § 2700.65(c). The judge forwarded Bruno's submission to the Commission's Washington, DC offices, where it was received on January 30, 1989. For the reasons set forth below, we deem Bruno's submission to constitute a motion for relief from a final Commission decision on the basis of newly discovered evidence, and we deny the motion.

The factual and procedural background of this case relevant to Bruno's motion may be summarized briefly. On April 4, 1988, Bruno filed a complaint with the Commission alleging that on December 12, 1983, he had been discriminatorily discharged by Cyprus Plateau Mining

Corporation ("Cyprus Plateau") in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). Bruno filed the complaint pro se and pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), following a determination by the Department of Labor's Mine Safety and Health Administration ("MSHA") that Bruno had not been discriminatorily discharged. 1/ The complaint alleges that in being fired, ostensibly for fighting, Bruno was subjected to illegally disparate treatment. The case was scheduled to be heard before Judge Morris on September 13, 1988. On September 8, 1988, the judge received an entry of appearance from counsel for Bruno, in which counsel specifically requested the judge to note that "complainant does not request a continuance of this matter." Appearance of Counsel (September 6, 1988) (emphasis in original).

Following the hearing and the submission of briefs by the parties, Judge Morris issued his decision dismissing Bruno's complaint. The judge decided the case on alternative grounds. First, he held that the delay by Bruno of over four years in filing the complaint materially prejudiced Cyprus Plateau. Therefore, the judge concluded that Bruno's complaint was not timely filed and had to be dismissed. 10 FMSHRC at 1652. Second, the judge held that although Bruno had engaged in protected activity in attempting to correct float coal dust conditions, his discharge by Cyprus Plateau, even if partly motivated by the protected activity, would have occurred in any event. In reaching this determination, the judge analyzed the evidence regarding management's knowledge of Bruno's protected activity, the coincidence in time between that activity and the adverse action, and disparate treatment. The judge concluded that Cyprus Plateau was motivated by Bruno's unprotected activity of fighting and would have fired him in any event for the fighting alone. 10 FMSHRC at 1655-59.

As part of the evidence regarding disparate treatment, the judge reviewed the evidence regarding fights at the mine. The judge credited Cyprus Plateau's evidence that Bruno was not the subject of disparate treatment and noted that Stan Warnick, Cyprus Plateau's Manager of Human Resources, testified that two other employees besides Bruno, Buddy Weaby and Dennis Craig, had been fired for fighting. 10 FMSHRC at 1658. The judge also noted that the fight for which Bruno was terminated was not Bruno's first "incident" and that Bruno had previously pushed another employee, an incident discussed during Bruno's termination interview. 10 FMSHRC at 1659.

On December 27, 1988, Bruno, by counsel, filed with the Commission a petition for discretionary review. On January 9, 1988, the Commission issued a Notice stating that because no two members of the Commission had voted to grant Bruno's petition, the judge's decision had become a final decision of the Commission 40 days after its issuance, i.e., on January 8, 1989. 30 U.S.C. § 823(d)(1).

1/ Bruno complained to MSHA of the alleged discrimination on January 19, 1988. On March 19, 1988, MSHA advised Bruno of its determination that a violation of section 105(c) of the Act had not occurred. See 30 U.S.C. §§ 815(c)(2) & (3).

On January 19, 1989, Bruno's counsel informed the Commission of his withdrawal from the case. In his letter of January 18, 1989, to Judge Morris, Bruno stated that he was without counsel and requested, in effect, that the judge reopen the case and reconsider the decision, because of new evidence that "clearly shows ... disparate treatment" and because of certain discrepancies that Bruno had discovered in the testimony of Warnick. Bruno letter 1 (January 18, 1989)("B.L.").

In his letter, Bruno asserts that Warnick's testimony that Weaby and Craig were fired for fighting, testimony credited by the judge, was not true. Bruno contends that a recently obtained statement from Gary McDonald, a retired company official, who was "responsible for the decision concerning the fight involving ... Weaby," establishes that Weaby quit and left the company for his own reasons and was not disciplined for fighting. B.L. 1-2. In addition, Bruno asserts that a statement from Craig, whom Bruno had "also found," establishes that Craig was fired for leaving the mine without permission, not for fighting. B.L. 3. (Bruno includes in his letter his own purported quotation of Weaby's and Craig's statements in non-affidavit form.) Finally, Bruno's submission argues that there are differences in the material facts as sworn to by Warnick in interrogatories from an earlier state trial involving Bruno's discharge and in Warnick's testimony before Judge Morris. B.L. 4-6. 2/

By letter dated January 26, 1989, Judge Morris informed Bruno that he no longer had jurisdiction and that "the matters raised in your letter ... should be presented to the ... Commission." ALJ letter to Bruno (January 26, 1989). Judge Morris forwarded to the Commission Bruno's submission and a copy of his letter to Bruno.

As noted above, Judge Morris' decision became final on January 8, 1989, 40 days after the decision was issued and because no two Commissioners had voted to grant review. We may consider the merits of Bruno's submission only if we construe it as a request for relief from a final Commission decision. See 29 C.F.R. § 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. P. 60(b) (relief from judgment or order). See generally M.M. Sundt Construction Co., 8 FMSHRC 1269, 1270 (September 1986); Henry L. Wadding v. Tunnelton Mining Co., 8 FMSHRC 1142, 1142-43 (August 1986).

A decision on a motion for relief from a final judgment calls for "a delicate adjustment between the desirability of finality and the prevention of injustice." In re Casco Chemical Co., 335 F.2d 645, 651 (5th Cir. 1964). In general, once a case has been considered on the merits, the pendulum swings in the interest of finality. See 11 C. Wright, A. Miller, Federal Practice and Procedure § 2857 (1973).

2/ Bruno's discharge generated two actions. First, Bruno sued Cyprus Plateau in the State of Utah District Court seeking reinstatement. Bruno's claim was denied by the trial court and Bruno lost on appeal. Later, Bruno filed the subject discrimination complaint with the Commission. See 10 FMSHRC at 1651.

Fed. R. Civ. P. 60(b)(2) provides: "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." (Fed. R. Civ. P. 59(b) provides that a motion for a new trial must be served no later than 10 days after the entry of the judgment.)

In order to prevail upon a Rule 60(b)(2) motion, the movant must establish that the newly discovered evidence was in existence at the time of the trial but not in the movant's possession; that even by exercising due diligence, the movant could not have obtained the evidence at the time of trial or in time to move for a new trial under Rule 59(b); and that the evidence is not merely cumulative and would change the result. See generally C. Wright, supra, at § 2859.

Bruno's submission falls short of these criteria in several respects. While Bruno's submission has been filed within a "reasonable time" of the finality point of Judge Morris' decision, and the "new evidence" upon which he relies (the two "statements" and discrepancies in Warnick's testimony) was in discoverable existence at the time of the hearing before Judge Morris, Bruno has failed to satisfy the "due diligence" and "affecting outcome" tests.

Concerning due diligence, Bruno has made no showing why McDonald's and Craig's purported testimony regarding disparate treatment could not have been discovered and used at the hearing had Bruno exercised due diligence. Bruno states that he discovered McDonald's testimony "just recently" when he "decided to go over to [McDonald's] house." B.L. 1. Of Craig, Bruno only states that he has "also found" him. Id. In short, Bruno has not established that, by the exercise of due diligence, he could not have obtained McDonald's and Craig's testimony in time for the original proceeding. See 7 J. Moore, W. Taggart & J. Wicher, Moore's Federal Practice Par. 60.29 (2d ed. 1985). We note also that Bruno obtained an attorney prior to the hearing, that his attorney specifically waived a continuance, and that he was represented by counsel at trial. Similarly, Warnick's interrogatories presumptively were available to Bruno prior to trial and thus were known to Bruno. Even so, they do not represent newly discovered evidence but are rather impeaching evidence, and thus fall outside the scope of a Rule 60(b)(2) motion. See, e.g., Harris v. Illinois California Express, Inc., 687 F.2d 1361, 1375 (10th Cir. 1982).

Further, Bruno has made no showing that McDonald's and Craig's purported testimony, even if proven, would change the outcome of the case. Their statements indicate only that each was involved in a single incident of fighting while, as the judge noted, Bruno's termination was based in part on his involvement in past incidents, including a shoving incident. 10 FMSHRC at 1659.

Disparate treatment is but one factor bearing upon an employer's motivation. The judge also noted that there was no showing that those personnel who fired Bruno knew of his protected activity in attempting to correct float coal dust conditions and that there was no coincidence

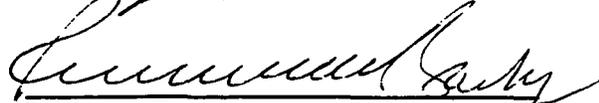
in time between Bruno's protected activity and his discharge. 10 FMSHRC at 1655. Thus, even if all of the evidence upon which Bruno now relies were assumed arguendo to be true, it would fall short of establishing the probability that the substantive merits of the decision reached by the judge would be affected. Cf. Wadding v. Tunnelton Mining, 8 FMSHRC at 1143 (failure to adduce clear and convincing evidence of fraud under Rule 60(b)(3)). In the final analysis, and upon review of the record, we regard Bruno's evidence as essentially cumulative of other evidence in his favor that was presented at trial.

Second, none of Bruno's "newly discovered evidence" affects the first basis for the judge's decision -- that Bruno's complaint was filed with prejudicial untimeliness. Accordingly, even were we to agree in all respects with Bruno, the outcome of the judge's decision would not be changed. Bruno's complaint would still be subject to dismissal on the basis of the complaint's untimeliness.

Accordingly, Bruno's request for reconsideration is denied.



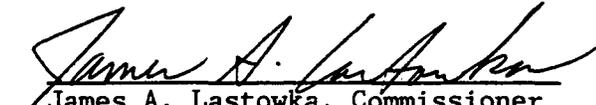
Ford B. Ford, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 1989

EMERY MINING CORPORATION :
and UTAH POWER AND LIGHT :
COMPANY :
 :
v. : Docket Nos. WEST 87-130-R, etc.
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
and :
 :
UNITED MINE WORKERS :
OF AMERICA (UMWA) :

BEFORE: Ford, Chairman; Backley, Doyle and Lastowka, Commissioners

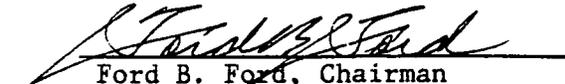
ORDER

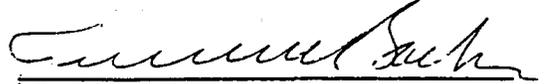
BY THE COMMISSION:

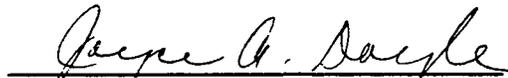
On January 10, 1989, we granted the petition for interlocutory review filed by the Secretary of Labor in this consolidated civil penalty and review proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). Our Direction for Review and Order was for the limited purpose of remanding this proceeding to the administrative law judge for a determination of whether, pursuant to Fed. R. Civ. P. 54(b), a certification of finality of his order of August 30, 1988, was appropriate. We held in abeyance our ruling on the Secretary's petition and retained jurisdiction pending the judge's determination on remand.

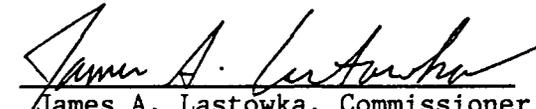
Following proceedings on remand, the judge issued an order on January 27, 1989, certifying the finality of his order of August 30, 1988. Any party aggrieved by the judge's August 30 order, as made final by his certification order, may file with the Commission a petition for discretionary review within the 30-day statutory period for seeking such review (30 U.S.C. § 823(d)(2)), which is deemed to have commenced running as of the judge's January 27, 1989 certification order.

Accordingly, the Secretary's petition for interlocutory review is dismissed, our direction for review is vacated, and this interlocutory proceeding is dismissed.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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February 8, 1989

SECRETARY OF LABOR, :
MINE SAFETY & HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. LAKE 88-67-M
 :
LINCOLN SAND AND GRAVEL COMPANY :

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), involves three citations issued to Lincoln Sand and Gravel Company ("Lincoln") alleging violations of mandatory safety standards. Following proper notice, a hearing on the merits was held in St. Louis, Missouri on July 25, 1988. Lincoln failed to appear at the hearing. In his decision issued December 8, 1988, Administrative Law Judge Roy J. Maurer determined that Lincoln violated the mandatory safety standards as alleged in the citations and assessed civil penalties totalling \$168. 10 FMSHRC 1679 (December 1988)(ALJ). We granted Lincoln's petition for discretionary review and stayed briefing. Upon consideration of the full record, we have determined that briefs are not necessary for the resolution of this case. For the reasons that follow, we affirm the judge's decision.

Lincoln is proceeding in this case without the benefit of counsel. In response to the Chief Administrative Law Judge's Order to Respondent to Show Cause why it failed to file an answer to the Secretary of Labor's Proposal for a Penalty, Lincoln replied, by letter mailed on June 2, 1988, that it had not received the Proposal for a Penalty and it requested a hearing. By notice of July 1, 1988, Judge Maurer set the hearing for 8:00 a.m., July 25, 1988, in St. Louis, Missouri. The record reveals that approximately one week prior to hearing, Lincoln, by telephone, requested a later hearing date. Tr. 3. The administrative law judge agreed to delay the hearing until 10:00 a.m. on the same date. Tr. 3; 10 FMSHRC at 1681. When Lincoln failed to appear by 10:30 a.m., the attorney representing the Secretary of Labor called Lincoln and was told by the office manager that no representative from Lincoln would be attending the hearing. Tr. 3-4; 10 FMSHRC at 1681. The Secretary presented evidence as to each citation and the hearing was closed at 11:15 a.m. The judge affirmed each citation in his written decision.

In its petition for discretionary review Lincoln first contends that Paul Orr, Vice-President of Lincoln, called Judge Maurer after receipt of the notice of hearing to request that the hearing be held in Lincoln, Illinois. Lincoln also alleges that Orr called the judge's office on the Wednesday or Thursday prior to the hearing and, in the judge's absence, informed the judge's secretary that he would not be able to attend the hearing and asked that the hearing be delayed. By implication, Lincoln argues that the judge's failure to grant these requests was unreasonable. We disagree. Lincoln did not request any particular hearing site or date in its June 2 written request for a hearing. Rule 51 of the Commission's Procedural Rules, 29 C.F.R. § 2700.51 provides:

All cases will be assigned a hearing site by order of the Judge, who shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

This Rule was derived from section 5(a) of the Administrative Procedure Act, 5 U.S.C. § 554(b), which states: "In fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties or their representatives." Judge Maurer, in accordance with Rule 51, reasonably set the hearing for St. Louis, Missouri, a city located less than 150 miles from the mine. Compare, Cut Slate, Incorporated, 1 FMSHRC 796 (1979) (administrative law judge abused his discretion by requiring a small quarry operator to attend a prehearing conference at a site about 450 miles from the operator's mine).

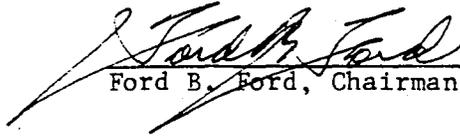
The notice of hearing setting forth the date, time and place of hearing was issued to Lincoln 24 days prior to the hearing date. See Procedural Rule 53, 29 C.F.R. § 2700.53. During his telephone conversation with Orr, the judge agreed, in response to Orr's request, to start the hearing two hours later on the scheduled hearing date. Tr. 3; 10 FMSHRC at 1681. Nothing in the record suggests that Orr objected to this resolution of his requests. Orr's alleged phone call to the judge's secretary requesting a further delay is not reflected in the record. */ In addition, Lincoln did not set forth any reasons to support the requested additional delay. For the foregoing reasons, we conclude that the judge complied with the requirements of the Mine Act and the Commission's Procedural Rules in setting this case for hearing.

Lincoln also challenges the judge's findings that it violated the mandatory safety standards alleged in the citations. We have reviewed the record and conclude that the judge's findings of violation are supported by

*/ We previously have noted "the risk of possible misunderstandings, conflicting interpretations, and differing recollections, resulting from ... telephonic [,rather than written,] communications...." Inverness Mining Co., 5 FMSHRC 1384, 1388 n. 3 (August 1983).

substantial evidence. 30 U.S.C. 823(d)(2)(A)(ii)(I). Lincoln makes other allegations in its petition for review that do not raise issues under the Mine Act and are not appropriately addressed in this decision.

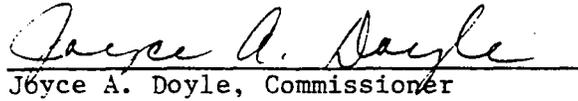
For the foregoing reasons, the judge's decision is affirmed.



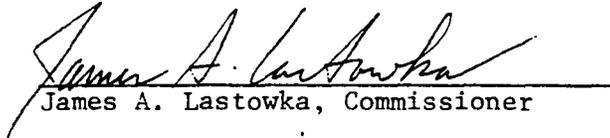
Ford B. Ford, Chairman



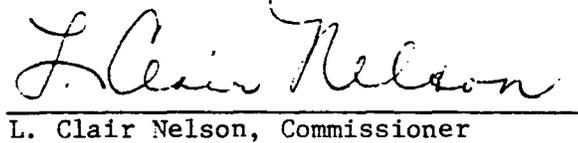
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. LAKE 86-67
 :
FREEMAN UNITED COAL MINING :
COMPANY :

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. (1982)("Mine Act"), the issue before us is whether Freeman United Coal Mining Company ("Freeman") violated 30 C.F.R. § 75.316 by failing to maintain an air velocity of at least 5,000 cubic feet per minute (cfm) at the end of a line curtain, as required by Freeman's approved ventilation system and methane and dust control plan ("ventilation plan"). 1/ Commission Administrative Law Judge John J. Morris held that the violation occurred as alleged and assessed a civil penalty of \$200 against Freeman.

1/ 30 C.F.R. § 75.316, a mandatory standard for underground coal mines, repeats section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and provides in part:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator.... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

9 FMSHRC 1678 (September 1987)(ALJ). For the reasons that follow, we reverse Judge Morris' decision.

Freeman's Orient No. 6 mine is an underground coal mine located in Waltonville, Illinois. On December 11, 1985, John Stritzel, a ventilation specialist and inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") performed a ventilation inspection at the mine. Stritzel was accompanied by Mark Eslinger, his supervisor, Larry Eubanks, the miners' representative, and Howard Hill, a ventilation engineer for Freeman. When the inspection party arrived at the last open crosscut between two rooms in an intake entry of the mine, the party did not proceed into one of the rooms because a continuous mining machine was loading a shuttle car at the working face. 2/

While waiting for the shuttle car to move, Stritzel examined the plastic ventilation line curtain that was installed across the intake entry and directing intake air to the face. He observed that the curtain was down in the corner of the room, causing a gap of approximately three feet in the curtain. Eslinger asked Stritzel "do you see that curtain.... It looks like a violation." Stritzel replied "it's not a violation till I check the air." Tr. 26.

After the shuttle car left the room, Stritzel, Eslinger, and Eubanks proceeded toward the working face. Stritzel told the operators of the continuous mining machine that he needed to take an air reading and, therefore, they should turn on the machine's scrubber. 3/ Stritzel testified that the ventilation plan requires a minimum air velocity of 5,000 cfm at the end of the line curtain and that he believed that an air reading taken without the scrubber operating would be inaccurately low.

The scrubber was started. At about the same time, the trailing cable of the offside shuttle car became entangled in the line curtain, tearing an 18 to 20 foot gap in it. 9 FMSHRC at 1684. Robert Newton, another shuttle car operator, heard the curtain tear and, after seeing the large gap, immediately prepared to rehang the curtain as he had been properly trained by Freeman. Tr. 97-98. As Stritzel was preparing to take the air reading at the end of the line curtain at the face, someone informed him that he would not get an accurate reading because, outby in the entry, the line curtain was being rehung by someone. Stritzel testified that he walked back from the face, into the room, and told someone not to hang the line curtain. A miner that Stritzel could not identify responded that he worried about the velocity of air in the section just as much as Stritzel did. Tr. 30. Stritzel stated that he

2/ A "room" is described as "space driven off an entry in which coal is produced." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 941 (1968).

3/ The scrubber, which helps to remove respirable dust from the air in the room, affects the air velocity by pulling approximately 1,000 cfm of air to the end of the line curtain.

answered the miner by stating that he had to take an air reading at the face before the curtain could be rehung. 9 FMSHRC at 1684, Tr. 30.

Newton testified that as he prepared to rehang the curtain, the inspector came up to him and directed him not to rehang it until Stritzel's air reading was completed. Tr. 98-99, 101-102. Newton testified that had he not been interrupted, it would have taken him about three or four minutes to rehang the curtain. Tr. 99-100.

Stritzel proceeded to take an air reading with an anemometer, a device that measures air velocity. Based upon the results of the air reading, Stritzel determined that the air velocity at the end of the line curtain was 1662 cfm. According to Stritzel, no more than three minutes elapsed between the time he ordered that the curtain not be rehung and his completion of the air velocity reading. Tr. 56-57. Stritzel informed Hill that the air velocity was not sufficient to comply with the mine's ventilation plan and that Freeman had violated section 75.316. Stritzel also found that the violation was caused by Freeman's unwarrantable failure to comply with the standard and significantly and substantially contributed to a mine safety hazard. Therefore, he issued an order pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 4/

Freeman's personnel immediately repaired, rehung, and repositioned the curtain. A second air measurement taken by Stritzel indicated an air velocity of over 5,800 cfm, and Stritzel terminated the order of withdrawal.

The Secretary proposed a civil penalty of \$950 for the violation and a hearing was held. Freeman argued that Stritzel's air measurement

4/ Section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), states in part:

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

Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), requires that an inspector issue a citation if he finds that a violation is "of such nature as could significantly and substantially contribute to a mine safety or health hazard" and is caused by the operator's "unwarrantable failure ... to comply," and that an order of withdrawal be issued if, during the same inspection or any subsequent inspection within 90 days after the issuance of such citation, he finds another "unwarrantable failure" violation.

did not establish a violation of the ventilation plan and that Stritzel had impermissibly interfered with the normal mining cycle at the Orient No. 6 mine when he directed Freeman's miner not to immediately repair the 20 foot gap in the line curtain.

The judge rejected Freeman's arguments. The judge concluded that although Freeman's witness testified that the three-foot gap in the line curtain would not have caused the air velocity to drop below 5,000 cfm, it was immaterial whether the inadequate velocity measured by the inspector was caused by a three-foot gap or a twenty-foot gap. 9 FMSHRC at 1684. He found the evidence uncontroverted that the air velocity measured 1662 cfm at the end of the line curtain and that a velocity of 5,000 cfm was required. Therefore, he held that the evidence established a violation of the ventilation plan and consequently of section 75.316. 9 FMSHRC at 1684. Regarding Freeman's argument that Stritzel had interfered with the mining cycle, the judge stated that it could not be considered part of any mining cycle for a shuttle car to tear down part of a line curtain. Id. Contrary to the inspector's findings, the judge held, however, that the violation was neither significant and substantial nor unwarrantable, and he lowered the civil penalty assessed to \$200. 9 FMSHRC at 1685-86.

We granted Freeman's petition for discretionary review. Freeman argues that the Secretary did not prove a violation of the standard, and we agree.

A ventilation plan is approved by the Secretary and adopted by the mine operator pursuant to section 75.316 and section 303(o) of the Mine Act. 30 U.S.C. § 863(o). Once the plan is approved and adopted its provisions are enforceable as mandatory standards. Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987); see also Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981). In an enforcement action before the Commission, the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition violated the provision. Jim Walter, 9 FMSHRC at 907.

The Secretary has failed to establish this latter requirement. There is no dispute that the ventilation plan for the Orient No. 6 mine provides for a minimum air velocity of 5,000 cfm at the end of the line curtain. The plan states:

The minimum air quantities or velocities to be employed, and the maximum distance ventilating devices will be maintained from the deepest point of face penetration, where coal is being cut, mined loaded or drilled for blasting are outlined below.

* * *

A blowing line curtain in conjunction with a ... scrubber may be used. The blowing line curtain will deliver a minimum of 5,000 cfm with the scrubber

operating. The inby end of the curtain will be maintained to within 25 feet of the face.

P. Ex. 1 at III. However, the plan itself does not suggest that failure to deliver the minimum air velocity at all times and in all circumstances necessarily results in a violation of the plan. Indeed, when the plan is read together with other relevant mandatory ventilation standards for underground coal mines, it is clear that in certain circumstances, including the unique factual circumstances presented here, a temporary interruption in the minimum air velocity delivered can occur without a violation of the Act resulting.

While minimum air quantity or velocity requirements of ventilation plans and mandatory safety standards provide an objective test by which the adequacy of a mine ventilation system can be evaluated, other mandatory ventilation standards recognize that the dynamics of the underground mining environment occasionally interfere with attainment of constant minimum quantity or velocity levels. The other standards recognize that disruptions in mine ventilation inevitably occur and that the key to effective compliance lies in expeditiously taking those steps necessary to restore air quantity or velocity to the required level.

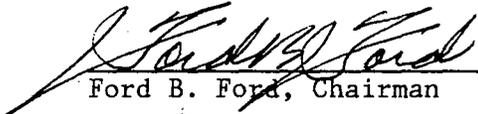
For example, it is obvious that an unplanned power outage and the temporary shutdown of the main fan will reduce the quantity and velocity of air delivered to the face areas. Such a contingency is anticipated in the mandatory standards, however, and procedures for the restoration of air and the steps to be taken if ventilation cannot be restored within a reasonable time are outlined accordingly. See 30 C.F.R. §§ 75.300-3(a)(2), 75.321, and 75.321-1.

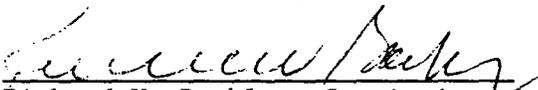
Similarly, and directly on point with the situation presented in this case, there are mandatory safety standards that anticipate the possible diminution in ventilation caused by damaged or downed line brattice. 30 C.F.R. § 75.302, a standard drawn verbatim from the statute, 30 U.S.C. 863(c), requires that "[p]roperly installed and adequately maintained line brattice ... shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation.... When damaged by falls or otherwise, such brattice ... shall be repaired immediately." (Emphasis added.) Furthermore, 30 C.F.R. § 75.302-2 provides that, "[w]hen the line brattice ... is damaged to an extent that ventilation of the working face is inadequate, production activities in the working place shall cease until necessary repairs are made and adequate ventilation restored." These standards recognize that line curtains may be damaged or torn down and that ventilation at the working face may, as a result, be diminished. They also make clear, however, that absent any unusual circumstances, it is the operator's failure to take immediate steps to repair or replace the downed line brattice that constitutes a violation.

Here, the second shuttle car operator stopped his machine and, consistent with the dictates of section 75.302, immediately began rehanging the downed line brattice. For purposes of section 75.302-2, production activities had ceased, since his was the next shuttle car to be loaded at the continuous miner and he would not have returned to the

loading area until he had repaired the 20 foot gap. Thus, compliance with section 75.302-2 would have been achieved but for the inspector's order, mistaken as it may have been, to cease rehangng the line brattice. Had not the inspector intervened, the minimum air velocity would have been restored almost immediately. 5/ At the very least, the inspector's unwitting interference with Freeman's abatement skewed the results of the air measurement so as to render it invalid for purposes of establishing a violation insofar as the three-foot gap initially observed by the inspector is concerned. Under these circumstances we conclude that Freeman did not violate its ventilation plan.

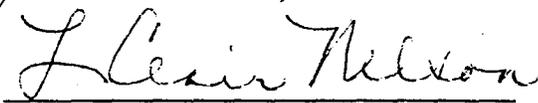
Accordingly, we reverse the decision of the administrative law judge.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

5/ We note, as did the judge, that Freeman's expert testified that the three foot gap in the line curtain would not have resulted in a drop in the air velocity below 5,000 cfm. 9 FMSHRC at 1684.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
On behalf of BRYAN PACK : Docket No. KENT 86-9-D
 :
v. :
 :
MAYNARD BRANCH DREDGING COMPANY :
and ROGER KIRK :

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

DECISION

BY: Ford, Chairman; Doyle and Nelson, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982) ("Mine Act"), Complainant, Bryan Pack alleges a violation by Maynard Branch Dredging Company ("Maynard Branch") and its President, Roger Kirk, of section 105(c) of the Mine Act. Commission Administrative Law Judge William Fauver held that Maynard Branch Dredging Company and its president, Roger Kirk, did not violate the Mine Act in discharging Pack. 9 FMSHRC 1474 (August 1987). While the judge found that Pack had engaged in protected activity by reporting a safety violation to MSHA inspectors, he went on to find that Pack's failure to report the conditions which created the violation to a supervisor or to his co-workers constituted misconduct of sufficient seriousness that Respondents would have discharged him on that ground alone even if he had not complained to the inspectors. 9 FMSHRC at 1476. We granted the Secretary of Labor's petition for discretionary review. For the reasons set forth below, we affirm the judge's decision as correct both as a matter of law and as supported by substantial evidence.

At the time of the events giving rise to this proceeding, Maynard Branch operated a coal dredging and preparation facility in Lawrence County, Kentucky. The dredging operation extracted coal from a river bottom by means of a suction hose extending from a dredging platform. The platform floated atop an assembly of empty oil drums. Movement of the platform back and forth across the river was accomplished by means of cables and winches situated on either shore. Material dredged from the river bottom was pumped through a pipeline to a conveyor system that included a series of shaker screens where the coal was

separated from silt, sand and other refuse. Tr. 23-28. The dredging and preparation activity employed five to seven miners and produced about 9,000 tons of coal per year. Tr. 24, 9 FMSHRC at 1474.

Complainant Pack was employed by Maynard Branch as a night watchman and fill-in laborer for approximately one and one-half years prior to his discharge. Working alone from 11:00 p.m. to 7:00 a.m., he was responsible for security at the facility. He was also responsible for seeing that the dredging platform remained afloat and for cleaning up spillage around the conveyor and shaker screens. Tr. 20, 21, 45, 47.

On May 15, 1984, prior to the start of his shift, Pack testified that he was asked by his brother, Jeffrey Pack, a former employee of Maynard Branch, whether dynamite was still being stored in the glove compartment of a school bus being used as an office and storage facility at the dredging site. Tr. 32. Upon arriving at the site Pack, who had been unaware of the presence of the dynamite on the bus, examined the glove compartment and discovered dynamite and detonators. 1/ Concerned for his safety, he carefully closed the glove compartment and spent the remainder of the shift in his own truck. 9 FMSHRC at 1475.

During and after his shift he told no supervisor of his discovery even though the company policy required him to notify management of any hazardous conditions discovered at the dredging site. 9 FMSHRC at 1475. 2/ Nor did Pack inform miners coming on shift the morning of May 16, 1984 of his discovery of the dynamite. Id. Instead, he left the site, picked up his father, and drove to a nearby town. Id.

As they drove past a restaurant parking lot, Pack's father recognized a car belonging to an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Pack thereupon located two inspectors and informed them of his discovery of the dynamite. One of the inspectors, Baron Lawson, proceeded to the dredging site where he informed one of the foremen, James Adkins, that he had received a complaint regarding improper storage of explosives. Upon inspection of the glove compartment, Inspector Lawson discovered two and one-half sticks of dynamite and two detonators or blasting caps. Tr. 13. He issued a citation to Maynard Branch charging a violation of 30 C.F.R. 77.1301(a) dealing with the storage of explosives. 3/

1/ The testimony establishes that at least some of the dynamite was left over from a blasting operation performed during the previous winter when it became necessary to blast river ice away from the dredging platform. Tr. 94. There is no evidence in the record as to how the detonators came to be stored in the glove compartment.

2/ One of the foremen, Rocky Fitzpatrick, lived less than a mile from the dredging operation. Tr. 65. On a previous occasion Pack had gone to Mr. Fitzpatrick's house to notify him of flooding conditions that damaged the pump on the dredging platform. Tr. 142.

3/ Maynard Branch did not contest the citation and paid the penalty assessed by the Secretary. 9 FMSHRC at 1475.

During the inspection Kirk arrived on the scene and asked the inspector who had complained about the explosives. The inspector indicated that he did not know the complainant by name but gave Kirk a physical description of Pack. Kirk responded that "[w]e know who it is," believing that the inspector had described Pack. Once the inspector left the site, Kirk directed Foreman Fitzpatrick to fire Pack. Fitzpatrick fired Pack that afternoon. 9 FMSHRC 1476.

Thereafter, Pack confronted Inspector Lawson regarding Lawson's description of Pack to Kirk. The inspector denied having described Pack in detail and suggested that Pack file a complaint of discrimination. Tr. 39. Pack's complaint to the Secretary was filed May 29, 1984. After an investigation the Secretary filed her complaint on Pack's behalf with this Commission on October 17, 1987. 4/

In his decision below the judge held that the Secretary had established a prima facie case of discrimination. Pack had engaged in protected activity by reporting the illegally stored explosives to the MSHA inspectors and the respondents were motivated at least in part by that protected activity when they discharged him. 9 FMSHRC at 1476. The judge went on to hold, however, that Maynard Branch and Kirk had rebutted the prima facie case by establishing with "convincing proof" that they were motivated more by what they considered to be the serious misconduct of Pack in neglecting to carry out his duties as a security guard, i.e., in failing to report a dangerous situation to a foreman or to the oncoming crew. Id.

On review the Secretary urges reversal of the judge's decision on the grounds that it is legally erroneous and that certain of its factual conclusions are not supported by substantial evidence. The Secretary argues that the judge's decision, if not reversed, will have a chilling effect on the right of miners to report dangerous conditions or safety and health violations to MSHA. Moreover, the Secretary interprets the judge's decision to require that miners make their complaints first to the operator and only then to the Secretary, thus imperiling the anonymity protections afforded miner informants under section 103(g) of the Mine Act, 30 U.S.C. 813(g). 5/

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

4/ At the hearing before the judge, respondents moved to dismiss the complaint as untimely filed, which motion the judge took under advisement pending post-hearing briefing on the issue. Tr. 91. Although the question was briefed, the judge's decision contains no ruling on the matter. In any event, the timeliness issue is not before us on review.

5/ It should be noted that the confidentiality of miner informants is also protected by this Commission in its procedural rules. 29 C.F.R. § 2700.59.

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the unprotected activity. Pasula, supra; Robinette supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-6 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving a nearly identical test under the National Labor Relations Act).

The affirmative defense referred to above is involved in this case. On that issue the judge held that Maynard Branch and Kirk had rebutted the prima facie case by establishing with "convincing proof" that they were motivated by the serious unprotected misconduct of Pack in neglecting his duties as a security guard, i.e., in failing to report a dangerous situation to a foreman or to the oncoming crew, and would have discharged him on that ground alone. 9 FMSHRC 1476.

At the outset of his opinion the judge stated that he made his findings of fact based upon his consideration of the hearing evidence and the record as a whole. 9 FMSHRC at 1474. Among those findings was the judge's determination that Pack's failure to report the presence of the dynamite violated company procedure. Although the Secretary argues otherwise, we find sufficient support in the record for the judge's determination that Maynard Branch did have an established policy requiring that safety and health hazards be reported to the operator's supervisors. Jeffrey Kinser, James Atkins and Rocky Fitzpatrick, all foremen while Pack was employed at Maynard Branch, each testified that it was the operator's policy that safety violations and problems were to be reported by an employee to his immediate supervisor. Tr. 98, 99, 117, 143, 144, 152. Kirk, testifying in his capacity as part owner, affirmed that this was company policy. Tr. 178. Fitzpatrick, who was Pack's supervisor, testified that he told Pack "to inform [him] day or night, weekend, whenever [there was a problem]." Tr. 143, 144.

The Secretary conceded that the record contains statements by members of Maynard Branch's management, including Roger Kirk, that there was a policy requiring employees to report dangerous conditions, but protests that these statements are "unsupported." Sec. Br. at 13. The judge, in his role as fact finder, determined that a preponderance of the reliable and probative evidence established that there was such a company reporting policy. Statements of management officials that there was such a policy constitute substantial evidence where the judge determines, as he apparently did here, that those statements were reliable.

We also note that it is commonly understood that security guards have the duty to report breaches of security to their employers and that the presence of improperly stored dynamite undeniably constitutes such a reportable breach. Even Pack, while unable to recall whether a reporting policy was in effect (Tr. 52), nevertheless testified that the job of a security guard is to report safety violations. Tr. 68.

In response to the Secretary's arguments that Pack didn't appreciate the inherent hazard of the dynamite's storage in the glove box until after he reported it to MSHA, 6/ that everyone already knew the dynamite was stored there, and that Maynard Branch's failure to discipline an employee who stored part of the dynamite in the glove box demonstrates that Pack was really fired solely for reporting the matter to MSHA, it must simply be said again that the judge, after reviewing all of the reliable and probative evidence, did not accept those arguments and consequently did not include them among his findings of fact.

The Secretary implicitly raises the issue of whether Pack received disparate treatment in being discharged over the incident since the individual responsible for placing one of the sticks of dynamite in the glove compartment, Fitzpatrick, was not similarly disciplined. 7/ Sec. Br. 13. The judge, however, credited Kirk's statement that the dynamite incident was the "straw that broke the camel's back" with respect to Pack's work record and that, prior to Pack's failure to report the serious safety and security problem, Kirk had been asked to fire Pack for other incidents. 9 FMSHRC at 1476. The record contains testimony by Kirk and others that Pack's inattention a week or two earlier had resulted in the capsizing of the barge platform and severe damage to the dredging pump. At that time Atkins had urged Kirk to fire Pack. Tr. 116, 129, 143.

The Secretary also argues that when a miner engages in protected activity by reporting a dangerous condition to MSHA, such action by the miner insulates the individual from being discharged for failing to also report that condition to his foreman or co-workers. Consequently, according to the Secretary, operators may not impose a policy which requires a miner who makes a safety complaint to MSHA to also notify the operator of the complaint. Pointing to section 105(c)'s proscription that miners shall not suffer adverse action for making a complaint under the Mine Act, the Secretary asserts that Pack was discharged for doing exactly that. The Secretary believes that, if not reversed, the judge's decision will have a chilling effect on the right of miners to report dangerous conditions or safety and health violations to MSHA. Moreover, the Secretary interprets the judge's decision to require that miners must make their complaints first to the operator and only then to the Secretary, thus imperiling the anonymity protections afforded miner informants under section 103(g) of the Mine Act, 30 U.S.C. 813(g).

It is important to point out what did and did not happen here. Maynard Branch did not have a policy that prohibited miners from reporting dangerous conditions to MSHA, a policy that would clearly be prohibited by the Mine Act. Nor did Maynard Branch have a policy that required miners to notify the company

6/ Pack's recognition of the danger posed by the improperly stored dynamite and blasting caps is signified by his conduct in carefully closing the glove box and spending the shift away from the bus. 9 FMSHRC 1475, Finding of Fact No. 4.

7/ The record reflects that foremen Fitzpatrick and Atkins and a Mr. Kinser, the blaster who oversaw the ice clearing activity, were orally reprimanded by Kirk. Tr. 90.

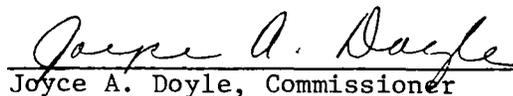
prior to contacting MSHA. The company policy only required employees to report dangerous conditions to the company, and contained no instructions or prohibitions as to employees' actions vis-a-vis MSHA. The facts show that, upon finding the dynamite, Pack failed to perform his job responsibility at any time and then, by fortuitous circumstances, reported the condition to MSHA. Pack's failure to perform the essence of his job, that of reporting security breaches, exposed other miners to the risk of injury, and it was that breach that cost him his job. The specter raised by the Secretary of miners being intimidated from exercising their rights under sections 103(g) or 105(c) of the Mine Act simply is not presented by this case.

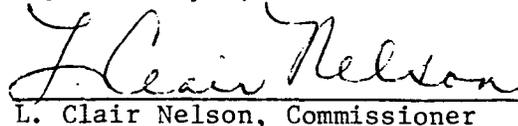
Moreover, the Secretary's position fails to take into account an operator's right to require the reporting of dangerous conditions. It is beyond dispute that a mine operator has the right to hire individuals whose job duties include the reporting of dangerous conditions. The Mine Act itself recognizes the importance of such an arrangement. While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA. This is particularly true where the miner's very job responsibilities, by definition, include the duty to report unsafe conditions to the operator. The Secretary's position would create other untenable situations. For example, it would prohibit an operator from disciplining a pre-shift examiner who, rather than reporting dangerous conditions to the operator, chose instead to report to MSHA, while the miners on the incoming shift entered the mine unaware of the dangers. We do not believe this is what anti-discrimination provisions of the Mine Act contemplated.

As the judge found, Pack was a security guard who engaged in serious misconduct by failing to perform an essential duty: reporting to the mine foreman or oncoming crew his discovery of a very dangerous situation which jeopardized their safety. It was for this reason that the judge determined that Maynard Branch and Kirk, while motivated in part to discharge Pack for reporting the dangerous condition to MSHA, were also motivated by Pack's egregious failure to perform his job, and that, whether he reported to MSHA or not, Pack would have been fired for this misconduct.

We find there is substantial evidence in the record of Pack's dereliction of those duties inherent in his position as security guard. That evidence supports the judge's conclusion that Pack would have been discharged for that misconduct alone. Accordingly, we affirm the judge's decision dismissing Pack's complaint.


Ford B. Ford, Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Backley concurring in part and dissenting in part.

The administrative law judge concluded that Bryan Pack engaged in a protected activity by notifying MSHA of a dangerous safety violation, and that Respondent was motivated at least in part by such protected activity in discharging him. I agree. The administrative law judge also found that:

the seriousness of Pack's misconduct as a security guard - in discovering a very dangerous situation and failing to report it to the foreman or oncoming crew - jeopardized their safety . . .

9 FMSHRC 1476

Again, I agree. Moreover I join the majority in finding ... "substantial evidence in the record of Pack's dereliction of those duties inherent in his position as a security guard " Slip op. at 6. Pack's failure to warn oncoming crew members of the danger was especially egregious.

The Secretary however argues otherwise. The Secretary states that "the judge in effect has ruled that an operator may require miners to notify the company of any complaints made to MSHA." The Secretary argues that such a request "would severely chill miners' exercise of their statutory rights" and "vitiates many of the protections of the Mine Act..." Sec. Br. at 6. Elsewhere the Secretary states, "even where a miner believes that an imminent danger exists Section 103(g) does not require the miner to report that condition to the operator..." Sec. Br. at 7.

I find the Secretary's position on this issue to be perverse. The Secretary apparently condones the manner in which Mr. Pack acquitted himself - leaving the mine knowing that a dangerous condition existed, yet failing to warn oncoming fellow workers. In her zeal to find a way to prevail in this case, the Secretary seems to be willing to turn a blind eye toward the fundamental goal of the Act - to ensure that every miner does all that he can to make the work environment safe. In this regard, Pack failed.

To attempt to dignify Pack's conduct by invoking statutory reporting rights is irresponsible. There is no conflict of rights in this case and the judge's ruling on the matter creates no conflict. Mr. Pack had the right to anonymously make a safety complaint to MSHA, and he did so in this case. 1/ However, because of the exigencies of this particular

1/ His identity may have remained unknown to Respondent Roger Kirk but for the astounding fact that MSHA inspector Bryan Wilson Lawson provided Kirk with a physical identification of Pack.
Tr. 15

situation, Mr. Pack had, in my opinion, a fundamental obligation to first forewarn his fellow workers of the safety hazard before leaving the mine. On this point the Secretary quibbles that no such company policy may have existed and that "the effect of Maynard Branch's reporting requirement is to place an impermissible burden on miners making safety complaints." Sec. Br. at 12. This myopic view of the facts of this case is disturbing. More significantly, the question to be posed is what type of burden was placed upon the safety of the crew who were not properly warned of the hazard known by Mr. Pack?

Accordingly, I concur with the majority regarding Pack's duty and his failure to fulfill that duty. I would also affirm the administrative law judge's conclusion that the Secretary made a prima facie case of discrimination. 9 FMSHRC 1476

The administrative law judge concluded that:

Respondents rebutted the prima facie case by convincing proof that Respondents were motivated by serious unprotected misconduct of the employee and would have discharged him on that ground alone even if he had not complained to the inspectors.

9 FMSHRC 1476

The majority has affirmed this conclusion. I cannot agree.

A review of the record, which of course includes the written decision, does not persuade me that Respondents' motivation went beyond pure retaliation for Pack's reporting of the dangerous condition to MSHA. The record contains evidence confirming the retaliatory motivation, including damaging admissions by Roger Kirk, President and part owner, (Tr. 178) and foreman Rocky Fitzpatrick. Tr. 158, 164. That evidence, however, is not the basis of my dissent.

Elsewhere in the record we learn that Fitzpatrick admitted placing a stick of dynamite in the subject bus (Tr. 140) and further that he informed no one of that dangerous condition. Tr. 141, 156-157. The record also discloses that Kirk responded to Fitzpatrick's conduct by merely advising him "not to let it happen again" Tr. 190.

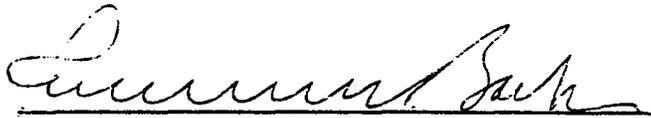
While I understand that legitimate reasons may exist within this record which might reconcile the disparate treatment accorded Pack and Fitzpatrick, I am not inclined, as is the majority, to naively conclude that unarticulated findings of fact equate to rejection of arguments. Slip op. at 5. Our Rule 65(a), 29 C.F.R. 2700.65(a) and the APA, 5 U.S.C. Sec. 557(c) both require that all material issues of fact, law, or discretion be specifically addressed in the decision. Unfortunately the decision in this case contains no reference to the above-noted evidence.

In this case, the entire decision turns on whether respondents would have discharged Pack for his unprotected activity alone. In attempting to resolve that issue, nothing could be more material than record evidence which establishes that a contemporaneous violation of the very same company policy by another, who did not call MSHA, resulted in no discipline. Rarely in discrimination cases do we have the opportunity to so clearly measure potential disparate treatment. Ironically the decision in this case contains no such analysis.

The absence of such an analysis is particularly significant because Fitzpatrick's conduct was, by any measure, far more egregious than Pack's. Fitzpatrick created a dangerous safety hazard; Fitzpatrick failed to warn the crew of the danger for an extended period of time; and Fitzpatrick, as foreman, had a high degree of duty and responsibility for the safety of the entire crew....a duty which was at least as high as the duty to which Pack was charged as a security guard.

Consequently, in the absence of any findings or analysis, Respondents' disparate reaction to Fitzpatrick's breach of duty severely undercuts the administrative law judge's conclusion that Pack would have been discharged solely for his unprotected activity.

Accordingly, I would remand, and direct the administrative law judge to consider and discuss the above-referenced evidence regarding disparate treatment, and to determine, in light thereof, whether Pack's unprotected activity alone was the motivation for discharge.


RICHARD V. BACKLEY, Commissioner

Commissioner Lastowka, dissenting:

Section 103(g) of the Mine Act provides to miners the right to report to the Secretary of Labor the existence of hazardous conditions at a mine. 30 U.S.C. 813(g). The Secretary is required to respond to such reports by conducting a special inspection "as soon as possible" to determine if a danger exists. In order to encourage miners to report dangerous conditions, thereby enlisting their aid in the attempt to make mining a less hazardous occupation, miners are granted anonymity in filing a safety complaint. Id. Section 105(c) of the Mine Act further encourages and protects the reporting of violations by prohibiting a mine operator from retaliating against a miner "because such miner ... has filed or made a complaint under or related to this Act...." 30 U.S.C. 815(c)(1).

In the present case, Bryan Pack discovered dynamite and blasting caps stored in the glove compartment of a school bus used as an office at a surface mine site operated by Maynard Branch Dredging Company. Pack reported this condition to a Mine Safety and Health Administration (MSHA) inspector. The inspector promptly proceeded to the mine where he informed the foreman of the complaint. Upon opening the glove compartment, the improperly stored blasting materials were observed and removed. The mine operator was charged with a violation of 30 C.F.R. 77.1301(a), a mandatory safety standard prohibiting improper storage of explosives. Maynard Branch did not contest the violation and paid a civil penalty.

Up to this point, the statutory scheme for encouraging and protecting miner reports of unsafe conditions would appear to be running its intended course. A series of errors by the MSHA inspector, the administrative law judge and now a majority of this Commission, however, have served to vitiate the very protection that Congress intended to provide to miners like Pack who take the initiative to report safety and health hazards. As a direct consequence of his report to the MSHA inspector concerning the improperly stored explosives, Pack was fired. In my opinion, the majority's upholding of this result on a substantial evidence basis is erroneous and far afield from a proper implementation of section 105(c). Accordingly, I must dissent.

The error by the MSHA inspector may not be of controlling importance at this stage of this proceeding, but nonetheless is deserving of comment if only to underscore its gravity and dissuade its repetition. In this regard, the inspector's mistake and its consequences are succinctly set forth in the judge's findings of fact:

9. Respondent Roger Kirk is the president of the company, and owns one-third interest in the business. He personally supervised the dredging facility. Kirk asked the inspector for the name of the person who had made the complaint about the dynamite. The inspector told him he did not get his name, but described him. Kirk recognized the description very well and stated, "We know who it is." Kirk believed that the complainant was Bryan Pack.

10. After the inspector left the dredge, Kirk told the foreman, Rocky Fitzpatrick, to fire Bryan Pack.

9 FMSHRC at 1475-76.

The inspector's transgression is apparent. The Secretary concedes this and represents that the inspector has been reprimanded for identifying Pack to the company. Sec. Br. at 6 n.4. Perhaps as to this inspector a reprimand is sufficient. Given the fundamental nature and longstanding history of the miners' right that was compromised, however, this discipline could be viewed as being charitable. In light of this incident and the serious adverse impact on the miners who must bear the brunt of such mistakes, it may behoove the Secretary to consider the need for a general reinstruction of her inspectorate concerning the importance of strict adherence to the guarantee of anonymity Congress gave to miners who report safety violations to the government.

Of greater moment are the factual and legal errors committed by the administrative law judge and the majority that control the outcome of this proceeding. As discussed below, I believe that under a correct reading of the record and a proper application of the law, Pack established a violation of section 105(c) and the judge's contrary conclusion must be reversed.

The administrative law judge found that Pack had engaged in protected activity by reporting the improperly stored dynamite to the Secretary. He further found that Maynard Branch was motivated in part by such activity in discharging Pack. Thus, the judge concluded that a prima facie case of discrimination had been established. Nevertheless, the judge dismissed the complaint based on his further finding that the company had presented "convincing proof" that it was "motivated by serious unprotected misconduct of [Pack] and would have discharged him on that ground alone even if he had not complained to the inspectors." 9 FMSHRC at 1476. The Secretary challenges this finding of the judge as lacking substantial evidentiary support. I must agree.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion". Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Measured against this standard, the judge's finding that Maynard Branch's firing of Pack was motivated by serious, unprotected misconduct fails. In fact, to the extent that there is testimony in the record in support of the judge's conclusion, I believe that the totality of the record nevertheless reveals that the misconduct-based rationale for Pack's firing constitutes nothing more than a plain and simple pretext.

The "serious unprotected misconduct" found to justify Pack's firing is the fact that he did not tell anyone at the work site about his discovery prior to his reporting it to the MSHA inspector. The rationale for labelling Pack's failure to communicate his discovery to the operator as misconduct appears to be twofold. First, because Pack was a security guard proper performance of his job required that he immediately tell his superiors what he had found. Second, given the hazard posed by the condition that he had observed, his failure to notify the operator prolonged the hazard to his co-workers thereby justifying removal of his report to MSHA from the cloak of protected activity. These theories of misconduct raise an interesting question concerning whether a miner's right to report hazards to the Secretary should be weighed against the hazard posed to co-workers by any delay in the

reporting of the hazard to the mine operator. Whatever merit these theories may have in the abstract, however, measured against the facts of record in the present case their appeal proves purely superficial.

Maynard Branch is not a large operation with a sophisticated operating structure; it employed only 5 to 7 workers at its river dredging site. Pack worked as a night watchman at the dredge and also occasionally filled in as a laborer removing rock and debris from the coal and cleaning up around the conveyor. On May 15, 1984, Pack was to report to the mine at 11:00 p.m. That same night his brother, a former Maynard Branch employee, had asked him if there were still explosives in the glove compartment of the school bus used as the office. Tr. 32. According to his brother, the dynamite had been placed in the glove compartment by Rocky Fitzpatrick, the foreman, after a winter blasting operation. Tr. 67. Pack knew nothing about this, but upon arrival at the site he immediately checked the glove compartment and observed "two things that looked like road flares". Tr. 53. He then "closed the glove box back real carefully and left the bus very carefully and sat in my truck the rest of the night" Tr. 33.

Pack was the only person at the site during the night shift. Id. Pack left work at the end of his shift without mentioning what he had observed to the others arriving for work because "[f]rom what I had been told, everyone knew it was there except me. They all knew it was there". Tr. 54. See also Tr. 55, 66, 67. While driving home, he saw an MSHA vehicle in a restaurant parking lot and stopped to report to the MSHA inspectors what he had found and to inquire as to the safety and legality thereof. Tr. 33-34. The consequences of Pack's doing so have already been detailed.

The linchpin of the judge's conclusion that Pack's conduct is not protected under the Mine Act, and the majority's affirmation of that result, is their finding that Pack's failure to inform the other workers of the presence of the dynamite in the bus constitutes "serious misconduct". In so finding, they necessarily refuse to accept Pack's consistent testimony that he did not do so because he believed that everyone else had long been aware of what he had only just found out. Pack's testimony in this respect cannot be discredited or ignored, however, because it is directly corroborated by the testimony of respondent's own witness, foreman Rocky Fitzpatrick.

Fitzpatrick testified that in January 1984 the river had frozen and dynamite was used to blast the ice and free the dredge. Tr. 138-39. He explained that after discovering that he had accidentally left a stick of dynamite on the dredge, "I removed it from the dredge and I took it to the bus that we used as storage and office space, and I put it in the glove compartment of the bus". Tr. 140. As late as one week before Pack's discovery, Fitzpatrick knowingly continued to allow this dangerous and improper storage. He testified:

It was on a Tuesday or Wednesday night. Delbert [Fitzpatrick] was helping me watch the cables and the water and stuff, and I was trying to get some sleep. It was 2 or 3:00 in the morning. I had instructed him to keep an eye on the dredge and things, I was going to try to get some sleep. This bus was in two sections. There was like a plastic partition that separated the office space from the storage space. The office end of it had a recliner chair

and a table and some other objects in that end, and the other end was storage space. I sat down in the recliner chair, and I told Delbert, I said, I am going to try to get a couple of hours sleep. You can keep an eye on things. He said, well I'll go up here where I can keep an eye on things. He went up and sat down in the driver's seat of the bus. The driver's seat was still in the bus, and the rest of the seats were taken out for storage space. He walked up there and sat down, and he lit a cigarette. I said, I don't know why, but it just come to me that that stick of explosives was in the glove compartment. I said, you better watch smoking cigarettes, more or less joking, you better watch smoking cigarettes up there, there is a stick of dynamite in that glove compartment. He said, really, or you're kidding, or something like that. I said no. I walked up and opened the glove compartment, and the one stick was there.

Tr. 149-50. See also Tr. 82 (testimony of MSHA special investigator that Fitzpatrick told him he had placed dynamite in glove compartment).

Fitzpatrick's candid admission concerning his culpability in placing the dynamite in the bus corroborates Pack's testimony concerning his brother's revelation to him of the dynamite's presence, Fitzpatrick's role in placing it there and the knowledge of others about its presence. In these circumstances, it can only be concluded that Pack's belief in the futility of communicating to Fitzpatrick and the others what he had belatedly learned was held reasonably and in good faith. Simpson v. FMSHRC, 842 F. 2d 453 (D.C. Cir. 1988).

The majority's emphasis of the fact that Pack was a night watchman whose duties apparently also included reporting safety hazards he discovered (Tr. 68) ignores the crucial fact that Pack's good faith belief in the futility of doing so in this instance excuses his failure to communicate with the operator. Simpson, supra. Further, their emphasis of Pack's "egregious" misconduct in failing to protect his fellow workers from the hazard he had just discovered not only ignores his belief in the futility of telling them what they already knew, but also grossly distorts the consequences of Pack's actions. Rather than callously causing others to be exposed to a continued hazard, Pack acted responsibly and, as a result, the danger that Maynard Branch's foreman knowingly had allowed to exist for several months was swiftly and effectively abated. In these circumstances, the majority's casting of Pack as an irresponsible employee undeserving of the Act's protection is incomprehensible. Compare Miller v. FMSHRC, 687 F. 2d 194, 196 (7th Cir. 1982).

Other evidence in the record also detracts from the substantiality of the evidence supporting the judge's conclusion that Pack was fired for misconduct rather than for reporting the illegally stored dynamite to MSHA. Most telling is the evidence illustrating Maynard Branch's disparate treatment of Pack as compared to its other employees who actually were involved in the improper use and storage of dynamite. Roger Kirk, owner of Maynard Branch, testified at a state administrative proceeding that "there wasn't suppose[d] to be any powder on the premises at all.... We had no permit to have powder on the...premises at all." Exh. C-6 at 5-6. Despite this, foreman Fitzpatrick testified that he used dynamite to blast ice from the river, that he left a stick of dynamite on

the dredge by accident, that he placed the dynamite in the glove compartment, and that he observed the dynamite as late as one week before the inspector's arrival at the site. Tr. 138-141, 149-150, 155-58. In addition, Jeff Kinser, a fill-in foreman, testified as to his involvement in the blasting operation and that afterwards he had given some dynamite to Pack's brother, then an employee, for personal use even though he did not know whether he was licensed or certified. Tr. 96. Foreman James Atkins also testified as to his involvement in the blasting. Tr. 114-15.

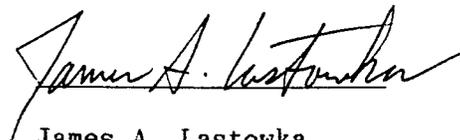
Despite this demonstrated widespread nonchalance towards the handling and use of explosives at Maynard Branch, Pack, who was not at all involved, was the only employee disciplined as a result of the inspector's discovery. Fitzpatrick, Kinser and Atkins were merely "talked to about it and told not to let it happen again. Tr. 190.

The operator's self-serving assertion that Pack's "misconduct" concerning the dynamite was only one in a series of incidents leading to his firing also fails to survive a disparate treatment analysis. In this regard, the majority draws comfort from the operator's argument that shortly before the incident at issue "Pack's inattention ... had resulted in the capsizing of the barge platform and severe damage to the dredging pump." Slip op. at 5. Assuming this to be true, two points must be noted. First, this incident did not trigger any action against Pack until after his report to MSHA. Second, James Atkins testified that he and the rest of the day shift had been involved in a pump tipping incident just two or three weeks before the pump incident that ostensibly influenced Pack's firing, and that he had been neither disciplined nor criticized. Tr. 122-27.

Finally, I find troubling the majority's attempt to draw support for their result from section 2(e) of the Act, 30 U.S.C. 801(e). Slip op. at 6. It seems strange to me that section 2(e)'s statement of a congressional finding that miners must assist operators in the prevention of hazards can be relied on as justification for disciplining a miner whose good faith report to MSHA of a known hazard caused the prompt abatement of the hazard.

In sum, upon consideration of the record as a whole, I conclude that the administrative law judge's finding that Bryan Pack was fired for serious misconduct apart from his protected activity is not supported by substantial evidence and is contrary to law. I further conclude that the non-protected reasons advanced in support of Pack's firing constitute nothing more than a pretext. Pack was fired for making a report to MSHA and his firing therefore violated section 105(c) of the Mine Act.

Accordingly, I dissent.



James A. Lastowka
Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 28, 1989

PAULA PRICE :
 :
 v. : Docket No. LAKE 86-45-D
 :
 MONTEREY COAL COMPANY :

BEFORE: Ford, Chairman, Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this discrimination proceeding, initiated by Paula Price pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Sec. 815(c)(3), the administrative law judge dismissed the complaint for lack of jurisdiction because Price had filed her private action with the Commission prior to a determination by the Secretary that no violation had occurred. 9 FMSHRC 1663 (Sept. 1987). In reaching that conclusion, the judge exclusively relied upon the then recently issued decision of the Commission in the matter of Gilbert v. Sandy Fork Mining Company, Inc., 9 FMSHRC 1327 (Aug. 1987), wherein the Commission invalidated part of Procedural Rule 40(b), 29 C.F.R. 2700.40(b).*/ In its decision, the Commission concluded that under Section 105(c)(3) "the complainant may file his private action only after the Secretary has informed the complainant of his determination that a violation has not occurred." Gilbert at 1337 (emphasis in original).

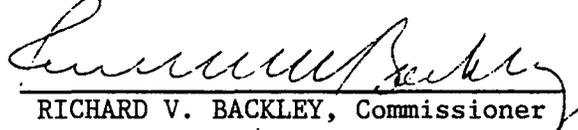
Because the Commission's decision in Gilbert expressly extended the holding to all pending Section 105(c)(3) cases, and because the judge found that the required Secretarial determination had not been made regarding Paula Price's complaint, the judge below concluded that dismissal of the complaint was required.

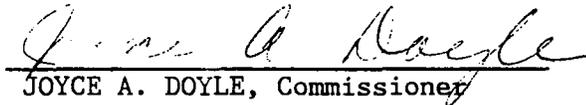
Subsequent to the Commission's direction for review in this matter, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in the case of Gilbert v. FMSHRC, No. 87-1499 (January 27, 1989), reversing the Commission's retroactive application of revised Procedural Rule 40(b).

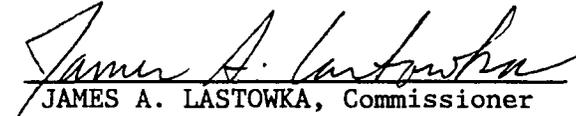
*/ That part of former Commission Procedural Rule 40(b) invalidated by the Commission provided that a complainant could file a private action for discrimination if the Secretary failed to make a determination that no violation had occurred within 90 days after the miner complained to MSHA.

In light of the D. C. Circuit's opinion, the stated basis for the judge's dismissal of Price's Sec. 105(c)(3) complaint cannot stand. Therefore, we remand the case to the administrative law judge for the purpose of completing the record and entering a decision. Accordingly, the Commission's direction for review previously issued in this matter is hereby vacated and the case remanded for further appropriate proceedings.


FORD B. FORD, Chairman


RICHARD V. BACKLEY, Commissioner


JOYCE A. DOYLE, Commissioner


JAMES A. LASTOWKA, Commissioner


L. CLAIR NELSON, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FEB 1 1989

LOCAL UNION 5817, DISTRICT 17, : COMPENSATION PROCEEDING
UNITED MINE WORKERS OF :
AMERICA (UMWA), : Docket No. WEVA 85-21-C
Complainant :
v. : No. 1 Surface Mine
:
MONUMENT MINING CORPORATION :
and :
ISLAND CREEK COAL COMPANY, :
Respondent's :

ORDER OF DISMISSAL

Before: Judge Koutras

On June 16, 1988, the Commission issued an Order remanding this case to me for further adjudication, and the Order stated as follows:

On February 23, 1988, the United States Court of Appeals for the District of Columbia Circuit issued its decision in this matter, styled International Union, UMWA v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988), reversing the Commission's decision (Local Union No. 5817, District 17, UMWA v. Monument Mining Corp. and Island Creek Coal Co., 9 FMSHRC 209 (February 1987)), and remanding for further proceedings consistent with its opinion.

In accordance with the Court's order, we are obliged to remand this matter to the administrative law judge originally assigned for further proceedings including, if necessary, consideration of any remaining challenges by Island Creek Coal Company to the complaint for compensation that have not been previously waived.

On June 28, 1988, I issued an Order requesting the parties to inform me as to any further appropriate remedial action which may be required in this case pursuant to the Court's decision, and the Commission's remand Order of June 16, 1988. In response to my Order, the parties advised me of their mutual

agreement that no issue remains on the question of the respondent's liability, and that the only remaining issues concern the amount of compensation due the miners, including interest, and costs of litigation.

The parties have now reached a mutually satisfactory agreement with respect to the compensation due the miners, including interest, and costs of litigation. The record reflects that all of the affected miners have been compensated and paid the amounts due them, including interest, and that the respondent has paid the UMWA for all costs incurred in pursuit of its court appeal. Under the circumstances, since the parties have reached a mutual agreement with respect to the final disposition of this case, I see no reason why it should not now be dismissed.

ORDER

In view of the foregoing, this case IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America (UMWA),
900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

Robert M. Clark, Esq., Dechert, Price & Rhoads, 1730 Pennsylvania
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Marshall S. Peace, Esq., Island Creek Coal Company,
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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 1 1989

LINDIA SUE FRYE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. VA 88-55-D
: :
PITTSTON COAL GROUP/ : NORT CD 88-01
CLINCHFIELD COAL COMPANY, :
Respondent : Moss No. 3 Prep Plant
:

DECISION

Appearances: Jerry O. Talton, II, Esq., United Mine Workers',
District 28, Castlewood, Virginia, for Complainant;
W. Challen Walling, Penn, Stuart, Eskridge & Jones,
Bristol, Virginia, for Respondent.

Before: Judge Weisberger

Statement of the Case

On July 11, 1988, a Complaint was filed alleging violations of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). An Answer was filed on August 9, 1988. On August 19, 1988, Respondent filed a Motion for Summary Decision, and a Response to the Motion for Summary Decision was filed by Complainant on September 6, 1988. On September 14, 1988, an Order was entered denying the Motion for Summary Decision.

Pursuant to notice, a hearing was held on October 19 - 20, 1988, in Lebanon and Abington, Virginia, respectively. T. R. Dino, MD, Joseph Pendergast, Samuel G. Sanders, James W. Hicks, Darnis Salyer, William McCoy, Billy Lee Bise, Kenneth Robert Holbrook, and Lindia Sue Frye testified for Complainant. Michael Ray Hendrickson, Sam Sanders, Roy F. Castle, Donald W. Hughes, and James W. Rhoton testified for Respondent. Proposed Findings of Fact and Memorandum of Law were filed by the Parties on December 27, 1988. Reply Briefs were filed by Complainant and Respondent on January 10, and January 12, respectively.

Issues

1. Whether the Complainant has established that she was engaged in an activity protected by the Act.

2. If so, whether the Complainant suffered adverse action as the result of the protected activity.

3. If so, to what relief is she entitled.

Discussion and Findings of Fact

Lindia Sue Frye, who worked for Respondent as a mechanic from July 1978 to September 1987, has predicated her complaint of discrimination against Respondent under section 105(c) of the Act, upon assertions that she was discharged in retaliation against her complaints with regard to Respondent's policy of holding safety meetings adjacent to male bathroom and against her refusal to work.

In evaluating the evidence presented herein, I have been guided by the Commission's recent decision of Goff v. Youghioghney & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), which reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

It has been further held by the Commission that, a miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, supra, Robinette, 3 FMSHRC, 803 at 812; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), Aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). Perando v. Mettiki Coal Corp., 4 FMSHRC 491 (1988). As stated by the Commission in Secretary on behalf of Sedgmer, et al v. Consolidation Coal Company, 8 FMSHRC 303, at 307 (March 1986), "The case law addressing work refusals contemplates some form of contact or communication manifesting an actual refusal to work."

In this connection the Commission, in the recent decision of Secretary on behalf of Keene v. S and M Coal Company, Inc., 10 FMSHRC 1145, 1150 (1988), noted as follows:

A miner has the right under section 105(c) of the Mine Act to refuse to work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. Where reasonably possible, a miner refusing to work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exist. Reco, supra, 9 FMSHRC at 995; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also Miller v. Consolidation Coal Co., 687 F.2d 194, (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

Protected Activities

I.

According to Frye, in September 1987, she had episodes of vomiting, and had complained of this condition to her physician Dr. T. R. Dino. Darnis Salyer testified in this connection that in August or September 1987, Frye had complained of being sick and went to the nurse at Respondent's plant where she worked. William McCoy, a coworker of Frye's, indicated that he saw her vomit at the work site, and he could tell that she was sick. Michael Ray Hendrickson, who was Respondent's foreman, indicated that Frye had complained of being sick, and Donald W. Hughes, who was Frye's evening shift foreman from early 1984 through the middle of the year in 1985, indicated that at times he was informed that Frye was sick. Doctor T. R. Dino, a physician with a general practice, testified that he had been treating Frye since September 1981, and that she has a history of an ulcer for which he had prescribed medication. He said that on September 16, 1987, she complained of epigastric pain which she described as burning, and which he attributed to the possible ulcer that she had in the past. He indicated that if the epigastric pain which she had been complaining about from September 16 - 21, 1987, would have included nausea and vomiting he would not have let her work. However, he indicated that his notes did not indicate she had nausea and vomiting. He further indicated that the notes do not indicate that he advised Frye not to work, but on cross-examination indicated that he recalled advising her not to work, but that he did not discuss the specific tasks that she should not do. According to Frye, however, after she saw Dr. Dino on September 16, 1987, she was provided with a slip to allow her to work the following day. Significantly, Frye indicated, upon cross-examination, that prior

to September 22, 1987, she did not feel that it was too dangerous for her to work. Considering this statement, along with the lack of any contemporaneous notation by Dr. Dino with regard to her inability to work, I conclude that prior to September 21, 1987, the evidence fails to establish that there was any work refusal on Frye's part due to any good faith, reasonable belief that her continuing to work involved a hazardous condition. (c. f. Pasula, supra, at 2789-96).

In essence, according to Frye, while driving to work on September 21, 1987, she suffered a dizzy spell, blacked out, and got involved in an automobile accident. The following day Frye saw Dr. Dino, who, according to Frye, advised her not to work as it would be too dangerous for her and for her coworkers. Frye also said that Dr. Dino advised her not to drive. Frye indicated that Dr. Dino told her not to return to work until she was evaluated by Dr. Morgan a neurologist. In essence, she testified that she did not work subsequent to September 22, 1987, as she was afraid to drive, and to work at her job which required her at times to work at heights and in proximity to equipment. Dr. Dino indicated that, assuming Frye had to work as a mechanic in a preparation plant, which required her to tear down and repair pumps, work in an area with water tanks, work in high places and climb stairs, and be around machinery and welding, he would not recommend her to work at this job or drive.

It appears from Frye's testimony that she was motivated not to work subsequent to September 23, 1987, in part based upon her fear of driving. Clearly this concern relates solely to Frye's ability to travel to the work site rather than to any hazard at the site. She also indicated, in essence, that her job entailed working at heights, welding, and being exposed to various equipment, and that due to her dizziness she was afraid to work. There is no evidence of any objective data, either clinical signs or laboratory findings to provide a medical basis for Frye's complaints of dizziness. Also, the record does not present significant evidence as to the frequency, density, and duration of Frye's dizziness. As such, the hazard of any injury is based solely upon Frye's subjective complaints, and is not based upon a condition or practice under Respondent's control. As such, I find that section 105(c) of the Act did not cover Frye's not working subsequent to September 22, 1987, based upon her dizziness.

In making this decision, I agree with the following statement of the law as set forth in Bryant v. Clinchfield Coal Co. 4 FMSHRC 1380, 1421 (1982), "Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition

or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute." (See also, Mastings v. Cotter Corp. 5 FMSHRC 1047 (1983)).

I do not find Eldridge v. Sunfire Coal Co. 5 FMSHRC 408 (1983), relied on by Complainant, to be applicable to the case at bar. In Eldridge, supra, Judge Koutras held that a miner's refusal to work an extra shift due to fear of exhaustion, was a protected activity within the scope of section 105(c) of the Act. Thus the physical disability of fatigue in Eldridge, which led to a miner's refusal to work, was as a result of having already worked a shift and thus was clearly job related. In contrast, in the case at bar, Frye's dizziness has not been established to have been job related.

II.

Assuming arguendo that Frye's dizziness provided a basis for her not to work subsequent to September 22, 1987, her Complaint under section 105(c) of the Act, must fail, as she has not established that she refused to work, and communicated this refusal to Respondent. Not only did Frye fail to communicate to Respondent the reasons for her not working subsequent to September 22, but she did not notify Respondent of any refusal to work subsequent to that date. According to Frye, after Dr. Deno advised her not to work, she attempted to telephone Respondent on two occasions, but did not receive any answer. According to the uncontradicted testimony of Sam Sanders, Respondent's superintendent, Respondent did not hear from Frye from the time she last worked on September 22, until she came in to see Sanders on October 5, in response to Sanders' communication to her that she had violated the Last Chance Agreement. Indeed, according to the uncontradicted testimony of Sanders, on October 5, 1987, Frye did not indicate that she felt it was unsafe to work or that it would be hazardous to others, but merely said she some "dizziness problems," and stated that she was afraid to drive to work (Tr. Vol. II, 286).

Frye indicated that Dr. Dino told her that Respondent was advised of her illness. Respondent admitted that on or about October 3, 1987, a nurse, at the Moss No. 3 Nurses Station had a conversation with Dr. Dino's office, and was informed that Frye had been treated for dizzy spells and was seen on September 16, 21, 23, and October 5, 1987. However, the only communication from Dr. Dino to Respondent bearing on Frye's ability to work subsequent to September 16, 1987, is a letter dated October 20, 1987, more than 1 month after Frye last worked. In the same fashion, the only written statement from Dr. Steven W. Morgan, a neurologist who examined Frye in October 1987, with regard to her ability to work, is dated October 28, 1987, again more than a

month after Frye last worked. Based upon the above, I conclude that Frye has not established that she communicated to Respondent her work refusal, and as such, her complaint must fail (See Sedgmer, supra, Keene, supra.

III.

In addition to safety training, which is mandated, Respondent provides its employees, on a voluntary bases, with a weekly safety meeting. These meetings, which last approximately 15 minutes, and for which the employees are paid time and a half, allow the latter to ask safety questions and provide safety suggestions. When weather permits, these meeting are held out of doors, and in inclement weather they are held in a hot water heater room which is adjacent to, but separated by a doorway, from the men's bathroom. It was the testimony of Frye, as corroborated by William McCoy, that with the door open, it is possible to observe male nudity and men urinating in the bathroom. 1/ However, it is possible, while attending a safety meeting, to stand in a position where it would not be possible to see through the doorway to the men's bathroom. Frye also testified that during the safety meetings she observed men in the meeting room wearing only their long underwear, and her testimony was corroborated by Darnis Salyer. According to Frye she attended "a lot" of safety meetings (Tr. Vol. II, 110), but that in the fall of 1986, she first encountered male nudity at a meeting. This was the last meeting she attended, and she asked Billy Lee Bise, the Union Mine Committeeman, to ask Sanders to change the location of the meetings. She said that Bise informed her that Sanders had informed him that he would provide a different meeting place, but that she was never approached by any of Respondent's personnel to come to another site. She said that she talked to Bise again about this matter 1 week prior to her discharge in September 1987, but that no alternate sites were provided to her. In this connection, Bise indicated that in approximately February 1987, and again "a while" before Frye was discharged (Tr. Vol. II, 45), he told Sanders that different arrangements should be made for a facility for the safety meetings as it was not proper to have females exposed to men changing clothes. Bise indicated that Sanders told him that he would arrange for one of the foremen to give Frye safety meetings by herself. Thus, the only evidence of any activity on Frye's part, that has any relevance with regard to activities protected by the Act, was her request of Bise to ask Sanders to change the safety meeting site. Frye thus was not

1/ There is some conflict in the record as to whether or not on the dates in issue there was a door in this doorway. The weight of the evidence tends to establish that there was a door although it was usually kept open.

seeking the right to attend a safety meeting, but rather was seeking a change in its situs to a location that would not be offensive, and an embarrassment to her. I conclude that Frye's request is beyond the purview of the Act, and as such is not protected thereunder.

Motivation

Assuming arguendo that Frye's request to have the location of the safety meetings changed was a protected activity, Frye's case must fail, as she has not established that her discharge was motivated "in any part by this activity." To the contrary, the evidence establishes that Frye's dismissal was based solely on her excessive absenteeism.

On January 1, 1985, Respondent instituted a Chronic and Excessive Absentee Control Program in order to address chronic absenteeism. In December 1985, Sanders met with Frye and informed her that he was going to be the superintendent as of January 1986, and that he was aware of her absenteeism. He also indicated that they should help one another so that the absenteeism would not be a problem. In September 1986, Sanders met with Union Officials, James Hicks and Bise, to ask them to counsel Frye with regard to her absenteeism. In February 1987, Frye missed 16 percent of scheduled working days, and in March and April of 1987 missed 42 percent and 90 percent respectively of scheduled working days.

In May 1987, Frye was absent for 96 percent of the scheduled working days, and in June her absentee rate was 44 percent. Frye was orally counseled with regard to her absentee rate by Sanders on April 30, June 8, and July 20, 1987. On that last date Frye was suspended, with intent to discharge, due to excessive absenteeism. Subsequently, pursuant to a 24 - 48 hour meeting on July 25, 1987, Frye entered into a Last Chance Agreement in which she agreed that she would not exceed the mine absentee rate of four percent in any month in the next 12 months commencing August 1, 1987.

In August 1987, Frye's absentee rate did not exceed the mine average, however, in September 1987, her absentee rate was 39 percent. On October 1, 1987, Sanders informed Frye that inasmuch as her absentee rate in September 1987, exceeded the provisions of the Last Chance Agreement she was to contact the superintendent within 48 hours. Sanders subsequently met with Frye on October 5, 1987, and explained to her that she was to be suspended as she had violated the Last Chance Agreement. On October 16, 1987, Sanders sent a notification to Frye informing her that she was being suspended with intent to discharge because her absenteeism was in violation of the Last Chance Agreement. A 24 - 48 hour meeting ensued, and subsequently Frye was discharged.

Based upon the above facts, I conclude that the sole reason for the discharge of Frye was her excessive absenteeism. This clearly is a prerogative of management, and I do not find sufficient evidence to establish that the discharge was motivated in any part by any protected activities. Accordingly, the Complaint herein must be dismissed. (See Goff, supra).

ORDER

Based on the above, it is ORDERED that this proceeding be DISMISSED.



Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

FEB 2 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-197-M
Petitioner : A.C. No. 42-01997-05502
 :
v. : Rattlesnake Mine
 :
W. K. ENTERPRISE, :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment for civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the operator of the Rattlesnake mine, W. K. Enterprise with violating a mandatory regulatory standard 30 C.F.R. § 57. 3200, because there was unsupported, loose and unconsolidated material on the left side of the mine portal. On December 10, 1986, the MSHA inspector issued a section 104(d)(1) Citation No. 2646222 at the Rattlesnake mine.

The operator filed a timely appeal contesting the existence of the alleged violation, its characterization as significant and substantial and the appropriateness of the proposed penalty.

The case was set for hearing on the merits at the same place and time as other cases involving the same parties were heard on the merits. At the hearing counsel for the Secretary moved to amend the proposed penalty so as to reduce the proposed penalty from \$800.00 to \$400.00. There was no objection. The motion was granted. Counsel for respondent then moved to withdraw its notice of contest to both the alleged S & S violation and the amount of the penalty as amended at the hearing. There was no objection; the motion was granted.

In support of this proposed disposition of the case the parties have submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions I find that the proposed disposition is reasonable, appropriate, and in the public interest.

ORDER

Citation No. 2646222 is affirmed. W. K. Enterprise, if it has not already done so, is directed to pay a civil penalty in the sum of \$400.00 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 1989

CHARLES F. ROSE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 88-350-D
CONSOLIDATION COAL COMPANY, : Pursglove No. 15 Mine
Respondent :
:

ORDER OF DISMISSAL

Before: Judge Weisberger

On January 19, 1989, Counsel for Complainant filed a statement indicating Complainant "Wishes to Withdraw his Complaint and terminate this proceeding." On January 23, 1989, a copy of a signed statement from the Complainant was filed. In this statement Complainant has indicated as follows: "I wish to withdraw the discrimination proceeding filed by me at Docket No. WEVA 88-350-D relating to activities at Consolidation Coal Company's Pursglove No. 15 Mine."

Accordingly, is is ORDERED that the above proceeding be DISMISSED.



Avram Weisberger
Administrative Law Judge
(703) 756-6210

Distribution:

William R. Nalitz, Esq., Sayers, King, Keener & Nalitz, 77 South Washington Street, Waynesburg, PA 15370 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 87-272
Petitioner : A.C. No. 46-07273-03501
: :
v. : No. 1 Mine
: :
BIRCHFIELD MINING INCORPORATED: :
Respondent :

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for Petitioner;
William D. Stover, Esq., Beckley, West
Virginia for Respondent.

Before: Judge Melick

This case is before me upon remand by a majority of the Commission to determine whether its findings that the violation at issue was not "significant and substantial" would affect the amount of civil penalty imposed below.

In the decision below, 9 FMSHRC 2209 (1987), it was found that the failure to complete and record a pre-shift examination required by 30 C.F.R. § 75.303(a) was a "serious" violation and warranted a civil penalty of \$400. The Commission majority found however that the violation did not contribute "a measure of danger to safety" and in essence did not constitute a serious hazard. Since the gravity determination below was a significant component in the amount of penalty established, there must now be a corresponding reduction in penalty. Accordingly considering the criteria under section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., I now direct that a penalty of \$300 be paid.

ORDER

Birchfield Mining Incorporated is hereby directed to pay a civil penalty of \$300 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 88-42
Petitioner : A. C. No. 01-01322-03697
: :
v. : No. 5 Mine
: :
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION

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

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Jim Walter Resources, Inc., under section 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 820. An evidentiary hearing was held on November 30, 1988, and post-hearing briefs have now been filed.

Citation No. 3011407, dated January 13, 1988, recites as follows:

"Based on the results of an evaluation of SCSR training conducted 12/16-22/87 where 25 persons were interviewed to determine the effectiveness of the training 5 of the 25 persons failed to know the proper procedures for donning the self contained self rescuer. This is 20 per cent of the persons interviewed. The training shall be reevaluated by management and an assurance obtained that all mine personnel underground are aware of the proper donning procedures."

On January 28, 1988, the citation was modified to allege a violation of 30 C.F.R. § 75.1714. The parties agree that (c)(2) is the applicable portion of § 75.1714 (Tr. 5). The mandatory

standard in effect at the time the citation was written, provided as follows:

(2) Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip. 1/

At the hearing the parties agreed to the following stipulations: (1) The operator is the owner and operator of the subject mine; (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) the administrative law judge has jurisdiction of this case; (4) the inspector who issued the subject citation was a duly authorized representative of the Secretary; (5) true and correct copies of the subject citation and modification were properly served upon the operator; (6) copies of the subject citation and modification are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein; (7) imposition of a penalty will not affect the operator's ability to continue in business; (8) the operator's history of prior violations is average; (9) the operator is large; (10) the applicable regulation is 30 C.F.R. § 75.1714(c)(2). The foregoing stipulations were accepted at the hearing (Tr. 5).

The citation recites that twenty-five people were interviewed to determine the effectiveness of the operator's training program and that 5 of the interviewees failed to know proper donning procedures. The inspector testified that she conducted the interviews to determine the effectiveness of the operator's training and issued the citation because she believed the training was ineffective and a failure (Tr. 26-27, 54, 56). She stated that the interviews were not conducted to determine individual failures and therefore, she did not cite specific instances regarding particular individuals (Tr. 56). She also testified that in order for the operator's training to be effective and for the operator to avoid being found guilty of a violation, 100% of the individuals interviewed must correctly answer the required number of questions and perform the donning procedures set forth in an MSHA test which the inspector used to determine compliance with the mandatory standard (Tr. 62). If

1/ 30 C.F.R. § 75.1714 was subsequently amended, but its substantive requirements are essentially unchanged. 53 F.R. 10336, March 30, 1988.

one in 500 employees failed the test, the inspector would find the training ineffective (Tr. 63-64). It would not matter to the inspector if a miner feel asleep during training, did not absorb the training, knew it but forgot it, or purposely failed the test because he was mad at the company (Tr. 64-65). However, the MSHA supervisory inspector testified that if less than 100% of miners passed the test or if 1% failed, he might not issue a citation, whereas another inspector might, and that issuance of a citation under such circumstances was a judgment call (Tr. 96).

30 C.F.R. § 75.1714(c)(2) directs that miners be given training in the use self-rescuers and that this training include performance of certain activities by individual miners which may be summarized as "hands-on" training. The inspector's requirement that the operator's training program be "effective" does not appear in the mandatory standard. Rather it is nothing more than the inspector's own creation cut from whole cloth. In addition, the inspector testified that regardless of the circumstances all miners must pass the test or the training would be found ineffective and the operator guilty of a violation. The inspector's equation of effectiveness with perfection also is unfounded. It is clear that in issuing this citation the inspector has strayed far from what the law actually prescribes. Elemental fairness requires that the operator be held accountable only for what the law and regulations require.

Furthermore, the MSHA supervisory inspector could not offer any basis for sustaining the lack of effectiveness charge in the citation. Although he did not agree with the issuing inspector's 100% compliance requirement, he offered no acceptable explanation of his own. He merely stated that issuance of a citation where there was less than 100% compliance was a "judgment call". Such an approach is unsatisfactory because it would leave every inspector free to decide for himself when to issue a citation and every operator unable to tell what is expected of it.

The citation's further allegation that five miners failed to know proper donning procedures also does not properly charge a violation of the mandatory standard. Once again, it must be noted that the mandatory standard requires that training be given and that the training be hands-on. As the testimony at the hearing makes clear, individuals may receive the required training, but still not be able to put on the self-rescuers for a variety of reasons, such as forgetting, inability to understand, or willful intent to fail (Tr. 64-65). Upon prompting by the Solicitor, (Tr. 74-75), the inspector equated donning failure with training failure, without considering any of the foregoing circumstances which could render that equation false. Moreover, the Solicitor did not challenge the possible existence of these factors.

The MSHA supervisory inspector testified that the allegation of being unaware of the donning procedures meant personnel at the

mine had not been properly trained (Tr. 90). As already set forth, I reject this reasoning because although donning failure may certainly be evidence of a lack of training, it does not always follow that an individual's inability to put on a self-rescuer means he did not receive the requisite training. Therefore, one cannot automatically be equated with the other. The supervisory inspector further stated that rather than issue five citations in this case, only one was issued to give the operator time to comply (Tr. 93). However, in view of the language of the mandatory standard, a lack of the prescribed training for named individuals should be charged and thereafter supported with specific proof, whether the individuals are identified in one citation or in separate citations. The operator has a right to expect that the charges against it conform to the statute and regulations.

For the foregoing reasons, I conclude that the citation does not properly charge a violation in accordance with the applicable mandatory standard.

Even if the citation had properly alleged a violation, MSHA's case would fail, because the evidence falls far short of establishing a violation. At the hearing the inspector could not remember the names of the five individuals whom she alleged failed the MSHA test until she looked at her notes (Tr. 41-42). And even after she named the five miners, she could not remember how many of the five did not know how to put on the self-rescuer (Tr. 75). All she could say was that "some" of the miners who could not don the self-rescuer were included in the five referred to in the citation, but she did not know which ones or if all five failed the donning procedures (Tr. 75-76).

Only one of the five named individuals, Ms. Willie Jean McCrary, testified at the hearing. Ms. McCrary stated that she had not been given hands-on training (Tr. 13-15). However, she admitted signing a Certificate of Training which states on its face in bold letters that she had received hands-on training (Op. Exh. 1, Tr. 10-11, 18). One of the operator's associate safety inspectors, Mr. Haygood, testified that hands-on training had been given in classes of about 10 people (Tr. 105-106). Mr. Haygood had not himself trained Ms. McCrary, but he had on occasion assisted Mr. Lee another associate safety inspector, who had trained Ms. McCrary and signed her certificate (Op. Exh. No. 1, Tr. 112-113). According to Mr. Haygood, each shift was set up the same way, calling ten people for training (Tr. 111). The instructors went by the manufacturer's guidelines and their training included everything in the MSHA test used by the inspector (Tr. 127-128, 131). After consideration of the matter, I find persuasive the signed Certificate of Training and the testimony of Mr. Haygood. I do not find convincing Ms. McCrary's testimony that she did not remember signing the certificate and that she did not know what hands-on training meant (Tr. 10, 23-24). Ms. McCrary admitted she did not remember everything her instructor,

Mr. Lee, said and did (Tr. 19). Finally, Ms. McCrary said she knew some of the donning procedures, but not all of them and the record does not indicate what she knew and what she did not know (Tr. 15). Therefore, I conclude Ms. McCrary received hands-on training.

The remaining four individuals referred to in the citation did not testify and the inspector did not state what they knew or did not know or what they did or did not do in their interviews. As already noted, the inspector admitted she did not know how many or which ones of the five could not put on the self-rescuer (Tr. 75). The record contains signed Certificates of Training for three of these four miners, Lockhart, Sides and Dukes (Op. Exhs. Nos. 2, 3, 4). Mr. Haygood, the associate safety inspector whose testimony I have already accepted, trained and signed the certificates of Lockhart and Dukes. I find persuasive these certificates and Haygood's testimony that these two individuals received hands-on training. Mr. Lee who signed Ms. McCrary's certificate, also signed Sides' certificate. Here again, the certificate and Mr. Haygood's testimony regarding the training he and Mr. Lee gave are persuasive. The record does not contain a certificate of training for the fifth individual, Harris. However, MSHA has failed to make out a prima facie case of no hands-on training for Harris because the inspector did not specify what he could not do and, aside from reading his name from her notes, she did not specifically refer to him. In light of the foregoing, even if the citation properly charged a violation, I would have no alternative but to conclude that MSHA failed to prove a violation with respect to any of these five miners.

The rest of the inspector's testimony was similarly vague and nonspecific. She said "several people" forgot to put goggles on or forgot to take the nose clip out of the mouthpiece and that "some people" missed every part of the MSHA test, one question or another (Tr. 38). But she did not identify these people. There is no way for the operator to defend itself against charges that a group of unidentified individuals could not perform one step or another in the donning of self-rescuers or did not have the knowledge deemed necessary by the inspector.

Although "effectiveness" is not a proper measure by which to determine whether a violation occurred and although the evidence does not, in any event, show the existence of a violation, note must be taken of the means whereby the inspector undertook to demonstrate the existence of a violation. The inspector questioned the 25 miners she interviewed based upon a test devised by someone at MSHA headquarters (Govt. Exh. No. 1, Tr. 92). The inspector received the test from her supervisor, but she did not know who devised it and she was not told what to do with the test other than go to the mine and give it (Tr. 63). The test assigns a point value to each question; there are two parts to the test (one of which requires donning ability); both

test parts must be passed; and the passing grade for each part is specified (Govt. Exh. No. 1, Tr. 36, 42, 59-61). The first time the operator learned of the test was when the inspector furnished a copy as she began the interviews (Tr. 27, 109). The inspector admitted the test is not part of the mandatory standard (Tr. 58-59). It is difficult to imagine anything more unfair than finding the operator guilty of a violation based upon a questionnaire and scoring system, of which it had no advance notice. Therefore, apart from all the other reasons why this citation is invalid, use of the MSHA test under the circumstances presented here is improper.

For a similar result see the recent decision of Administrative Law Judge John J. Morris Secretary of Labor v. Utah Power and Light Company, decided January 9, 1989, (Dk. No. West 88-92).

The briefs of the parties have been reviewed. To the extent that they are inconsistent with this decision they are rejected.

ORDER

Accordingly, it is ORDERED that Citation No. 3011407 be VACATED and that the instant petition for the assessment of a civil penalty be DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 6 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-113
Petitioner : A.C. No. 46-06722-03556
v. :
: No. 2 Mine
STONE COAL COMPANY, :
Respondent :

DECISION

Appearances: Ronald E. Gurka, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Petitioner;
William D. Stover, Esq., M.A.E. Services, Inc.,
Beckley, West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks civil penalty assessments in the amount of \$1,500 for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting one of the alleged violations, namely section 104(d)(1) Order No. 2716156, 30 C.F.R. § 75.319, served on the respondent by an MSHA inspector on August 25, 1987. The respondent opted not to contest the second alleged violation, section 104(d)(1) Order No. 2716152, 30 C.F.R. § 75.303, served on August 25, 1987, and has agreed to pay the proposed civil penalty assessment of \$700 (Tr. 3). A hearing was held in Beckley, West Virginia, and the parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." Additional issues raised by the parties, including the "unwarrantable failure" issue, are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4):

1. The presiding judge has jurisdiction to hear and decide this matter.
2. The assessment of a civil penalty for the alleged violation in question will not affect the respondent's ability to continue in business.
3. The respondent has products which enter commerce or has operations which affect commerce.

Discussion

The contested section 104(d)(1) Order No. 2716156, served on the respondent on August 25, 1987, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.319, and the cited condition or practice is described as follows: "A separate split of intake air was not provided for the mechanized mining section being operated in the return air courses, 35 feet in by the No. 4 drift opening."

Petitioner's Testimony and Evidence

MSHA Inspector George Bowman, testified as to his experience and training, and he confirmed that he has conducted

"quite a few" regular and spot inspections of the respondent's mine. He confirmed that he was at the mine on Friday, August 21, 1987, to complete an inspection, and that he advised Mine Foreman Don Hughes that he would be back the following Tuesday, August 25, to "run dosimeters on his underground employees." Upon his return to the mine he noticed two employees exiting a drift opening where a new fan installation was begun over the weekend, and he identified exhibit P-1 as a copy of the approved mine map ventilation system for the area where this installation was being made. The entry had been advanced approximately 70 feet, and Mr. Bowman confirmed that he observed a continuous miner and a shuttle car in the entry, and that he issued Citation No. 2716152, for a violation of section 75.303, when he could not find any evidence that a preshift examination had been conducted and reported for the entry. After observing the employees exit the drift, he proceeded into the area and observed that no ventilation line curtains had been installed. He also observed other violative conditions, and issued a total of six citations for several ventilation and electrical violations (Tr. 5-15).

Mr. Bowman stated that he noticed that the air current was coming back down the entries toward the area that was being mined, and the "air current was to the extent that you could feel it; it was very good movement" (Tr. 15). He then proceeded to the mouth of the six left entry toward the six left gob, between the first and second crosscuts between the two entries to take a reading of the direction of the air flow from the pillared area, and he marked the location with an "X" on the mine map. He confirmed that he used an anemometer to check the air, and that "the vanes of the anemometer did turn rapidly," and he determined that the air coming from the gob area was flowing toward the drift entry. After making this determination, he cited the respondent with a violation of section 75.319 (Tr. 16-17).

Referring to the mine ventilation system map, exhibit P-1, Mr. Bowman described and explained the intake air flow system through the area in question, and he confirmed that it should have been coursing positive toward the outside of the mine. He found that the air had apparently reversed through the approach to the six left pillared out area and that under the approved plan it should have been going in the opposite direction toward the gob area rather than toward the new drift mouth where the continuous miner and shuttle car were located (Tr. 17-20). The coursing of the air in the wrong direction presented a hazard in that any methane or "black damp" which may have developed during mining would not be coursed away from the new drift entry. Since the entry had been mined for

approximately 69 feet with no line ventilation curtains, contaminants from the pillared area would have passed over or near the equipment which was operating, and an arc or blown cable may have ignited any methane in that drift entry which he marked with the letter "A" on the map. Mr. Bowman confirmed that this location in the entry was inby the last open crosscut (Tr. 22).

Mr. Bowman identified a copy of a supplemental ventilation plan submitted by the respondent on August 26, 1987, after his inspection, and it shows the installation of two stoppings across the number one and two entries separating the intake split from the air that passed by the six left bleeder. These stoppings provided a separate split of intake air to the miners working down in the drift opening, and had the effect of abating the violation (Tr. 26).

Mr. Bowman believed that the violation resulted from a high degree of negligence because mine foreman Don Hughes was aware of the installation of the fan and they had discussed the situation the week prior to the inspection of August 25, 1987, when the drift in question was being developed. The drift was constructed in an effort to control some water located inby the drift which was freezing and causing problems for the fan and travel in the area (Tr. 30). Mr. Bowman confirmed that coal was being mined as the drift was being advanced, and upon completion of the drift entry, normal mining operations would have continued (Tr. 32).

On cross-examination, Mr. Bowman confirmed that although he discussed the fan installation prior to August 25, 1987, he raised no objections about the new drift entry because the method of mining the new entry never came up, and he was not aware that a new entry would be needed for the fan installation (Tr. 32). He confirmed that he did not go beyond the point marked "X" on the map, and did not walk into the gob area. He confirmed that he made no methane test in that area, and that the anemometer readings which he made indicated that the air was coming in the opposite direction from what was shown on the approved ventilation plan (Tr. 33). He explained the direction of air travel by reference to the map (Tr. 34-36).

Mr. Bowman stated that intake air becomes return air when it has passed through or ventilated the lasted open crosscut, or after it passed the working faces. Assuming the intake air was going through the regulator down toward the area being developed, it would not have passed any working faces if it were travelling that course (Tr. 38). He confirmed that he

walked the area where the continuous miner had been working and made methane tests. Although he could not recall the exact methane level, it could not have been over one percent (Tr. 40). However, methane and "black damp" is a concern when the air current in a ventilation bleeder system is not travelling in the proper course and direction, and he believed the air was coming from the approaches to the gob area, and not the gob area itself (Tr. 41, 44). He confirmed that he did not check the bleeder evaluation points in the gob area (Tr. 43), but reiterated that the air "wasn't going the way it was supposed to be going" as shown on the ventilation plan (Tr. 45-46).

Mr. Bowman identified the "mechanical mining section" that was not being ventilated by a separate split of air as the area marked "A" on the ventilation map, and he indicated that it was 35 feet in by the number four drift (Tr. 48). He stated that when that area was initially developed it was an entry, and when "he goes back and rehabilitates the area, its a crosscut" (Tr. 49). He explained that the area in question had no equipment in it when he was at the mine on August 21, and it would have been an entry. However, when he returned on August 25, the entry had been developed, and it became a crosscut (Tr. 54). The air that was ventilating this area was return air rather than intake air (Tr. 56).

Respondent's Testimony and Evidence

Josiah C. Lilly, mine superintendent, confirmed that he was at the mine when Mr. Bowman issued the order on August 25, 1987, and he explained the work performed to install the fan at the number 4 entry or portal in order to increase ventilation and improve the efficiency of the fan. He also confirmed that his engineering department informed MSHA about the ventilation changes, but he was not sure that he spoke with Mr. Bowman about them, but that the mine foreman did (Tr. 63). Referring to a copy of the ventilation map, exhibit R-1, Mr. Lilly explained the working ventilation system prior to the installation of the fan, and he confirmed that the map was in effect at the time the order was issued (Tr. 64-66).

Mr. Lilly identified two stoppings shown on the map which were installed soon after the violation was issued to separate the gob area, and he confirmed that they were installed in response to the violation. In response to a question as to whether or not intake air passed through the regulator shown on the map down to the cited area in the number 4 drift opening, Mr. Lilly replied that "it was possible," but he did not go to the area to check it (Tr. 67).

Mr. Lilly stated that he walked through the area designated as No. 1 on exhibit R-1, and that the air coming into the entries "had to come off the main intake." The bleeders were functioning properly, and he stated that "the air going in at this point, there's no way it could be coming out and going to the area where the men had been working" (Tr. 70). He tested for methane and found none. He confirmed that the regulator stopping marked on the map with a "green R" had some blocks out of it and that air was coming through at the barrier point. He agreed with Inspector Bowman that air was coming out in the wrong direction, and that "it wasn't supposed to be travelling in that direction at that point, that's correct" (Tr. 70). However, he did not believe there was any danger of air coming out of the gob because pressure was kept against the gob by means of a blowing fan.

Mr. Lilly confirmed that he discussed the abatement of the violation with the inspector and the company engineering department, and that the two stoppings marked in green on the map were installed to abate the violation. He also believed that the regulator had to be opened more, but he was not sure. The effect of the stoppings "prevented any air from coming that way, and made all the air come out at one point--out of one location, where the regulator is" (Tr. 72). He did not check the air after this was done, and he did not know whether this made any difference in the amount of air at that point (Tr. 72). However, he indicated that the intake air was still traveling in the same direction at every location, but that the stoppings which were installed eliminated the inspector's concern with the air coming off the gob. This change was approved by MSHA to abate the violation so that the order could be terminated to allow work to continue (Tr. 73).

On cross-examination, Mr. Lilly confirmed that the ventilation map he referred to, exhibit R-1, is undated, and that he did not know when it was prepared or submitted to MSHA. Respondent's counsel stated that the map was never submitted to MSHA, but was prepared specifically for this case as Mr. Lilly's recollection of the ventilation in place at the time of the violation (Tr. 74). Mr. Lilly stated that the arrows marked in blue on the map shows the direction of the intake air flow going down the entries at the time of the violation. When asked whether intake air was in fact going in the direction of the arrows, Mr. Lilly replied "I know when I went into this area that air was going into the gob, and there was going this direction also (sic). These areas were being ventilated off of the intake air" (Tr. 76). He confirmed that he was in the area at 7:30 a.m., after the violation was

issued at 6:30 a.m., and that he had not previously been there for at least 3 months. Prior to the violation, he did not know whether intake air was flowing down towards the number two entry as indicated by the blue arrows. He also confirmed that the four single arrows which he circled in red on the map indicated the direction of return air, and that according to the map, it reflects that intake air and return air were flowing in the same direction down the same air course (Tr. 77-78). Mr. Lilly stated that "I feel like myself, that it was more intake air than was needed to ventilate the gob area, and that was the air that was coming down" (Tr. 78).

Mr. Lilly confirmed that it was impossible for intake and return air to be flowing in the same direction within the same air course as shown on the map, but that his testimony regarding the ventilation which he believed existed at the time of the violation is based on the map (Tr. 84). When asked whether he knew whether intake or return air was going to the entry marked number two on the map used by the inspector during his testimony, exhibit P-1, Mr. Lilly replied "not at the time of the violation, no" (Tr. 85). Mr. Lilly confirmed that he was aware of the fact that the fan in question would be installed 3 or 4 weeks before the violation was issued, and that he made the decision to install it with his engineering department. He confirmed that the ventilation system shown on his map, exhibit R-1, reflected the planned ventilation system, but he could recall no blue or orange coloring on the map when he reviewed it (Tr. 86). Respondent's counsel reiterated that the map was presented "for the purpose of Mr. Lilly's recollection" (Tr. 89). Petitioner's counsel confirmed that the two maps, exhibits P-1 and R-1, are identical except for the blue and orange arrow markings (Tr. 90).

Mr. Lilly conceded that the cited area in question was not being ventilated in the manner shown on the ventilation map submitted to MSHA, and respondent's counsel stipulated that the plan submitted to MSHA showed that area in question "showed that as being the return" (Tr. 90-91). Mr. Lilly contended that on the day of the violation, intake air was being used to properly ventilate the entry where the fan was being installed (Tr. 92). When asked why the stoppings were installed after the violation was issued if in fact the area was being properly ventilated, Mr. Lilly responded "to get everything taken care of to get the violation abated" and "we had to get back to work. We had to do what would satisfy MSHA" (Tr. 92-93).

Mr. Lilly stated that the regulator next to the number 2 entry was removed on the Sunday prior to Inspector Bowman's

return to the mine on Tuesday, August 25, 1987. He explained that the regulator had "quite a few openings" and "wasn't plastered to actually seal the air completely off." He stated that the removal of the regulator could possibly have had the effect of reversing the air flow in the gob area, but he believed that this was not the case. He conceded, however, that he would not have known this until after he went to the area at 7:30 a.m., on the day the violation was issued (Tr. 103). In explaining his travel through the area, he stated that "there were different locations up through here where air was coming in, along with the leakage through the stoppings. No matter how you build a stopping, it leaks a little" (Tr. 104-105). When asked to locate those areas, he stated that they do not appear on the map, exhibit P-1 (Tr. 105). He confirmed that the regulator had to be removed so that equipment could pass through the drift that was being driven (Tr. 107).

Inspector Bowman was called in rebuttal by the petitioner, and he explained the effect of the removal of the regulator on the ventilation used for the number 2 entry in question, as well as the gob area. Although he was of the opinion that the air ventilating the gob was not sufficient to ventilate it properly, he conceded that he could not support a citation for this purported condition because he could not make such a determination, and he did not know how much air was coming off the gob. The only determination that he could make was that "the air was coming by the approaches," and that some of it was pulling away from the gob area, as determined by his anemometer reading which indicated that "there was enough to turn the vanes of the anemometer" (Tr. 111, 113, 115-116). He confirmed that he had no knowledge as to the quality of the air going over the working area because he did not sample it (Tr. 116).

On cross-examination, Mr. Bowman stated that the regulator marked with a green "R" on respondent's map, exhibit R-1, was there during his inspection, and that intake air was going through it (Tr. 117).

Petitioner's Arguments

Petitioner maintains that given the fact that coal producing machinery was located and used for mining in the cited mechanized mining section, that area was in fact a mechanized mining unit within the meaning of section 75.319. With regard to the respondent's arguments concerning the phrase "contiguous working places" as found in the section 75.319-1, the definition of a "mechanized mining section," and the definition of "working places," petitioner maintains that the evidence establishes that there was only one working place,

namely the cited drift area where the mining equipment was located. Petitioner points out that the inspector believed that the cited location of the violation was in by the last open crosscut, and it takes the position that the definition found in section 75.319-1, does not require the existence of a number of working places at this location. Petitioner asserts that the definition was designed for application to a normal working face with an open crosscut and several entries going up to the working faces, and that a typical mechanized unit would have a set of equipment used to work several entries, and the definition was designed with this in mind.

Petitioner asserts that the facts in this case present a "unique situation" where mining was being done just inside the opening of a well developed mine, and that the primary purpose of this mining was to install a ventilation fan whose ultimate purpose was to improve mine ventilation. However, given the presence of mechanized mining equipment and mining in an entry which was not ventilated on a separate split of intake air, the hazards designed to be addressed by section 75.319 existed. In the event a hypothetical second entry was necessary, and was mined prior to the situation found by the inspector, the hazard to miners would have been the same because the hazard presented comes from the equipment used for mining in the area, rather than from the number of entries that the equipment is being used in. By citing section 75.319, and requiring a separate split of intake air to ventilate the area to abate the violation, the inspector believed that this was the safest method for ventilating the area and preventing possible explosions or other hazards (Tr. 118-120).

With regard to the question of negligence, petitioner asserts that the evidence presented clearly demonstrates more than "mere negligence" and supports the inspector's "unwarrantable failure" finding. In support of this conclusion, petitioner maintains that the respondent proceeded to install the fan without concern for the safety of miners, conducted no preshift inspection, and did not check its ventilation plan to ensure there was proper ventilation where mining was taking place. Given the fact that the respondent "just wanted to go in there and get this done and didn't care about the miners in there one way or another," counsel concludes that the respondent demonstrated a high degree of negligence (Tr. 120-121).

With regard to the gravity of the violation, petitioner points out that the inspector compared it with the "Farmington Disaster," which presented a serious explosion hazard, and it takes the position that the requested minimum civil penalty assessment of \$800 is adequate. Petitioner conceded that

there is no evidence of the presence of any explosive levels of methane or that the continuous-mining machine was in other than a permissible condition. However, petitioner took the position that the mere presence of the miner was a potential ignition source, and that the respondent had an obligation to preshift the cited area to verify that no hazardous conditions were present (Tr. 123-124).

Respondent's Arguments

Respondent asserted that in the absence of any "mechanized mining section," the alleged violation of section 75.319, cannot stand. Given the definition of "working place" as the "area of coal inby the last open crosscut," and the absence of any crosscut at the place where the fan was to be installed, an "SMU number," and a dust-control plan, respondent concludes that there is no evidence of the existence of any "mechanized mining section" on the day of the inspection. However, the respondent conceded that at the time of the inspection, four entries were being driven, and that while the last entry may be considered the last open crosscut, given the absence of a definition of "crosscut," and the mine map which shows that one would have to travel a long way beyond the location of the alleged violation to reach a point inby the last open crosscut, the respondent questions whether or not these driven entries may be considered "contiguous working places," or whether the alleged violation took place "inby the last open crosscut" within the meaning of section 75.319. Further, respondent stated that "contiguous working places" means "more than one place you're working," and the only place the respondent intended to work "was just to cut this one place for the fan." Respondent concluded that "it's stretching the definition quite a bit to try to include this area in a mechanized mining section" (Tr. 124-126).

With regard to the alleged use of return air to ventilate the area 35 feet inby the drift opening where the respondent intended to install a fan, respondent states that the only evidence advanced by the petitioner to support this contention is the ventilation plan reference on the mine map which depicts an arrow showing that return air was ventilating the cited location. Respondent maintains that an arrow drawn on a map "does not make it return" air, and that in order for it to be return air, the air would have to pass through a working place and then out of the mine. Respondent contends that there is no evidence that the air that ventilated the area being developed passed through any working place, and that "the only smidgeon of evidence or assertion of it passing somewhere where it might be turned into return, was the fact

that it went by an abandoned area." Referring to mandatory section 75.311, which states that "Air which has passed by an opening of any abandoned area shall not be used to ventilate any working place in the coal mine if such air contains .25 volume per centum or more of methane," respondent asserts that even if the intake air somehow becomes return air by passing an abandoned area, it can still be used for ventilation purposes because the petitioner has not established the presence of any methane or contaminants in the air (Tr. 127).

With regard to the lack of any preshift examination, respondent pointed out that "you're looking at sixty feet in by the opening of the mine. It's just a question of walking sixty feet and coming out and writing it in a book . . . it wasn't like the whole mine didn't get pre-shifted" (Tr. 127). The respondent concluded as follows at (Tr. 127-128):

At best, I think that what could have been written in regard to the actions that transpired here was a technical violation of the ventilation plan. What instead was written was an unwarrantable failure of the operator to properly ventilate where it was working. And there's no allegations that there was improper air, improper volumes of air where the mining machine was operating. The only allegation is that instead of intake air it was return air. And that comes back to the definition. When did it become return air? Just having the arrows on the map doesn't make it return air. It's got to be exposed to some contaminants, and it's Respondent's position that there was no such exposure.

Respondent asserted that given the "unwarrantable failure" standard of proof required by the Commission in Emery Mining Corporation, 9 FMSHRC 1997 (Dec. 1987), the respondent's negligence was only "ordinary" because it did not believe it was mining in "a mechanized mining section," and that this is "something that's not plain, unambiguous" (Tr. 129). Assuming that the facts and evidence establishes an unwarrantable failure, respondent concedes that the underlying procedural time sequence requirements for the issuance of the section 104(d)(1) order in question were technically correct (Tr. 129). Given the absence of any evidence of improper or insufficient air ventilating areas where men were working, respondent concludes that no one was exposed to any hazards, and that only three men would normally be working in the area where the fan was being installed (Tr. 130).

Respondent conceded that the cited location was driven 60 feet on a conventional mining section which utilized a continuous-mining machine, bolter, and shuttle car operating in sequence, and that it intended to cut the entry in for a distance of approximately 100 feet to connect up with the number 10 entry. The principal purpose of cutting at the cited location was to facilitate the installation of the fan which was ultimately installed approximately 3 weeks later (Tr. 131).

Arguing in rebuttal to the respondent's reference to the first sentence of section 75.311, petitioner's counsel stated that the next sentence of the standard requires that all air containing less than .25 volume per centum or more of methane be examined during the preshift examination required by section 75.303. Counsel pointed out that the respondent was also cited by Inspector Bowman on August 25, 1987, for not performing the required preshift and did not contest that order. Had the required preshift been conducted, and the air tested along the entire air course as required, and found to be below .25, the gravity would have been much less (Tr. 132). Although the respondent's counsel stated that "the rest of that area was preshifted," and that only the area where the miner was operating was not tested, I take note of the fact that the uncontested order citing a violation of section 75.303, was issued for the failure by the respondent to preshift the active workings inby the drift opening in question, and that all areas inby the drift opening were ordered withdrawn by the inspector (Tr. 132-133).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.319, which provides as follows:

Each mechanized mining section shall be ventilated with a separate split of intake air directed by overcasts, undercasts, or the equivalent, except an extension of time, not in excess of 9 months, may be permitted by the Secretary, under such conditions as he may prescribe, whenever he determines that this subsection cannot be complied with on March 30, 1970.

The term "mechanized mining section" is defined by 30 C.F.R. § 75.319-1, as follows:

The term "mechanized mining section" means an area of a mine in which coal is mined with one set of production equipment, characterized in a conventional mining section by a single loading machine, or in a continuous mining section by a single continuous mining machine, and which is comprised of a number of contiguous working places. Specialized mining sections, such as longwall mining sections, which utilize equipment other than specified in this section, may, if approved by the Coal Mine Safety District Manager, be ventilated by a single split of air.

The term "working place" is defined by 30 C.F.R. § 75.2(g)(2) as "the area of a coal mine in by the last open crosscut." The term "crosscut" is synonymous with the term "breakthrough," and it is defined in part by A Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines, U.S. Department of the Interior, 1968, pg. 280, as follows:

A crosscut may be a coal drivage * * * . In room and pillar mining, the piercing of the pillars at more or less regular intervals for the purpose of haulage and ventilation. * * * In general, any drift driven across between any two openings for any mining purpose. * * *

"Breakthrough" is defined as "A passage cut through the pillar to allow the ventilating current to pass from one room to another. * * * An opening made either accidentally or deliberately, between two underground openings." Mining Dictionary, at pg. 137.

A "split of air" means a separate air circuit, e.g., when mine workings are subdivided to form a number of separate ventilating districts. The main intake air is split into the different districts, each of which is given a specific supply of fresh air free from contamination by the air of other districts, and later the return air from the districts reunited to restore the single main return air current. Mining Dictionary, at pg. 1201.

The respondent's contention that the area cited by Inspector Bowman was not a "mechanized mining section" as defined by section 75.319-1, because it did not include any "contiguous working places" due to the absence of any "last open crosscut" and the fact that the only place it intended to work was where the fan was to be placed is rejected. The evidence clearly

establishes that when the violation was issued, the entry in question was being actively mined. Inspector Bowman observed a continuous-mining machine and shuttle car in the entry, and he observed miners leaving the area. Mine Superintendent Lilly confirmed the fact that the mining sequence included the use of a continuous miner, shuttle car, and roof bolter, and the roof was being bolted as coal was being mined in the entry.

Superintendent Lilly admitted that at the time the violation was issued, the respondent intended to drive the entry for a distance of approximately 100 feet to connect it up with the number 10 entry, and that the fan was actually installed 3 weeks after the entry was initially driven (Tr. 131). Further, the evidence establishes that at the time the entry in question was being driven and mined, three additional adjacent entries were in existence, and the mine maps reflect the presence of crosscuts, stoppings, regulators, and the establishment of air ventilation.

Inspector Bowman's un rebutted testimony reflects that while the cited location may have been an entry when it was initially designed and cut, once it is driven and rehabilitated due to changes and maintenance resulting from the presence of water, that location would be considered the last open crosscut (Tr. 49). The evidence establishes that at the time the violation was issued, the entry had been driven and developed for approximately 70 feet, and the mining cycle included the use of a mining machine, shuttle car, and roof bolter. Mr. Bowman explained and described the location of the last open crosscut (Tr. 23).

The evidence also reflects that during his inspection of August 25, 1987, Inspector Bowman issued an uncontested violation because of the failure by the respondent to conduct an adequate preshift examination "in the active workings" in by the drift opening in question, and that he also issued several other citations for violations of the respondent's approved roof-control plan, the failure to adequately protect a continuous miner trailing cable, and the installation of line brattice only within 69 feet of the working face, rather than 10 feet as required by the cited mandatory ventilation standard section 75.302 (Exhibit P-2). This particular standard requires that such ventilation devices be continuously used from the last open crosscut of an entry or room of each working section in order to provide ventilation to the working faces.

Under all of the aforementioned circumstances, I conclude and find that the area cited by Inspector Bowman included contiguous working places within the meaning of section 75.319-1, and that it was in fact a mechanized mining section within the scope of cited section 75.319. I also find the testimony of Inspector Bowman regarding the existence and location of the "last open crosscut" within the area which he cited to be credible. See: MSHA v. Jim Water Resources, Inc., Docket Nos. SE 87-8, SE 86-105-R, decided by the Commission on January 13, 1989.

Inspector Bowman cited a violation of section 75.319, because of the failure by the respondent to provide a separate split of intake air to ventilate the mechanized mining section which was operating in the return air course inby the drift opening which had been driven to facilitate the installation of a fan. Mr. Bowman confirmed that when he conducted his inspection and issued the violation, he observed that the entry had been advanced and developed for a distance of approximately 70 feet, and that it was being driven around some water located inby the Number 4 drift opening. Mr. Bowman observed a continuous-mining machine and a shuttle car in the entry, and he also observed several miners coming out the drift entry which had been driven and mined. Mr. Bowman proceeded into the area and found that no ventilation curtains had been installed, and using an anemometer, he determined that the air currents leaving the gob area were flowing in the direction of the drift entry where coal was being mined as the entry was advanced. Mr. Bowman testified that the anemometer vanes were turning rapidly and that he could feel the air movement. Mr. Bowman determined that the air coursing into and down the entry towards the drift area in question had apparently reversed itself and was flowing in the "wrong direction" contrary to the respondent's ventilation plan, and he concluded that this was ventilation return air rather than intake air as required by section 75.319. Since this was the case, he issued the violation.

The respondent contended that the ventilation directional arrows shown on the mine ventilation maps, which indicate the cited area in question being ventilated by return air, rather than intake air, were "engineering mistakes." However, it presented no credible engineering testimony or evidence to support any such conclusion. The only witness called to rebut the inspector's testimony was mine superintendent Lilly. Mr. Lilly confirmed that the mine ventilation map, exhibit R-1, which clearly shows the cited area being ventilated by return air, rather than intake air was in effect at the time the violation was issued. The evidence shows that Mr. Lilly

was not at the cited location when the violation was issued, had not previously been there for at least 3 months, and that he arrived at the scene an hour after the violation was issued. Further, Mr. Lilly agreed with the inspector that the air passing through a regulator from the gob area was moving in the "wrong direction," and that the air flow directional arrows shown on the mine ventilation map reflecting the ventilation pattern for the cited entry shows that the area was being ventilated by return air. Mr. Lilly admitted that at the time the violation was issued, he did not know whether the cited area was being ventilated by intake air or return air. He also agreed with the inspector that air was coursing in the wrong direction through a regulator (Tr. 70, 103).

After careful review of the testimony presented in this case, I conclude and find that the credible testimony and evidence presented by Inspector Bowman establishes that the cited area in question was being ventilated by return air and that a separate split of intake air was not provided to ventilate that area. Since the cited standard clearly requires the area to be ventilated by intake air, I further conclude and find that a violation of section 75.319 has been established. Accordingly, the violation issued by Inspector Bowman IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a

violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogeny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

I take note of the fact that at the time he issued the section 104(d)(1) unwarrantable failure order in question, Mr. Bowman made a negligence finding of "Reckless Disregard" (item 11(E), Order), but then changed it to reflect a finding of "High" negligence (item 11(D)). I also take note of MSHA's civil penalty assessment criteria found in Part 100, Title 30, Code of Federal Regulations. Section 100.3(d), Table VIII, explains the various degrees of negligence associated with a violation which is being reviewed for assessment purposes. Under these guidelines, "high negligence" is applicable in those instances where an "operator knew or should have known

of the violative condition or practice, and there are no mitigating circumstances," "Reckless disregard" is applicable in those instances where an "operator displayed conduct which exhibits the absence of the slightest degree of care."

In support of his "high negligence" and unwarrantable failure finding, Inspector Bowman explained that after completing his prior inspection on August 21, 1987, he advised mine foreman Don Hughes, who he knew very well, that he would be returning to the mine the following Tuesday, August 25, to conduct his noise surveys. Since the foreman knew he would be coming back, and since he advised Mr. Bowman that he had been in the area the preceding day, Mr. Bowman questioned "why he allowed this to go on" (Tr. 28). Since the foreman was responsible for the operation of the mine, and given the "overall conditions" that he found upon his return to the mine, Mr. Bowman concluded that the foreman should be held accountable for his failure to address all of these conditions which Mr. Bowman believed were readily observable. Although Mr. Bowman alluded to the fact that he had a general conversation with the mine foreman concerning the installation of the fan within 2 or 3 weeks of his inspection, Mr. Bowman confirmed that he was not aware of the fact that a new entry was required for the fan installation, and that this "was never brought up" (Tr. 29, 32).

It seems obvious to me from the facts of this case that Inspector Bowman's "high negligence" finding was not limited to the conditions which prompted him to cite a violation of section 75.319. His justification for issuing the unwarrantable failure order included the additional conditions which he found and cited during the course of his inspection, and Mr. Bowman tacitly admitted this was the case when he stated that "whenever you have several problems that one piece of paper can correct, I try to stay that way as much as I can" (Tr. 114).

Mine foreman Hughes was not called to testify in this matter. Superintendent Lilly stated that 3 or 4-weeks prior to the inspection he made the decision to install the fan after consulting his engineering department. He confirmed that he reviewed the ventilation plan prior to the installation of the fan, and that the proposed ventilation changes were submitted to MSHA through the engineering department. However, he had not visited the cited area for at least 3-months prior to the inspection, and only discussed the matter with Mr. Bowman after the violation was issued in order to abate it (Tr. 76-77, 86, 94). Mr. Lilly further explained that the fan was installed to improve the ventilation and to

increase the amount of air used to ventilate the mine, and he confirmed that the installation was finally completed approximately 3 weeks after the violation was issued (Tr. 131).

During the course of oral argument, respondent's counsel suggested that given the fact that the regulatory definition of a "mechanized mining unit" is not plain and unambiguous, the respondent could not have known whether the cited location was in fact a mechanized mining section which was required to be ventilated by intake air pursuant to section 75.319. I agree that the interpretation and application of this section requires one to refer to the definition of "mechanized mining unit" as stated in section 75.319-1, the definition "working place" found in section 75.2(g)(2), and to make a determination as to the location of the "last open crosscut," and the existence of "contiguous working places." Given the complexity of these regulatory and factual determinations, I find some merit in the respondent's argument, but find nothing in Mr. Lilly's testimony to support a conclusion that he was confused or oblivious to the fact that the cited area was required to be ventilated by intake air rather than return air.

The petitioner takes the position that the additional violations issued by Inspector Bowman during the course of his inspection shortly before the issuance of the contested unwarrantable failure order in question reflects a complete disregard for any safety concerns on the part of the respondent, and clearly supports an unwarrantable failure finding in this case (Tr. 14, 120-121, 129-130). I disagree. Unlike an imminent danger order issued pursuant to section 107(a), which may be based on a combination of violative conditions or practices, an unwarrantable failure violation and order issued pursuant to section 104(d)(1) of the Act, is limited to a specific violation of a particular mandatory safety or health standard. Accordingly, I conclude and find that the degree of negligence associated with the additional violations which are not in issue in this case must be determined on the particular facts associated with those violations and may not be used to support an alleged unwarrantable failure by the respondent to comply with the requirements of the cited standard section 75.319.

Although one of the aforementioned prior violations included a negligence finding of "reckless disregard," and was included as part of the petitioner's pleadings in this case, the respondent subsequently decided not to contest it further (Tr. 3; respondent's answer). No information has been forthcoming with respect to the status of the other violations, and

I take note of the fact that with respect to two of these violations, Inspector Bowman made findings of "moderate negligence," and found "high negligence" with respect to another one (Exhibit P-2).

The respondent's history of prior violations, as reflected by an MSHA computer print-out submitted by the petitioner reflects that for a 2-year period prior to the inspection by Mr. Bowman on August 25, 1987, shows that the respondent paid civil penalty assessments for a total of 77 violations of the mandatory ventilation standards found in Part 75, Subpart D, Title 30, Code of Federal Regulations. Except for two section 104(d)(1) unwarrantable failure citations, one of which was issued on October 17, 1985, for a violation of section 75.316, and one of which was issued on March 10, 1987, for a violation of section 75.319, the same standard cited in this case, the remaining citations were all section 104(a) citations, and 29 of them were "single penalty" non-"S&S" citations.

After careful review of all of the evidence and testimony adduced in this case, I find no credible or probative evidentiary support for any conclusion that the respondent's conduct in failing to adhere to the requirements of section 75.319, was aggravated, inexcusable, or egregious, or resulted from the absence of the slightest degree of care. Accordingly, the inspector's unwarrantable failure finding IS VACATED.

Modification of the Contested Order

In view of my unwarrantable failure finding, the contested section 104(d)(1) Order is modified to a section 104(a) citation. See: Old Ben Coal Company, 2 FMSHRC 1187 (June 1980); Consolidation Coal Company, 3 FMSHRC 2207 (September 1981); Youngstown Mines Corporation, 3 FMSHRC 1793 (July 1981).

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Bowman testified that the mine has a history of liberating methane, and since the entry in question had mined and advanced for some 69 feet without the use of ventilation line curtains, he was concerned that a buildup of methane and mine contaminants or "black damp," which could be present at any time in the return air being coursed to the area where mining was taking place, could have exposed the miners working

in the area to an ignition hazard, particularly in the event of arcing or a blown electrical equipment cable (Tr. 21-22).

Superintendent Lilly did not dispute the fact that coal was being mined as the drift entry was being advanced, and he confirmed the fact that the mining sequence included the use of a continuous-mining machine, shuttle car, and roof bolter, all of which I consider to be potential ignition sources. Although the entry had been driven for approximately 69 feet at the time of the inspection, Mr. Lilly conceded that the respondent had intended to drive it for a distance of 100 feet, and he did not rebut the inspector's credible testimony with respect to the absence of, or inadequately placed, ventilation line curtains in the area where coal was being mined.

Although there is no credible evidence to establish the actual presence of explosive mixtures of methane, or the presence of "black damp" in the return air course being used to ventilate the working area in question, since all mines freely liberate methane, particularly when coal is being cut at the face, inadequate ventilation and the use of return air, which normally is used to course methane and other contaminants out of the mine, to ventilate such areas poses a discrete explosion hazard, as well as a hazard of the miners who could be exposed to other mine gases and contaminants commonly known as "black damp." Since the clear intent of section 75.319, is to insure that such areas are ventilated by "clean" intake air, the use of return air for this purpose is contrary to the requirements of the standard.

On the facts of this case, given the fact that three to five miners would normally be present in the area while the entry in question was being mined and advanced by electrically powered machinery which posed a potential ignition source, and given the added fact that the right mixture of explosive methane and air could be present at any time, particularly in an area which has not been preshifted to insure the absence of excessive levels of methane or other mine contaminants, or which had not been adequately ventilated by line curtains, I believe it is reasonable to conclude that a potential accident or explosion hazard was present at the time of the inspection when the violation was issued. In the event of any such occurrences, I further conclude that it would be reasonably likely that the miners working in the area would likely suffer fatal injuries or injuries of a reasonably serious nature. Under all of these circumstances, I agree with the inspector's "significant and substantial" finding, and IT IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

Exhibit P-1, an MSHA "Controller Information Report," reflects that the respondent's No. 2 Mine produced 244,116 tons of coal in 1986, and 386,954 tons in 1987, and respondent's counsel characterized the respondent's mining operation as "medium." I conclude and find that the respondent's mining operation is medium in scope, and I adopt the stipulation by the parties that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business as my finding on this issue.

History of Prior Violations

An MSHA computer print-out submitted by the petitioner reflects that for the period August 25, 1985 through August 24, 1987, the respondent paid civil penalty assessments in the amount of \$24,930, for 372 violations, 219 of which are characterized as "significant and substantial" violations. Seventy-seven (77) of these prior paid violations were for violations of the ventilation requirements found in 30 C.F.R. Part 75, Subpart D, but only one was for a prior violation of section 75.319. For a mine operation of its size, I conclude that the respondent's overall prior compliance history is not particularly good, and I have considered this in the civil penalty assessment which I have made for the violation in question.

Negligence

I conclude and find that the violation which has been affirmed resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary or moderate negligence.

Gravity

For the reasons stated in my "significant and substantial" findings and conclusions, I conclude that the violation was serious.

Good Faith Abatement

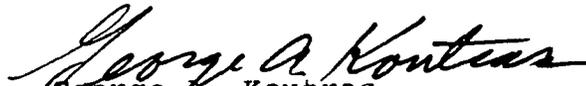
The evidence establishes that abatement was achieved by the installation of stoppings to provide a separate split of intake air to the miners working in the cited area (Tr. 26, 71-73), and I conclude and find that the respondent timely abated the cited condition in good faith.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$450 is reasonable and appropriate for the violation which I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$450 for a violation of 30 C.F.R. § 75.319, as stated in the modified section 104(a) "S&S" Citation No. 2716156. If it has not already done so, respondent is FURTHER ORDERED to pay a civil penalty assessment in the amount of \$700 for the uncontested August 25, 1987, section 104(d)(1) Order No. 2716152, 30 C.F.R. § 75.303. Upon receipt of payment by MSHA, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 9 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 88-161
Petitioner : A.C. No. 15-02705-03645
v. :
PEABODY COAL COMPANY, : Camp No. 2 Mine
Respondent :

DECISION

Appearances: William F. Taylor, Esq., Office of the
Solicitor, U.S. Department of Labor for the
Petitioner;
Eugene P. Schmittgens, Jr., Esq., Peabody
Holding Company, Inc., St. Louis, Missouri for
Respondent.

Before: Judge Melick

This case is before me upon cross motions for summary decision filed pursuant to Commission Rule 64, 29 C.F.R. § 2700.64. The underlying petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charges Peabody Coal Company (Peabody) with one violation of the regulatory standard at 30 C.F.R. § 48.10. The general issues before me are whether Peabody violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation before me, No. 2836947, issued pursuant to section 104(a) of the Act, charges that "in checking the training records for the annual retraining for 1988 held on March 14-15, the records indicate that personal [sic] at the mine were not being trained on their normal working shift as defined in 48.2(d)."

Section 115 of the Act provides that miners are to receive their statutorily mandated health and safety training during normal working hours. The regulation at 30 C.F.R. § 48.10(a) also states that such training "shall be conducted

during normal working hours". "Normal working hours" is defined in the regulations at 30 C.F.R. § 48.2(d) as follows:

"normal working hours" means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice.

The essential facts are not in dispute. The Camp No. 2 Mine is an underground facility located in Union County, Kentucky. It operates five days a week with three shifts on the following schedule:

1st shift (day shift) - 8:00 a.m. to 4:00 p.m.
2nd shift (night shift) 4:00 p.m. to 12:00 a.m.
3rd shift (midnight shift) 12:00 a.m. to 8:00 a.m.

On March 15 and 17, 1988, the Federal Mine Safety and Health Administration (MSHA) District Office in Madisonville, Kentucky was notified that Peabody was violating the training provisions at 30 C.F.R. § 48.10(a) in that miners were being forced to attend annual refresher training courses during hours the miners were not normally scheduled to work. MSHA Inspector Ronald Oglesby, thereafter on March 17, 1988, visited the Camp No. 2 mine and found that several miners who ordinarily worked the second shift, (4:00 p.m. until 12:00 midnight) were required to attend annual refresher training on March 14 and 15, 1988, during the first shift hours from 8:00 a.m. until 4:00 p.m.

Upon his arrival at the mine Oglesby met with Peabody officials Jim Cartwright (Safety Manager) and Matt Haaga (Camp No. 2 Mine Foreman), and with Luis Seaton of the United Mine Workers of America. Haaga told Oglesby that Peabody did not honor the employees' normal shift assignments for purposes of training and acknowledged that two miners, Larry Menser and Anthony Edwards, both assigned to work the second shift from 4:00 p.m. until 12:00 midnight, were directed by him to attend the annual refresher training course on the day shift scheduled from 8:00 a.m. until 4:00 p.m. on Monday, March 14, 1988.

The two miners told Haaga that they were second shift employees and consequently should receive their training during their scheduled work hours from 4:00 p.m. until 12:00 midnight. The two miners maintained that they should not be forced to attend training during the day shift hours because

those were not the hours they were otherwise scheduled to work. Haaga responded at this point by giving a "direct order" to Menser and Edwards to attend the training as directed or "face discipline up to and including discharge."

The undisputed evidence shows that Menser reported to the Peabody Training Center as directed and attended training during the scheduled day shift hours on March 14, 1988. After attending this training session he requested to work the second shift on March 15, 1988. Peabody granted this request and Menser was paid at the overtime rate for that work. The evidence further shows that Edwards called in sick on March 14, 1988, and did not attend the training session as ordered. Edwards subsequently attended the training course on March 15, 1988, during the day shift hours from 8:00 a.m. until 4:00 p.m. but did not work the second shift on March 15, 1988.

The Secretary maintains that these miners who were ordinarily assigned to work the second shift were unlawfully required to attend training on the first shift on March 14 and 15, 1988--times other than their "normal working hours". Peabody maintains on the other hand that the evidence in this case demonstrates that cross-shifting between shifts was such a regular practice at the Camp No. 2 Mine as to have established it as a "common practice". Under this rationale the subject training could therefore be given to the noted miners on the day shift on March 14 and 15, 1988, as their "normal working hours."

Under certain circumstances the mine operator has the right to cross-shift miners for the purpose of providing the required training if cross-shifting is a common practice at the mine. See Consolidation Coal Co. v. Secretary of Labor, 4 FMSHRC 578 (1982) (ALJ); Secretary of Labor v. Peabody Coal Co., 7 FMSHRC 1039 (1985) (ALJ). In order for Peabody to prevail in this case then, it must establish that such a "common practice" existed at the Camp No. 2 Mine in March 1988. "Common practice" is defined in the latter decision as "that which is generally done, the prevailing practice."

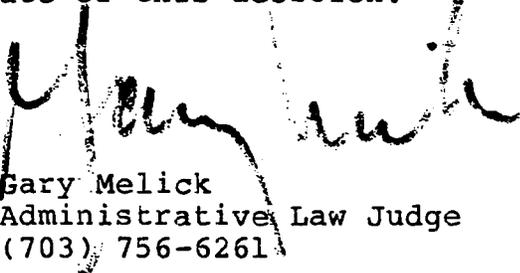
In this case it is not disputed that there were approximately 291 miners employed at the Camp No. 2 Mine during the period January through March 1988, and of the approximately 180 shifts worked during that period there were more than 100 shift changes. In all but two cases during this period however the shift changes occurred at the request of the individual miners and not at the direction of Peabody. Thus if there was any "common practice" of cross-shifting it was limited to cross-shifting initiated by the miners. The

existence of only two involuntary "cross-shifts" during the period January through March 1988 over approximately 180 shifts does not support a finding that there was a "common practice" of involuntary cross-shifting at the mine. Under the circumstances requiring the miners at issue to attend annual refresher training on March 14, and 15, 1988, during the first shift was not during the "normal working hours" of those miners and accordingly was in violation of the cited regulation.

I find however that the operator is chargeable with but little negligence. The precise legal issue appears to be one of first impression and it cannot be said that Peabody's position was entirely frivolous. In assessing a penalty herein I have considered all of the criteria under section 110(i) of the Act. Under the circumstances I find that a civil penalty of \$50 is appropriate.

ORDER

Peabody Coal Company is directed to pay a civil penalty of \$50 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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

Eugene P. Schmittgens, Jr., Peabody Coal Company, 301 N. Memorial Drive, P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 9 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 88-153
Petitioner : A.C. No. 15-14872-03512
v. :
: No. 1 Surface
TWIN OAK CONSTRUCTION :
COMPANY, :
Respondent :

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner.

Before: Judge Fauver

The Secretary of Labor brought this proceeding for civil penalties for alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The case was called for hearing in Huntington, West Virginia, on January 18, 1989. Government counsel appeared with her witnesses and documentary evidence. Respondent did not attend the hearing.

The Government's inspector was sworn and testified, and the documentary evidence was received.

Because of Respondent's default, it is held that the Secretary is entitled to a default decision. Therefore, the allegations in the six citations involved are deemed to be true and are incorporated in this Decision as findings of fact. Also, the allegations of violations of the cited safety standards are deemed to be true and are incorporated in this Decision as conclusions of law.

Respondent has demonstrated a persistent and deliberate failure to pay prior civil penalties for violations of mine

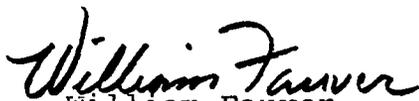
safety standards that are long overdue and not in present litigation. In the 24-month period preceding the citations involved in this case, Respondent was assessed \$2,813 for 24 violations and of that amount, Respondent has not paid any of the civil penalties. The recalcitrance shown by this record of nonpayment is part of Respondent's compliance history, cognizable under section 110(i) of the Act. In light of this poor compliance record, I agree with the Secretary's proposal that the civil penalties in this case should be higher than the original amounts proposed.

Based upon the above, and the other criteria for civil penalties in section 110(i) of the Act, I assess civil penalties for the following violations in the amounts shown:

<u>Citation No.</u>	<u>Civil Penalty</u>
2979395	\$ 250
2979396	\$ 250
2979397	\$ 250
2979398	\$ 250
2979399	\$ 300
2979400	\$ 300
	<u>\$1,600</u>

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties of \$1,600 within 30 days of this Decision.


William Fauver
Administrative Law Judge

Distribution:

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

Mr. Hobert Newman, President, Twin Oak Construction Company, Box 8, Bevinsville, KY 41606 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 13 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 88-53-M
Petitioner : A.C. No. 41-00046-05520
v. :
: El Paso Quarry & Plant
EL PASO SAND PRODUCTS, INC., :
Respondent :

DECISION APPROVING SETTLEMENT
AND
ORDER TO PAY

Before: Judge Koutras

The parties have filed a motion to approve a settlement of this case. The originally assessed civil penalty assessment for the violation in question was \$345, and the parties proposed to settle the matter for a civil penalty payment of \$258.75. In support of their settlement proposal, the parties have submitted arguments and information for my consideration, and after due consideration of same, I conclude and find that the proposed settlement is reasonable and in the public interest. The motion IS GRANTED and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay \$258.75 to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment by MSHA, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

FEB 16 1989

ROBERT BUELKE, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. WEST 86-192-D
 : DENV-CD 86-8
 :
THUNDER BASIN COAL COMPANY, : Black Thunder Mine
Respondent :

DECISION

Appearances: Mr. Robert W. Buelke, Gillette, Wyoming,
pro se.;
Charles W. Newcom, Esq., Sherman and Howard,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by Robert Buelke under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that his layoff on January 31, 1986, by Thunder Basin Coal Company, (Thunder Basin), was in violation of section 105(c)(1) of the Act. 1/

1/ Section 105(c)(1) of the Act provides as follows:

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

On January 31, 1986, Thunder Basin Coal Company conducted a layoff at its Black Thunder Basin mine near Wright, Wyoming. In that layoff, the workforce was reduced by approximately 140 employees. Approximately 100 of those employees were hourly employees, and approximately 40 of those employees were management employees. Eight of the miners laid off were electricians who fell within the reduction in workforce criteria established and used by the company in conducting a layoff at its mine. One of the eight electricians laid off was Mr. Buelke, complainant in this action.

Complainant contends that he fell within the reduction in workforce criteria established by the Company because he engaged in activities protected under the Act. Thunder Basin denies that it in any way discriminated against Mr. Buelke in violation of Section 105(c) of the Act. Thunder Basin states that Mr. Buelke was one of approximately 140 employees, including 40 management employees, laid off on January 31, 1986 because of lack of work and that the lay off occurred under reduction in force criteria, which was established in 1983.

Thunder Basin also contends that Mr. Buelke's claim is not timely and should be dismissed for failure to comply with the applicable statute of limitations.

ISSUES

1. Is complainant's complaint barred by time limitations?
2. Was complainant selected for layoff or otherwise discriminated against because of activity protected under the Act?

TIME LIMITATIONS

The threshold issues which must be addressed is whether Mr. Buelke's claim is timely. Mr. Buelke layoff occurred on January 31, 1986. On March 31, 1986 Mr. Buelke filed a discrimination complaint with the Mine Safety and Health Administration (MSHA). MSHA investigated Mr. Buelke's complaint and based upon that investigation determined that a violation of section 105(c) of the Act had not occurred. MSHA so advised Mr. Buelke by letter dated May 13, 1986. The May 13, 1986 letter also advised Mr. Buelke that if he disagreed with MSHA's determination, he had 30 days after the receipt of that "notice" to file his own action with the Commission.

Mr. Buelke's pro se complaint was received and stamp-dated in the Commission office on June 24, 1986. This was his initial contact with the Commission. He dated the letter (complaint) June 16, 1986. Exhibits R-21, R-22, and R-23. The envelope which enclosed Mr. Buelke's letter was postmarked June 19, 1986. It is noted that June 16, 1986 was a Monday and June 19, 1986, the date

the letter was postmarked was a Thursday. Mr. Buelke's appeal to the Commission was not filed within 30 days of the date of MSHA's May 13, 1986 notice. MSHA's May 13, 1986 letter was signed for on May 16, 1986 by a friend of Mr. Buelke who he was having pick up his mail for him. Mr. Buelke also testified regarding various personal problems and circumstances which occurred in May and June of 1986 to explain the delay in filing his action with the Commission such as stress due to the illness of a friend and the death of his aunt.

Mr. Buelke states that he has had approximately 225 hours of college credit; that he understood he needed to file with the Commission within 30 days of the May 13, 1986 notice from MSHA if he should disagree with MSHA's determination.

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary. The Act further provides that upon receipt of a complaint by a miner, the Secretary shall commence an investigation within 15 days, and if he determines that discrimination has occurred, he shall immediately file a complaint with the Commission. It directs the Secretary to notify the miner in writing within 90 days of the receipt of a complaint of his determination whether a violation has occurred. The Act further provides that if the Secretary, upon investigation, determines that the provisions of 105(c) have not been violated, the "complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination ...".

On review of the legislative history of the Federal Mine Safety and Health Act of 1977 and Commission cases involving section 105(c), I am satisfied that the time limitations of section 105(c) were not intended to be jurisdictional. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the respondent shows material, legal prejudice attributable to the delay. Cf. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986). No such showing has been made here. Although respondent alleges prejudice and some of the potential witnesses are no longer employed by Thunder Basin, I find that respondent has not shown material legal prejudice attributable to the delay. Respondent's contention that Mr. Buelke's claim must be dismissed for failure to comply with the statute of limitations contained in section 105(c) of the Act is rejected.

ADVERSE ACTION - THE LAYOFF

Due to lack of work Thunder Basin on January 31, 1986 laid off approximately 140 employees including 40 management employees. Mr. Buelke was one of the 8 electricians in the electric department that fell within the reduction in work force criteria used by Thunder Basin in conducting a layoff at its mine. This reduction in work force criteria consisted primarily of the same criteria previously established and used by Thunder Basin in an earlier, 1983, reduction in work force. The basic relevant criteria under which Mr. Buelke was laid off is set forth in Exhibit 1 as follows:

THUNDER BASIN COAL COMPANY

REDUCTION IN WORKFORCE, 1986

1. ANY THUNDER BASIN COAL COMPANY EMPLOYEE THAT FALLS UNDER THE FOLLOWING 1983 CRITERIA WILL BE SEPARATED REGARDLESS OF SENIORITY STATUS:

5 PERFORMANCE RATING,

3RD STEP CORRECTIVE ACTION,

4 PERFORMANCE RATING,

3- PERFORMANCE RATING AND TWO CORRECTIVE ACTIONS,

TWO CORRECTIVE ACTIONS.

There was no evidence that the criteria used in the reduction in force layoff on January 31, 1986, was improper or unfair criteria for Thunder Basin to use in conducting the layoff and Mr. Buelke clearly fell within the reduction in work force criteria. At the time of January 31, 1986 layoff Mr. Buelke had two third step corrective actions in his personnel file. Exhibit R-7 and R-12. The most recent performance review in his file was a 3- rating. (Exhibit R-17). In addition Mr. Buelke had a total of four corrective actions in his file (Ex. R-2, R-3, R-7, and R-12). Thus, Mr. Buelke fell within three of the five performance criteria which were the first factors looked to in selecting employees for the 1986 layoff (Exhibit R-1). Under the established criteria Mr. Buelke would have been selected for layoff if he fell within only one of the five performance criteria.

With regard to the four corrective actions Mr. Buelke was initially disciplined for using code 33 to record three different absences during 1984. Thunder Basin contends that this was contrary to company policy set forth in Exhibit R-36. It is

clear from the record that Mr. Buelke used the code 33 designation on his absences even though he had been specifically instructed by his supervisor "O. W. Wendell" Johnson that he should not do that.

Next Mr. Buelke received a step II corrective action for leaving his work area without permission. (Exhibit R-3). He then received two step III corrective actions, one for failure to remove company property from his locker, (Exhibit R-7) and a second for unsafe conduct when he was involved in a serious accident. (Exhibit R-12).

Mr. Buelke also had a 3- evaluation in his file at the time of the layoff. (Exhibit R-17) Mr. Stanforth testified that in making his evaluation of Mr. Buelke, he was concerned with Mr. Buelke's short attention span and concentration, inattention to safety, and lack of urgency in repairing equipment.

Evidence was also presented that Mr. Buelke had received a 3 evaluation in December of 1985 while Mr. Buelke was working for Mr. Munn at the Coal Creek Mine of Thunder Basin, a mine approximately 25 miles from Black Thunder Mine where Mr. Buelke usually worked. This evaluation never reached Mr. Buelke's personnel file which was left at the Black Thunder Mine. Nothing in the record suggest that the loss of this evaluation was in any way tied to any protected activity by Mr. Buelke. However, even if the evaluation had been in Mr. Buelke's file, he still would have been laid off under the reduction in work force criteria because of the corrective actions he had received. Mr. Buelke had a total of four corrective actions and needed only two corrective actions to be laid off. He also had two 3rd-step corrective actions and needed only one 3rd-step corrective actions to be laid off under the established reduction in work force criteria.

DISCRIMINATION

It is well settled that in order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless

may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act.

PROTECTIVE ACTIVITY

Mr. Buelke fully established that he engaged in protective activity. At the safety meetings he and his fellow electricians would voice safety concerns. He often took the lead in voicing those concerns. One of the major items with which he became concerned early in 1983 was a high voltage underground feeder wire buried directly into the earth (no conduit, no concrete). He testified that he was concerned about the risk of a fatality from this underground buried cable. Mr. Buelke states that Thunder Basin "seem to be dragging their feet for over two years" and that "after about two years of trying to get the company to correct the condition, I and two other electricians hired a private attorney to confront the company". A meeting was held in June 1984 but there was no immediate correction. He states that early in 1984 he had a job that involved this underground service feeder. He refused to work on these lines. He disconnected them, grounded them and tagged them out with a "do not operate tag". Mr. Buelke testified that thereafter Bob Bassett, electrical supervisor, ordered two other electricians to remove the tag and put this underground feeder back into service. Early in January 1985 Mr. Buelke complained to MSHA about the underground cable. He met with MSHA in conjunction with his complaint. This led to the January 31, 1985 MSHA inspection and investigation. As the result of the investigation and inspection MSHA did not issue any citation because the company was in process of replacing these underground feeder cables. (Exhibit R-10).

MOTIVATION

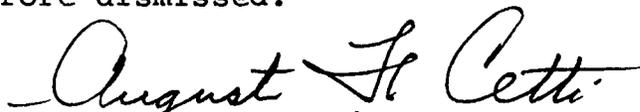
It is Mr. Buelke's contention that his poor performance evaluations and corrective actions were based upon misinterpreted, misunderstood, or nonexistent company policies which were applied against him without using proper facts or investigation.

It is recognized that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as

knowledge of protective activity, coincidence in time between the protective activity and the adverse action, and disparate treatment. See Secretary on Behalf of Chacon v. Phillips Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983). Nevertheless it has been held that an employee's "mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." Branson v. Price River Coal Co., 853 F.2d 768, 46 FEP Cases (BNA) 1003 (10th Cir. 1988). There must be evidence of discriminatory intent or evidence from which a reasonable inference of discriminatory intent can be drawn.

The essential question is not whether Thunder Basin has treated Mr. Buelke in a reasonable, fair, and nondiscriminatory manner, but whether any adverse action was taken against him in any part because of his protected activity. I find no persuasive evidence, direct or circumstantial, from which to draw a reasonable inference of discriminatory intent because of Mr. Buelke's protective activity. I find no bases on this record for inferring that any adverse actions taken against Mr. Buelke were taken in some part because of his protective activity. No evidence was presented indicating that Thunder Basin's actions in disciplining him and in selecting him for a layoff were in any part related to any of his protected activity. Thus, Mr. Buelke has failed to present a prima facie case of discrimination.

Accordingly, I find that while Mr. Buelke did engage in protected activity and suffered adverse action, the preponderance of the evidence presented fails to establish that the adverse action was motivated in any part by the protected activity. The case is therefore dismissed.


August F. Cetti
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 16 1989

RIVCO DREDGING CORPORATION, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. KENT 88-25-R
: Order No. 2985273; 9/29/87
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. KENT 88-26-R
ADMINISTRATION, (MSHA), : Order No. 2985274; 9/29/87
Respondent :
: River Dredge Mine
: Mine I.D. #15-12672

DECISION

Appearances: Gene A. Wilson, President, Rivco Dredging Corp.,
Louisia, Kentucky, for the Contestant
G. Elaine Smith, Esq., Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for the Respondent.

Before: Judge Maurer

Rivco Dredging Corporation (Rivco) has contested two section 104(b) orders issued by the Secretary of Labor (Secretary) on September 29, 1987. A hearing on this matter was held in Huntington, West Virginia on October 21, 1988.

This rather unusual case began when the original two section 104(a) citations, Citation Nos. 2985271 and 2985272 were issued on September 17, 1987 by the Secretary and 6 days were allowed for abatement of the violative conditions. Due to the fact that the contestant failed to abate these violations in a timely manner, i.e., within the 6 days allowed, the two section 104(b) orders at bar, Order Nos. 2985273 and 2985274 were then issued.

The underlying section 104(a) citations were not contested within 30 days of their issuance and therefore the Commission was without subject-matter jurisdiction to adjudicate Rivco's objections to these citations. Freeman Coal Mining Corp., 1 MSHC 1001 (1970); Alexander Bros., Inc., 1 MSHC 1760 (1979); Island Creek Coal Co., 1 MSHC 2143 (1979). Therefore the contest proceedings docketed at KENT 88-23-R and KENT 88-24-R, which concerned these section 104 (a) citations were dismissed at 10 FMSHRC 889 (July 12, 1988) (ALJ).

Accordingly, the factual and legal bases for these underlying section 104(a) citations are no longer at issue and the fact of violation of the mandatory standards cited therein is not subject to collateral attack in the contest proceedings concerning the section 104(b) orders at bar.

The remaining issues I will deal with in this decision are:

1. Are the violative conditions described in the two orders at bar abated?
2. Were the violations described in the underlying citations abated within the period of time originally fixed therein or as subsequently extended?
3. If the answer to No. 2, above, is "no," [which it is] was the time set for abatement reasonable or should the time set for abatement have been extended or further extended without issuing the instant section 104(b) orders?

The Secretary stipulates that the original citations are abated as of the date of the hearing in this matter, and the two section 104(b) orders at bar have been terminated.

The condition cited in Citation No. 2985272 is as follows:

A safe means of access is not provided to the shaker screens, motor and flywheels at the upstream screening plant, where workers are required to travel for maintenance, repair and/or examination in that no steps, platform nor hand rail is present thereon. A worker is required to climb up approx. 7-12' above ground on the plant structure for access and a fall therefrom can inflict serious injury.

When Inspector Hatter issued Citation No. 2985272 on September 17, 1987, he envisioned abatement to be construction of a catwalk around the shaker. He allowed six days for that abatement to take place; one day to order the materials, one day for delivery and four days to do the construction work. He considered this to be a reasonable amount of time based on his experience.

On September 29, 1987, section 104(b) Order No. 2985273 was issued by Inspector Hatter because the operator had still failed to provide a safe means of access to the coal shaker even though

the time for abatement of Citation No. 2985272 had passed. He further testified that at the time of this visit, some eleven (11) days after he had issued the citation, nothing had been done to abate the condition, no additional time was requested by the operator to abate the condition and to the best of his knowledge, the operator has never alleged that the time given for abatement was inadequate.

Interestingly, the catwalk around the shaker was never built, but the citation was subsequently abated and the section 104(b) order terminated by a different inspector on June 21, 1988, upon the operator furnishing a Grove RT 518 "cherry-picker," equipped with a cage to safely perform maintenance, and assembly/disassembly of the coal shaker. Inspector Hatter disagrees with this method of abatement/termination, to say the least, but the order is nonetheless terminated and the citation abated.

In summary, the operator made no attempt to abate the citation within the six days allowed or in the eleven days that passed between the issuance of the citation and the section 104(b) order. Nor did the operator request any extension of the abatement period.

I conclude from my review of the record that the violative condition set out in the citation was abated on June 21, 1988, and the order was terminated at that time. The condition was obviously not abated in a timely fashion, but in fairness to the operator it should be pointed out that Inspector Hatter, who wrote the section 104(b) order would not have accepted the abatement method that was ultimately the basis for the abatement/termination. Nevertheless, I find and conclude that the original abatement period of six (6) days was reasonable, especially in light of the fact that the operator made no objection to this time limit set for abatement and did not request any enlargement of time in which to abate the cited violative condition. Therefore, the now terminated Order No. 2985273 will be affirmed.

The other condition we are concerned with in these cases is cited in Citation No. 2985271 and the violative condition is set out therein as follows:

The insulated conductor wiring providing power to the 240/480 VAC 30 fresh water pump is not properly maintained to assure safe operating condition in that it is not protected from moisture nor physical abuse. Such wiring is partially laid in a 15" casing pipe for about 100', in the ground partially buried for about 41', then through approx. 16'-15" CM pipe and then

approx. 40' is laid on the ground over the river bank to the pump, where it is subject to deterioration and contact by workers.

This citation was likewise issued on September 17, 1987 and once again, Inspector Hatter allowed six days for abatement. He reasoned that was sufficient time to make arrangements for an electrician to do the work and to obtain the necessary materials.

On September 29, 1987, eleven (11) days after issuing the underlying citation, Inspector Hatter issued section 104(b) Order No. 2985274 because the operator had still failed to protect the wiring to the fresh water pump from moisture and physical abuse even though the time for abatement of Citation No. 2985271 had passed. As before, the inspector also testified that no additional time was requested by the operator to abate the condition and to the best of his knowledge, the operator had never complained that the time allowed for abatement of the condition was unreasonable or inadequate.

On June 21, 1988, Inspector Thomas Goodman, an MSHA electrical inspector, inspected the Rivco Dredging Company location and spoke with Mr. Wilson, the President of the company, to determine if the cited condition had been abated and found that it still had not. He advised Mr. Wilson at that time that the Company needed to be in compliance with the standards for pump wiring set forth in the National Electrical Code or the applicable MSHA regulations.

On July 5, 1988, Inspector Goodman returned to the site to find the cited condition had still not been abated. A conference was held with Mr. Wilson, as a result of which he agreed to comply with the requirements of the National Electrical Code, which he subsequently did. Section 104(b) Order No. 2985274 was therefore finally terminated on July 25, 1988, with the notation that: "The pump circuit was installed in conduit."

I find and conclude from my review of the record that the violative condition set out in the citation was abated on July 25, 1988, and the order was terminated at that time. The condition was not actually abated until approximately 10 months after it was first pointed out to the operator. I find that abatement to be untimely in the extreme and furthermore conclude that the original abatement time of six days set by Inspector Hatter was reasonable and sufficient. Therefore, the now terminated Order No. 2985274 will also be affirmed.

ORDER

WHEREFORE IT IS ORDERED THAT:

1. Order Nos. 2985273 and 2985274 ARE AFFIRMED.


Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Gene A. Wilson, Rivco Dredging Corporation, Post Office
Box 702, Louisa, KY 41230 (Certified Mail)

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

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 16 1989

WILFRED BRYANT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 85-43-D
: :
DINGESS MINE SERVICE, :
WINCHESTER COALS, INC., :
MULLINS COAL COMPANY, :
JOE DINGESS AND :
JOHNNY DINGESS, :
Respondents :

DECISION ON REMAND

Before: Judge Broderick

On September 29, 1988, the Commission reversed my determination that Mullins and Winchester were not liable for the discrimination for the discriminatory discharge of Complainant, but affirmed my determination that the adverse action was terminated when complainant refused reemployment. The proceeding was remanded to me for a redetermination of the award of attorneys' fees to complainants attorneys. 10 FMSHRC 1173 (1988), affirming in part and reversing in part 9 FMSHRC 336, 9 FMSHRC 940 (1987).

Pursuant to my order, Complainant's attorneys submitted a revised statement of attorneys' fees, together with affidavits and other documents in support of their request. They also submitted a legal memorandum arguing that their fee should be increased above the lodestar because of the contingent nature of the case, and that the fee should not be reduced because complainant was unsuccessful in his claim for reinstatement and because his back pay recovery was very limited.

Respondent replied to the attorneys' fee request, and argued that an enhancement of the fee because the case was contingent is inappropriate, and that the fee award should be reduced to reflect the limited success achieved.

REASONABLE HOURLY RATE-HOURS REASONABLY EXPENDED

Complainant's attorneys have submitted a revised statement of fees for their hours expended prior to the appeal of the case to the Commission, and a supplemental statement of fees for the

work performed since that time. Respondents' counsel has not commented either on the hourly rate or on the hours claimed to have been expended. The revised statement claims different hourly rates for court time (\$80 per hour for Sheridan; \$90 per hour for Fleischauer), for consultation with co-counsel (\$40 per hour for each attorney), and for other legal work (\$65 per hour for Sheridan; \$75 per hour for Fleischauer). Although the proposed fee does in part respond to my Supplemental Decision of May 13, 1987, by reducing the fee request for hours expended in consulting with each other, it fails to respond to my concern that each attorney was seeking full compensation for the time they spent jointly in taking depositions and participating in the hearing. Nor does it explain or justify the time spent calling unidentified persons and travelling.

I conclude (1) that \$75 per hour is an appropriate rate for Ms. Fleischauer and \$65 per hour is an appropriate rate for Mr. Sheridan. I do not agree that they each should receive an increased rate for court time. I do agree that they should receive a reduced rate for consultation with each other and for their joint efforts. I have reviewed the statements of counsel and am persuaded that my prior conclusion that 100 hours of Ms. Fleischauer's services and 75 hours of Mr. Sheridan's are properly billable at the full rate was correct. The remaining hours involve consultation with each other, duplication of services, calls to unidentified persons, travel time between Morgantown, West Virginia (Fleischauer's office) and Logan, West Virginia (Sheridan's office), etc. Therefore, I will approve 100 hours of Ms. Fleischauer's time and 75 hours of Mr. Sheridan's time at the regular rates of \$75 and \$65 respectively. I will approve fees for the remainder of the time at the rate of \$40. On this basis Ms. Fleischauer's fee would total \$11,340; Mr. Sheridan's, \$6715.

With respect to services performed since June 1987, counsel request approval of fees of \$75 per hour (Sheridan) and \$100 per hour (Fleischauer) for regular services; \$100 per hour (Sheridan) and \$125 per hour (Fleischauer) for court time and \$50 per hour for consultation with co-counsel. Mr. Sheridan claims 35.15 hours of regular services and 3.4 hours consultation time. Ms. Fleischauer claims 49.85 hours of regular services, 3.4 hours of consultation time and 2.25 hours of court time. Most of this time of course is related to the appeal which was in part successful (Mullins and Winchester were held liable as mine operators). I will approve the fees requested: \$2800 for Sheridan and \$5400 for Fleischauer and I will approve the reimbursement of Fleischauer's expenses of \$254.34.

ENHANCEMENT FOR CONTINGENCY

Counsel did not request an upward adjustment of their fees for contingency at the time their statements were originally submitted. Nor does the Commission's remand direct me to consider such a request. Nevertheless, in order to make a complete record, I will consider their request at this time.

There may be circumstances in which enhancement of a reasonable lodestar to compensate for the contingent nature of the attorney's employment is justified. But these circumstances are rare. See Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. ____, 97 L.Ed. 2d at 603 (concurring opinion of O'Connor, J.). Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984). I previously determined that this case was of average complexity. It did not involve any unique legal theory or factual difficulty. There is no basis for concluding that without an enhancement of the fee because of contingency, competent counsel would not have been available to complainant. Complainant's request for an "upward adjustment" of their fee by 50 percent is DENIED.

RESULTS OBTAINED

Complainant was not successful in his claim for reinstatement. His back pay recovery was limited to nine days, because of the determination that he refused offered reemployment and resigned his position. His recovery therefore is limited to \$1297.48 plus interest after April 24, 1987. In a statute such as the Mine Act, the amount recovered is not the determining factor in fixing a reasonable attorney's fee. But it is one factor. As I stated in my Supplemental Decision "a substantial part of the time for which fees and claimed was 'spent litigating issues upon which plaintiff did not ultimately prevail,'" citing Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Because of the limited recovery, I will reduce the attorneys' fees by 15 percent. Therefore I will approve a total fee for Ms. Fleischauer in the amount of \$15,229 (\$11,340 + \$5400 less 15%). I will approve a total fee for Mr. Sheridan in the amount of \$8088 (\$6715 + \$2800 less 15%). I will also approve reimbursement of Ms. Fleischauer's expenses.

ORDER

In accordance with the Commission's remand, Respondents are ORDERED to pay within 30 days of the date of this decision the following amounts:

(1) To Barbara Evans Fleischauer, Esq., \$15,229 attorney's fees and \$820.52 as litigation expenses;

(2) To Paul Sheridan, Esq., \$8088 attorney's fees.

James A Broderick

James A. Broderick
Administrative Law Judge

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Barbara Evans Fleischauer, Esq., 346 Watts Street, Morgantown, WV 26505 (Certified Mail)

Robert Q. Sayre, Jr., Esq., Goodwin & Goodwin, 1500 One Valley Square, Charleston, WV 52301 (Certified Mail)

Paul R. Sheridan, Esq., Appalachian Research & Defense Fund, Inc., 504 White & Browning Bldg., Logan, WV 25601 (Certified Mail)

Dingess Mine Services, Mr. Joe Dingess, Mr. Johnny Dingess, P.O. Box 1024, Chapmanville, WV 25508 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-328-M
Petitioner : A. C. No. 42-01153-05501
 :
v. : Kennecott Carr Fork
 :
MCFARLAND & HULLINGER, :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

On December 22, 1988, the Solicitor submitted a motion to approve settlement of the three violations involved in this case. On January 13, 1989, I issued an order approving settlement for two of the violations, disapproved the settlement for the remaining violation and ordered the Solicitor to submit additional information for that violation. The Solicitor now has submitted an amended motion containing the required additional information.

The one citation remaining in this case was issued for a violation of 30 C.F.R. § 57.9037 because a dump truck had been left on a grade with the parking brakes on, but the wheels neither blocked nor turned into a bank or rib. The truck started to roll and the driver was fatally injured as he attempted to climb aboard. The penalty was originally assessed at \$1,000 and the proposed settlement is for \$800. The Solicitor represents that the reduction is warranted because operator negligence is less than originally thought. The Solicitor advises in this respect as follows:

"Prehearing preparation had revealed that Melvin Steward, the decedent, had earlier in the day witnessed a highway accident which resulted in the death of an elderly gentleman who was killed when his camper ran a stop sign. This occurrence greatly disturbed and upset Mr. Steward. In fact, he not only telephoned his wife to relate his observations but decided to tell the shop lead man Ivan Zenger what he had witnessed. His idiosyncratic behavior in locking the truck brakes yet failing to lock the trailer brakes can only be explained by his agitated state of

mind. Secondly, it was disclosed that Mr. Zenger was not a shop foreman but a lead man who did not exercise any supervision, direct or indirect, over Mr. Steward."

I accept the foregoing representations, and based upon them I approve the recommended settlement.

Accordingly, the motion to approve settlement for this violation is GRANTED and the operator is ORDERED TO PAY \$800 within 30 days from the date of this decision.

In the prior partial settlement approval, I approved settlements for the two other violations involved in this case. If it has not already done so, the operator is ORDERED TO PAY \$300 for these violations within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Sidney K. Hullinger, McFarland & Hullinger, Box 238, Tooele, UT 84074 (Certified Mail)

Thomas Mascolino, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 414, Arlington, VA 22203 (Handcarried)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 27 1989

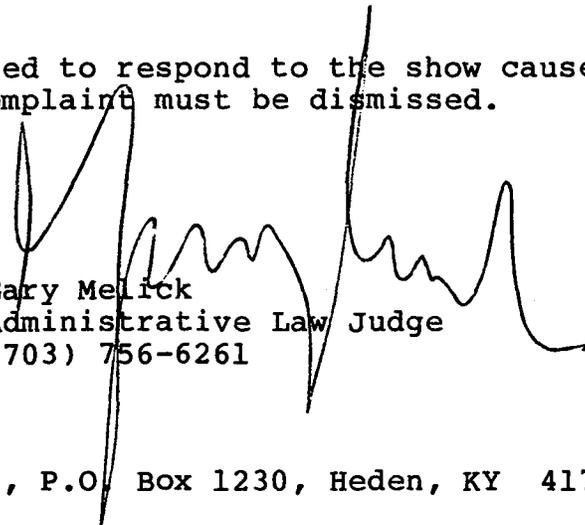
KENNETH HOWARD, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 89-2-D
: :
B & M TRUCKING, : BARB CD 88-56
Respondent : No. 2 Mine

ORDER OF DISMISSAL

Before: Judge Melick

On December 2, 1988, a show cause order was issued directing the Complainant to provide inter alia service and proof of service of his complaint to the Respondent mine operator within 30 days of that date or be subject to dismissal of his complaint.

The Complainant has failed to respond to the show cause order and accordingly his complaint must be dismissed.


Gary Melick
Administrative Law Judge
(703) 756-6261

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

January 4, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-121
Petitioner : A.C. No. 05-00301-03629
 :
 : Docket No. WEST 88-122
v. : A.C. No. 05-00301-03630
 :
 : Docket No. WEST 88-123
MID-CONTINENT RESOURCES, : A.C. No. 05-00469-03642
INC., :
Respondent : Docket No. WEST 88-124
 : A.C. No. 05-00469-03643
 :
 : Dutch Creek No. 1 and No. 2
 : Mines

ORDER GRANTING SECRETARY'S MOTION

Respondent, Mid-Continent, has indicated, in these and other proceedings, that it wishes to establish by evidence, including statistical data, that the enforcement documents (Orders and Citations) issued by the Secretary are examples of and the products "of a pattern of harassment and enforcement abuse by MSHA directed at Mid-Continent." ^{1/} This issue is for convenience being referred to as the "abuse" issue.

Petitioner, the Secretary, in a Motion in Limine filed on November 29, 1988, seeks to have an order issued prohibiting Respondent from submitting evidence on both the "abuse" issue and on the issue relating to its alleged failure to follow its own regulations in proposing penalties. Both parties have submitted briefs in support of their positions.

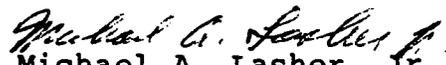
In Docket No. WEST 89-3-R, Judge John J. Morris determined that the Commission does not have jurisdiction to review alleged abuse of discretion by the Secretary in enforcing the Mine Safety Act at Respondent's Dutch Creek Mine and granted the Secretary's motion to dismiss Respondent's "broad allegation of alleged abuse...". Having carefully considered the arguments and authorities presented by the parties on this issue. I am in full accord with the views and holdings of Judge Morris expressed in

1/ In a preliminary hearing held in these four proceedings in Denver on November 2, 1988, Respondent also indicated its intent to establish that the Secretary did not follow her own regulations in proposing penalties for the alleged violations.

his Order dated December 22, 1988, in Docket No. WEST 89-3-R, and such are fully incorporated herein by reference as an integral part of my decision here. It is specifically concluded that the Commission and its judges have no jurisdiction to hear the "abuse" issue. Evidence bearing on this issue and subject matter will thus be deemed irrelevant and excluded at the evidentiary hearings to be held in the four subject proceedings.

With respect to the allegation that MSHA did not follow its regulations in proposing penalties for the alleged violations, it is first noted that Respondent, at the prehearing conference, indicated that it did not desire to have penalty assessments sent back to MSHA's penalty assessment office for reassessment (Transcript of Prehearing Conference, p. 66). One of the purposes of the de novo formal hearings scheduled in these matters is to develop a record with respect to the various mandatory penalty criteria which are to be considered by the Judge and Commission in the event a violation is established.

Respondent also argues (at page 8 of its brief) that the Secretary's failure to follow her own regulations "is a further indication of abuse ...". Since I have previously determined the Secretary's position with respect to the lack of jurisdiction to hear the "abuse" issue is meritorious, this argument of Respondent is rejected. Evidence on this issue and subject matter will also be excluded at the evidentiary hearings in these proceedings.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., Delaney & Balcomb, Drawer 790, Glenwood Springs, CO 81602

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-157
Petitioner	:	A.C. No. 15-16154-03505
v.	:	
	:	Mine No. 1
KENTUCKY MOUNTAIN RESERVE,	:	
INC.,	:	
Respondent	:	

ORDER DENYING PROPOSED SETTLEMENT
NOTICE OF HEARING

On July 25, 1988, the Secretary of Labor filed a petition for assessment of a civil penalty before this Commission. On January 3, 1989, the Secretary submitted a proposed settlement in which Respondent agreed to pay the proposed penalties of \$10,000 in full. Included as part of that proposal however was the following stipulation:

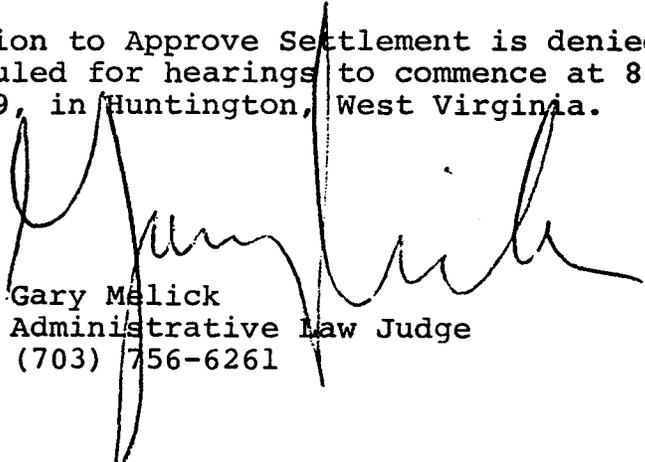
Nothing contained herein shall be deemed an admission by Respondent of a violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto in any action (other than an action or proceeding under the Federal Mine Safety and Health Act where the official record of the operator under MSHA enforcement may be relevant).

No party other than the parties to this agreement may use this settlement agreement for any purpose. Without restricting the generality of the foregoing, it is specifically understood that respondent enters into this stipulation in reliance on its sole and exclusive purpose being to expeditiously and inexpensively resolve a single item of administrative litigation without affecting in any way any other cause, claim or litigation, of either a private or governmental nature, that may now be pending or that may be initiated in the future. Moreover, it is not intended that this stipulation or the settlement resulting

therefrom establish a standard of care or
adjudge compliance therewith. By this
settlement, the parties do not intend to
be collaterally estopped from raising any
issue or defense in any civil proceeding.

I find this disclaimer to be so contradictory and ambiguous
as to be in violation of the principles set forth by this
Commission in Amax Lead Company of Missouri, 4 FMSHRC 975
(1982).

Accordingly the Motion to Approve Settlement is denied
and this case is rescheduled for hearings to commence at 8:30
a.m., on February 1, 1989, in Huntington, West Virginia.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

G. Elaine Smith, Esq., U.S. Department of Labor, Office of
the Solicitor, 2002 Richard Jones Road, Suite B-201,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 1989

KTK MINING AND CONSTRUCTION, : CONTEST PROCEEDING
Contestant, :
v. : Docket No. KENT 89-47-R
: Citation No. 2772892; 11/2/88
:
SECRETARY OF LABOR, : No. 3 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID 15-16308
Respondent :

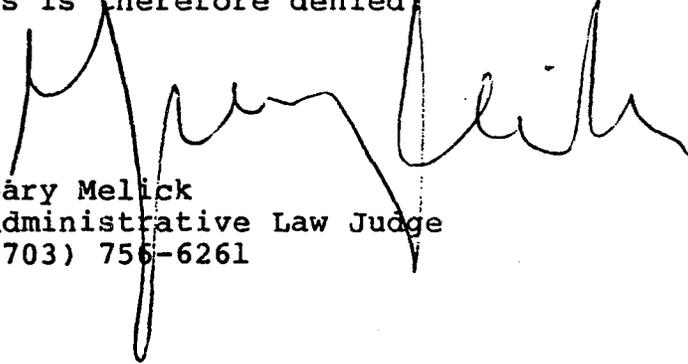
ORDER DENYING MOTION TO DISMISS

The Secretary of Labor has moved to dismiss the instant proceeding for untimely filing. The evidence is undisputed that the citation at bar, Citation No. 2772892, was issued pursuant section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", on November 2, 1988. It is further undisputed that Contestant, K T K Mining and Construction, Inc., (KTK), mailed its notice of contest by certified mail to the Office of the Solicitor, U.S. Department of Labor, Mine Safety Division on December 12, 1988. The Secretary argues in her Motion to Dismiss that KTK's Notice of Contest was not timely because it was not received by the Office of the Solicitor until December 5, 1988, more than 30 days after the receipt of the citation by KTK.

Section 105(d) of the Act requires an operator to notify the Secretary within 30 days of the receipt of a citation, (or notice of proposed assessment of penalty) that it intends to contest the issuance of the citation (or notice of proposed assessment of penalty). The Secretary argues that section 105(d) requires that the Secretary receive "actual" notice of an operators intent to contest within 30 days and that, therefore, KTK's certified mailing was not effective as it was not received until December 5, 1988.

In Secretary v. J. P. Burroughs and Son, Inc., 3 FMSHRC 854 (1981) the Commission addressed the validity of a Notice of Contest which was mailed to the Secretary within the specified 30 days but which was not received until after that deadline had expired. The mine operator in J. P. Burroughs mailed its Notice of Contest to the Secretary on the 30th day after receipt of a proposed assessment of penalty. The

Secretary received the Notice of Contest two days later. The issue in that case was similarly whether the Secretary must receive the operator's Notice of Contest within 30 days or whether the operator satisfies the requirement of notifying the Secretary if it mails its Notice of Contest within 30 days. The Commission found therein that in fact mailing within 30 days constituted sufficient and effective notice under the Act. While the J. P. Burroughs case involved interpretation of Section 105(a) of the Act, Section 105(d) of the Act contains virtually identical language requiring notice to the Secretary within 30 days of receipt of the challenged citation. J. P. Burroughs is accordingly persuasive authority on the interpretation to be placed upon section 105(d) of the Act. Accordingly I find that the mailing by KTK within the 30 day time period set forth in section 105(d) of the Act by certified mail meets the filing requirement under that section of the Act and accordingly KTK filed its Notice of Contest in a timely manner. The Secretary's Motion to Dismiss is therefore denied.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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Barbara L. Krause, Esq., Smith, Heenan & Althen, Suite 400, 1110 Vermont Avenue, N.W., Washington, D.C. 20005-3593 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-132-M
Petitioner	:	A.C. No. 03-00479-05501
v.	:	
	:	Wilson Springs Pit & Plant
DEVELOPERS INTERNATIONAL	:	
SERVICE CORPORATION,	:	
Respondent	:	

ORDER DENYING PROPOSED SETTLEMENT NOTICE OF HEARING

On September 19, 1988, the Secretary of Labor filed a petition for assessment of a civil penalty before this Commission proposing a penalty of \$4,000 for a "significant and substantial" regulatory violation allegedly causing the electrocution of a miner. In a motion to approve settlement filed with this Commission on January 13, 1989, and seeking a 25 percent reduction in penalty the Secretary stated as follows:

The proposed assessments were reduced for the following reasons:

- a. Respondent demonstrated extraordinary good faith in achieving rapid compliance.
- b. Respondent does not have a lengthy history of prior violations.
- c. Respondent's size of business is relatively small.
- d. Payment of the fine will not materially impair Respondent's ability to continue in business.
4. Respondent has paid the agreed proposed penalty of \$3,000 sought by Petitioner; therefore, Respondent hereby withdraws the notice of contest filed in this case.
5. Respondent states that Respondent will comply with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The information provided by the Motion is totally inadequate for an independent and proper evaluation of the alleged violation under the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

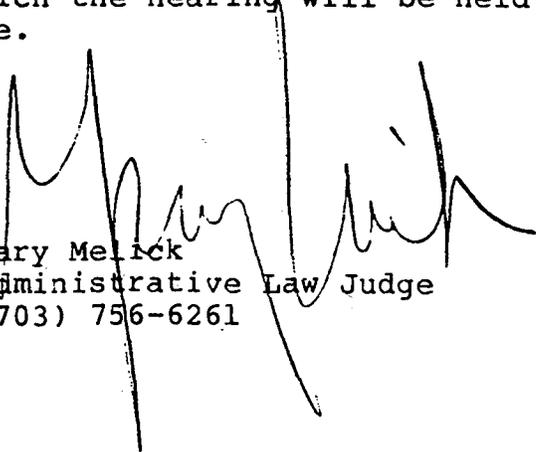
The motion provides no factual basis to support any of the criteria that must be considered by the Commission under Section 110(i). Indeed the motion fails to even address the important issues of negligence and gravity.

Section 110(k) of the Act provides that "no proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." Penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. Secretary v/ Phelps Dodge Corp., 9 FMSHRC 920 (Chief Judge Merlin 1987); Sellersburg Stone Co., v. FMSHRC, 736 F.2d 1147.

In Secretary v. Wilmot Mining Co., 9 FMSHRC 684 (1987) the Commission stated as follows:

Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k); see Pontiki Coal Corporation, 8 FMSHRC 668 (1986). The Commission has held repeatedly that if a Judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See e.g. Knox County Stone Company, 3 FMSHRC 2478, 2480-81 (1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

Under the circumstances the Motion to Approve Settlement Agreement is denied and this case is set for hearing on the merits on March 7, 1989 at 8:30 a.m. in Hot Springs, Arkansas. The specific courtroom in which the hearing will be held will be designated at a later date.



Gary Melick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
703-756-6232

February 9, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-53-M
Petitioner	:	A.C. No. 41-00046-05520
v.	:	
	:	Docket No. CENT 88-65-M
EL PASO SAND PRODUCTS, INC.,	:	A.C. No. 41-00046-05521
Respondent	:	
	:	Docket No. CENT 88-79-M
	:	A.C. No. 41-00046-05522
	:	
	:	Docket No. CENT 88-83-M
	:	A.C. No. 41-00046-05523
	:	
	:	Docket No. CENT 88-104-M
	:	A.C. No. 41-00046-05524
	:	
	:	Docket No. CENT 88-141-M
	:	A.C. No. 41-00046-05525
	:	
	:	El Paso Quarry & Plant

ORDERS REJECTING PROPOSED SETTLEMENTS

Statement of the Proceedings

These proceedings concern proposed civil penalty assessments filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner is seeking civil penalty assessments in the amount of \$8,835.00, for 23 alleged violations of certain mandatory safety and health standards found in Part 56, Title 30, Code of Federal Regulations.

These cases were docketed for hearing in El Paso, Texas, during the hearing term January 10-12, 1989. However, the hearings were continued and cancelled after the parties informed me that they had reached a proposed settlement in all of the cases. The parties have now filed motions seeking approval of the proposed settlements, the terms of which require the respondent to pay civil penalty assessments in the amount of \$6,626.25, in settlement of all of the alleged violations. The alleged violations, initial proposed civil penalty

assessments, and the proposed settlement amounts are as follows:

DOCKET NO. CENT 88-53-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3060567	06/24/87	56.14003	\$345	\$258.75

DOCKET NO. CENT 88-65-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
2869424	04/23/87	56.14029	\$126	\$ 94.50

DOCKET NO. CENT 88-79-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3060786	01/11/88	56.9022	\$178	(Total of \$370.50 for all citations)
3060788	01/12/88	56.11001	\$ 79	
3060789	01/12/88	56.12032	\$ 79	
3060793	01/12/88	56.20003	\$ 79	
3060795	01/12/88	56.20011	\$ 79	

DOCKET NO. CENT 88-83-M

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3060996(A)	10/15/87	56.14001	\$1,000	(Total of \$3,765 for all citations)
3060996(B)	10/15/87	56.14029	\$1,000	
3060785	01/11/88	56.3131	\$1,000	
3060790	01/12/88	56.4201(5)(b)	\$ 20	
3060847	02/17/88	56.3131	\$2,000	

DOCKET NO. CENT 88-104-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3060571	06/25/87	56.12028	\$ 20	(Total of \$262.50 for all citations)
3060791	01/12/88	56.16006	\$ 79	
3062861	03/01/88	56.12030	\$ 36	

3062862	03/01/88	56.12030	\$ 20
3062863	03/01/88	56.12030	\$ 36
3062864	03/01/88	56.11001	\$ 68
3062865	03/01/88	56.9002	\$ 91

DOCKET NO. CENT 88-141-M

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3062866	03/01/88	56.15005	\$1,000	(Total of
3062867	03/01/88	56.9022	\$ 500	\$1,875 for all
3062868	03/01/88	56.3200	\$ 600	citations)
3062869	03/01/88	56.6001	\$ 400	

After review and consideration of the motions filed by the parties, and for the reasons which follow below, I have approved one of the proposed settlements (Docket No. CENT 88-53-M), tentatively approved two of the proposed settlements (Docket Nos. CENT 88-79-M and CENT 88-104-M), subject to the filing of additional information, and I have rejected three of the proposed settlements (Docket Nos. CENT 88-53-M, CENT 88-83-M, and CENT 88-141-M), subject to their re-filing with additional information.

Discussion

The Commission's Rules concerning proposed settlements are found at 29 C.F.R. § 2700.30, and they provide as follows:

(a) General. No proposed penalty that has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission after agreement by all parties to the proceeding.

(b) Contents of settlement. A proposal that the Commission approve a penalty settlement shall include the following information for each violation involved; (1) the amount of the penalty proposed by the Office of Assessments of the Mine Safety and Health Administration; (2) the amount of the penalty proposed by the parties to be approved; and (3) facts in support of the appropriateness of the penalty proposed by the parties.

(c) Order approving settlement. Any order by the Judge approving a proposed settlement shall be fully supported by the record. In this regard, due consideration, and discussion thereof, shall be given to the six statutory criteria set forth in section 110(i) of the Act. Such order shall become the final decision of the Commission 40 days after approval unless the Commission has directed that such approval be reviewed. [Emphasis added.]

In support of the proposed settlements and reductions of the initial proposed civil penalty assessments for each of the violations in issue, the parties rely in part on the following "boilerplate" argument which is included in each of the motions filed in these cases:

There was little or no negligence involved, since the violations could not have been reasonably predicted.

Probability of injury was overevaluated since very few employees were exposed to the risk, these employees were not, during the normal course of their work, exposed to the risk with any great frequency, these employees were not in the zone of danger, and the employees were not working under stress or where their attention would be distracted. (Emphasis added).

A review of MSHA's initial pleadings, including the citations/orders, and the "narrative findings" by MSHA's Office of Assessments, reflects the following:

Docket No. CENT 88-65-M

Section 104(a) Citation No. 2869424. The citation states that a miner became entangled in the tail pulley of a conveyor belt while it was in motion, and that he suffered severe injuries to his left arm. It also states that the plant operator could not observe the miner and that the miner was entrapped between the pulley, belt, and support structure until he was rescued by another miner. The inspector found that permanently disabling injuries occurred. The violation was issued because of the failure to shut off the machine or to otherwise block it against motion.

Imminent Danger Order No. 3060996(A & B). The order and narrative findings made by MSHA's assessment officer reflects that an employee was shoveling up spillage from under an unguarded conveyor tail pulley, and that the shovel was within 4 inches of the pulley, and the miner was within 1 foot of the pulley. This work was being performed while the machine was in motion and the power on. The inspector found that the employee's exposure to the unguarded pulley pinch point would highly likely result in permanently disabling injuries, and that the violations were the result of a high degree of negligence by the respondent.

Imminent Danger Order No. 3060785. This order was issued on January 11, 1988. The inspector observed a loader operator and two haulage units working at and near the base of a pit highwall approximately 60 to x feet high, and the highwall contained "loose boulders and unconsolidated materials above the employees and equipment." The inspector found that the cited conditions would highly likely result in fatalities, and that the violation resulted from a high degree of negligence.

Imminent Danger Order No. 3060847. This order was issued on February 17, 1988, after the inspector observed a front-end loader and two haul trucks loading materials from the base of an 80 to 90 foot highwall. The loader was observed operating directly below loose materials located approximately 60 to 70 feet from the base of the highwall. The inspector took note of the fact that this violative condition took place in the same area where he issued the previous January 11, 1988, order, and he concluded that fatal injuries were highly likely. The inspector made a negligence finding of "Reckless Disregard."

Imminent Danger Order No. 3062866. This order was issued by the inspector after he observed a drill operator working on top of a 40-foot highwall within 2 feet of the edge of the highwall, and the drill helper walking around the front of the drill within approximately 16 inches from the edge of the highwall. Neither employee was wearing a safety belt or line, and the inspector concluded that they were in danger of falling off the highwall, and that it was highly likely that a fatality would occur.

Unwarrantable Failure Citation No. 3062867. This citation was issued at 2:40 p.m., on March 1, 1988, after the

inspector observed that the outer edge of a roadway approaching the "upper-most bench" of the quarry was not bermed or guarded with guardrails to prevent vehicles using the roadway from dropping off of the 40 to 100 foot "drop off." The roadway was used to haul explosives to the top of the hill, and other vehicles and equipment also used the roadway, including a truck used to transport two drill operators to the top of the bench. The inspector noted that the superintendent admitted that he had inspected the area at 6:30 a.m., on the same day the violation was issued, and that the roadway was not bermed or otherwise guarded. The inspector also found that permanently disabling injuries were highly likely. The inspector found that the violation resulted from a high degree of negligence.

Unwarrantable Failure Order No. 3062868. This order was issued by the inspector at 2:45 p.m., on March 1, 1988, after he observed two drillers drilling and travelling the upper bench of the quarry where loose boulders were "hanging on the wall" which was approximately 30 to 40 feet high. The inspector noted that some boulders had fallen off the face of the highwall from vibration from a nearby blast. The inspector found that permanently disabling injuries were highly likely, and that the violation resulted from a high degree of negligence.

Unwarrantable Failure Order No. 3062869. The order was issued after the inspector found two blasting caps in an office desk drawer of an employee. The inspector found that permanently disabling injuries were reasonably likely, and that the violation was the result of a high degree of negligence.

Contrary to the assertions by the parties that no employees were "in the zone of danger," the aforementioned information with respect to each of the violations reflects that miners were directly exposed to hazards, and that one miner suffered serious disabling injuries to his arm when it was caught in a moving conveyor belt. Further, the assertion that employees were not exposed to any risk "with any great frequency" is irrelevant. From a gravity point of view, the issue is whether or not any employee was exposed to any hazard, regardless of its frequency. For example, the employee who caught his arm in a moving conveyor may have only been exposed to a risk on this one occasion, but the result was disastrous.

With regard to the question of negligence, the unexplained assertions by the parties that there "was little

or no negligence" is totally without foundation. The inspectors found that the violations noted above were the result of a high degree of negligence, and in one case, the inspector made a negligence finding of reckless disregard.

I have reviewed the answers filed by the respondent in each of these cases, including the defenses advanced with respect to each of the violations. If the parties believe that these defenses have merit, or should be considered by the judge in mitigation of the civil penalties, it is incumbent on the parties to place these arguments clearly and succinctly before the judge for his consideration. Reliance on boiler-plate contradictory language that bears no rational or reasonable relationship to the particular facts of a case is simply unacceptable, and I will continue to reject such submissions in support of proposed settlements. In this regard, this is not the first time I have rejected a proposed settlement filed by the Dallas Regional Solicitor's Office based on the identical language used in these cases. See: Secretary v. Boorhem-Fields, Incorporated, Docket No. CENT 88-56-M, August 29, 1988, Order Rejecting Proposed Settlement.

Apart from the gravity and negligence contradictions noted above, the Commission's rules governing proposed settlements requires the judge to consider and discuss all information with respect to the civil penalty criteria found in section 110(i) of the Act. The failure by the parties to submit clear and complete information to the judge as part of their submissions in support of any settlement puts the judge in the untenable position of attempting to decipher MSHA's civil penalty "point system." In these cases, the parties have failed to provide any narrative discussion with respect to the section 110(i) criteria concerning the respondent's size, good faith abatement, or history of prior violations. They simply state that they have reviewed and reconsidered the operator's size, good faith, and prior history of violations, but have failed to advance any arguments or conclusions as to how this information may impact on the proposed settlements or civil penalty assessment reductions. They simply refer me to "Exhibit A to the Complaint." It is incumbent on the parties, and not the judge, to extrapolate this information, and to submit it in some meaningful narrative form.

With regard to Docket Nos. CENT 88-79-M, CENT 88-83-M, CENT 104-M, and CENT 88-141-M, the proposed settlement amounts for each of the violations are lumped together in one lump sum. Commission Rule 30(b), 29 C.F.R. § 2700.30, requires the parties to submit a proposed settlement amount for each violation. Again, it is incumbent on the parties, not the judge,

to prorate or allocate the specific amounts to be assessed for each individual violation, and unexplained lump sum proposals are simply unacceptable.

CONCLUSIONS AND ORDERS

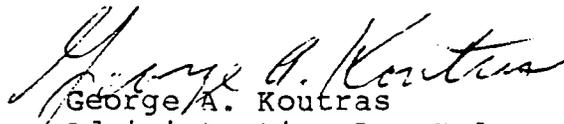
In view of the foregoing, I make the following dispositions of these cases:

1. Docket No. CENT 88-53-M. I will approve the proposed settlement of this case, and a separate dispositive decision will follow.

2. Docket Nos. CENT 88-79-M and CENT 88-104-M. The proposed settlements in these cases are tentatively approved, subject to the submission and receipt of further information from the parties with respect to the section 110(i) civil penalty criteria concerning the respondent's size, good faith abatement, history of prior violations, and the allocation of the specific settlement amounts for each of the violations. Upon receipt of this information, I will issue further dispositive decisions.

3. Docket Nos. CENT 88-65-M, CENT 88-83-M, and CENT 88-141-M. The proposed settlements in these cases are rejected, subject to their re-filing. The parties ARE ORDERED to resubmit amended motions with a full discussion and explanation clarifying or justifying the proposed penalty reductions in light of the apparent gravity and negligence contradictions noted herein. The parties ARE FURTHER ORDERED to submit a discussion concerning the civil penalty criteria with respect to the respondent's size, good faith abatement, history of prior violations, and the allocation of the specific settlement amounts for each of the violations.

The parties ARE FURTHER ORDERED to submit all of the aforementioned information to me within thirty (30) days of the receipt of these Orders.


George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

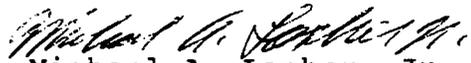
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

February 17, 1989

FMC WYOMING CORPORATION, : CONTEST PROCEEDING
Contestant :
 :
v. : Docket No. WEST 88-312-R
 : Order No. 2648287; 7/13/88
 :
SECRETARY OF LABOR, : FMC Trona Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

ORDER DENYING SECRETARY OF LABOR'S
MOTION TO DISMISS

On August 25, 1988, Contestant FMC mailed its Notice of Contest herein; such was received August 30, 1988. Thereafter, in November, 1988, the Secretary combined the proposed assessment for the Citation involved here- No. 2648482 -- with three other Citations. Such combined assessment for all four Citations was paid by FMC in one check. Thereafter, on January 30, 1989, the Secretary filed a Motion to dismiss, citing Old Ben Coal Company, 7 FMSHRC 205 (1985). In response thereto, FMC pointed out that such payment for Citation 2648482 was made in error, and supported such contention with an affidavit of its Safety Manager, Julius Jones. Mr. Jones affidavit clearly indicates that the payment of the proposed assessment for the subject Citation was made in error. The Commission's decision in Old Ben, supra, clearly points out that its ultimate conclusion that the contest should be barred because of payment of the proposed penalty, might have been different had the mine operator paid such penalty by "mistake", rather than intentionally. I conclude in the circumstances here that payment of the proposed penalty through mistake or inadvertence does not bar a mine operator from proceeding with its contest proceeding where such is timely filed. There is no question in this record that Contestant did indeed intend to contest the subject Citation. Accordingly, the Secretary's Motion to Dismiss is denied.


Michael A. Lasher, Jr.
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 87-21-D
ON BEHALF OF	:	
DONALD J. ROBINETTE,	:	NORT CD 87-5
Complainant	:	
v.	:	Mine No. 8
	:	
BILL BRANCH COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 87-22-D
ON BEHALF OF JOEY F. HALE,	:	
Complainant	:	NORT CD 87-7
v.	:	
	:	Mine No. 8
	:	
BILL BRANCH COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	

STAY ORDER

In a Decision issued September 29, 1988, finding Respondent violated section 105(c) of the Act, the Complainants were directed to file statements indicating the specific relief requested, and Respondent was granted a right to reply. Respondent has subsequently filed in United States Bankruptcy Court for reorganization in bankruptcy pursuant to Title 11 of the United States Code, and thereby the proceedings herein in the above captioned cases are subject to an automatic stay (11 U.S.C. § 362(a)(1)). The Solicitor, on behalf of Complainants, filed in United States Bankruptcy Court, a Motion For A Determination That Stay Does Not Apply.

Accordingly, it is ORDERED that proceedings in the above captioned cases be STAYED pending a determination by the United States Bankruptcy Court that the automatic stay does not apply.



Avram Weisberger
Administrative Law Judge
(703) 756-6210