

FEBRUARY 1991

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FEBRUARY 1991

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

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. LAKE 90-53. (Judge Broderick, January 9, 1991)

Drummond Company v. Secretary of Labor, MSHA, Docket No. SE 91-10-R, SE 91-11-R. (Judge Weisberger, January 14, 1991)

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

Secretary of Labor, MSHA v. C & C Crushed Stone, Inc., Docket No. CENT 90-21-M, CENT 90-68-M. (Judge Fauver, December 27, 1990)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 14, 1990

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

v.

BOB SHERMAN, Employed by
BLACKHAWK

:
:
:
:
: Docket Nos. WEST 90-110-M
:
:
:
:

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1988)("Mine Act"). On July 18, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Bob Sherman ("Sherman"), employed by Blackhawk, in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. Sherman had been cited for violating the Mine Act's mandatory standards prohibiting smoking. 30 U.S.C. § 877(c). The judge assessed the civil penalty of \$250 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on July 18, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). On August 2, 1990, the Commission received a letter from Sherman, addressed to Judge Merlin, in which Sherman explained that he had failed to timely respond to the judge's show cause order because he had been hospitalized until July 19, 1990. Sherman also expressed his belief that the penalty assessed against him was in the amount of \$25.00 and sent that sum in payment. Under the circumstances, we deem Sherman's letter to

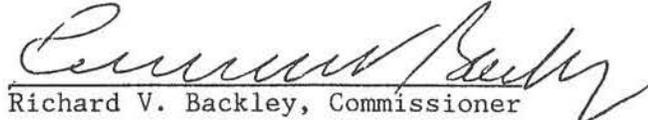
constitute a timely petition for discretionary review requesting relief from the judge's default order and assessment of the \$250 penalty. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

It appears from the record that Sherman filed a "Blue Card" request for a hearing in this matter in response to the Secretary's initial notification of proposed penalty. It further appears that Sherman, proceeding without benefit of counsel, may have raised an explanation for his failure to timely respond to the judge's show cause order. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has generally afforded relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., Hickory Coal Company, 12 FMSHRC 1201, 1202 (June 1990). We are unable on the basis of the present record to evaluate the merits of Sherman's position but, in the interest of justice, we will permit Sherman the opportunity to present his position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., A.H. Smith Stone Company, 11 FMSHRC 2146, 2147 (November 1989).

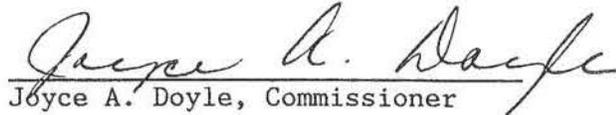
Accordingly, we grant Sherman's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.



Ford B. Ford, Chairman



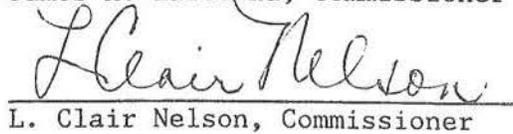
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 1991

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 90-72-M
	:	
TRANSIT MIXED CONCRETE COMPANY	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On October 11, 1990, Commission Administrative Law Judge John J. Morris issued a decision in this matter approving settlement between the Secretary of Labor and respondent Transit Mixed Concrete Company ("TMC"). The Secretary now requests that the judge's decision be amended or that a supplemental decision approving settlement be issued. The Secretary asserts that the parties' settlement agreement inadvertently omitted one of the citations involved in this case and that the parties have now settled that matter as well. For the reasons explained below, we reopen and remand this matter to the judge for further proceedings.

In relevant part, the record discloses that on August 24, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration issued to TMC two citations at its Azusa plant in Los Angeles County, California. Citations No. 3466441 and No. 3466442 allege defective brakes on, respectively, a mobile sweeper and fork lift in violation of 30 C.F.R. § 56.14101.

TMC filed a "Blue Card" notice of contest of the Secretary's proposed civil penalty assessment for the two alleged violations. On January 26, 1990, the Secretary filed with the Commission a civil penalty petition proposing penalties of \$600 for each violation. By letter to the Commission dated February 14, 1990, TMC indicated that it "accept[ed] citation #3466442 and [was] in the process of sending [penalty] payment" but that it still wished to contest Citation No. 3466441.

On July 30, 1990, the Secretary filed with the judge a motion for approval of a settlement with respect to Citation No. 3466441. The motion

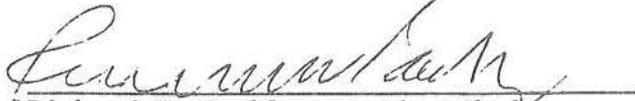
stated that TMC had agreed to pay a civil penalty of \$400 but without admission of the violation. On October 11, 1990, Judge Morris issued his Decision Approving Settlement ordering TMC to pay the agreed-to penalty of \$400.

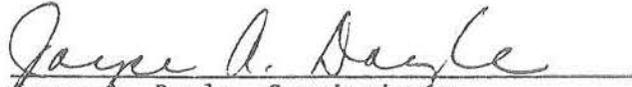
By letter to Judge Morris dated January 16, 1991, the Secretary requests the judge to amend his October 11, 1990 decision or to issue a supplemental decision approving settlement. The Secretary's letter acknowledges that it was the parties' "error" not to have included Citation No. 3466442 in the original motion to approve settlement. The letter asserts that TMC has paid the proposed civil penalty of \$600 for Citation No. 3466442. A copy of a check for \$600 dated December 7, 1990, from TMC to the order of the U.S. Department of Labor is attached. On the statement accompanying the check, there is handwriting indicating "Citation #03466442." Judge Morris has forwarded the Secretary's letter to the Commission.

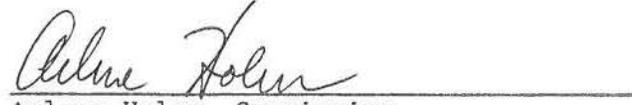
The judge's jurisdiction in this matter terminated when his Decision Approving Settlement was issued on October 11, 1990. The Secretary did not file a timely petition for discretionary review of the judge's decision within the 30-day period prescribed by the Mine Act (30 U.S.C. § 823(d)(2)(A)(i). See also 29 C.F.R. § 2700.70(a)). Nor did the Commission direct review on its own motion within this 30-day period (30 U.S.C. § 823(d)(2)(B)). Thus, under the statute, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem the Secretary's submission to be a request for relief from a final Commission order, and to incorporate by implication a late-filed petition for discretionary review. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in absence of applicable Commission rules); Fed. R. Civ. P. 60(b) (Relief from Judgment or Order). See, e.g., Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1988); Kelley Trucking Co., 8 FMSHRC 1867, 1868-69 (December 1986). Accordingly, we reopen this matter and proceed to consider the Secretary's substantive request for relief.

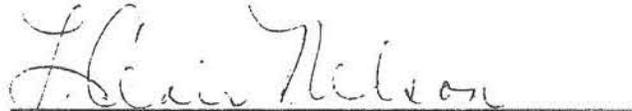
Relief from a final judgment or order on the basis of mistake, inadvertence, surprise or excusable neglect is available to a movant under Fed. R. Civ. P. 60(b)(1) & (6). The record suggests that the Secretary's original motion for settlement approval erroneously and inadvertently failed to present to the judge a complete settlement agreement addressing Citation No. 3466442. Now the Secretary has proffered, in effect, an amended settlement approval motion addressing that citation. We conclude that this matter should be remanded to the judge, who shall conduct appropriate proceedings necessary for final disposition of Citation No. 3466442.

For the foregoing reasons, this case is remanded to the judge for appropriate proceedings.


Richard V. Backley, Acting Chairman


Joyce A. Doyle, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 1991

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 89-198
 :
EASTERN ASSOCIATED COAL :
CORPORATION :

BEFORE: Backley, Acting Chairman; Doyle, Holen, 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. (1988) ("Mine Act" or "Act"), presents the question of whether a violation by Eastern Associated Coal Corporation ("Eastern") of 30 C.F.R. § 75.400, a mandatory underground coal mine safety standard requiring that combustible materials be cleaned up and not permitted to accumulate in active workings, was of a "significant and substantial" nature ("S&S") and the result of Eastern's "unwarrantable failure" to comply with the standard.¹ Commission Administrative Law Judge Avram Weisberger concluded that Eastern violated 30 C.F.R. § 75.400 but that the violation was not S&S and was not the result of its unwarrantable failure. 12 FMSHRC 239 (February 1990)(ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's determinations that the violation was not S&S and was not unwarrantable. For the reasons that follow, we affirm, on substantial evidence grounds, the judge's conclusion that the violation was not S&S, and vacate his conclusion that the violation was not unwarrantable, remanding the issue of unwarrantability for reconsideration.

¹ 30 C.F.R. § 75.400, entitled "Accumulation of combustible materials," states:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

I.

Factual Background and Procedural History

Eastern owns and operates the Federal No. 2 Mine, an underground coal mine located in West Virginia. On February 8, 1989, a Department of Labor Mine Safety and Health Administration ("MSHA") inspector, Thomas Doll, examined the 3 North tipple area during the course of a quarterly inspection of the mine. When Doll entered the tipple area, James Merchant, the tipple operator, informed Doll of an oil leak on the opposite side of the track and stated that he had reported the leak to Eastern's management "more than once." Tr. 137-38.

Upon inspection, Doll found accumulations of hydraulic oil on and around the hydraulic tub structure. The hydraulic tub is designed to hold over 30 gallons of hydraulic oil. It has a 460-volt AC motor, pump, and a series of hoses and fittings that take oil where it is needed for the operation of the tipple. Doll testified that the oil was leaking from numerous hose fittings and that some of the fittings were "dripping really bad, ... coming out really fast...." Tr. 146, 175. The oil was on and under the motor and motor frame, on the tub's hoses, and under the hydraulic tub. A piece of belting was hooked under one of the fittings to direct one of the leaks to the mine floor. The puddles under the tub were approximately three feet wide, four feet long, and up to four inches deep. According to Doll, the oil was pure hydraulic oil and was not mixed with mud or dirt. The motor on the hydraulic tub was functioning, but the tipple itself was not running. Tr. 144-48.

Doll also found accumulations of hydraulic oil under the car spotter motor, which was located near the hydraulic tub.² Doll did not notice any leaks on the car spotter motor and believed that the accumulations came entirely from the hydraulic tub. Doll estimated that the total accumulation of hydraulic oil was 20 to 25 gallons. Doll also noticed that a trench, measuring 10 inches wide, 6 to 8 inches deep, and 15 feet long, had been hand-dug to collect the oil. Tr. 143-47.

Doll issued a withdrawal order to Eastern, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of 30 C.F.R. 75.400 for an excessive accumulation of a combustible material, hydraulic oil. Doll found that the alleged violation was S&S. At the hearing, he testified that the hazard was the accumulation of hydraulic oil, coupled with the presence of electrical wires, motors, and cables as ignition sources. Doll indicated that the oil was flammable and that some ignition sources were nearby, pointing out that the cables for the motor on the hydraulic tub and the motor on the car spotter were within inches of the oil. He indicated that a short-out, arc, or spark could start a fire and stated that ignition of the oil was "highly likely" if the "situation was not taken care of." Doll further testified that in the event of a fire, serious burn or smoke inhalation injury was quite likely. Tr. 152-54.

² The car spotter motor moves the coal cars on the track as they are loaded so that the cars are loaded evenly.

Doll found Eastern's negligence to be high and that the violation resulted from Eastern's unwarrantable failure to comply with the standard because the condition had been reported to Eastern by Merchant, the tipple operator, on January 31, 1989, a week prior to the date the violation was cited. Doll testified that the quantity of accumulated oil was also a factor. Doll further stated that the track was fire bossed daily and that the condition should have been noticed. Doll indicated that, while he had been informed that Eastern had sent mechanics to work on the leaks during the prior weekend, considering the way the system was leaking, he did not believe that any effective work had been done. Tr. 156-58.

Merchant testified that on and off for the two to three years prior to the citation there had been problems keeping a sufficient reservoir of oil in the tipple. Tr. 197. He indicated that on some days he would be required to add some 20 to 25 gallons of oil per shift. Tr. 198. Merchant stated that he had told his foreman, John Kucish, and Roger Boggess, a maintenance foreman, of the oil leak problems at the tipple. Tr. 117, 200-03, 260. He testified that about a week before February 8, he had reported the condition to Kucish and that Boggess subsequently told him that the problem was supposed to have been fixed, but that the person assigned did not get to it. Merchant also testified that on February 6 and 7 the tipple was not leaking any less, because he still needed to add 15 to 25 gallons of oil each shift. According to Merchant, he would have had to add oil under normal conditions only once each month. Tr. 203-07.

To abate the violation, Kucish, Boggess, and David Tennant, underground maintenance superintendent, went to the site. The area was cleaned and the car spotter unit was run to determine what, if anything, was leaking. According to Kucish, drips were located at some of the fittings. In his view, those drips were insufficient to accumulate during one shift into the quantity of oil present when the order was issued. Tr. 242, 246-47. Boggess testified that on February 8 he worked on the abatement of the violation, and that only one slight "dripper" on the car spotter unit/hydraulic power unit remained. Tr. 249-50. To correct that one dripper, some plumbing was eliminated on the system. Tr. 250. Boggess opined that the one leak in question was not of sufficient size to have caused the accumulation. Tr. 250. Tennant essentially confirmed Boggess' testimony. Tr. 260-61. All three felt that the unit may have been overfilled, causing oil to come back out of the breathers, or that oil was spilled when it was put into the hydraulic tub. Tr. 242, 250, 261-62, 264-65. In terminating the withdrawal order, Doll indicated "[t]he area was cleaned and some oil leaks were fixed." G. Exh. 1.

Before the judge, Eastern conceded the violation. In addressing the S&S question, Eastern argued that there was no likelihood of any injury as a result of the accumulation. Boggess and Tennant testified that a spark or short from the electrical equipment in the area would be incapable of igniting the oil. Tr. 255, 264. Kucish further testified that the area was adequately rock dusted. Tr. 239. Boggess and Kucish testified that there was a fire suppression system over the car spotter motor. Tr. 240-41, 253-54. Boggess also testified that there were fire fighting materials and equipment in the area, including water hoses, rock dust, and fire

extinguishers. Tr. 240.

In contesting the inspector's unwarrantable failure finding, Eastern argued that it had performed maintenance on the tipple equipment, including dealing with oil leaks, on January 31 and February 4, 1989. Kucish testified that when he observed the area on February 5, 1989, after the second maintenance operation, there were no observable oil leaks. Tr. 231-32. Eastern asserted that it was unaware of the oil situation at the tipple on February 8, 1989, and further suggested that the accumulation could have resulted from either spillage or overfilling of the hydraulic tub that day.

In his decision, the judge found a violation of 30 C.F.R. 75.400, as conceded by Eastern. However, the judge vacated the S&S and unwarrantable failure findings. With respect to the S&S finding, the judge held that "[a]lthough, based on [Inspector] Doll's testimony, it can be concluded that ignition of the oil could have resulted, I find that it has not been established that such an event was reasonably likely to occur." 12 FMSHRC at 240. The judge discounted the fact that various ignition sources, including a motor, wires and cables, were present because "there is nothing in the record to indicate that this equipment was in such a condition as to make sparking or arcing an event reasonably likely to occur." *Id.* Relying on Eastern's witnesses' testimony, the judge stated:

[D]ue to Roger Boggess' experience as a maintenance foreman, I place some weight on his opinion that a spark would not ignite the oil, and that a sustained fire would be needed. Further, John Kucish, who was the production foreman in charge of the section on February 8, indicated that the area in question was adequately rock-dusted. Also, he and Boggess indicated that there was a fire suppression system over the top of the power unit of the car spotter, and that there were various items to extinguish fires in the area.

12 FMSHRC at 240. Taking all of the above factors into account, the judge concluded that it had not been established that the violation was S&S.

The judge also determined that the violation was not unwarrantable. He found that the leak had existed on and off for two to three years and had been reported to Eastern several times, including one week prior to the issuance of the instant order. 12 FMSHRC at 242. However, the judge noted:

I accept the testimony of Respondent's witnesses that twice within 8 days prior to February 8, maintenance work had been performed on the equipment in question. I accept the testimony of Kucish that when he observed the area on the day after the work had been performed on February 4, there were no "visual leaks". ... Although Merchant indicated that on February 6-7, 1989, the equipment was not leaking less, there is no evidence that the

condition was reported to management on these days. I thus conclude, taking the above into account, that Respondent herein did not exhibit any aggravated conduct, and hence the violation herein did not result from its unwarrantable failure.

12 FMSHRC at 242.

In assessing the civil penalty for the violation, the judge found that Eastern was highly negligent for not ensuring that its work on February 4 was successful and that there was no longer any accumulation of oil. The judge relied on Merchant's testimony that the leakage problem had existed intermittently for two to three years and had been reported to Kucish numerous times. The judge additionally noted the large quantity of oil observed on February 8. 12 FMSHRC at 242. The judge assessed a civil penalty of \$900. Finally, the judge modified the withdrawal order to a citation issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a).

II.

Disposition of Issues

A. Whether the violation was S&S

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogeny & Ohio Coal Co., 9 FMSHRC 2007, 2011-12 (December 1987). In determining whether the judge's S&S finding is supported by substantial evidence, as with other substantial evidence questions, the record as a whole must be considered, including evidence that "fairly detracts" from the finding. E.g., Universal Camera Corp. v. NLRB,

340 U.S. 474, 488 (1951); see also e.g., Florence Mining Co., 11 FMSHRC 747, 753, 755-57 (May 1989). The term "substantial evidence," as this Commission has consistently recognized, means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Harry Ramsey v. Industrial Constructors Corp., 12 FMSHRC 1587, 1592 (August 1990), and cases cited.

As to the first S&S element, the violation of section 75.400 has been established. Concerning the second element, there is no serious question on review that a discrete hazard of a potential fire existed. There was an undisputed accumulation of a combustible substance, hydraulic oil, combined with the presence of possible ignition sources. The crucial question on review is the third S&S element -- whether there was a "reasonable likelihood that the hazard contributed to will result in an injury." The third element of the Mathies formula "requires that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and the violation itself must be evaluated in terms of continued normal mining operations. (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)). The relevant time frame for determining whether a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC at 12; U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

As a threshold contention, the Secretary submits that the judge erroneously equated the reasonable likelihood element with the presence of an "imminent danger." (See 30 U.S.C. § 817 (dealing with procedures to counteract imminent dangers); see also 30 U.S.C. § 802(j) (definition of "imminent danger").) If this were, in fact, what the judge had done, the Secretary's point would be well taken. Section 104(d)(1) of the Mine Act, in which the S&S terminology is initially set forth, makes clear that the conditions created by an S&S violation need not necessarily be so impending as to constitute an imminent danger.³ We find no indication in the

³ Section 104(d)(1) of the Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]....

judge's decision, however, that he actually required the Secretary to demonstrate a reasonable likelihood of injury so pressing as to be "imminent." Further, we are satisfied that the judge applied the correct reasonable likelihood test consistent with Commission precedent. The question is whether his findings in that regard are supported by the evidence.

In Texasgulf, supra, the Commission developed an analytical approach useful for determining the reasonable likelihood of a combustion hazard resulting in an ignition or explosion. The Commission established that there must be a "confluence of factors" to create a likelihood of ignition. 10 FMSHRC at 501. The evidence relied on by the judge in the present proceeding provides adequate support for a finding that there was not a "confluence of factors" pointing to a reasonable likelihood of a fire involving the accumulation of hydraulic oil.

The judge relied on Boggess' testimony that a spark would not ignite the oil, and that a sustained fire would be needed for ignition. 12 FMSHRC at 240; Tr. 253. Tennant, who has State electrical certification, also testified that a spark would not be a sufficient ignition source for hydraulic oil. Tr. 264. Boggess testified that the hydraulic oil would not burn easily. Tr. 252. On review, the Secretary has not addressed substantively Boggess' or Tennant's testimony, or otherwise discussed the actual ignitability of hydraulic oil. Although Inspector Doll testified that the oil was not fire-resistant (Tr. 147), he conceded that he did not perform any combustibility tests (Tr. 161). The Secretary had the burden of proof on this point, but only very limited evidence concerning the combustibility of hydraulic oil was presented.

As the judge also found, there was nothing in the record to indicate that the mining equipment nearby was in such a condition as to make sparking or arcing an event reasonably likely to occur. 12 FMSHRC at 1240. Boggess testified that there were no shorts or other problems with the electrical circuits at the time. Tr. 253. Tennant testified that it was unlikely for a fire to start because the power unit's electrical system was protected by electrical devices that would deenergize power if there were any abnormalities in the electrical circuits. Tr. 263. Boggess stated that the electrical equipment was protected by electric circuits. Tr. 253. Inspector Doll conceded that the system overloads, breakers, and similar devices were working. Tr. 164. There is no evidence in the record indicating the likelihood of these safety features breaking down under normal continued mining operations.

The evidence of record suggests that even if there were to be an ignition, it would be of a limited nature and readily contained. The judge assigned weight to the testimony of Kucish and Boggess that there was a fire suppression system, including a water dilute system, over the top of the hydraulic tank itself, and readily accessible firefighting equipment, including water hoses, rock dust, and fire extinguishers. 12 FMSHRC at 240;

30 U.S.C. § 814(d)(1)(emphasis added).

Tr. 240-41, 253-54, 263. Boggess also testified that the systems were in working order. Tr. 253. MSHA inspector Doll conceded that these fire suppression systems were working. Tr. 164. Kucish also testified that the area was adequately rock-dusted and that, as a general rule, the area was damp. Tr. 239-40. Merchant conceded that the area was adequately dusted. Tr. 164. Additionally, Merchant acknowledged that he installed a belt to function like a trough to drain the oil away from the electrical motors and added rock dust to muck the oil in the ditch. Tr. 197-98, 199, 216. See also Tr. 183-84. A miner is also posted at all times at the loading station just a few feet away. Tr. 240, 263. The testimony also suggests that there has never been a fire on a power unit at the tiple. Tr. 264.

The Commission's task is not a de novo reweighing of somewhat conflicting evidence but a determination of whether there is substantial evidence in the record to support the judge's conclusions. As explained above, we conclude that substantial evidence does support the judge's conclusion that the hazard was not reasonably likely to cause an injury and, consequently, that the violation was not S&S.⁴

B. Whether the violation was unwarrantable failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogeny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, supra, 9 FMSHRC at 2001. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Id.

⁴ The three Commission decisions relied on by the Secretary on review are distinguishable from the present case. U.S. Steel Mining Co., 7 FMSHRC 327 (March 1985), affirming a judge's S&S finding, involved a water pump with power wires that were not protected with a required bushing. The pump vibrated when in operation. The vibration could cause a cut in the wires' insulation and, if the circuit protection failed, a person touching the pump frame could be shocked or electrocuted. The vibrating defect is more akin here to the presence of a more flammable substance or more certain evidence of sparking or arcing. Youghiogeny & Ohio Coal Co., 9 FMSHRC 673 (April 1987) and U.S. Steel Mining Co., 6 FMSHRC 1866 (August 1984), also affirming judges' S&S findings, involved hazards concerning potential methane ignitions. Methane is ignitable by a spark and is much more flammable and explosive than hydraulic oil. Further, the mines in both those proceedings were gassy mines, as defined by the Mine Act. In all three of these cases, we perceive the kind of showing of a "confluence of factors" that was not made here.

In finding that the violation was not the result of Eastern's unwarrantable failure, the judge accepted testimony of Eastern's witnesses that twice within eight days prior to February 8, maintenance work had been performed on the equipment in question. 12 FMSHRC at 242. Boggess and Tennant testified that a leak had been reported on January 31, 1989, and that corrective maintenance was performed that day. Boggess and Tennant also testified that on February 4, maintenance at the tipple and the track unit was performed and that adjacent hydraulic jacks were repacked or replaced because of possible leaks. Tennant stated that any leaks that could be found were addressed that day. The judge accepted the testimony of Kucish that, when he inspected the area on February 5, there were no apparent leaks. Id. Kucish additionally testified that "the area had been cleaned up and had been dusted." Tr. 231. The judge also concluded that aggravated conduct was lacking because the leakage on February 6-7 was not reported to Eastern. 12 FMSHRC at 242.

Notwithstanding these findings, the judge also found that Eastern was "highly negligent" with respect to the violation:

[T]aking into account Merchant's testimony, that I accept, that the leak had existed on and off for 2 to 3 years, and was reported by him to Kucish on numerous times, and taking into account the large quantity of oil that was observed on February 8, I conclude that the Respondent was highly negligent in not having taken steps to ensure that an accumulation would no longer occur. Although maintenance work was performed on February 4, and examined one day later by Kucish, and observed not to have any visible leaks, there is no evidence that Respondent examined the area on February 6-7, to ensure that its work on February 4 was successful, and there was no longer any accumulation of oil. For these reasons, I conclude that Respondent was highly negligent herein.

12 FMSHRC at 242 (emphasis added).

The terms "unwarrantable failure" and "negligence" are distinguished in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. § 814(d). Negligence, on the other hand, is one of the criteria that the Secretary and the Commission must consider in proposing and assessing, respectively, a civil penalty for a violation of the Act or of a mandatory health or safety standard. 30 U.S.C. §§ 815(b) (1)(B) & 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the concepts are distinct. See Quinland Coals, Inc., 7 FMSHRC 1117, 1122 (August 1985); Black Diamond Coal Co., 9 FMSHRC 1614, 1622 (September 1987). Nevertheless, as explained in Emery, and Youghioghney & Ohio, aggravated conduct constitutes more than ordinary negligence for

purposes of a special finding of unwarrantable failure. "Highly negligent" conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

Evidence seemingly unaddressed by the judge in his analysis is relevant in considering the question of unwarrantable failure. The judge appears to have found that a leak was the source of the problem. See 12 FMSHRC at 242. Thus, he apparently rejected the testimony of Eastern's witnesses that the most plausible explanation for what occurred was either a spill or overflow. The judge, however, made no finding concerning how long the leak had continued unabated. If the leak had actually continued unabated from February 6, as Merchant testified, a lack of care on Eastern's part would appear to be present. Tr. 205-06. The area was fire-bossed daily and involved at least 12 to 15 inspections (preshift and onshift) by four or five different people over the period February 6-8. Tr. 209, 233, 235; R. Exh. 6.

A lack of actual knowledge by Eastern's management of the apparently continuing leak does not necessarily bar an unwarrantable failure finding. In Pocahontas Fuel Co., 8 IBMA 136, 148-49 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), failure of a rank-and-file preshift examiner to detect a violation was found to be imputable to the operator for unwarrantable failure purposes. Even assuming that Eastern's preshift and onshift examiners did not record any continuing problem, that consideration does not necessarily preclude an unwarrantable failure finding. Emery makes clear that unwarrantable failure may stem from what an operator "had reason to know" or "should have known." 9 FMSHRC at 2003.

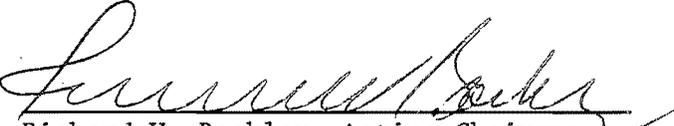
We further note the judge's finding that "leakage off and on" had been a problem for two to three years. 12 FMSHRC at 242. Arguably, this continuing problem placed on Eastern the need for heightened scrutiny to assure compliance with section 75.400. See Youghiogeny & Ohio, 9 FMSHRC at 2011 (history of roof falls at mine placed operator on notice that heightened scrutiny was vital). (We also note that in the Y&O case, the Commission recognized that preshift examinations of the affected area had been conducted but that the violative condition had not been reported. 9 FMSHRC at 2010-11.)

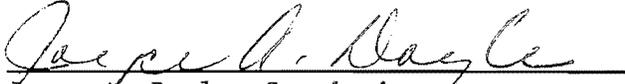
We do not reach an ultimate resolution of this issue. The fact that the judge did not reconcile his findings with respect to negligence and unwarrantable failure requires that we vacate his conclusion that no unwarrantable failure existed and remand this proceeding to the judge for further analysis and consideration.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Eastern's violation of section 75.400 was not S&S, vacate his determination that the violation did not result from unwarrantable failure, and remand the question of unwarrantability for reanalysis and further consideration consistent with this opinion. If the judge determines on remand that the violation did result from unwarrantable failure, the citation should be converted to the original section 104(d)(2) withdrawal order.


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 5, 1991

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. PENN 88-284-R
	:	PENN 88-285-R
v.	:	PENN 89-72
	:	
ROCHESTER & PITTSBURGH COAL	:	
COMPANY	:	

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding involves the issue of whether two violations by Rochester and Pittsburgh Coal Company ("R&P") of 30 C.F.R. § 75.305, a mandatory underground coal mine safety standard requiring weekly examinations for hazardous conditions in specified areas of mines, were the result of R&P's "unwarrantable failure" to comply with the standard.¹ Commission Administrative Law Judge Roy J.

¹ Section 75.305, which repeats the statutory standard at section 303(f) of the Mine Act, 30 U.S.C. § 863(f), states:

In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas. Such weekly examinations need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be

Maurer concluded that R&P had violated 30 C.F.R. § 75.305 and that the violations were of a "significant and substantial" nature ("S&S") but determined that the violations were not the result of R&P's unwarrantable failure. 11 FMSHRC 1978 (October 1989)(ALJ). Judge Maurer concluded that the conduct of the mine examiner responsible for the weekly examinations was not imputable to the operator for unwarrantable failure purposes because the examiner was a rank-and-file miner and the violation resulted from that employee's intentional misconduct. 11 FMSHRC at 1982-83. For the reasons set forth below, we reverse and remand this matter for further proceedings consistent with this opinion.

I.

Factual and Procedural Background

The facts are essentially undisputed. Before the judge, R&P stipulated that the mine examiner had failed to place his initials and the date and time of examination at the places subject to examination, thus conceding the two violations. (The mine in question provides date boards on which examiners are to place the date and their initials as they pass an area.) While of the opinion that the examinations in question were not done, R&P was unwilling to so stipulate. R&P conceded that the examiner had entered the examinations in the record book as though completed.

On July 13, 1988, John Daisley, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection at R&P's Greenwich Collieries No. 2 Mine, an underground coal mine located in Pennsylvania. Daisley traveled with United Mine Workers of America ("UMWA") mine examiner John Urgolites to the P-9 area of the mine. Daisley did not find any dates, times or initials to indicate that R&P had conducted a weekly examination in the area for the week ending July 6, 1988, or any day thereafter. Daisley found some dates, times and initials for the week prior to July 6, 1988, made by Joseph Mantini, indicating that he had conducted an examination of the P-9 area at that time.

reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

After Daisley reached the surface, he examined R&P's record book entitled "Weekly Reports of Air Measurements and Conditions of Aircourse...." The record book indicated that an examination of the P-9 area had been made on July 6, 1988. The entry in the book was signed by Mantini, the miner responsible for the examination. At that time, Daisley did not take any enforcement action with respect to the P-9 area because he "actually couldn't believe" that there could be such a discrepancy and he intended to re-inspect the area. Tr. 23-24. The record book indicated that on Thursday, July 7, 1988, an examination of the main S return had also been conducted by Mantini. Tr. 63-64; Exh. R-4.

On July 14, 1988, Daisley entered the mine and went to the S and T areas of the mine, accompanied by Urgolites, mine examiner Rich Rummell, and Joe DeSalvo, R&P safety inspector. Daisley did not find any dates, times or initials indicating that an examination had been conducted in the S and T areas for the week ending July 7, 1988, or any day thereafter until July 13, 1988. However, Daisley found dates, times, and initials indicating that examinations had been conducted by Mantini in some of the areas for the week prior to July 7, 1988. In some locations, the last date Daisley found entered on the applicable date board was June 23, 1990. Exh. G-3.

On July 14, 1988, Daisley issued R&P two withdrawal orders, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging violations of section 75.305. The orders stated that the required weekly examinations in the inspected areas had not been made although the mine examiner, Mantini, had recorded the examinations as having been conducted. Daisley marked both orders "S&S" and "high" for negligence. Daisley noted that no area was affected by withdrawal because appropriate examinations were made during the course of his inspections.

Mantini was not the regular examiner for the areas involved in this proceeding. The period June 26 through July 10, 1988, was the regularly scheduled two-week vacation period for most of the miners who worked at the mine. Although production was discontinued during the vacation period, some miners performed various tasks in the mine. Normally Mantini, a rank-and-file miner, was a belt person. However, during the miners' vacation period, he had the right, due to his qualifications and seniority, to work and to serve as the examiner charged with conducting the weekly examinations required under 30 C.F.R. § 75.305. Mantini is certified by the State of Pennsylvania as a mine examiner and, as such, meets MSHA's requirements for serving as a certified mine examiner. See 30 C.F.R. § 75.2(a).²

² In order to be certified by Pennsylvania, a miner needs three years of underground experience and must pass an oral and written examination. Tr. 20-21, 47, 51. For purposes of section 75.305's weekly examinations, a certified person is a "person who [is] certified as a mine foreman (mine manager), an assistant mine foreman (section foreman), or a preshift examiner (mine examiner)." 30 C.F.R. § 75.100(a).

After the vacation period ended all the miners returned to work. In Daisley's view, examinations were required to be made on July 6 and 7, 1988, before the miners returned underground.³

Daisley testified that, apart from Mantini, no other R&P employee was negligent in connection with the violations and no member of mine management was aware of any violative conduct prior to July 13, 1988. The Secretary proposed civil penalties of \$1,100 for each violation. MSHA also conducted an investigation of Mantini's role in the incident pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c). MSHA apparently concluded that Mantini had falsified the examination records. Tr. 64. However, MSHA did not take any enforcement action against Mantini individually. Tr. 55. The record suggests that R&P may have suspended Mantini for misconduct. Tr. 35-36.

At the hearing, R&P did not challenge the proposition that the Mine Act imposes liability without regard to fault for violations of the Act. As noted at the outset, R&P also conceded at least a recording violation in both instances. R&P did challenge, however, the inspector's findings of high negligence and unwarrantable failure as well as the penalties proposed by the Secretary. R&P argued that a rank-and-file miner's negligent or willful conduct may not be imputed to an operator for the purpose of making unwarrantable failure findings. R&P asserted that, in light of its own lack of negligence, the unwarrantable failure finding could not be supported and urged modification of the section 104(d)(2) orders to citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a).

The Secretary contended that Mantini was an agent of the operator, not merely a rank-and-file employee, when he was acting as mine examiner. The Secretary argued that Mantini's willful and aggravated conduct was, therefore, properly imputable to the operator.

In his decision, the judge found that the required examinations were not in fact made and affirmed the violations of section 75.305. 11 FMSHRC at 1981. He also found that the violations were S&S. *Id.* However, the judge vacated the unwarrantable failure findings associated with the inspector's orders, concluding that the record established R&P's negligence to be "nil." 11 FMSHRC at 1983. He determined that a rank-and-file miner's intentional misconduct is not per se imputable to the operator simply because the operator had appointed him as mine examiner. He further concluded that for unwarrantable findings, the requisite "aggravated conduct" must be the operator's own conduct. 11 FMSHRC at 1981-83. The judge reasoned:

³ Under section 75.305, "weekly examinations need not be made during any week in which the mine is idle for the entire week except that such examination shall be made before any other miner returns to the mine." R&P does not dispute that the examinations on July 6 and 7, 1988, were required to be made.

In this case, Mantini's misconduct was willful and intentional. He did not perform the required examinations, he knew he did not, and yet he certified in the operator's official records that he had performed them. I have a lot of trouble with the idea that a rank-and-file employee's intentional misconduct is imputable to management as their own "aggravated conduct" when there is absolutely no evidence in the record that any member of mine management actually knew or even should have known that the examinations were not done....

11 FMSHRC at 1982.

The judge modified the section 104(d)(2) orders to section 104(a) citations. 11 FMSHRC at 1983. Citing Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-65 (August 1982) ("SOCCO"), the judge found that, for penalty assessment purposes, rank-and-file employee negligence was not imputable to the operator, that the operator's negligence was to be determined by an examination of the operator's own conduct, and, as noted, that the operator's negligence was "nil." Id. The judge reduced the penalties from the \$1,100 proposed by the Secretary for each violation to \$450 for each violation. Id.

The Commission granted the Secretary's subsequent petition for discretionary review, which challenged only the judge's determination that there was no unwarrantable failure on the part of the operator. We heard oral argument in the matter, and now reverse.

II.

Disposition of Issues

On review, there is no dispute that Mantini engaged in intentional misconduct in failing to perform the required weekly examinations. The question before us is whether the judge erred in not imputing that misconduct to R&P in assessing whether it had unwarrantably failed to comply with 30 C.F.R. § 75.305. In addressing this question, three issues are presented: (A) whether intentional misconduct is within the scope of unwarrantable failure under the Mine Act; (B) whether Mantini, a rank-and-file employee acting as a mine examiner, was an agent of R&P in that capacity; and (C) if so, whether his misconduct was within the scope of his authority and, hence, imputable to R&P as principal.

A. Scope of unwarrantable failure

The special finding of unwarrantable failure, as set forth in section 104(d) of the Mine Act, 30 U.S.C. § 814(d), may be made by authorized Secretarial representatives in issuing citations and withdrawal orders pursuant to section 104. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010

(December 1987), the Commission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation." 9 FMSHRC at 2003. In Emery, the Commission also pointed out that in Eastern Associated Coal Co., 3 IBMA 331 (1974), the Interior Board of Mine Operations Appeals ("Board") had defined unwarrantable failure as "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." 9 FMSHRC 2003, citing Eastern, 3 IBMA at 356 n.5 (emphasis added).

Intentional misconduct, whether by commission or omission, is similar in terms of culpability to the kinds of indifferent, willful, or knowing behavior adverted to in Emery. From the perspective of plain meaning, intentional misconduct is "aggravated conduct." Eastern, cited in Emery, includes intentional failure to comply within the scope of unwarrantable failure. Accordingly, we conclude that intentional misconduct is a form of unwarrantable failure for purposes of the Mine Act.

B. Mantini's status as R&P's agent

In SOCCO, the Commission held, in relevant part, that the negligence of an operator's agents may be imputed to the operator for civil penalty purposes. 4 FMSHRC at 1463-64. Similarly, an agent's conduct may be imputed to the operator for unwarrantable failure purposes.

On review, R&P states that Mantini, notwithstanding his status as a rank-and-file miner, was "arguably" charged with responsibility for the operation of part of a mine and, hence, was R&P's agent within the meaning of the Mine Act's definition of "agent" (see below). R&P Br. at 6. See also Tr. Oral Arg. 17. However, in R&P's view, the determinative question in this case is "when does an agent cease to be an agent." R&P Br. at 6. R&P argues that because Mantini's intentional misconduct in failing to carry out the weekly examinations was outside the "scope of his authority" as an agent, his actions were not imputable to R&P. While the scope of authority issue is the focus of the parties' arguments on review, we deem it advisable to clarify the principal-agent relationship between an operator and those miners it charges with the responsibility of carrying out the examinations required under the Mine Act. Based on the language of the Mine Act and settled principles of the common law of agency, we have no difficulty concluding that a rank-and-file employee like Mantini is the agent of an operator when carrying out the required examinations entrusted to him by the operator.

Section 3(e) of the Mine Act provides in relevant part that "'agent' means any person charged with responsibility for the operation of all or a part of a coal or other mine...." We concur with R&P (R&P Br. at 6) that, in carrying out such required examination duties for an operator, an examiner like Mantini may appropriately be viewed as being "charged with responsibility for the operation of ... part of a mine," and, therefore, the examiner constitutes the operator's agent for that purpose.

Further, while the common law meaning of agent may be distinguished technically from the Mine Act's definition of the term, there is no substantive inconsistency between the two. The Commission has previously employed both the Act's definition and common law principles in resolving agency problems (see, e.g., Wilfred Bryant v. Dingess Mine Service, 10 FMSHRC 1173, 1178-80 (September 1988), aff'd sub nom. Winchester Coals v. FMSHRC, No. 89-334 (4th Cir. May 10, 1990)), and we find it appropriate to do so here as well. Generally, an agent is one who is authorized by another, the principal, to act on the other's behalf. See, e.g., Black's Law Dictionary 59 (5th ed. 1979) ("Black's"); Johnson v. Bechtel Associates Profes'l Corp., 717 F.2d 574, 579 (D.C. Cir. 1983). The Restatement (Second) of Agency (1958) ("Restatement") indicates that the essential feature of the principal-agent relationship is that the agent has authority to represent his principal with third parties in dealings that affect the principal's legal rights and obligations. Restatement, § 10. Within the plain meaning of these common law concepts, we conclude that when R&P assigned Mantini the statutorily mandated responsibility of an operator to conduct and record the weekly mine examination required under section 75.305, Mantini became an agent of R&P for that purpose.

In this regard, Pocahontas Fuel Co., 8 IBMA 136, 146-48 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), is instructive. There, the Board concluded that a rank-and-file miner, who was responsible for conducting a required preshift examination, was an agent of the operator, and that the miner's failure to detect a violative condition could properly be imputed to the operator for unwarrantable failure purposes.⁴ In Pocahontas, the operator argued that its designated preshift examiner was a rank-and-file employee and member of the UMWA and, hence, not a "management employee," nor "the company," and that, accordingly, the examiner's failure ought not be attributed to the operator. In concluding that the preshift examiner was an agent of the operator, the Board emphasized that the preshift examination was a statutorily mandated duty of the operator and had been delegated by the operator to the rank-and-file employee. 8 IBMA at 147-49. The Board stated that the statute made clear that Congress had recognized that the preshift examination was a most important function in the operation of a coal mine. The Board noted that the Act went into lengthy detail regarding the areas required to be inspected and the procedures to be followed as part of the preshift examination and that the statute further required the operator to "designat[e]" a "certified person" to conduct the examination. 8 IBMA at 147. The Board observed that although the duties delegated to the preshift examiner were the kind of duties "that one might expect an employer more normally to delegate to management personnel," it was

⁴ Pocahontas arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("Coal Act"). The preshift examination involved in Pocahontas was required by section 303(d)(1) of the Coal Act (30 U.S.C. § 823(d)(1) (1976) and the parallel standard at 30 C.F.R. § 75.303(a)(1975). Both section 303(d)(1) of the Coal Act and 30 C.F.R. § 75.303(a) have been carried over unchanged as section 303(d)(1) of the Mine Act and 30 C.F.R. § 75.303(a)(1990).

undisputed that the operator had delegated those duties to a rank-and-file miner. 8 IBMA at 148. The Board clearly recognized that whether a person is an agent does not necessarily depend on the individual's status as a supervisor but, rather, on his authority to act on behalf of the principal. We find that all of the foregoing considerations relied on by the Board in Pocahontas with respect to preshift examinations by a rank-and-file miner apply with equal force to the weekly shift examinations involved in the present case.

Accordingly, we hold that Mantini, although a rank-and-file miner, was an agent of R&P for the purpose of conducting the weekly examination. See generally Pocahontas, 8 IBMA at 146-49; cf. SOCCO, 4 FMSHRC at 1464.

C. Scope of Mantini's authority

If Mantini's violative conduct was within the "scope" of his employment or authority as an agent, then it may be imputed to R&P for purposes of an unwarrantable failure finding.

A leading commentary on the law of torts makes clear that "scope of employment" is both a broad and flexible concept:

It is ... a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not. It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.

* * *

The fact that the servant's act is expressly forbidden by the master, or is done in a manner which he has prohibited, is to be considered in determining what the servant has been hired to do, but it is usually not conclusive, and does not in itself prevent the act from being within the scope of employment. A master cannot escape liability merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable....

Prosser & Keeton, Torts, § 70 (p. 502)(5th ed. 1984). See also Restatement, § 228.

Under common law concepts of agency, generally it is not necessary to show that the principal (master) authorized or permitted the agent's

(servant's) particular injury-causing conduct in order for that conduct to be viewed as lying within the scope of the agent's duties and employment. See, e.g., Restatement § 232. Unauthorized acts of misconduct, including the failure to act, may be within the agent's scope of employment. The principal's express prohibition of an agent's act does not necessarily bar a finding that the misconduct was within the agent's scope of employment. A principal is liable even for the deceit of its agent, if that deceit was committed in the business that the agent was appointed to carry out. This holds even when the agent's specific conduct is carried out without the knowledge of the principal. E.g., CFTC v. Premex, Inc., 655 F.2d 779, 784 n.10 (7th Cir. 1981). The fraud of an agent may also be imputed to the principal when an agent is executing a transaction within the scope of his authority. In re Nelson, 761 F.2d 1320, 1322 (9th Cir. 1985). See also Restatement, §§ 257, 282.

Applying these principles, we conclude that Mantini's intentional misconduct was within the scope of his employment and, accordingly, was imputable to R&P for unwarrantable failure purposes. There is no question that Mantini was delegated the duty and was entrusted with the responsibility of the section 75.305 weekly examinations and recordings. Mantini's authority to perform those tasks is undisputed. As noted above, even if Mantini's conduct is characterized as deceit or fraud, that in itself would not necessarily bar its imputation to R&P. His actions were taken in relation to that duty: they were not separate actions unrelated to his entrusted responsibility. Moreover, we must not lose sight of the fact that statutorily mandated operator safety examinations are involved here. R&P, as the operator, had the absolute duty to ensure that these examinations were made, and Mantini must be considered R&P's agent acting within the scope of his authority with respect to that duty, since he was the individual assigned by R&P to discharge that duty. See Restatement, § 214; 53 Am. Jur. 2d, Master and Servant, §§ 313, 322, 323.

Thus, we reject R&P's contentions that Mantini's intentional misconduct was outside the scope of his authority. Under settled principles of agency law and in the context of the Mine Act, we hold that Mantini was R&P's agent for purposes of the examinations and that the manner in which he transacted that delegated statutory duty was within the scope of his authority. Accordingly, his misconduct is properly imputable to R&P for unwarrantable failure purposes.

D. Other contentions

We also reject R&P's other contentions. R&P argues that the Commission should apply the doctrine first enunciated in SOCCO, 4 FMSHRC at 1464; that the negligence of a rank-and-file miner is not imputed to an operator for penalty purposes if, among other things, the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. Accord: A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983). However, as already discussed, the Commission also stated in SOCCO that the negligence of an operator's agents may be imputed to the operator. 4 FMSHRC at 1464. Even though Mantini was a rank-and-file miner, he was an agent of R&P for examination purposes and, as we have held, his unwarrantable

table conduct is properly imputable.

R&P also points to the Commission's decision in Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981), in which the Commission declined to impute the negligence of a supervisor to the operator if two general conditions were met: (1) the operator had taken reasonable steps to avoid the kind of accident in question; and (2) no other miners were put at risk by the supervisor's conduct. Here, the judge found, and R&P does not contest on review, that both of the violations put other miners at serious risk. 11 FMSHRC at 1981. Thus, the Nacco exception does not apply in this case. R&P has not advanced, nor do we perceive under the facts of this case, any convincing reasons why Nacco should be expanded to include unwarrantable failure. As we have emphasized, weekly mine examinations are critical to mine safety and the failure to conduct such examinations may put many miners at risk.

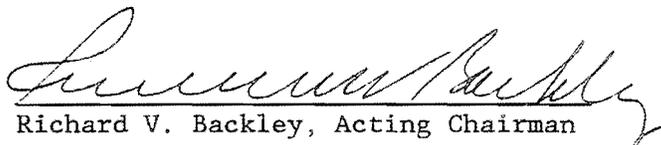
R&P argues further that imputation of intentional misconduct to the operator frustrates the purposes of the Mine Act. However, the Act has been construed to contain a deliberate scheme of vicarious liability of operators for violations committed by their employees. Western Fuels-Utah, Inc., 10 FMSHRC 256 (March 1988), aff'd, 870 F.2d 711 (D.C. Cir. 1989). The goal of this liability scheme is "to promote the highest degree of operator care." Western Fuels-Utah, 10 FMSHRC at 261. Although it may be extremely difficult to prevent intentional misconduct on the part of employees, R&P's argument that "Mr. Mantini's intentional misconduct is of a nature that is impossible to prevent" is not plausible. The liability scheme of the Mine Act is designed to give employers the strongest incentives to select, train, monitor, and discipline their employees in ways that will result in enhanced mine health and safety. The Act furthers that goal in addition by providing civil and criminal penalties against individuals for knowing violations (section 110(c), 30 U.S.C. § 820(c)) or false statements (section 110(f), 30 U.S.C. § 820(f)). Any appeal to change that scheme must be directed, not to the Commission, but to Congress.

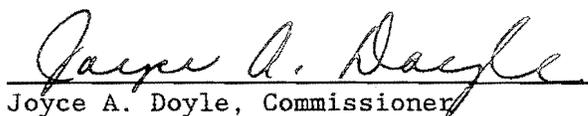
Finally, as noted above, an agent's violative conduct is imputable to the operator for negligence purposes. SOCCO, 4 FMSHRC at 1463-65. In view of our finding that Mantini's misconduct was imputable to R&P for unwarrantable failure purposes, the judge's failure to consider Mantini's violative conduct for negligence purposes was error. Although the terms "unwarrantable failure" and "negligence" are not used synonymously in the Mine Act, the same or similar factual circumstances may be included in the Commission's consideration of both. See, e.g., Quinland Coals, Inc., 9 FMSHRC 1614, 1622 (September 1987).

III.

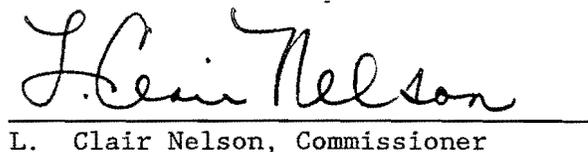
Conclusion

For the foregoing reasons, we reverse the judge's determination that the violation did not result from R&P's unwarrantable failure. In view of our finding that Mantini was R&P's agent, acting within the scope of his authority, the judge's failure to consider Mantini's violative conduct in determining negligence was also erroneous. Accordingly, we remand this matter for reconsideration of the appropriate civil penalty. In light of our conclusions, the section 104(a) citations should be converted to the originally issued section 104(d)(2) withdrawal orders.


Richard V. Backley, Acting Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


L. Clair Nelson, Commissioner

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Administrative Law Judge Roy Maurer
Federal Mine Safety & Health Review Commission
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 7 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. CENT 90-45-M
v. : A.C. No. 16-01064-05513
B & B GRAVEL COMPANY, INC., :
Respondent : Petty Pit A

DECISION

Appearances: Sara D. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Wallace Heck, Jr., Vice-President, B & B Gravel Company, Inc., Baton Rouge, Louisiana, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and pursuant to notice, a hearing was convened in Baton Rouge, Louisiana, and the parties appeared for trial. However, after a brief pretrial conference, the parties informed me that they reached a proposed settlement of the case. The citations, initial proposed civil penalty assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3270896	11/03/89	56.12008	\$213	\$ 86
3270897	11/03/89	56.12008	\$ 20	\$ 20
3270898	11/03/89	56.4101	\$ 20	\$ 20

Discussion

Section 104(a) "S&S" Citation No. 3270896, November 3, 1989, cites a violation of 30 C.F.R. § 56.12008, and the cited condition or practice states as follows: "The electrical conductors to the water pump did not have proper fittings where the conductors entered the switch box."

Section 104(a) non-"S&S" Citation No. 3270897, November 3, 1989, cites a violation of 30 C.F.R. § 56.12008, and the cited condition or practice states as follows: "The electrical conductors to the sizing screen motor did not have the proper fittings and bushings where the conductors enter the motor splice box."

Section 104(a) non-"S&S" Citation No. 3270898, November 3, 1989, cites a violation of 30 C.F.R. § 56.4101, and the cited condition or practice states as follows: "The fuel storage tank aboard the dredge does not have visible signs prohibiting smoking or open flames in the area."

The inspector established an abatement time of 8:00 a.m., November 17, 1989, for each of the citations. However, he subsequently terminated the citations on November 27, 1989, and the termination notices state as follows: "The dredging operation was shut down on 11-14-89, and the operator is moving the equipment to a different location for storage. Citation No. 3270896 is terminated by this action."

The parties agreed that the respondent is a large sand and gravel mine operator, with an annual production of 250,000 tons, and 12 employees. With regard to the particular pit operation where the citations were issued, the parties agreed that it was a small operation with approximately three employees. The evidence establishes that the pit was subsequently closed shortly after the citations were issued (Tr. 11-12).

In support of the proposed settlement of this matter, the Solicitor asserted that at the time the citations were issued on November 3, 1989, the respondent was in the process of closing down its pit operations and moving to a new location. The Solicitor stated that since its move to a new location, the respondent has shown an improvement in its electrical equipment and has attempted to stay in compliance with the requirements of the electrical standards.

MSHA Inspector James Bussell, stated that at the time of his inspection of November 3, 1989, the respondent was in the process of closing the pit and moving its equipment to another location. He further stated that the old pit was in fact closed on November 14, 1989, and that he subsequently terminated the citations on November 27, 1989. He confirmed that when he issued the citations he was aware of the fact that the respondent was in

the process of closing its old pit and was moving its equipment to another location. He further confirmed that he scheduled the abatement time of November 17, 1989, in order to allow the respondent sufficient time to complete its move.

With regard to Citation No. 3270896, concerning the water pump fittings, Inspector Bussell stated that the cited pump in question was located in the plant operator's compartment and the operator would have been exposed to a potential hazard. He identified photographic exhibits G-1 and G-2 as the switch box in question (Tr. 15-16).

With regard to Citation No. 3270897, Inspector Bussell stated that he issued it as a non-S&S citation because the motor in question was installed at an elevated location out of reach of anyone and there was no hazard exposure (exhibit G-4).

With regard to Citation No. 3270898, concerning the absence of a visible sign prohibiting smoking and open flames, the inspector stated that he observed some diesel fuel spillage on the dredge dock and issued the citation to alert the respondent to this condition. He confirmed that no visible sign was posted on the diesel fuel storage tank.

The respondent's representative, Wallace Heck, Jr., company Vice-President, stated that the respondent has always tried to comply with the applicable mandatory standards but has experienced some difficulty in communicating with the inspectors with respect to precisely what is required of him for compliance. With regard to the absence of the cited sign, Mr. Heck asserted that a warning sign had originally been painted on the fuel storage tank but that it was obscured over time by diesel fuel. He also asserted that the fuel tank was not physically located on the dredge, but was installed on a rack at the rear of the dredge which placed the tank over the water and not the dredge. He further indicated that the dredge operator's compartment was located at the other end of the dredge (Tr. 19-20).

Mr. Heck further stated that the cited water pump was installed 5-years prior to the citation issued by Mr. Bussell, and that the dredging operation had previously been inspected numerous times prior to the inspection in question. I take note of Mr. Heck's answer of July 9, 1990, in this case, in which he states that no accident was likely because he was in the process of disconnecting and moving the equipment, and that no accidents have ever occurred at this operation.

Inspector Bussell confirmed that the inspection which he conducted on November 3, 1989, was his first inspection at the dredging operation in question. He further confirmed his "moderate" negligence findings with respect to each of the cited conditions (Tr. 17).

The pleadings filed by the petitioner include a copy of MSHA's Proposed Assessment Form 1000-179, which reflects that 27 prior citations were issued to the respondent during the course of 14 inspections which took place over a 24-month period prior to November 3, 1989. However, there is no evidence that any of these prior violations were for violations of sections 56.12008 or 56.4101.

Conclusion

After careful consideration of the arguments presented in support of the proposed settlement disposition of this matter, and pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the proposed settlement was approved from the bench. My bench decision approving the settlement is herein reaffirmed, and I conclude and find that it is reasonable and in the public interest.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above in satisfaction of the citations in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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(Certified Mail)

Mr. Wallace Heck, Jr., Mr. Raymond E. Heck, B & B Gravel Company, Inc., 5415 Choctaw Drive, Baton Rouge, LA 70805 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 7 1991

BETHENERGY MINES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 90-206-R
	:	Citation No. 3099370;
	:	6/15/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 90-207-R
ADMINISTRATION (MSHA),	:	Citation No. 3099371;
Respondent	:	6/15/90
	:	
	:	Somerset Portal/84 Complex
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 91-52
Petitioner	:	A.C. No. 36-00958-03847
v.	:	
	:	Mine No. 84
BETHENERGY MINES, INC.,	:	
Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Bethenergy Mines, Inc. (Bethenergy)

Before: Judge Broderick

The above cases were consolidated because the citations contested in the contest proceedings were included in the citations for which the Secretary seeks penalties in the civil penalty proceeding. Pursuant to notice, the cases were called for hearing on January 29, 1991, in Pittsburgh, Pennsylvania.

The two contested citations, 3099370 and 3099371, charge violations of 30 C.F.R. § 75.305 because return aircourses could not be examined in their entirety as a result of roof falls rendering the travelways impassible. At the hearing counsel for the Secretary stated that further examination convinced the Secretary that the cited areas were not return aircourses, and

therefore there were no violations of the standard as charged. The Secretary moved to vacate the citations and to withdraw the penalty petition with respect to these two citations.

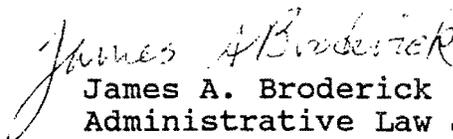
Citation 3092556 charges a violation of 30 C.F.R. § 75.316 because co sensors were more than 1200 feet apart on the belt entry in violation of the approved ventilation plan. The violation was designated as significant and substantial. Further investigation disclosed that co sensors were also located in the parallel track entry. The track entry sensor was within 500 feet of either sensor in the belt entry. For these reasons, the Secretary moved to delete the significant and substantial designation and to reduce the penalty from \$275 to \$175 which Bethenergy has agreed to pay.

Based on the representations of counsel and considering the criteria in section 110(i) of the Act, **IT IS ORDERED:**

1. Citations 3099370 and 3099371 are **VACATED**. The Notices of Contest filed in Docket Nos. PENN 90-206-R and PENN 90-207-R are **GRANTED**, and the proceedings are **DISMISSED**. The penalty petition with respect to these citations is **DENIED**.

2. Citation 3092556 is **MODIFIED** to delete the significant and substantial designation and, as modified, is **AFFIRMED**.

3. Bethenergy shall, within 30 days of the date of this decision pay the sum of \$175 for the violation charged in citation 3092556.


James A. Broderick
Administrative Law Judge

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 7 1991

Ronny Boswell, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 90-112-DM
National Cement Company, :
Respondent : SE MD 90-04
: Ragland Plant

DECISION

Appearances: Mr. Larry G. Myers, Union Representative,
Independent Workers of North America, Birmingham,
Alabama, for the Complainant;
Harry L. Hopkins, Esq., Lange, Simpson, Robinson &
Somerville, Birmingham, Alabama, for the
Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me based on a complaint filed by Ronny Boswell, alleging a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the Act). Respondent filed an answer, and pursuant to notice, the case was heard on September 5, 1990, in Birmingham, Alabama. At that hearing, Boswell himself, as well as Gerald W. Bowman, James E. Noah, and Gary R. Meads testified for the complainant. James Allen and Cedric Phillips testified for the respondent. Mr. Hopkins filed a post-trial brief on behalf of the respondent which I have considered in making this decision; none was filed by the complainant.

DISCUSSION

At all times relevant to the complaint, Ronny Boswell worked for respondent as a utility laborer, until the company disqualified him from being such on January 11, 1990. Boswell had held this position on three different occasions during his fourteen years of employment with National Cement. He had been a utility laborer this latest time since approximately 1982 and has been a utility laborer for approximately ten of the fourteen years of his tenure there.

Boswell became a payloader operator by some convoluted process unimportant to the merits of this case upon his disqualification as a utility laborer on January 11, 1990, and has remained so to this day.

Complainant seeks the difference in pay between what he would have received and what he did in fact receive as a result of and since the disqualification. Additionally, he seeks reinstatement to the position of utility laborer.

The respondent stated five specific grounds for the disqualification of Mr. Boswell from his position as a utility laborer. (Tr. 161, Resp. Ex. No. 1).

The Kiln Incident of August 8, 1989

The incident began with two other men already inside the kiln, tearing brick and coating down from overhead using fiberglass pry bars to pull it down. This was normal procedure for two men at a time to go inside and pull the brick down. When it gets too hot, they come out and two different men go in. There are always two men at a time pulling down the brick, which comes down in chunks weighing a hundred pounds and upwards. At the same time, there were eight men, including the complainant and Mr. Noah standing around out in front of the kiln.

At this particular point in time, one of the new French managers came upon this scene and inquired of their supervisor why more men were not working inside the kiln. The men had never before been asked to throw brick back up the kiln while people were still pulling brick and coating down from overhead. But, on this occasion, their supervisor, James Allen, prodded by the new manager, wanted three more men, including complainant, to go in there and throw brick that had already been pulled down back up the hill while two other men continued to pull brick and coating down around their heads.

The complainant refused and exercising his union contract rights, called for a safety review. However, he didn't get one. The union safety representative came when called, but the company man never showed up. The issue was resolved when the company just let it go. The supervisor simply continued the work with the usual procedure of having just the two men inside the kiln while the brick was being pulled down. Only after all the brick and coating was pulled down did they start cleaning it out, which is the next phase of the job.

Mr. Noah, who was on the scene at the time, concurred with and corroborated the testimony of the complainant. He testified that he informed Mr. Phillips, the Safety Director at the plant, that if Boswell hadn't called for a safety review, he would have, because it was unsafe to do what they were asked to do.

In any event, at the time, Boswell had an eye infection that had been "acting-up" for the previous two or three weeks, and he went home after four hours because his eye was hurting him and he didn't want to get dust in it. His supervisor, Mr. Allen, gave him permission to leave. Boswell also testified, unrebuted, that they had plenty of men to do the job; they didn't have to replace him.

Mr. Allen also testified about this incident. However, he misidentifies it as occurring on December 22, 1989 (Tr. 92) and states a widely differing version of the facts. For example, he states that only one man was working inside the kiln, not two and that they had already finished the pulling down phase of the work at the time he asked Boswell and a couple more men to throw loose brick up the kiln.

I make the necessary credibility finding in favor of the complainant. His testimony is corroborated by Mr. Noah and to some extent by Respondent's Exhibit No. 1. Mr. Allen apparently has some other incident in mind; perhaps the kiln incident of December 22, 1989.

Mr. Allen did go on to concede, however, that if the incident was as described by complainant and Noah, that would be "totally unsafe".

I therefore find that complainant did engage in protected activity by refusing to perform work and asking for a "safety review" related to the kiln incident of August 8, 1989. I also find that the adverse action taken by the company (i.e., disqualification) was predicated at least in part on this protected activity.

The Clay Shredder Incident of October 1, 1989

Mr. Boswell was charged with refusing to operate the clay shredder on October 1, 1989. He says because he had no knowledge of how it worked nor had he ever had any training to operate it.

Initially, that strikes me as being a fairly reasonable proposition. But, it turns out he didn't really refuse to operate it, he refused to be responsible for it. When James Allen asked him to operate it, he replied he didn't know how. Allen offered to show him. They then got into some repartee back and forth about who would be responsible if anything untoward happened, etc. The upshot of the whole thing was Allen decided it didn't need to be run after all and simply assigned Boswell to do something else.

The next night, the same issue arose again. This time Allen started the machine up for Boswell and he agreed to simply watch

it while it ran. This he did and Allen seemed satisfied with that, at least at the time.

The complainant feels the clay shredder is a dangerous piece of equipment for which adequate training is essential to operate it. Besides, he believes that operation of the clay shredder was not a part of his job.

Basically, with regard to the entire clay shredder incident, I don't find much in it for either side. Boswell performed, albeit reluctantly, the task assigned by Allen to Allen's satisfaction. Accordingly, I do not find any protected activity herein related to this incident. Nor do I find any unprotected justification for Boswell's disqualification.

The Radio Incident of October 22, 1989

This is another non-issue. Everybody at this point agrees nothing happened on this date. Boswell was off work on this particular date. Furthermore, Boswell testified that nothing like this ever happened.

On the other hand, Supervisor Allen testified that whatever date it was, it happened. When he tried to call Boswell on the radio, he got no answer and so he went looking for him. When he found him, he asked if he heard him calling on the radio. Boswell said "no". Mr. Allen thereupon checked the radio and it seemed to be working fine. The intimation being I suppose that Boswell was "goofing off" and didn't want to answer the radio to get assigned to some work detail.

Once again, I don't think this issue is going to do the company any good. The only possible purpose its proof might serve is to establish a legitimate cause for Boswell's disqualification. However, the closest Mr. Allen was able to pin this date down was "sometime in 1989" and then he didn't report it to the company until January 11, 1990, when the company was gathering ammunition to take action against Boswell. Therefore, I find the proof that the incident happened at all to be extremely weak.

The Kiln Incident of December 22, 1989

On the day in question, Mr. Boswell had arrived on the job four hours early and worked outside in the cold for the entire time, including four hours of his regular shift, for a total of eight hours. He testified it was very cold that particular day and he had been having ear problems for a month or longer. His ears had been bleeding. After eight hours outside, his ears were hurting worse. He told Supervisor Allen that and was excused for the day. That was the sum and substance of the entire episode

and I find this also to be a neutral situation. It neither helps nor hinders either side of the case.

The Bobcat and Wheelbarrow Incident of January 1, 1990

Supervisor Allen needed to get about three Bobcat¹/ buckets full of 3-inch diameter alloy steel mill grinding balls out of the mill basement, which area was accessed by a 20-30 degree inclined ramp, strewn with loose clinker.

He first went out to talk to the first shift Bobcat operator who was getting ready to leave. Allen asked him if he could stay over and finish cleaning the balls up as he (Allen) stated he needed it finished by morning. The man couldn't stay for personal reasons and so Allen next turned to Boswell. He wanted Boswell to operate the Bobcat and finish cleaning up the balls. Boswell objected-said he was afraid to and also stated that it was unsafe for him to attempt to do so as he had no training on the machine. He claims to have only operated this Bobcat about 8 hours total time during his fourteen years with the company and never up and down this ramp. Boswell acknowledges that other people do run the Bobcat down there to clean-up the balls, but he states that they are trained and qualified and they do it every day.

Next, Allen told him that if he wouldn't run the Bobcat, then take a wheelbarrow and go down there in the bottom of the mill room and load these balls in it and push it up the inclined ramp. Boswell states you can't even walk up and down that ramp without holding onto the side, much the less push a wheelbarrow up it. In any event, he refused to do it and instead, for the second time in five months, called for a safety review. Once again, he got no safety review. Supervisor Allen said "no, let it go." He told Boswell to go get the bulldozer and push rock and so he did for the balance of that shift.

DISCUSSION AND CONCLUSIONS

Respondent is of the view that Boswell did not have a reasonable, good faith belief that using the wheelbarrow in this instance was unsafe. At the heart of the inquiry then is whether this work refusal and request for a "safety review" rose to the status of "protected activity" as that term is used in this context.

¹ A Bobcat is a relatively small machine with a scoop bucket on the front that allows you to pick up material. It doesn't have a steering wheel, but rather is steered with foot and hand controls. It requires good coordination and some getting used to in order to properly operate it.

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 to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511, (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983; and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Generally, refusal to work cases turn on the miner's belief that a hazard exists, so long as that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra at 810.

Thus, the principal question for decision here is did Boswell reasonably and in good faith believe that he was going to

be required to operate a piece of equipment or perform some job which was deleterious to his personal safety.

With regard to the kiln incident of August 8, 1989, there can be no doubt that Boswell's refusal to work as directed and his request for a "safety review" were both made in good faith and eminently reasonable. The work he was requested to perform was patently unsafe.

The Bobcat and wheelbarrow incident is a closer call, but I find his refusal to work in this instance and his request for a safety review to be protected activity also. He had very limited experience operating the Bobcat and none operating it on a twenty degree slope. He therefore felt it would be unsafe for him to do so in this instance and I cannot fault him for that. It would seem to me that if the company needs trained and experienced Bobcat operators on each shift that it would be more prudent to train sufficient personnel to meet their needs rather than attempt to press untrained and inexperienced operators into service as a stop-gap measure. As for the wheelbarrow alternative Boswell was presented with, although respondent claims it is possible, and in fact Mr. Allen claims to have personally run a wheelbarrow up and down that particular incline, Boswell didn't think it could be done safely and he called for a safety review. We don't know what would have happened had a safety review been accomplished because, as is the usual practice, the supervisor simply sent the requestor off somewhere else to perform some other task. This Boswell apparently did to the operator's satisfaction.

Mr. Boswell was not made aware that any of these incidents involving he and James Allen were going to result in disciplinary action until January 11, 1990, when they told him they were disqualifying him off his job for going home sick twice, calling the two safety reviews and not answering the radio once (as it turns out on a day he wasn't even at work).

Accordingly, I conclude that the complainant engaged in protected activity on August 8, 1989, and again on January 1, 1990. Furthermore, the disqualification from his position as a utility laborer was motivated at least in major part by that protected activity. Therefore, I find and conclude that Boswell was discriminated against in violation of section 105(c) of the Mine Act.

In resolving the issues herein presented I was also guided in part by the Legislative History of the Act which embodies Congress' intent in enacting the Mine Act. The Senate Report, on the Senate version of the bill that became the Act, (S. Rep. No. 95-181, 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623

("Legislative History"), contains the following language relating to the protection of miners against discrimination:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

I also found instructive the following language from the Senate Report, supra, (Legislative History at 623):

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

The Senate Report, supra, (Legislative History at 624) explicitly indicates that Section 105(c), was intended by the Committee:

[T]o be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

REMEDIES

Turning now to the complainant's remedies, I find that for 1990 as of August 29, 1990, complainant was financially better off in the job he was sent into on January 11 than he would have been had he remained in the job he was disqualified from. Boswell, as of August 29, 1990, has earned \$28,640.26 for 1552 hours worked as a payloader operator. The man who took over his job as a utility laborer, Meads, earned \$27,720.72 for 1496 hours during the same time period. In other words, Boswell earned \$919.54 more as a payloader operator than he would have earned as a utility laborer for 56 more hours of work. Therefore, I find

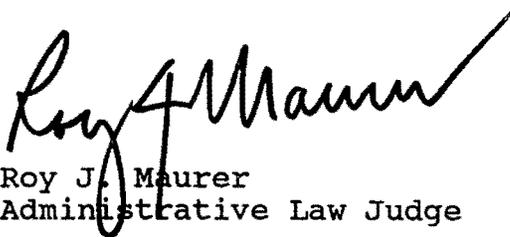
that Mr. Boswell is not due and owing any back pay from respondent as a result of his discriminatory disqualification from his utility laborer position.

He is, however, entitled to be reinstated to the position of utility laborer and to have his personnel file purged of any derogatory information pertaining to that disqualification. It will be so ordered.

ORDER

WHEREFORE IT IS ORDERED THAT:

1. Respondent shall, within 30 days of this decision, reinstate Complainant to the same position, pay, assignment, and with all other conditions and benefits of employment that he would have had if he had not been disqualified from his previous position as a utility laborer on January 11, 1990, with no break in service concerning any employment benefit or purpose.
2. The personnel records maintained in Mr. Boswell's file shall be completely expunged of all information relating to the January 11, 1990 disqualification.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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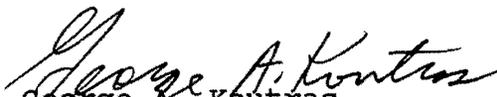
FEB 7 1991

LOCAL UNION 9909, DISTRICT 31, : COMPENSATION PROCEEDING
UNITED MINE WORKERS :
OF AMERICA, (UMWA), : Docket No. WEVA 90-74-C
Complainants :
v. : Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

ORDER OF DISMISSAL

Before: Judge Koutras

The complainants have filed a motion to dismiss this proceeding on the ground that the complaining miners have been paid the compensation due in accordance with a settlement reached by the parties. Under the circumstances, the motion IS GRANTED, and this matter IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

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Walter J. Scheller III, Esq., Consolidation Coal Company, Consol
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 7 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-5
Petitioner	:	A.C. No. 46-07204-03514
v.	:	
BENTLEY COAL COMPANY,	:	Flatbush No. 1 Mine
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

On January 30, 1991, the Secretary of Labor, on behalf of the parties to this action, filed a motion to approve the settlement negotiated between them. At issue in this case are three citations, originally assessed at \$10,500 in the aggregate. Settlement is proposed at \$8,750.

Citation No. 3110495 was issued for a violation of 30 C.F.R. § 77.1605(1) on November 14, 1989. A fatal accident had occurred on November 9, 1989, when a rock truck backed off an elevated roadway and fell fifty (50) feet into a water-filled pit. Immediately before the accident occurred, the driver had been attempting to dump a load of overburden at a location where none of the protective measures described in the cited mandatory standard had been provided. The Solicitor represents that the operator's negligence was moderate and the gravity very serious. The Secretary proposed a penalty of \$5,000 for this violation and the respondent has agreed to pay this amount in full.

Citation No. 3110496 was issued for a violation of 30 C.F.R. § 77.1605(k), which requires berms or guards to be provided on the outer banks of elevated roadways. It was originally thought that this violation also contributed to the fatal accident herein before described, but it now appears to the Secretary that the failure to have berms or guards along the roadway did not contribute to the accident. Nevertheless, the Solicitor again represents that the operator's negligence was moderate and the violation serious. The Secretary originally proposed a penalty of \$4000 for this violation, but the parties now wish to settle for the payment of \$2,750.

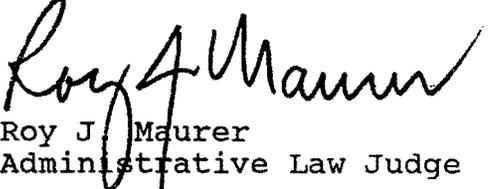
Citation No. 3110497 was issued for a violation of 30 C.F.R. § 77.1713 which relates to an inadequate preshift/onshift

examination for the hazardous conditions alluded to above. The Solicitor asserts that the mine operator's negligence was again moderate and the gravity serious. The parties seek a reduction in the proposed penalty from \$1500 to \$1000.

In support of the proposed settlement, the Solicitor states that the parties have discussed the alleged violations and the six statutory criteria stated in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), and that the circumstances presented warrant the reduction in the original civil penalty assessments for the violations in question. Further, he has submitted a detailed discussion and disclosure as to the facts and circumstances surrounding the issuance of the citations as well as a full explanation and justification for the proposed reductions.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the hearing scheduled for Wednesday, February 20, 1991, in Elkins, West Virginia, is CANCELLED, the motion for approval of settlement is GRANTED, and it is ORDERED that respondent pay a penalty of \$8,750 within 30 days of this decision.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 7 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 90-9-M
Petitioner : A. C. No. 30-02184-05502
v. :
HERBA SAND & GRAVEL, : Mayfield Pit & Plant
Respondent :

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor,
U. S. Department of Labor, New York, New York, for
the Secretary;
Mr. Ed Herba, Jr., Owner, Herba Sand & Gravel,
Gloversville, New York, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this Civil Penalty Proceeding, the Secretary (Petitioner), seeks the imposition of a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. § 56.14101(a)(3). Pursuant to notice, a hearing was held in this matter on January 23, 1991, in Albany, New York. John Montgomery II testified for Petitioner, and Edward F. Herba, Jr. testified for Respondent.

Findings of Fact and Discussion

I.

On October 5, 1989, John Montgomery, an inspector employed by the Mine Safety and Health Administration, while inspecting Respondent's operation, observed a Euclid haul truck while it was backing up to a dump point. Montgomery testified that it appeared that the truck did not have adequate brakes. He said that he spoke to the driver, Art Thompson, who told him that the parking brakes would not hold the truck. Montgomery testified, in essence, that Thompson further told him that the only way he is able to hold the truck on a hill, is to place two feet on the brakes, and keep the truck in gear.

According to Montgomery, he walked alongside the truck while it was going up a grade that he estimated to be between 8 to 10 percent. Montgomery told Thompson to hit the brakes and, because he had Thompson leave the door of the truck open, he observed that Thompson placed both feet on the brakes, but the truck still rolled backwards. Montgomery thereupon issued an imminent danger order as well as a citation alleging a violation of Section 56.14101(a)(3), supra, which provides as follows: "All braking systems installed on the equipment shall be maintained in functional condition."

Respondent did not offer any evidence to contradict the testimony of Montgomery with regard to the functioning of the brakes on October 5. Edward F. Herba, Jr. testified that the following day the back brakes did work, and he made just a little adjustment on them. However, he indicated that the front brakes were not holding and they had to be adjusted. He opined, essentially, that on the day of Montgomery's inspection the brakes were functioning at 80 percent.

Based on Montgomery's testimony that he observed that the Euclid haul truck rolled backwards after the brakes had been applied, and considering Herba's testimony that the front brakes were not holding and had to be adjusted, I conclude that the evidence establishes that Respondent herein did violate Section 56.14101, supra.

II.

According to Montgomery, based upon his observations, experience, and information he obtained from reviewing accident reports, he concluded that, if the brakes in question were not corrected, it was reasonably likely that an operator could lose control and either go over an embankment injuring himself or run over an outside vendor who could have come onto the premises. He thus concluded that the violation was significant and substantial.

The site in question was described by Herba as being hilly and Montgomery testified that at one point the terrain was at a grade of approximately 8 to 10 percent. Given these conditions and the condition of the brakes, certainly an accident could have occurred as a result of the operator of the truck not being able to stop it properly. However, the evidence fails to establish that an injury of a reasonably serious nature was reasonably likely to have occurred. (See, Mathies Coal Co., 6 FMSHRC 1 (January 1984)). Essentially, according to Montgomery, the haul truck operator could have been injured if the truck rolled over as a consequence of going over an embankment by virtue of the brakes not functioning properly. However, no proof was adduced as to the existence of embankments and their specific locations, particularly in reference to the areas where the haul truck

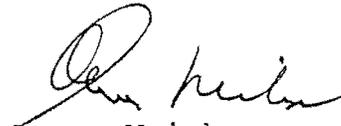
operated. Also, the evidence is lacking with regard to whether persons other than the operator are frequently present in the area where the truck operates. Although, according to Montgomery outside vendors could enter the premises, the record does not establish how frequently, if at all, vendors enter the area in question. Hence, I conclude that it has not been established that the violation herein is significant and substantial (See, Mathies Coal Co., supra).

III.

I accept Herba's testimony that the back brakes needed only a small adjustment, but that the front brakes needed adjustment. Additionally, taking into account the hilly terrain in question, I conclude that the violation was of a moderately serious level of gravity. Montgomery testified that Thompson had told him that he had reported to Herba the problem concerning the brakes. However, Thompson did not testify. Herba testified that prior to October 5, 1989, Thompson did not tell him that there were any problems with the brakes. I thus conclude that Respondent was negligent to only a low degree. Considering these factors, as well as the size of Respondent's operation, as stipulated to by the Parties at the hearing, and the fact, as stipulated to at the hearing, that no violations were cited by MSHA in the 24-month period prior to the inspection at issue, I conclude that a penalty of \$150 is appropriate for the violation found herein.

ORDER

It is **ORDERED** that, within 30 days of this Decision, Respondent pay \$150 as a civil penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

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Mr. Ed Herba, Jr., Owner, Herba Sand & Gravel, RD #2, Gloversville, NY 12078 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 11 1991.

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 90-410
Petitioner : A.C. No. 15-16316-03515
v. :
: No. 1 Mine
R B M ENTERPRISES, INC., :
Respondent : Docket No. KENT 90-418
: A.C. No. 15-16735-03506
:
: No. 2 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
the Secretary;
Billy R. Shelton, Esq., Baird, Baird, Baird and
Jones, P.S.C., Pikeville, Kentucky, for the
Respondent.

Before: Judge Melick

These cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary of Labor has proposed civil penalties for alleged violations by R B M Enterprises, Inc., (RBM) of regulatory standards. The general issues before me are whether RBM committed the violations as alleged and, if so, the amount of civil penalty to be assessed.

Docket No. KENT 90-410

At hearings the parties submitted a proposal for settlement of the one citation at issue in the amount of \$20. The motion was granted at hearing on the basis of the Secretary's representation that she has agreed to alternate means of achieving the purpose of the cited standard and that the operator has complied with that alternate method i.e. providing a fire proofing agent to be sprayed on the coal ribs at the battery station cited in this case. Under the circumstances the proposal for settlement is approved and the corresponding penalty will be incorporated in the order following this decision.

Docket No. KENT 90-418

Citation No. 3535703 issued pursuant to section 104(d)(1) of

the Act^{1/ 2/} charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Combustible material in form of float coal dust from grey to black was allowed to accumulate along under the No. 2 belt conveyor line and the connecting cross cuts and in the No. 3 [illegible] the left side the belt going toward the 001 section with loose wet coal and coal dust from one-inch to approximately 14 inches in various locations, starting at head drive and extending inby for 600 feet in length. This condition has existed for sometime due to the coal that was left along ribs from when the belt line had been moved up.

The standard at 30 C.F.R. § 75.400 provides as follows:

¹ Section 104(d)(1) of the Act provides as follows:

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

² The Citation herein was modified at hearing from a Section 104(d)(2) order to a Section 104(d)(1) citation since there had in fact been an intervening cleaning inspection following the precedential Section 104(d)(1) order.

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

MSHA Supervisory Inspector Kellis Fields testified that on March 6, 1990, he was performing a general inspection of the cited No. 2 Mine accompanied by Mine Superintendent Ellis Adkins. It is not disputed that at the time of this inspection there were 8 to 10 miners working on the sections but that the mine was not then producing coal because the motor on the coal feeder had earlier broken down. According to Inspector Fields the belts were nevertheless still running for the clean-up of loose coal. According to Fields, he and Superintendent Adkins entered along the No. 1 belt and turned right along the No. 2 belt (see Government Exhibit No. 3). The areas marked in green on that exhibit comport with the description in the citation that there was float coal dust under the No. 2 belt conveyor and the connecting crosscuts. In addition, according to Inspector Fields there was loose wet coal and coal dust from one inch to approximately to 14 inches deep in various locations starting at the head drives and extending inby for 600 feet. He found the larger accumulations (up to 14 inches) in locations where the coal feeder had previously been situated. Based on estimated mining progress, Fields concluded that the feeder had been moved from 14 to 16 days before his inspection. He observed that spillage normally occurs at feeder locations as a result of overflowing.

According to Inspector Fields, Superintendent Adkins admitted to him several days after the inspection that he had been aware of the coal spillage, but had not had time to have it cleaned up. The coal spillage had apparently been left at the feeder locations after the belt had been moved.

Inspector Fields believed that there was a serious potential for ignition from various electrical components including the 112-volt belt control line, the 440-volt "AC" belt control box and the 4160 "AC" power center. Fields noted in particular that the belt control box was a "nonpermissible" box and that one quarter inch of coal dust lay inside the box and on the components inside. He further noted that the coal dust within the control box was dry and that it could have been ignited by a spark inside the box resulting in fire or explosion. He opined that the belt rollers themselves could also become stuck causing friction with the belt resulting in the drying and ignition of adjacent coal dust. The 112-volt control line could also become damaged causing an arc and triggering an explosion.

The record shows that additional citations were also issued at this time for other extant conditions, namely for coal dust within the belt control box, for an inadequate water spray (fire

suppression) system on the belt line, for failure to provide a fire hose where a 500-foot hose was required, for the absence of water outlets onto which fire hoses could be attached, and for the absence of fire sensors to automatically activate the belt water deluge system in the event of fire. These citations were not challenged and were issued for violations occurring concomitantly with the violation at issue herein. This evidence provides a basis for finding highly aggravating circumstances.

Accordingly, within this framework, Inspector Fields' conclusion that it was highly likely that all of the miners (estimated to be 8 to 10 working at the face alone) would be killed by explosion or fire is clearly supported by credible evidence. I find the inspector's testimony sufficient to support the "significant and substantial" violation charged herein. See Mathies Coal Co., 6 FMSHRC 1 (1984).

In reaching these conclusions, I have not disregarded the testimony of RBM witnesses Ted Robinson, a certified electrician, Ronny Dean Smith, a miner helper, and Elmo Green, a mine inspector for the Kentucky Department of Mines and Minerals, that the mine at issue was so wet that the "coal dust" consisted of nothing more than soupy mud. Inspector Green opined that with the amount of water in the subject mine there would not be an explosion or fire hazard from coal dust. He observed that mud from 1 to 4 inches deep existed on the bottom of the mine.

Indeed there appears to be no dispute that the subject mine was an extremely wet mine and that much of the coal dust cited was in fact wet and muddy. However, those factors do not preclude a violation of the standard at 30 C.F.R. § 75.400. See Secretary v. Black Diamond Coal Mining Company, 7 FMSHRC 1117 at p.1120-1121 (1985); Utah Power light Company Mining Division v. Secretary of Labor, 12 FMSHRC 965 (1990). The Commission observed in those decisions that even though such accumulations may be damp or wet they are still combustible and noted that in the case of a fire starting elsewhere in the mine the resulting heat may be so intense that wet coal can dry out and propagate a fire.

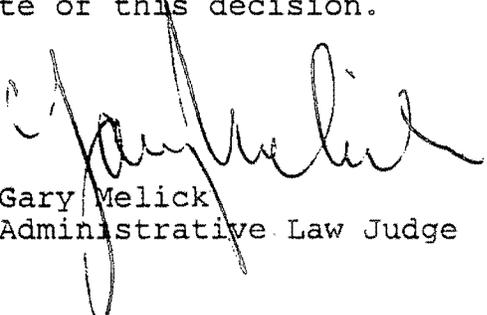
Moreover, in light of the many other aggravating conditions, noted above, considered in the context of continued normal mining operations, there was a confluence of factors present in this case to constitute a reasonable likelihood of a combustion hazard resulting in an ignition or explosion in spite of the wetness. See U.S. Steel Mining Co. Inc., 6 FMSHRC 1573 (1984) and Texas Gulf, Inc., 10 FMSHRC 498 (1988).

It is clear that the violation was also the result of "unwarrantable failure" and high negligence. The testimony of Inspector Fields that larger accumulations were located where the coal feeders had previously been located some 14 to 16 days

before his inspection, is credible. Indeed Superintendent Adkins admitted to Fields that he had been aware of such coal spillage, but had not had time to clean it up. Thus even assuming, arguendo, that miners were beginning to clean along the No. 2 belt line at the time of the inspection, it is clear that the existence of the accumulations for two weeks or more constituted such an aggravated omission and gross negligence that it was the result of unwarrantable failure. Emery Mining Company, 9 FMSHRC 1997 (1987). Accordingly, the section 104(d)(1) citation at bar must be affirmed. Moreover, considering the criteria under section 110(i) of the Act it is clear that the proposed civil penalty of \$800 is indeed appropriate.

ORDER

R B M Enterprises, Inc. is directed to pay civil penalties of \$820 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 11 1991

DANNY SPARKS AND OTHERS,	:	COMPENSATION PROCEEDING
Complainants	:	
v.	:	Docket No. VA 90-56-C
	:	
VP-5 MINING COMPANY,	:	VP-5 Mine
Respondent	:	

**ORDER APPROVING SETTLEMENT
AND DISMISSING PROCEEDING**

Before: Judge Broderick

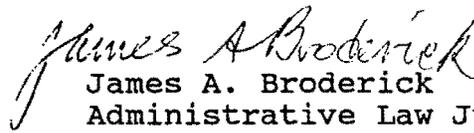
Applicants filed for compensation under section 111 of the Act for workers on the second shift at the subject mine following the issuance of an order of withdrawal under section 107(a) at 6:30 p.m., June 7, 1990. The withdrawal order was issued because of an excessive amount of methane in the bleeder system of the six development longwall. The application stated that the withdrawn miners were paid for 4 hours on June 7, 1990.

On January 28, 1991, Applicant Sparks, as Chairman of the Safety Committee at the mine, submitted a proposed settlement agreement in which the Respondent would pay an additional 2 hours pay to the withdrawn miners.

In a conference call on February 8, 1991, Mr. Sparks stated that the excessive methane was discovered by the company at about 6:00 p.m. on June 7, and the company ordered the men withdrawn before the Federal inspector issued his order. Some were out of the mine prior to the order and others were on their way out. Some of those withdrawn from underground continued working on the surface and were paid or will be paid for the time actually worked. Those who did not will be paid 2 hours in addition to the 4 hours pay they received under the union contract.

I have considered the settlement proposal and conclude that it effectuates the purposes of the Act.

Accordingly, the settlement proposal is **APPROVED**, and, subject to the payment of the agreed to 2 hours additional pay to the miners withdrawn on the second shift, June 7, 1990, this proceeding is **DISMISSED**.


James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 13 1991

WENDELL COOK, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 90-351-D
: MSHA Case No. BARB CD 90-16
SOUTH EAST COAL COMPANY, :
Respondent : Mine No. 411

DECISION

Appearances: Wendell Cook, Whitesburg, Kentucky, pro se, for
the Complainant;
James W. Craft, Esq., Whitesburg, Kentucky, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant, Wendell Cook, against the respondent South East Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated June 1, 1990, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, on July 5, 1990, the complainant filed a complaint with the Commission. A hearing was held in Hazard, Kentucky, 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, and I have also considered a posthearing letter of December 16, 1990, submitted by the complainant on his behalf, and a copy was furnished to the respondent's counsel.

The complainant, who was employed by the respondent as a bolting-machine helper, alleges that he was harassed by the respondent and then discharged on or about April 20, 1990, in retaliation for filing a prior discrimination complaint against the respondent in August, 1989.

The respondent denies that it discriminated against the complainant, and asserts that the complainant was discharged for cause for fighting on mine property with another miner. The respondent further asserts that fighting on mine property is a violation of company policy and state law, and that both miners who engaged in the fight on April 16, 1990, were discharged.

Issues

The critical question in this case is whether Mr. Cook's discharge was prompted in any way by his engaging in protected activity, or whether it was the result of his engaging in a fight on mine property in violation of company policy. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Complainant's Testimony and Evidence

Alisha Cook, the complainant's wife, testified that on several occasions her husband came home from the mine upset "over things that had happened at work." She stated that her husband wanted to insure safe working conditions at the mine but that when he mentioned any unsafe conditions at the mine the supervisors and his fellow miners would become upset when production decreased. She asserted that the miners were upset because she also worked, and she felt that management discriminated against her husband by not offering him opportunities for advancement. She discussed her husband's work situation with company official Danny Quillen on April 6, 1990, and that Mr. Quillen stated "why doesn't he just quit?" (Tr. 16). She further stated that she was surprised by this statement because the company had been good to her husband and he wanted to benefit the company.

With regard to her husband's discharge for allegedly fighting with Mr. Jesse Gibson, Mrs. Cook stated that the respondent believed that her husband had a vendetta against Mr. Gibson because he had co-signed a bank loan for Mr. Gibson and Mr. Gibson was delinquent in his payments. She stated that since her husband's discharge, they have attempted to speak with Mr. Gibson about the matter, and that during a visit to Mr. Gibson's home on August 2, 1990, her husband asked Mr. Gibson

about his delinquent payments. Mr. Gibson accused her husband of getting him fired and pulled a pistol on her husband and shot over their vehicle as they were leaving. She then swore out a warrant for Mr. Gibson's arrest (Tr. 18; exhibit C-3).

Mrs. Cook stated that her husband had been shoved many times at work and had dirt put in his lunch bucket (Tr. 19). In response to further questions concerning the alleged fight with Mr. Gibson, Mrs. Cook stated that her husband came home upset and stated that Mr. Gibson had shoved him down in the parking lot while her husband was walking to his truck. She stated that her husband was upset because "all the men, including their supervisor and their foreman were present to witness that yet nothing was done" (Tr. 21). She was aware that her husband was fired by the respondent for fighting with Mr. Gibson, but as far she knew, there was no fight and her husband only told her that he had been shoved on his way to his truck (Tr. 21).

On cross-examination, Mrs. Cook stated that her husband was upset "because of the safety situation at the mines and the equipment" (Tr. 22). She stated that she learned that her husband had been fired 2 days following the alleged fight with Mr. Gibson, and did not know that Mr. Gibson had also been fired at the same time as her husband (Tr. 22).

Wendell Cook, the complainant, stated that it was not uncommon for fighting to go on at the mine, and he identified one miner (Greg Horn) who was transferred to another mine for fighting. Mr. Cook also stated that management provided moonshine for miners after they came out of the mine, and that "it was nothing uncommon for management to have women at the mines" (Tr. 24). With regard to the alleged April 16, 1990, fight with Mr. Gibson, Mr. Cook stated as follows (Tr. 26-27):

MR. COOK: And the night that they are talking about there, that was on April 16th. When I come out of the mines--he had been calling me names all night inside the mine.

THE COURT: Who is that, Mr. Gibson?

MR. COOK: Mr. Gibson. And as I come up the bank there, he shoved me backwards. I had my dinner bucket in my left hand and my self-rescuer in my right hand and I am right-handed. If I was going to hit anybody, I think I would hit them with my right hand.

He shoved me backwards and as I was falling backwards, trying to catch my balance, I may have thrown my hand. If I hit him, he done it himself, you know. I will say that he did have a scratch on the top of his

nose, now. But it was not from a punch or nothing that I threwed.

Mr. Cook stated that Mr. Gibson was a roof-bolting machine operator and that he had been bickering with other miners on the section and the mine foreman for a month or so prior to the incident of April 16. He stated that Mr. Gibson was complaining that he had to do most of the bolting, and on March 24, 1990, shoved him because he was angry about having to bolt so much and about some of the bolting practices. Mr. Cook stated that Mr. Gibson had words with another miner that evening about the bolting, and that as a result of all of this bickering, he (Cook) asked Mr. Quillen to transfer him off the section.

Mr. Cook stated that on April 21, 1990, the day following his discharge, another miner, Tommy Gibson, informed him that he (Gibson) "knew that they were going to set me up," but that Mr. Gibson could not admit to this if the matter were to go to court "because he had to have his job" (Tr. 31).

Mr. Cook produced a copy of his termination letter and a copy of a Kentucky Department for Employment Services determination concerning his unemployment claim which he filed after his discharge (exhibits C-1 and C-2). He pointed out that the unemployment examiner found that there was insufficient evidence available to substantiate the fight in question, and that his separation was not disqualifying under state law (Tr. 34-35).

Mr. Cook stated that after he received his termination letter from the respondent, he spoke to Mr. Steve LaViers, a company official, and Mr. LaViers confirmed that he had discussed the matter with Mr. Danny Quillen, and understood that the alleged fight with Mr. Jesse Gibson was over the bank note which Mr. Cook had co-signed (Tr. 41). Mr. Cook produced a copy of a letter dated April 17, 1990, addressed to him and Mr. Gibson, from the Bank of Whitesburg, Kentucky, reminding them that the loan payment was overdue (exhibit C-4). Mr. Cook stated that he received the letter on Wednesday (April 18, 1990), and that Mr. Quillen told him that Mr. Jesse Gibson told him that he (Cook) hit him because he was not paying the note (Tr. 42).

Mr. Cook stated that he spoke to Mr. Quillen on Wednesday, April 18, 1990, and that Mr. Quillen told him to take the day off until he could check into the matter. He then telephoned Mr. Quillen on Thursday, April 19, 1990, and Mr. Quillen informed him that he would have to let him go, but gave him no reason (Tr. 43). Mr. Cook then went to see Mr. Quillen and Mr. Quillen informed him that he knew that he had hit Mr. Gibson on April 16 (Tr. 43). Mr. Cook stated that he visited Mr. Gibson at his home on the evening of April 16, and that there was nothing wrong with him and he did not file any accident report that evening. Mr. Gibson reported for work the next day, April 17, and Mr. Cook

saw that he had "a little scratch across the top of his nose" (Tr. 44).

Mr. Cook confirmed that he has reviewed the hospital reports concerning Mr. Gibson's injuries (exhibits R-1 through R-6), and when asked how he could account for the extent of Mr. Gibson's injuries, Mr. Cook replied as follows (Tr. 45-46):

MR. COOK: Well, I know I didn't hit the man.

THE COURT: But I am talking about the injuries. The guy had his nose broken in two places and all those contusions and the things that those doctors said that he had, wouldn't you think that he would have more than just a little old scratch on his nose?

MR. COOK: Well, he went to the doctor, what, Wednesday?

THE COURT: You said that you didn't hit him, but you said early on you said that you may have, you may have swung your lunch bucket or something"

MR. COOK: Well, if I did, it was--I mean, he walked into it, you know, me a falling.

THE COURT: While you were swinging the bucket he walked into it?

MR. COOK: Just falling backwards, naturally, you know, you are going to try to balance yourself. You know, I didn't hit the man. But now, he did have a scratch on his--I know that night--

Mr. Cook produced a receipt in the amount of \$20 from the Daniel Boone Clinic, for services rendered by a doctor on April 20, 1990 (exhibit C-5). He explained that he went to see the doctor that day because he had been shoved by Mr. Gibson on April 16, 1990, and hit his head when he hit the ground (Tr. 49). He further stated that he spoke with Mr. Quillen about the bill on April 21, and Mr. Quillen informed him that his regular insurance, rather than workmen's compensation, should pay the bill (Tr. 49-50). Mr. Cook confirmed that the doctor's certification reflecting that he was under the doctor's care from April 20 to April 24, 1990, was an excuse to cover that week (Tr. 48).

Mr. Cook stated that he and Mr. Gibson had been the best of friends, but that on April 16, Mr. Gibson had called him some names, and when asked for an explanation as to what may have prompted the name calling, Mr. Cook stated as follows (Tr. 51-53):

MR. COOK: The only thing I can assume, which you know, you can't go on assumptions, but I just assumed that he didn't want to work with me and wanted to--he knew that he wasn't going to pay the bank note, which he didn't. I had to pay it, right at \$1,000.00. I just assumed that he didn't want to work with me and just didn't--

THE COURT: But now, in your complaint, you said that Mr. Gibson was harassing you and you say that you believe this harassment was a direct result of management. What did you mean by that? Somebody reading that would think that the management put Mr. Gibson up to harassing you to give you an excuse to hit him to get rid of him.

MR. COOK: Well, you know, I wouldn't have no--

THE COURT: You think that is what happened? You think that the company told Mr. Gibson, "hey, start harassing Mr. Cook, and get him to do something to you; get him to hit you in the nose and fracture it so that we can set him up to fire him." You think that is what happened in this case?

MR. COOK: I think it is a very good possibility.

THE COURT: That just seems like an extreme thing for a company to do to get rid of somebody, and particularly extreme on Mr. Gibson's part. What did he get out of all this? He got fired, too, didn't he?

MR. COOK: I assume he did. He said he did. I don't know.

THE COURT: Is he working at this company, Mr. Cook?

MR. COOK: No.

Mr. Cook stated that there were fights at the mine "all of the time," and he confirmed that no one ever reported them (Tr. 55). He further confirmed that at the time he filed his MSHA complaint on April 24, 1990, he did not allege that he made any safety complaints or was fired for making such complaints. Mr. Cook stated that he told MSHA special investigator Mullins "about the violations," and when asked whether he is suggesting that the respondent fired him for reporting safety violations, Mr. Cook responded "I am not sure why they fired me. I know it was not for fighting" (Tr. 58).

Mr. Cook confirmed that he had filed an earlier discrimination complaint against the respondent in August, 1989, but withdrew it after reaching an agreement with Mr. Quillen who

assured him that he would be reinstated to his original job. Mr. Cook explained that after he returned to work he was put on another crew, and after complaining to Mr. Quillen, he was eventually returned to his old job and crew within 2 months (Tr. 58-63). In response to questions concerning his allegations that the respondent harassed him and retaliated against him for filing his earlier complaint, Mr. Cook alluded to the "bickering" which continued on his shift, his request to be transferred, management's refusal to transfer him, and the "hard feelings" which existed between him and mine superintendent Earl Duncil. Mr. Cook also believed that he was not given the same opportunities as others to change to less boring jobs, and he cited one instance in which he was denied an opportunity by Mr. Duncil to perform some clean up work rather than working as a roof-bolting assistant (Tr. 66-72).

On cross-examination, Mr. Cook stated that he was aware that Mr. Gibson left the mine at 6:00 p.m., on April 17, 1990, prior to the end of his shift, and that his replacement told him that Mr. Gibson was sick and had to leave (Tr. 73-74). Mr. Cook stated that he went to Mr. Gibson's home that evening at approximately 10:30 p.m., to see what was wrong with him and to ask him why he "acted in the manner that he did" when he pushed him down the prior evening. He stated that during his discussion with Mr. Gibson, he (Gibson) mentioned the bank note and told him that "he would fix me up that night" and ordered him to leave (Tr. 73-77).

With regard to a bank delinquency notice letter of April 13, 1990, addressed to him, (exhibit R-12), Mr. Cook stated that he received it the following Wednesday, April 18, 1990, and that he gave the post-marked envelope and original bank letters to Mr. Quillen when he spoke with him at the mine, but that when he retrieved the correspondence, the envelopes were gone. Mr. Cook admitted that he told Mr. Quillen that Mr. Gibson had shoved him, but denied telling him that nothing happened (Tr. 78-81). Mr. Cook confirmed that when he spoke with Mr. Quillen on April 18, Mr. Quillen knew about the bank note which he had signed, but he (Cook) denied that he knew anything about the bank delinquency letter of April 13, or that Mr. Gibson was not paying the note when the incident of April 16, occurred (Tr. 82-84). Mr. Cook stated further that he gave the bank correspondence to Mr. Quillen because Mr. Quillen told him that the incident with Mr. Gibson occurred because of the bank note, and that he (Cook) was trying to show Mr. Quillen that he knew nothing about the delinquent bank note payment on April 16 (Tr. 84-85).

Mr. Cook stated that miners smoked underground, would drink on the surface after they were off duty, and would engage in target shooting on the parking lot. He stated that he complained to Mr. Quillen and the mine superintendent, but did not complain to any mine inspectors. Mr. Cook confirmed that he did not tell

the mine foreman or superintendent that Mr. Gibson had shoved him to the ground on April 16, and that when he spoke with Mr. Quillen on April 18, Mr. Quillen said nothing about firing Mr. Gibson, and only indicated that he "was on compensation" (Tr. 96-97).

Respondent's Testimony and Evidence

Daniel Quillen, Jr., stated that he is employed by the respondent as Vice-President for operations, and that his duties include assisting in the management of the mines, hiring and firing, and the supervision of payroll and office records. He confirmed that the Brinkley Mine has been closed since October 10, 1990, that production has ceased, and that eight people are at the site removing the equipment. Mr. Quillen confirmed that Mr. Cook and Mr. Gibson worked on the second shift at the mine, from 2:00 p.m. to 10:00 p.m., and that they were both classified as "clean-ups," which including helping on the roof-bolting machine and attending or maintaining a belt conveyor (Tr. 98-101).

Mr. Quillen stated that the altercation of Monday, April 16, between Mr. Cook and Mr. Gibson first came to his attention on Wednesday morning, April 18, when Mr. Gibson walked into his office and it was obvious that he had been hit with something hard because his eye was black and "his nose was crooked like a dog's hind leg" (Tr. 102). Mr. Gibson told him that Mr. Cook hit him in the nose and eye with his dinner bucket Monday evening after leaving the mantrip and as they were proceeding to the parking area. Mr. Quillen stated that Mr. Gibson told him that he did not know why Mr. Cook struck him. He then instructed Mr. Gibson to go to the hospital emergency facility in Hazard to see a doctor, and either called, or had his secretary call Mr. Cook to come to the mine to speak with him (Tr. 102).

Mr. Quillen stated that he told Mr. Cook about Mr. Gibson's statement that he (Cook) had struck him, but that Mr. Cook denied that it ever happened and stated that "nothing happened" and "that if the man got hurt, it was after he left the mine because he didn't get hurt at the mines" (Tr. 103). Mr. Quillen confirmed that he advised Mr. Cook that he could not work until he found out what happened. Mr. Quillen further stated that Mr. Gibson had reported for work on Tuesday, April 17, but had to come out of the mine during his lunch hour at 6:00 p.m., after telling him that "he was hurting so bad and got sick in the mines" as a result of the injuries he had received on April 16 (Tr. 104).

Mr. Quillen stated that after investigating the matter, he fired Mr. Cook and Mr. Gibson for fighting on company property and that "it was just a disciplinary action that had to be taken to tell the people that works at South East Coal Company you

can't go around doing this on South East Coal Company's property" (Tr. 104). Mr. Quillen denied that his decision to discharge Mr. Cook had anything to do with the previous complaint filed by Mr. Cook, and that his decision to fire him was based on what he (Quillen) believed happened Monday evening, April 16 (Tr. 105).

Mr. Quillen stated that no one ever complained to him about drinking, women, or shooting on company property until he received Mr. Cook's letter of August 10, 1990, appealing MSHA's determination in connection with his discrimination complaint. Mr. Quillen stated that he has fired a miner for smoking in another mine, but that this was not brought to his attention by Mr. Cook. He confirmed that no one at the Brinkley Mine has been fired for smoking underground, and although he has heard several complaints about smoking, he stated that he needed definite proof in order to fire anyone (Tr. 107).

On cross-examination, Mr. Quillen stated that he did not believe that Mr. Gibson received his injuries somewhere else other than at the mine. He confirmed that Mr. Cook told him that nothing had happened, and if it did, it happened after Mr. Gibson left the mine. Mr. Quillen stated that he found out that Mr. Gibson rode home with another miner, Benny Campbell, Monday evening, April 16, and that when he contacted Mr. Campbell, Mr. Campbell told him that when he arrived at Mr. Gibson's truck, Mr. Gibson was already in it and that his nose was bleeding and that it bled all the way from the mine to his home (Tr. 107-110).

Mr. Quillen stated that he was unaware of any other fights at the mine, and could not recall Mr. Cook telling him about a fight between Larry Collins and Tommy Gibson (Tr. 114). Mr. Cook asserted that he told Mr. Quillen about this fight before he was discharged, when he had requested to transfer off the section, and that the fight was "over two men wanting a belt drive" (Tr. 115).

In response to further questions, Mr. Quillen confirmed that the termination letter of April 20, 1990, does not include a statement that Mr. Cook was discharged for fighting. Mr. Quillen explained that Mr. Cook knew why he was being fired and that he verbally informed him of the discharge on April 19, either by telephone, or personally at the mine office, and that they "had been talking about it for two days" (Tr. 118). Mr. Quillen confirmed that Mr. Cook gave him the two bank delinquency notices either on Wednesday, April 18, or a couple of days later, but that Mr. Gibson never said anything about any late payments. Mr. Quillen believed that Mr. Cook gave him the notices in order to show that "this was Jesse's fault, not my fault because Jesse hadn't made the payments" (Tr. 120).

Mr. Quillen could not recall the exact date of Mr. Gibson's discharge, but confirmed that it was before the doctor would have

permitted him to come back to work. Mr. Quillen was of the opinion that the argument was over the delinquent note payments, and he believed that "one of them was as much at fault as the other. So they should both be fired" (Tr. 121). Mr. Quillen confirmed that the company policy prohibiting fighting on company property is not in writing, and that the employees know about it through "common sense" (Tr. 123). He further confirmed that fighting at a mine is a violation of Kentucky Mine Law (Tr. 124). He stated that he had never previously fired or disciplined any other employees for fighting, and had no knowledge that anyone else had ever fought on mine property (Tr. 125-127). Mr. Quillen acknowledged that there were "hard feelings" at the mine and a conflict between Mr. Cook and management which resulted in his prior discharge. Mr. Quillen stated that the conflict concerned Mr. Cook's desire to be transferred from one job to another (Tr. 130).

Mr. Cook stated that at the time of his discharge, he was employed as a bolting-machine helper at an hourly rate of \$11.25, and that he worked "maybe eight hours a month" overtime. He was covered by a hospitalization plan, but had no retirement benefits. He was also covered by a company vacation plan. His last day of work was April 17, 1990, and he was paid through April 20, by using his vacation time. He stated that he has been unemployed since his termination, and has sought employment at three mines but has not been successful. He has not looked for any non-mining jobs and has been receiving unemployment benefit payments since his discharge, and the respondent has not prevented him from receiving these payments (Tr. 134-135). Mr. Quillen could not recall whether he contested Mr. Cook's unemployment compensation claim, and stated that "it is awful hard to prevent a person from getting unemployment in Kentucky" (Tr. 137).

Findings and Conclusions

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 to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way

motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator

can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. Cook's Protected Activity

Section 105(c)(1) of the Mine Act provides in pertinent part 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 * * * because such miner * * * has filed or made a complaint under or related to this Act * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner * * * of any statutory right afforded by this Act.

It is clear that Mr. Cook enjoys a statutory right to voice his concern about safety matters, to make safety complaints, or to file a discrimination complaint without fear of retribution or harassment by mine management. Management is prohibited from harassing Mr. Cook, or intimidating or otherwise interfering with Mr. Cook's rights to engage in these kinds of activities.

In order to establish a prima facie violation of section 105(c)(1) of the Act, Mr. Cook must prove by a preponderance of the evidence that he engaged in protected activity and that his discharge was motivated in any part by the protected activity. In order to rebut a prima facie case, the respondent must show either that no protected activity occurred, or that the discharge was in no way motivated by Mr. Cook's protected activity.

Mr. Cook's Discharge

The record reflects that Mr. Cook was discharged on two occasions by the respondent. The first discharge occurred in August, 1989, and Mr. Cook confirmed that Mr. Quillen fired him and sent him a letter identical to the discharge letter Mr. Quillen sent him on April 20, 1990, when he fired him a second time. Mr. Cook testified that when Mr. Quillen called him to inform him of the first discharge, he asked Mr. Quillen for a

reason for the discharge and that Mr. Quillen responded "for no particular reason" and "slammed the phone down" (Tr. 131). Mr. Quillen could not recall why Mr. Cook was discharged the first time, but denied that it had anything to do with any safety complaints (Tr. 130-131).

The record further reflects that as a result of the first discharge in August, 1989, Mr. Cook filed a discrimination complaint against the respondent but voluntarily withdrew it. Mr. Cook confirmed that he withdrew the complaint because "I thought everything was going to be okay" and that he needed the work (Tr. 132). Mr. Cook further explained that he withdrew the complaint after Mr. Quillen assured him that he would be reinstated to his original job, and he confirmed that upon his return to work after his reinstatement, he was assigned work with another crew, but after complaining to Mr. Quillen, he was eventually returned to his old job and crew within 2 months of his reinstatement.

With regard to the second discharge which prompted the instant discrimination complaint, the discharge letter signed by Mr. Quillen informing Mr. Cook of the discharge is dated April 20, 1990, and it states that Mr. Cook's employment with the respondent "is terminated this date, April 20, 1990 (exhibit C-1). Mr. Cook testified that he was not sure why he was fired, but insisted that it was not for fighting. His wife testified that she learned that her husband had been fired 2 days after the alleged fight with Mr. Gibson. Although the discharge letter does not state the reason for the discharge, Mr. Quillen testified that he and Mr. Cook had discussed the fighting incident for 2 days after it happened, and after Mr. Quillen had observed Mr. Gibson's condition and instructed him to seek medical attention. Mr. Quillen further testified that he verbally informed Mr. Cook of the reason for his discharge when he spoke with him by telephone or in his office on April 19, 1990.

Mr. Cook confirmed that he telephoned Mr. Quillen on the morning of April 19, and that Mr. Quillen informed him that "he was going to have to let me go," but gave him no reason (Tr. 42-43). Mr. Cook confirmed that he then went to the mine and spoke with Mr. Quillen and that Mr. Quillen informed him that he (Quillen) knew that he (Cook) had struck Mr. Gibson on April 16. Mr. Cook further confirmed that on the evening of April 16, he went to Mr. Gibson's home and found that nothing was wrong with him (Tr. 43). He later testified on cross-examination that he visited Mr. Gibson at his home on the evening of April 17, "to see what was wrong with him" (Tr. 75). Thus, Mr. Cook's testimony corroborates Mr. Quillen's testimony that he personally spoke with Mr. Cook, by telephone, and in person about the fight with Mr. Gibson. Having viewed Mr. Quillen in the course of his testimony, I find him to be a credible witness. Further, since it would appear from his own testimony that Mr. Cook went to

Mr. Gibson's home to inquire as to his condition, this raises a strong inference that Mr. Cook was aware of the possibility that Mr. Quillen would possibly hold him accountable for the altercation with Mr. Gibson. Under all of these circumstances, I believe Mr. Quillen's testimony that he informed Mr. Cook that he was being discharged for fighting with Mr. Gibson, and I conclude and find that Mr. Cook was informed of the reason for his discharge and that he knew he was being discharged by Mr. Quillen for fighting with Mr. Gibson.

The Alleged Discrimination

Safety Complaints

In his initial complaint letter received by the Commission on July 5, 1990, Mr. Cook makes reference to his prior discrimination complaint, and he asserted that he was discharged in August, 1989, "for refusing to work in unsafe conditions," and that he was terminated the day following his notifying state and federal authorities "about the conditions." In the letter, Mr. Cook took issue with the manner in which his first complaint was investigated by MSHA, and he suggested that the investigating inspector was related to the mine superintendent, Earl Duncil, and that this was a conflict of interest. With regard to his instant complaint, Mr. Cook also took issue with the manner in which it was investigated by the same inspector who investigated his first complaint, and his letter states that when he spoke with the inspector, the inspector purportedly informed him that he had no case, tried to get him to sign some unspecified form, which he refused to sign, and that the inspector informed him that he "would not write the case up because there was no protected act."

In a subsequent letter of August 10, 1990, addressed to Mr. Quillen, and which I consider part of his complaint, Mr. Cook asserts that his discharge was out of retaliation for his first complaint. He further alleges that after his reinstatement following the first discharge, he was subjected to harassment which he attributed to "hard feelings" against him by superintendent Duncil because of his first complaint, and he accused Mr. Duncil of supplying intoxicating beverages to miners on mine property after their work shifts, allowing miners to bring women onto mine property, allowing miners to remain on mine property after they were intoxicated, which resulted "in people being shot at while in the parking lot," and allowing miners to miss as much as a week's work "after drinking moonshine" supplied to them by Mr. Duncil. Mr. Quillen testified that such complaints were never previously brought to his attention by Mr. Cook, and that he first learned about them when he received the letter of August 10, 1990, in connection with Mr. Cook's complaint.

I take note of the fact that when Mr. Cook filed his complaint with MSHA on April 24, 1990, shortly after his discharge, and executed the usual complaint form, he made no mention of any safety complaints as the basis for his discharge. At that time, he claimed that Mr. Gibson began harassing him at the end of his work shift on April 16, 1990, and that he (Cook) "believed that this harassment was a direct result of management. I had previously filed a complaint against the company and had been reinstated."

In his complaint letter of July 5, 1990, Mr. Cook alleges that the respondent "forced him to work under unsafe conditions." I conclude and find that these allegations were in connection with Mr. Cook's prior discrimination complaint which he withdrew, and I find no credible evidence in connection with his present complaint to support any such claim. In his letter of August 10, 1990, Mr. Cook makes reference to a conversation of April 6, 1990, between his wife and Mr. Quillen, and he asserts that his wife "mentioned the long cuts measuring as much as 52 feet, men smoking underground, and many other unsafe acts" during that conversation. Mrs. Cook confirmed that she spoke with Mr. Quillen on April 6, 1990, at the mine because she believed that he may not have been aware of her husband's "work situation" and his concern "about the safety situations" (Tr. 16).

Mr. Cook confirmed that when he filed his complaint with MSHA he did not allege that his discharge was based on any safety complaints that he may have made. During the hearing, Mr. Cook mentioned one complaint when he claimed that he told the MSHA special investigator "about the violations." Mr. Cook also claimed that he had called an inspector "about the big cuts," and he explained that although the mine was on a 20-foot plan, it was common for 52-foot cuts to be made. He also claimed that he had mentioned the matter of "deep cuts" while attending a training class when a state mine inspector (Bobby Bentley) was present. However, Mr. Cook could not state when these complaints were made, and he asserted that "ninety-nine percent of the time they would -- the company would know it before an inspector got there" (Tr. 57). Mr. Cook makes no claim that he ever made any safety complaints to mine management.

It has consistently been held that a miner has a duty and obligation to communicate any safety complaints to mine management in order to afford management with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per

Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

As the complainant in this case, Mr. Cook has the burden of establishing by a preponderance of the evidence that he made and communicated any safety complaints to mine management or to an inspector, that management knew or had reason to know about the complaints, and that his discharge which followed was the result of the complaints and therefore discriminatory. In short, Mr. Cook must establish a connection between the complaints and his discharge. See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989).

After careful review of all of the testimony and evidence in this case, I find no credible probative evidence to support any conclusion that Mr. Cook ever made any safety complaints to mine management after he was reinstated following his first discharge, and prior to his subsequent discharge of April 19, or 20, 1990. With regard to Mr. Cook's asserted complaint to an inspector about "deep cuts," I find his testimony to be somewhat contradictory in that he first testified that he called an inspector about this matter, but later testified that he simply mentioned it during a safety class he was attending, during which the inspector was present. Mr. Cook could not state when this statement was made. Mr. Cook's purported complaint to an MSHA inspector "about the violations" were, by his own testimony, made after he filed his discrimination complaint and during the investigation of that complaint. Further, there is no evidence that mine management was ever aware of any such complaints, and I find credible Mr. Quillen's testimony that Mr. Cook never made any safety complaints to him, and that he first learned of the complaints concerning superintendent Duncil when he received Mr. Cook's letter of August 10, 1990, after he had filed his complaint. Although Mr. Quillen acknowledge that he was aware of complaints about smoking, he indicated that he needed proof of any such incidents in order to fire anyone, and could not accept unsubstantial allegations. He did confirm that he has fired miners at other mines for smoking, but denied that he ever received any such complaints from Mr. Cook prior to his discharge (Tr. 105-106).

In view of the foregoing, I conclude and find that Mr. Cook's discharge was not the result of any safety complaints made to mine management or to any mine inspector.

The alleged Harassment

As noted earlier, in his April 24, 1990, complaint to MSHA, Mr. Cook asserted that at the end of the work shift on April 16, 1990, the evening of the alleged fight with Mr. Gibson, Mr. Gibson began harassing him, and Mr. Cook believed that the harassment "was a direct result of management." Mr. Cook testified that Mr. Gibson, who was a bolting-machine operator, "had been calling me names all night inside the mine" (Tr. 26). He explained that Mr. Gibson "had been bickering" for at least a month prior to April 16, and that Mr. Gibson was upset and mad about having to do so much bolting work and had words with the mine foreman and another bolting crew "several times" (Tr. 28). Mr. Cook stated that on one occasion, on March 24, 1990, Mr. Gibson "gave me a big shove" because "he was mad over having to bolt so much," and that "it was just bickering within the whole crew" over the roof bolting work (Tr. 28-29). Mr. Cook stated further that "I wanted to get away from the bickering, quarrelling. And Mr. Quillen knew that this was going on amongst all the men, not just me. Really, I wasn't even involved in it" (Tr. 30).

Mr. Cook did not recall that Mr. Quillen was at the mine when the bickering and quarrelling went on (Tr. 63), but that he had spoken to Mr. Quillen about the situation, and although Mr. Quillen assured him that he would take him away from the section, he did not do so (Tr. 29). Mr. Cook stated that the mine foreman (Wood Stone) was "right in the middle" of the bickering among the work crew, and that Mr. Quillen knew that Mr. Duncil had "hard feelings" against him. He also stated that on one occasion Mr. Duncil "made his brags" about his (Cook's) refusal to ride a mantrip, and that when he went to the office to explain why he had not ridden the mantrip, Mr. Duncil instructed him to go back and that someone would come get him, and he heard Mr. Duncil comment "there comes the little S.O.B., I can fire him now" (Tr. 67). On another occasion, after asking foreman Stone for permission to trade shifts with another miner, the foreman advised him that Mr. Duncil would not approve it. On yet another occasion when he was offered an opportunity by another foreman to operate a scoop as a "clean up man," Mr. Duncil would not approve the change (Tr. 68-71).

Mr. Quillen confirmed that after his reinstatement, Mr. Cook informed him that "there were hard feelings" on his working shift, but that he had no way of knowing whether or not the other miners were jealous of Mr. Cook because his wife worked. Mr. Quillen denied that he harbored any grudge against Mr. Cook because he filed the prior discrimination complaint, and he confirmed that the complaint was withdrawn after they settled their differences. He explained that after Mr. Cook was reinstated, Mr. Cook came to his office and advised him that he wanted to go back to work and "really didn't want any arguments"

(Tr. 128). Mr. Quillen confirmed that he put Mr. Cook back to work, and although it may have taken a couple months, he eventually got his old job back (Tr. 129).

Mr. Quillen further confirmed that "there was a conflict between Wendell and the management over there that caused Wendell to be fired the first time" (Tr. 129). He explained that part of the "conflict" concerned Mr. Cook's desire to be transferred from one job to another, and his dissatisfaction with staying on one job for a long period of time (Tr. 130).

I find no credible evidence in this case to support any conclusion that mine management harassed Mr. Cook because of his prior complaint. The only direct evidence of any harassment is found in Mr. Cook's testimony which clearly points to Mr. Gibson as the culprit. Mr. Gibson was employed as a roof bolter and there is no evidence that he had any connections with management. Mr. Cook suggested that there was a "strong possibility" that management induced Mr. Gibson to start harassing him in order to provoke a fight so that it could have an excuse to fire him. I find this to be rather far-fetched, particularly since Mr. Gibson sustained rather serious injuries and was himself fired by the company.

Upon review of all of the testimony in this case, I conclude and find that the "bickering and quarrelling" alluded to by Mr. Cook was the result of dissatisfaction among Mr. Cook's fellow working crew members themselves and had nothing to do with any harassment by any foreman or other members of management. Based on Mr. Cook's own testimony, it seems obvious to me that Mr. Gibson was the principal cause of these encounters among the crew, and at one point during his testimony, Mr. Cook stated that he (Cook) was not involved in the quarrelling.

With regard to Mr. Cook's harassment by Mr. Gibson, I conclude and find that it was the result of personal differences between them, and notwithstanding Mr. Cook's denials to the contrary, I believe that part of their differences concerned a dispute over the failure by Mr. Gibson to make payments on a loan note co-signed by Mr. Gibson. Although Mr. Cook asserted that he and Mr. Gibson had been the best of friends prior to the fighting incident of April 16, he confirmed that Mr. Gibson shoved him on March 24, and nearly caused him to fall in front of a mantrip. Although Mr. Cook stated that he was not angry at Mr. Gibson over that incident, he believed that there was no excuse for Mr. Gibson's conduct (Tr. 28).

Mr. Cook also confirmed that on the evening of April 16, Mr. Gibson began calling him names and continued his harassment. When asked for an explanation of Mr. Gibson's conduct that evening, Mr. Cook "assumed" that Mr. Gibson did not want to work with him. However, Mr. Cook alluded to the fact that Mr. Gibson

knew that he was not going to pay the bank note, and that he (Cook) had to pay the \$1,000 note (Tr. 10). Mr. Cook further confirmed that when he went to Mr. Gibson's home on the evening of April 17, Mr. Gibson "mentioned the bank note" and ordered him off his property. A subsequent visit to Mr. Gibson's home by Mr. Cook and his wife after the discharge resulted in a confrontation over the bank note which was culminated by Mr. Gibson displaying a weapon and shooting over Mr. Cook's vehicle. As a result of that incident, Mrs. Cook obtained a warrant for Mr. Gibson's arrest.

It seems obvious to me after viewing Mr. Cook during his testimony at the hearing that he was dissatisfied with his working environment after he was reinstated. Mr. Cook apparently expected to be immediately put back on his former job and working shift upon his reinstatement, and he voiced his displeasure with Mr. Quillen for his failure to immediately return him to his old job. However, the fact remains that Mr. Quillen eventually put him back on his old job, albeit 2 months after the reinstatement. It seems to me that if Mr. Quillen harbored any ill will towards Mr. Cook over his prior complaint, Mr. Quillen would have left him where he was rather than ultimately putting him back on his old job. I take note of Mrs. Cook's testimony that when she spoke to Mr. Quillen on April 6, 1990, about her husband's "work station," Mrs. Cook told Mr. Quillen that the company "had been good" to her husband (Tr. 16).

With regard to Mr. Cook's displeasure after being rebuked in his attempts to shift to other job tasks after his reinstatement, and his belief that Mr. Duncil still "had it in for him" because of his first complaint, Mr. Cook conceded that as the mine superintendent, Mr. Duncil had the authority, within his managerial discretion, to regulate the work force and approve of all job assignments. Further, the record in this case establishes that on both occasions when he was discharged, it was Mr. Quillen, and not Mr. Duncil, who fired Mr. Cook, and there is no evidence of any involvement by Mr. Duncil in the discharge decisions. Under all of these circumstances, I find no credible or probative evidence to support any conclusion that mine management harassed Mr. Cook or retaliated against him because of his prior 1989 discrimination complaint.

The Fighting Incident of April 16, 1990

Mr. Quillen, the responsible company official for hiring and firing the work force, testified that he fired Mr. Cook for fighting with Mr. Gibson on mine property after the completion of their work shift on the evening of April 16, 1990, and he confirmed that such fighting was a violation of company policy, as well as the Kentucky mining laws. Mr. Quillen believed that the fight was the result of a personal dispute between Mr. Gibson and Mr. Cook over a personal bank loan note which Mr. Cook had

co-signed for Mr. Gibson, and he confirmed that after concluding that they were both equally at fault, he made the decision to discharge both of them for fighting.

Mr. Quillen confirmed that he conducted an investigation of the fighting incident, which included conversations with Mr. Gibson and Mr. Cook, and a statement by another miner (Benny Campbell) who rode to work with Mr. Gibson. Mr. Quillen testified that Mr. Gibson left his work shift early on April 17, because he was reportedly "hurting so bad" as a result of his injuries, and that when Mr. Gibson came to his office on April 18, Mr. Quillen observed that his eyes were black and his nose was crooked. Mr. Quillen stated that "it was obvious" that Mr. Gibson had been hit "with something hard," and that Mr. Gibson told him that Mr. Cook hit him in the eye and nose with his dinner bucket on Monday evening (April 16), after leaving the mantrip and while they were proceeding to the area where their vehicles were parked. Mr. Quillen instructed Mr. Gibson to seek medical attention, and after Mr. Gibson left to go to the hospital, Mr. Quillen summoned Mr. Cook to the mine to speak with him about the incident.

Mr. Quillen stated that when he spoke with Mr. Cook, and told him what Mr. Gibson had related to him, Mr. Cook told him that "nothing happened," and that if Mr. Gibson was hurt "it happened after he left the mine." Mr. Quillen confirmed that he also spoke to miner Benny Campbell, who rode to work with Mr. Gibson, and that Mr. Campbell informed him that when he got into Mr. Gibson's truck before leaving the mine, Mr. Gibson's nose was bleeding that it and bled all the way home.

Mr. Cook testified that prior to leaving the mine at the end of their work shift on April 16, 1990, Mr. Gibson had been calling him names all evening in the mine. Mr. Cook stated that after exiting the mine, and as he was walking up the bank, he had his dinner bucket in his left hand, and that Mr. Gibson shoved him backwards. Mr. Cook stated that as he was trying to catch his balance, "I may have thrown my hand." He confirmed that Mr. Gibson "did have a scratch on top of his nose," but denied that he struck Mr. Gibson with his fist or with a punch (Tr. 26-27). Mr. Cook testified further that if he indeed swung his bucket, it was because he was falling backwards, and was trying to balance himself, and that if it struck Mr. Gibson "he walked into it" (Tr. 45) and that "if he got hit, if I hit him," the only way it could have happened is that his bucket inadvertently struck Mr. Gibson on the nose (Tr. 76).

Mr. Cook testified that when Mr. Quillen spoke with him after summoning him to the mine on Wednesday, April 18, after he had spoken with Mr. Gibson, he (Cook) told Mr. Quillen that Mr. Gibson had shoved him backwards. Mr. Cook denied that he told Mr. Quillen that nothing had happened (Tr. 81). However, in

response to later bench questions, Mr. Cook stated that "nothing happened," and that Mr. Quillen may have said something about the incident. Mr. Cook further stated that he did not ask Mr. Quillen to fire Mr. Gibson and that he said nothing to Mr. Quillen about Mr. Gibson (Tr. 96). Mr. Cook stated that he said nothing to management about Mr. Gibson shoving him to the ground, and he "guessed" that both he and Mr. Gibson said nothing about this (Tr. 97).

Mr. Cook confirmed that when he spoke to Mr. Quillen following the April 16, incident, Mr. Quillen said nothing about firing Mr. Gibson, and simply told him that he was on compensation. At that point in time, and in light of Mr. Cook's testimony that he did not want to see Mr. Gibson fired, I believe it is reasonable to conclude that Mr. Cook would have said nothing to jeopardize Mr. Gibson's job. Coupled with his rather contradictory testimony concerning the shoving incident, I believe that Mr. Quillen testified truthfully that Mr. Cook said nothing to him about Mr. Gibson's shoving him to the ground, and that Mr. Cook made the statement that "nothing happened."

In a posthearing letter filed by Mr. Cook in support of his case, he questions the severity of Mr. Gibson's injuries, and the fact that there is no evidence that Mr. Gibson ever had surgery for his injuries. Mr. Cook suggests that it was possible that the x-ray reports may have related to previous injuries suffered by Mr. Gibson, and that the respondent "handpicked" and selected the medical records to support its case. Mr. Cook further asserts that all of Mr. Gibson's past and future medical records should have been produced so that he could have an opportunity to review them and verify that the injuries sustained by Mr. Gibson were in fact the result of the incident of April 16, 1990.

Mr. Cook also takes issue with the documentary evidence produced by the respondent with respect to Mr. Gibson's state workers' compensation claim (exhibits R-7 through R-10). The documents reflect that Mr. Gibson filed a claim against the respondent and its insurer, and that it was contested by the respondent. Mr. Gibson executed an affidavit on May 4, 1990, in connection with his claim, and in the space provided on the claim form for an explanation of the "accident," the following typed statement appears:

Prior to the date of the injury, there had been a "switching" of job's at Southeast's Brinkley mine site. Claimant had been operating a roof bolter and had Wendell Combs as a helper. After the switch, Wendell was operating the bolting machine claimant had operated. Wendell was dissatisfied with his roof bolting position and blamed claimant. As they were leaving the man trip on April 16, 1990, Wendell called out Jesse's name and when Jesse turned around, Wendell hit him in

the face with his lunch bucket, and told him "It's all your fault" (emphasis added).

Mr. Cook argues that Mr. Gibson's affidavit is erroneous in two respects, namely, (1) that his last name is "Cook" and not "Combs," and (2) that he (Cook) was not operating the roof bolt machine. Mr. Cook makes reference to his last pay check stub which shows that he was not paid the wage earned by a roof bolter operator, and that this is proof of the fact that he was not operating the roof bolt machine.

During the course of the hearing, Mr. Cook produced a copy of the findings of a state unemployment examiner made in connection with his unemployment claim (exhibit C-2). The examiner found that Mr. Cook was not disqualified from receiving benefits, and his finding in this regard is as follows:

The claimant was discharged for allegedly engaging in fighting while on company property. He has denied this allegation and there is insufficient evidence available to substantiate the charge. Therefore, it is concluded the separation was for reasons non-disqualifying under the law.

Mr. Cook suggested that since fighting would be an admission of misconduct, and since the unemployment examiner found that he was not guilty of misconduct, the alleged fight in question never occurred (Tr. 39). Mr. Cook further asserted that it was possible that Mr. Gibson lied when he executed the affidavit in connection with his compensation claim, or that someone "had to put him up to lying" (Tr. 90-91). Mr. Cook also suggested that if he had been fired for "misconduct," the respondent would have contested the unemployment examiner's finding (Tr. 136).

Mr. Quillen's conclusion that Mr. Gibson and Mr. Cook engaged in a fight was based on the results of Mr. Quillen's inquiry into the incident, including his interviews with the two principals, and another miner, and his personal observation of Mr. Gibson after the incident. Mr. Gibson and the other miner did not testify in this case, and neither party made any attempt to subpoena them for testimony. Mr. Cook acted pro se, and prior to the day of the hearing, the respondent, through Mr. Quillen, was acting pro se and retained counsel shortly before the commencement of the hearing. The documentary evidence presented by the respondent was obviously obtained and introduced at the hearing to support its contention that Mr. Gibson was injured in a fight with Mr. Cook.

Mr. Quillen's testimony regarding Mr. Gibson's purported statements that Mr. Cook struck him with his dinner bucket without provocation is hearsay. With respect to the hospital records concerning Mr. Gibson's injuries, they appear to be

genuine and ordinary business records maintained by the hospitals and attending physicians. Ordinarily, such records are admissible pursuant to the recognized "business records" hearsay exception rule when a foundation for their admissibility is established through testimony or affidavit of the custodian of the records or other qualifying witness. Absent these prerequisites for admissibility, the records are still hearsay. However, I have no reason to question their reliability or authenticity, and there is no evidence to rebut the presumption that they were obtained by the respondent from the hospital and Mr. Cook raised no objections (Tr. 99). In any event, I consider the hearsay statement attributed to Mr. Gibson and the hospital records in question to be relevant and material, and the Commission has held that such evidence is admissible in Mine Act proceedings. See: Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n. 7 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 77 L.Ed.2d 299 (1983); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-1137 (May 1984). The weight of such evidence is within the sound discretion of the presiding judge.

A hospital record from the Hazard Regional Medical Center (exhibit R-1), reflects that Mr. Gibson was x-rayed on April 18, 1990, for injuries diagnosed as "closed fracture of nasal bones," and that his employment was verified by Mr. Quillen. Exhibit R-3, a copy of a hospital emergency room record, reflects that Mr. Gibson was seen by a doctor on April 18, 1990, for injuries diagnosed as "fractured nasal bones, contusions, and left orbit." and on the space provided for writing in the patient's complaint, there is a notation which reads "states was hit in left eye with dinner bucket monday night." Another hospital form dated April 18, 1990, reflects the findings by a radiologist that Mr. Gibson had a "comminuted fracture involving the tip of his nasal spine" but "no evidence of any fractures of the left orbit."

Exhibit R-6, is a clinic doctor's report dated April 20, 1990, apparently made in connection with a workman's compensation claim filed by Mr. Gibson, and the results of the examination conducted by the doctor, reflects that Mr. Gibson had black eyes, a deviated nasal septum, external nose deviation to the right, and fractured nasal bones. The space provided on the report form for the "history of accident" contains the following typewritten statement: "32 year old man was hit on the nose on April 16 at work, 10:00 p.m. Having nasal bleeding, which has stopped. Also having nasal obstruction and headaches, some numbness over left cheek." The report reflects that Mr. Gibson was employed by the respondent at the time of his examination, that the doctor scheduled him for "closed reduction of nasal bones" on April 27, and that he would be out of work from April 16 to April 27, inclusive.

Mr. Cook's assertion that the injuries sustained by Mr. Gibson, as reflected in the aforesaid hospital reports, may have been incurred at a time earlier than April 16, and may have been injuries unrelated to that incident, are rejected. I find the information contained in these reports to be consistent and reliable, both as to the injuries sustained by Mr. Gibson, and the time frames shown in the reports, as well as to the information obtained by Mr. Quillen in the course of his inquiry.

Mr. Cook's arguments concerning the accuracy of the information contained in the workers' compensation application filed by Mr. Gibson are well taken and I have given this information little weight. However, Mr. Cook's suggestion that the findings of the examiner in connection with his own unemployment claim that he was not discharged for "misconduct" establishes that no fight ever occurred is rejected. Mr. Cook confirmed that he provided some information in connection with his claim, and that the respondent had apparently filed a reply indicating that he was discharged for fighting (Tr. 139). Mr. Quillen could not recall whether he protested the claim and he indicated that it is difficult to prevent anyone from receiving unemployment in Kentucky (Tr. 137). Respondent's counsel pointed out that unemployment benefits are paid out of a trust fund, that 99 percent of the cases go uncontested, that it is a costly process, and that it would have been easier for Mr. Quillen not to protest the claim (Tr. 138).

The examiner's conclusion that Mr. Cook was not disqualified from receiving unemployment was based on his finding that there was insufficient available evidence to support the allegation that Mr. Cook was discharged for fighting. In the absence of any further information as to what evidence was available to the examiner at the time he made that finding, it would appear that his finding was based on Mr. Cook's denial that he was discharged for fighting, and the respondent's assertion that he was. It would further appear that the respondent did not pursue the claim further, and that the examiner gave Mr. Cook the benefit of the doubt. In any event, I am not bound by the examiner's finding, which was made in the abstract, and I have given it no weight. The issue before me is whether Mr. Cook's discharge was in any way connected with or prompted by, the exercise of any protected rights on his part. See: Albert Vigne v. Gall Silica Mining Company, 6 FMSHRC 2625 (November 1984).

In his discrimination complaint letters, Mr. Cook insisted that nothing had happened on the evening of April 16, 1990, and he suggested that the respondent fabricated the fighting incident out of retaliation for his prior discrimination complaint. However, after careful consideration of all of the evidence and testimony in this case, including Mr. Cook's belated admissions concerning his encounter with Mr. Gibson, I conclude and find that something did in fact happen on the evening in question. I

further conclude and find that what happened was that after leaving the mine at the end of the work shift on Monday evening, April 16, 1990, and after an evening of name calling by Mr. Gibson, Mr. Gibson and Mr. Cook engaged in an altercation. During that altercation, Mr. Cook was shoved to the ground sustaining an injury to his head which required medical attention (exhibit C-5), and Mr. Gibson was struck in the face with the dinner bucket that Mr. Cook was holding in his hand, sustaining rather severe injuries to his nose and face. I find it difficult to believe that the injuries sustained by Mr. Gibson were the result of an "inadvertent swing of the bucket" while Mr. Cook was falling after he was shoved by Mr. Gibson, and I believe that Mr. Cook retaliated by consciously striking Mr. Gibson in the face with his dinner bucket. Under all of these circumstances, I conclude and find that Mr. Cook did in fact engage in a fight with Mr. Gibson on mine property on the evening in question.

Disparate Treatment

In his complaint, as well as at the hearing, Mr. Cook maintained that arguments and fighting, both underground, and on the surface, were common occurrences at the mine, that nothing was ever done about it, and he questioned why he should be "singled out" and fired (Tr. 23, 26, 54). He identified miner Greg Horn as one individual who engaged in a fight and who "was fired and transferred to another mine" (Tr. 24). During his cross-examination of Mr. Quillen, Mr. Cook identified two other miners (Larry Collins and Tommy Gibson), as two individuals who purportedly engaged in a fight over a dispute concerning "a belt drive" prior to his discharge (Tr. 114).

Mr. Cook stated that he informed Mr. Quillen about the Collins-Gibson fight prior to his discharge, and Mr. Quillen denied that anyone had ever reported that alleged incident (Tr. 114-115). Mr. Quillen confirmed that he was not aware of any prior fights on mine property, and he reiterated that "it is common sense you don't fight on mine property" and that "it is also Kentucky mine law that you don't hurt anybody around a coal mine" (Tr. 124). Mr. Quillen confirmed that prior to the discharge of Mr. Cook and Mr. Gibson, he had not previously fired or disciplined other miners for fighting on mine property (Tr. 126). Contrary to his testimony that he informed Mr. Quillen about one of the purported prior fights, and in response to an earlier bench question as to whether or not anyone ever said anything "about the fighting and all this carrying on" at the mine, Mr. Cook responded "No" (Tr. 55).

I find no credible or probative evidence to support any conclusion that Mr. Quillen was aware of any prior fights at the mine. Mr. Cook confirmed that Mr. Quillen was never underground when any of the "quarreling and bickering" was going on, and absent any evidence to the contrary, I cannot conclude that

Mr. Quillen knew of any prior fights and failed to act. I find Mr. Cook's earlier denials that anyone ever said anything about these incidents, and his later assertion that he told Mr. Quillen about at least one purported fight to be contradictory and not credible. Further, Mr. Cook himself confirmed that at least one miner who engaged in a purported prior fight (Greg Horn) was either fired or transferred for fighting. More to the point however, is the fact that both Mr. Gibson and Mr. Cook were discharged for the fight which occurred on April 16, 1990. Under all of these circumstances, I conclude and find that both of these individuals were treated equally, and Mr. Cook's inference of any disparate treatment by the respondent with respect to his discharge are rejected.

Respondent's Motivation for the Discharge of Mr. Cook

In view of the foregoing findings and conclusions, I conclude and find that Mr. Cook has failed to establish a prima facie case of discrimination. Based on a preponderance of all of the credible and probative evidence presented in this case, I conclude and find that Mr. Quillen's determination that Mr. Cook had engaged in a fight on mine property with Mr. Gibson on April 16, 1990, was based on all of the evidence then available to him. I further conclude and find that Mr. Quillen made a reasonable, credible, and plausible determination, and that the discharge which followed was justified. See: David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 9, 1984); Bruno v. Cyprus Plateau Mining Corp., 10 FMSHRC 1649 (November 19, 1988), aff'd, No. 89-9509 (10th Cir., June 5, 1989) (unpublished); James W. Dickey v. United States Steel Mining Co., Inc., 5 FMSHRC 519 (March 1983), Commission review denied, 5 FMSHRC (May 1983), aff'd, Dickey v. FMSHRC, 727 F.2d 1099 (3d Cir. 1984) (upholding the discharge of miners for fighting).

I further conclude and find that Mr. Quillen's decision to discharge Mr. Cook was motivated by the fight, rather than any intention by Mr. Quillen to retaliate against Mr. Cook for his prior discrimination complaint. In this regard, I take particular note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decisions, the Commission stated in part as follows at 4 FMSHRC 993: " * * * Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." On the facts presented in Mr. Cook's case, I conclude and find that the respondent's stated reason for the discharge of Mr. Cook is both credible and reasonable in the circumstances presented.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 19 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 89-68-M
Petitioner : A.C. No. 21-02942-05504
v. :
WARREN STEEN CONSTRUCTION, : Steens Pit Mine
INC., :
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 89-93-M
Petitioner : A.C. No. 21-02942-05505-A
v. :
WARREN STEEN, Employed by : Steens Pit Mine
WARREN STEEN CONSTRUCTION, :
INC., :
Respondent :

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor (Secretary);
Robert E. Mathias, Esq., Duluth, Minnesota for
Warren Steen Construction, Inc. (Steen
Construction) and for Warren Steen, individually.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties from Steen Construction for two alleged violations of the mandatory standard in 30 C.F.R. § 56.12071. In a separate proceeding, the Secretary seeks a penalty under section 110(c) of the Mine Act from Warren Steen individually on the ground that as the agent of a corporate operator, he knowingly authorized, ordered or carried out the violations committed by Steen Construction. The cases were consolidated for the purposes of hearing and decision. Pursuant to notice, the cases were called for hearing in Duluth, Minnesota on November 14, 1990. James King, Jack Hufford, Mark Belich and Larry Aubuchon testified on behalf of the Secretary. Warren

Steen and Tom Duesler testified on behalf of Steen Construction and Warren Steen. Counsel for the Secretary and for the respondents have filed post-hearing briefs. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Steen Construction was the owner and operator of a sand and gravel pit in Carlton County, Minnesota known as Steen's Pit. Respondents stipulate that the mine produces products which enter interstate commerce or its operations effect interstate commerce. The business was sold on May 1, 1989, but is still operated under the name Steen's Pit.

2. Steen's Pit actually included three pits. The main pit covered a total area of about 54 acres. It produced wash gravel. It included a crushing operation and a washing plant. Steen Construction had operated the pit for about 20 years.

3. There was a drive-in theater adjacent to the pit, and Steen Construction's three phase power came through the theater property. Steen Construction purchased the property in about May 1988.

4. In July 1988, approximately nine persons were employed at Steen's Pit, including truck drivers. Three or four persons worked on the pit. Steen Construction is a small operator.

5. Between July 6, 1986 and July 5, 1988, Steen Construction was cited for one violation of a mandatory health or safety standard. This history is not such that a penalty otherwise appropriate should be increased because of it.

6. Power was supplied to Steen's Pit by the Minnesota Power and Light (MPL). It constructed a 12,000 volt line on to the Steen Pit property.

7. Some months prior to July 1, 1988, MPL representatives observed that there were piles of gravel encroaching on the right of way of the power line. The pit was not being operated at the time. MPL cautioned Steen that he was working too close to the power wire. Steen replied that he needed some time to relocate the pile. There also was some discussion about relocating the power line.

8. On July 1, 1988, Gary Jobe, 23 years of age, was employed by Steen Construction as a crusher helper. He had worked for Steen for about 2 months. He was not given any formal safety training.

9. At about 9:30 a.m., on July 1, 1988, Jack Hufford, front-end loader operator, began making a new row of gravel piles. The loader was hooked by a chain to the 80 foot Nordberg stacker-conveyor. Hufford pulled the conveyor to the area where a new row was to be made. Jobe walked alongside the conveyor and signalled Hufford to stop. Jobe then threw a plank on the ground to stop the conveyor. However the conveyor rolled over the plank and continued for about 5 feet. Jobe pushed against the frame of the conveyor in an attempt to stop it when the conveyor came in contact with the overhead 12,000 volt power line. Job was jolted, ran and fell to the ground. CPR was administered; he was taken to the hospital by ambulance. He was pronounced dead by electrocution at 10:20 a.m., July 1, 1988.

10. On July 6, 1988, Federal Mine Inspector James King conducted an investigation of the July 1 fatal accident. The plant started up while King was on the premises and the stacker conveyor was still below the energized 12,000 volt power line. It was approximately 8 feet directly below the line.

11. On July 6, 1988, at about 10:00 a.m., Inspector King told Mr. Steen that he was issuing a 104(d)(1) citation for the violation of 30 C.F.R. § 56.12071 which occurred on July 1.

12. When Inspector King discovered that the plant was starting up with the conveyor still under the power line, he obtained permission to conduct a regular inspection (he had been authorized only to conduct an investigation of the fatality). He told Warren Steen that the equipment would have to be moved. Steen asked to be allowed to operate for two or three weeks before moving the conveyor. The top of the head pulley of the conveyor was approximately 8 to 8-1/2 feet from the energized main conductor lines. The ground line was about 3 feet from the head pulley.

13. Inspector King issued a 104(d)(1) withdrawal order at about 10:30 a.m., forbidding operation of the conveyor in the location where it was placed. The order alleged a violation of 30 C.F.R. § 56.12071 on July 6, 1988.

14. The citation and order were terminated the same day when the equipment was shut down and the conveyor moved away from the power line.

15. Warren Steen Construction, Inc., is a Minnesota Corporation. It was formed on April 9, 1976. Its president and incorporator was Warren Steen.

16. Warren Steen operated at Steen's pit for almost 20 years.

17. Warren Steen personally directed the operation at Steen's pit. When he was away "I guess everybody--like Jack Hufford has worked two years, he was probably more in charge than the other fellow." (Tr. 72.) At the time of the fatal injury to Mr. Jobe, Steen was not on the property but was getting fuel. He returned just after the accident occurred.

18. Steen stated that he was not aware of a federal regulation requiring machinery to be 10 feet or more from an overhead power line. He also testified that the stacker-conveyor was in the same location in September 1987, and no citation or order was issued during an MSHA inspection.

19. Steen Construction had been inspected by federal inspectors, most recently in September 1987. Steen had requested a book of safety regulations, but had not received one.

20. The stacker conveyor had chock blocks on them which were designed to stop the conveyor when it is moving and to keep it secure. They were not used on July 1, 1988.

STATUTORY PROVISION

Section 110(c) of the Act provides in part as follows:

Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a). . . .

REGULATORY PROVISION

30 C.F.R. § 56.12071 provides as follows:

When equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than ten feet, the lines shall be deenergized or other precautionary measures shall be taken.

ISSUES

1. Whether Steen Construction violated 30 C.F.R. § 56.12071 on July 1 and on July 6, 1988?

2. If so, whether the violations were significant and substantial and resulted from Steen Construction's unwarrantable failure to comply with the mandatory standard?

3. If so, what are the appropriate penalties therefor?

4. If a violation or violations are established for Steen Construction, whether Warren Steen knowingly authorized, ordered or carried out such violation?

5. If so, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Steen Construction was subject to the provisions of the Mine Act in the operation of Steen's Pit. Warren Steen was an officer and agent of Steen Construction. I have jurisdiction over the parties and subject matter of these proceedings.

2. On July 1, 1988, Steen Construction operated an 80 foot Nordberg Stacker conveyor within 10 feet of an energized high voltage power line, so that the conveyor came in contact with the power line. The line was not deenergized and other precautionary measures were not taken. This is a violation of 30 C.F.R. § 56.12071.

3. A miner who was in contact with the conveyor was electrocuted. The electrocution resulted from the violation referred to in Conclusion 2. The violation was extremely serious. It was properly designated as significant and substantial.

4. Steen Construction had been cautioned by MPL about working too close to the power line prior to the fatal accident. The operation of a large metal machine under a high voltage line is inherently dangerous, and should be recognized as such by a mine operator. The violation resulted from the operator's reckless disregard for the safety of the miners. It was properly designated as an unwarrantable failure to comply with the safety standard involved.

5. Based on the criteria in section 110(i) of the Act, I conclude that a penalty of \$8000 is appropriate for the violation on July 1, 1988 (Citation 3262564).

6. On July 6, 1988, Steen Construction commenced operation with the conveyor being between 8 and 8-1/2 feet directly below the energized high voltage line. This is a second discrete violation of 30 C.F.R. § 56.12071 (Citation 3262565).

7. The violation was extremely serious and was likely to result in serious injury if mining had been allowed to continue. It was properly designated as significant and substantial.

8. The operator had experienced a fatal accident five days previously as a result of the same condition. This violation

(July 5, 1988) resulted from the operator's reckless disregard for the safety of the miners, and was therefore an unwarrantable failure violation.

9. Based on the criteria in section 110(e) of the Act, I conclude that a penalty of \$8000 is appropriate for the violation on July 5, 1988 (Order 3262565).

10. Warren Steen was an experienced operator of a sand and gravel mine. He knew that his company was subject to the Mine Act and its regulations. As the 10th Circuit Court of Appeals stated in Emery Mining Corp. v. Secretary of Labor (a case under section 110(a)) 744 F.2d 1411, (10th Cir. 1984) at 1416:

. . . as a general rule those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law . . .

* * *

Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions.

In any event, whether Mr. Steen knew of the specific regulation regarding the minimum clearance between metallic equipment and high voltage lines, he certainly knew or had reason to know that operating such equipment close to high voltage line was unsafe. Cf. Kenny Richardson, 3 FMSHRC 8 (1981); Roy Glenn, 6 FMSHRC 1583 (1984). I conclude that Warren Steen knowingly authorized, ordered or carried out the violations of the corporate operator. Warren Steen's violation was serious and resulted from reckless disregard for safety. I conclude that an appropriate penalty for the violation is \$5000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 3262564 and order 3262565 are **AFFIRMED**.
2. Steen Construction shall, within 30 days of the date of this decision, pay to the Secretary \$16,000 for the violations found herein.

3. Warren Steen shall, within 30 days of the date of this decision, pay to the Secretary \$5000 for the violation found herein.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
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FEB 19 1991

WYOMING FUEL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEST 90-217-R
	:	Order No. 3241309; 5/5/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Golden Eagle Mine
ADMINISTRATION (MSHA),	:	Mine I.D. 05-02820
Respondent	:	

DECISION

Appearances: Lawrence J. Corte, Esq., Wyoming Fuel Company,
Lakewood, Colorado, for the Contestant;
Margaret A. Miller, Esq., U.S. Department of
Labor, Office of the Solicitor, Denver, Colorado,
for the Respondent.

Before: Judge Morris

This contest case is before me pursuant to Section 107(e)(1)
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
§ 801, et seq. (the "Act"). Contestant Wyoming Fuel Company
("WFC") seeks to invalidate Order No. 3241309 issued on

May 5, 1990, under § 107(a)¹ of the Act. WFC further seeks to invalidate modifications of the order.²

ISSUES

The issues presented are whether a condition of imminent danger existed so as to justify the § 107(a) order. If the order was properly issued, did MSHA abuse its discretion in the subsequent modifications and in keeping the § 107(a) order in effect.

Order No. 3241309 closed the No. 7 Entry South Mains from Crosscut No. 5 to Crosscut No. 13. This area was adjacent to the longwall face shield system at the Golden Eagle Mine. All personnel were withdrawn from this portion of the mine because of the alleged imminent danger. The order reads as follows:

The following conditions which collectively constitute an imminent danger were observed in entry #7 third South mains longwall recovery room, and longwall face, roof conditions have deteriorated, causing (header?) cribbing to break and crush, wooden cribbing crushed.

¹ The cited portion of the Act provides as follows:

Procedures to Counteract Dangerous Conditions

Sec. 107. (a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

² The contest filed by WFC places modifications 1 through 6 in contest. However, the evidence indicates there were 9 modifications to the original order. (See Judge's Exhibit 1).

Order No. 3241309 was modified six times during the period from May 5 through May 9, 1990.

The first of these modifications was Order No. 3241309-01 which reads:

Wooden cribbing material was installed from #5 Crosscut to #13 crosscut #7 entry South Mains Recovery room, and outby areas. Therefore, Order #3241309 in [sic] modified to allow personnel to enter the longwall recovery area, under the following condition in longwall recovery plan dated 5/5/90 (MSHA Order No. 3241309-01, "Subsequent Action" at section II, "Justification for Action").

The second modification was Order No. 3241309-02:

Order #3241309 is modified to add additional information. Item #8 Condition or Practice: The cribbing over a total of 11 persons were observed installing wooden cribs in area of deteriorated roof conditions due to forward abutment pressure. (MSHA Order No. 3241309-02, "Subsequent Action" at section II, "Justification for Action").

Subsequent modifications permitted only those persons necessary to work underground as specified in the longwall recovery plan, item 2. (MSHA Order No. 3241309-03, "Subsequent Action" at section II, "Justification for Action").

Later on May 8, 1990, the § 107(a) Order was modified again to allow workers to install additional roof support to the location of the shield face support system.

Finally, in modifications number five and six to the MSHA Order, WFC was allowed to move the longwall.

The fifth modification was Order No. 3241309-05, issued at 7:20 p.m. the evening of May 8, 1990. It stated the specific methods that WFC must employ to continue its full recovery effort of the longwall. It provides as follows:

Order #3241309 in modified to allow recovery of longwall system under the following conditions:
Item #1 Steel I Beam used as support;
Item #2 Maximum 10 foot advance cuts;
Item #3 Maximum 10 foot width of fact entry;
Item #4 all cutting and welding must comply;
CFR 30 Part 75.11106.

- Item #5 Air reaching headgate face 38,000 CFM;
- Item #6 Double row of cribbing in headgate roadway;
- Item #7 Replace damaged fibercrete cribbing with wooden cribs prior to recovery;
- Item #8 13 foot wide roadway approach and 10 foot wide roadway on face line;
- Item #9 8 foot resin bolt are to be used except where hand held drill must be used with 6 foot resin bolts for roof support. When EIMCO roof bolt is used 8 foot resin bolt must be used;
- Item #10 Resupport removal shields with wooden cribbing material. (MSHA Order No. 3241309-05, "Subsequent Action" at section II, "Justification for Action").

An expedited hearing was held in Denver, Colorado, on September 21, 1990. The Secretary objected to the expedition of the hearing for an imminent danger order; however, prior rulings involving the parties were held applicable. (Tr. 4-6).

The Commission has been invited to consider the issue of whether WFC is entitled to an expedited hearing. Accordingly, it is unnecessary to again review the issues here.³ See Wyoming Fuel Company, 12 FMSHRC 1604 (August 1990), (Review Granted, September 1990); see also, Wyoming Fuel Company, WEST 90-112-R - WEST 90-116-R (Decision issued October 22, 1990).

SUMMARY OF THE CASE

This case involves a credibility determination concerning the conditions in the Golden Eagle Mine in May 1990.

By way of background: at the time the § 107(a) order was issued the Company's mining procedure consisted of a longwall operation of 110 shields.

The initial stage of a longwall operation involves its installation. This takes place in a "start-up room." Once the coal has been extracted the longwall equipment is removed in what is called a "recovery room." In that location the purpose is to safely support and protect the recovery room so the longwall assembly can be fully and safely extracted in a minimum amount of time (Tr. 15).

The Golden Eagle Mine uses a retreating longwall process. Such a process is the easiest because once you begin to mine the

³ In the case at bar, the contested order, No. 3241309, was not terminated (Tr. 147, 156, 209).

coal you leave any problems you encounter behind you ⁴ (Tr. 24, 25). (The arrows on Ex. S-1 show the direction of advance of the longwall).

Barrier pillars are generally located in a position adjacent to the main entries. (They are shown in green on Ex. S-1). The 200 foot barrier pillars at Golden Eagle provides protection for the entries. (Seven entries are shown in Exhibit S-1).

The longwall mining system advances when the shields are lowered and pulled against the armored face conveyor (AFC). The cutting shear is above the AFC. As the shear cuts into the face the coal falls into the AFC. (Tr. 34, 37). (Exhibit S-2 illustrates some of the testimony.)

As the longwall advances toward the barrier pillar it puts stress on the coal in front of it (Tr. 26, 30). The coal barrier protects the entries from ground movement which generally results in floor heave or rib sloughage (Tr. 27).

Once the longwall assembly reaches the barrier all coal extraction activity stops and the longwall equipment is removed. (Tr. 28).

The height of the coal seam extracted is about six feet. During the longwall process, with the shields in place, it is normal for miners to stand up inside and travel the apron. In the Golden Eagle Mine the face was 550 feet long. (Tr. 44). This is a typical width in the western United States. (Tr. 45).

FINDINGS OF FACT

1. Melvin Shively, an MSHA inspector and a person experienced in mining, received a telephone call from Rick Callor, WFC's health and safety manager. Mr. Callor stated the company was experiencing a problem in their recovery area of the longwall section (Tr. 129, 131).
2. Upon arriving at the mine, Mr. Shively and the company safety supervisor, Frank Perko, went directly to the No. 7 entry. (Tr. 132).
3. In the entry the inspector observed miners installing wooden cribbing. He also saw massive cracking in the fiber cribbing. There was a lot of pressure on the cribbing (Tr. 133).

⁴ Left behind can be a combination of fallen roof material, floor heave, etc. It is commonly called "gob" (Tr. 25, 34).

(Exhibits S-7I, S-7G, S-7H and S-7L are photographs ⁵ showing the condition of the fiber cribbing.)

4. The fiber cribbing was broken and the roof was working a little bit and taking pressure. The roof was in the mold where pressure was being transferred over the top of the area (Tr. 134).

5. Bolts were popping, the roof was moving and timbers were cracking. Fiber cribbing was also breaking, cracking and crumbling off to the side (Tr. 135).

The wooden cribbing was as shown in Exhibits S-7B and S-7N. Exhibit S-7A shows a fiber crib that had broken and crushed away. A wooden cribbing had been installed behind it in an effort to maintain support (Tr. 136).

6. The wooden cribbing was moving and taking a lot of weight (Tr. 136).

There was a rib cutter in the roof. (A rib cutter is a crack in the roof that runs the length of the entry.) There was also a lot of "rash". That is, an area where you lose a lot of coal top. The top moves and falls out. Rocks, roof and coal laying on the mine floor indicated some of the roof had fallen (Tr. 137).

7. Sap or moisture was leaking from the wooden cribbing (Tr. 137, 138).

The inspector had to crawl into the tailgate area. There were 111 shields and "a bunch" were down (Tr. 139).

8. At 1315 hours Inspector Shively issued an imminent danger order to protect employees from the hazardous roof conditions he had observed. The inspector believed a roof fall could cause a fatality in the area (Tr. 140, 141). The roof was still moving. Continual movement causes additional cracks and fractures in a roof. (Tr. 144).

⁵ Some of the photographs in this case were presented on a single cardboard panel. The Secretary explained that a presentation had been made involving the photographs. At that time the photographs were grouped by circled numbers 1, 2, 3, 4, 5 and 6. The same presentation was made at the hearing. Each photograph was identified with its identifying number adjacent to it. Each photograph was also identified on the back by the same number that appears adjacent to it.

9. The imminent danger order affected No. 6 to No. 13 entry as well as No. 6 to No. 13 crosscut of the No. 7 entry of the third south main (Tr. 141, 142).

10. The § 107(a) order was modified to allow cribbing to be done from a safe location. In other words, "crib your way" into the area (Tr. 142). The inspector said seven miners, monitored by a certified person, could work from a safe location (Tr. 143).

11. The second modification to the Order allowed eleven miners in a cribbing crew (Tr. 144).

12. The third modification resulted from the company's plan as to how they were going to continue cribbing and recover this area (Tr. 144).

13. The company proposed to come into the headgate area and install bridge planking and rock-lock (Tr. 145). The third modification allowed the company time for the work to be done as shown in the equipment recovery plan. The plan had been submitted by management's Rick Callor (Tr. 145).

14. Modification No. 5 contains the conditions WFC had to comply with to work in the area. The ten items were based on information received from tech support people and Mr. Smith [Lee Smith] (Tr. 146).

15. The order has not been terminated (Tr. 147). In Inspector Shively's opinion the installation of additional support in the No. 7 entry should only be done while protecting the personnel doing the work (Tr. 148, 151).

16. The order was directed to the miners to require them to work from a safe location, and make a safe travelway into the area (Tr. 149). Without necessary support, the biggest part of the entry would have been lost (Tr. 149).

17. Mr. Shively agreed the operator complied in good faith with the modifications.

18. In Inspector Shively's opinion danger of a roof collapse is still present. As a result the § 107(a) order is still in effect because of the possibility of roof failure within the area at any given time. (Tr. 156).

19. A lot of the cribs were failing (Tr. 158). Without the cribs the entry would have been lost (Tr. 159). The cribbing was squeezing and bending. (Tr. 160).

20. In Inspector Shively's opinion the removal of the intermediate pillar caused the No. 7 entry recovery room to fail. (Tr. 166).

21. The area subject to the order was about 700 feet in a straight line. (Tr. 168). The cracks indicated the roof had failed; it was cracked and broken. (Tr. 169).

22. The conditions observed by the inspector told him the miners needed protection. If the 200 foot barrier pillar had been in place the roof would not have been cracked or broken. (Tr. 170).

23. The inspector told management the miners had to work from a safe location. (Tr. 173).

24. LEE SMITH, an MSHA field office supervisor, is a roof control specialist (Tr. 11, 12). At the direction of MSHA's district manager Mr. Smith went to the Golden Eagle mine arriving there May 8, 1990. (Tr. 45).

25. Mr. Smith found the longwall system was experiencing unstable ground conditions. The width of the barrier pillar was zero (where the longwall had mined through) to 15 feet.

26. The No. 7 entry, closest to the barrier, was in stages of failure. There was stress transference; where the roof and rib met the area was experiencing failure. (Tr. 46). There were large cavities in the mine roof. The cribs were receiving a great deal of weight and they were beginning to roll and come away from the mine roof. (Tr. 47). Cribs installed in a uniform fashion are depicted in Exhibit S-6B; the function of crib was described by the witness. (Tr. 48).

27. Exhibits S-7A, B, C, D, E, and F show the cribs in Entry No. 7 were receiving great stress; pitch was flowing down the crib; they were attempting to roll out. They were in almost total failure. (Tr. 49, 50).

28. The wooden cribs were installed to replace the failed fibercrete cribs and to preserve the longwall recovery room. But the cribs were not able to support the roof (Tr. 50). The crib shown in Exhibit S-7C was in failure. It is not safe to travel in an area where a crib has failed. (See Exhibit S-7C). (Tr. 51, 54).

29. The roof had tension fractures, cracks and sloughage indicating it had failed (Tr. 51).

The fibercrete cribs in Entry No. 7 had all failed. Exhibits S-7I, H, G, L and N show the failed cribs. (Tr. 52-53). Roof and floor heaves were a problem here. (Tr. 54).

30. The condition of the cribs indicated to Mr. Smith that the roof was already in failure. The cribs were rolling, a great

deal of sloughage, apparent cutters, and fallen away roof bolts indicated a roof fall was imminent. (Tr. 55).

31. Popping and breaking sounds indicated the coal ribs were failing or attempting to move. (Tr. 56).

32. The remnants of the barrier pillar between the base and the No. 7 entry had yielded and was turning to rubble. It had lost its load carrying capacity. (Tr. 56). The conditions found by Mr. Smith existed along the entire face of the longwall.

33. The longwall shield assemblies from shield No. 70 to No. 90 had collapsed from the stress (Tr. 57; see Exhibits S-3G and S-3E). Further, the burst values in the hydraulic system were weeping. (Tr. 58). The shields were almost sitting on top of the spill plates. (Tr. 59).

34. The company was resupporting the headgate area at the stage loader. The beams were to hold the roof in place until the longwall assembly could be extracted. (Tr. 61).

35. It would be very difficult to safely and fully extract the longwall. (Tr. 61). The shields had lost their ability to move up and down and the jacks could not travel. (Tr. 62). In order to remove the shields the operator would probably remove under the coal the jack to have room to maneuver.

36. The longwall had received abnormal stress. In Mr. Smith's opinion the longwall panel overrode the barrier pillar and was attempting to equalize itself on the coal pillars between No. 7 and No. 6 entries. (Tr. 64).

37. The longwall was in danger of going solid. That is, there would be no possibility of travel between the longwall shield and the apron. (Tr. 64). (Exhibits S-3D and S-3F show miners crawling to the face).

38. The wooden cribs shown in S-7B, C, D, and E are in an advanced stage of failure. Floor fractures are evident in Exhibit S-7B. Roof fractures show in Exhibit S-5A and S-5B indicate the roof is in failure. (Tr. 65). The roof failure indicate a roof fall is imminent; it provides a serious hazard to the miners (Tr. 65).

39. On May 8th the roof in No. 7 entry was in mid-failure and it was going to fall. (Tr. 67).

40. The roof can fail to the point where the operator may not be able to remove the shields. In such circumstances the operator may wait a year or two for the area to stabilize and then remove the equipment. However, the conditions may

deteriorate to the point where the longwall would be lost. (Tr. 67, 68).

41. On May 8th, the operator was not employing a normal method to recover the longwall. (Tr. 69).

42. On May 8th, Mr. Smith did not consider the No. 7 entry to be a safe working place. (Tr. 71). He entered the middle entry of the tailgate and walked 1200 to 1400 feet looking for signs of unstable roof conditions. (Tr. 71).

43. Mr. Smith was aware of the § 107(a) order and its modification to allow mines to work in the area. (Tr. 72).

44. As a result of his visit to the mine Mr. Smith's seven or eight recommendations were incorporated into Inspector Shively's order as modification No. 5. (Tr. 73). (Judge's Exhibit 1).

45. Based on his observations of May 8th, Mr. Smith believed the imminent danger order was properly in place. (Tr. 83). If the roof had failed a serious injury or death could have occurred.

The immediate roof had separated from the main roof. (Tr. 84).

46. Mr. Smith was not aware of any longwall recovery method that does not leave a barrier pillar between the longwall and the main entry development. (Tr. 86).

RICK CALLOR testified for WFC. He serves as the operator's manager of health, safety and human resources. He is experienced in mining. (Tr. 199, 200).

He has been involved in six or seven longwall removals. (Tr. 200). In a conventional longwall move he has observed adverse roof conditions. (Tr. 201).

On May 5, 1990, Mr. Callor advised MSHA that the shear of the longwall would no longer pass under the shields. This was due to the limited space. In view of this situation the company decided to use a different method of longwall recovery.

Mr. Callor did not accompany the inspector underground. (Tr. 202). The previous night Mr. Callor did not feel there was a condition of imminent danger. However, he believed Inspector Shively sincerely felt such a condition existed.

Mr. Callor and Inspector Shively discussed § 103(k) versus a § 107(a) order. (Tr. 203). The inspector said he would issue a control order and no assessments would be involved.

The company brought in a continuous miner and set up an entirely new recovery room. This was necessary because they could not advance the longwall into the predriven recovery room. (Tr. 204).

The original order was modified to allow the company to reenter that portion of the No. 7 entry that was the subject of the imminent danger order. (Tr. 205). No more than eleven miners could work in the area. (Tr. 207).

While Mr. Callor did not feel there was a condition of imminent danger, he thought Inspector Shively immediately took care of his concerns by showing the men the method he wanted them to use in installing temporary supports. The work as required under the modifications was completed no later than 24 hours after the issuance of the order. (Tr. 208, 211). At the time of the hearing, WFC still remains under Order No. 3241309. (Tr. 208).

In his prior experience with § 107(a) orders Mr. Callor had seen modifications as specific as in modification number 5, but he did not believe it was common practice to use § 107(a) in this fashion. (Tr. 216).

The completion of the room, as far as being cribbed, was completed in less than 24 hours. In Mr. Callor's opinion that abated the § 107(a) condition. (Tr. 218).

The company had decided to mine through the pillar but the shear stuck before it reached the recovery room. (Tr. 220). After the decision was made to go with the predriven recovery room the No. 7 entry was the company's choice as the recovery room. (Tr. 221).

Some fibercrete cribs had taken an enormous amount of weight. Mr. Callor also saw coal sloughage from the roof or ribs. The shields were weeping but they did not fail but kept the roof totally intact throughout the entire recovery of the longwall. (Tr. 222).

The company began wooden cribbing after the failure of the fiber cribs. Mr. Callor did not see total failure of any of the wooden cribs. (Tr. 223).

While Mr. Callor was there, the MSHA team and others went through the entire section after some cribbing had been done. (Tr. 224). The cribbing was installed as an additional precaution. (Tr. 225).

In Mr. Callor's opinion the pressure from the gob overrode the shield system and the No. 7 entry. (Tr. 225). After overriding the system it sat down on the pillar between entries

number 5 and 6. As a result the company was able to remove the shields and longwall. However, the roof came down low enough that the shear could not be removed. (Tr. 226).

Mr. Callor was upset because MSHA interfered with management decisions. (Tr. 227, 228).

The use of an I-beam as required in MSHA's modification order causes more hazards (due to clearances) than conventional roof control methods. (Tr. 228, 229). Mr. Callor did not feel the company would lose the longwall before MSHA came in. (Tr. 231).

Mr. John DeMichiei, MSHA's District Manager, approved the recovery plan. (Tr. 237, Ex. P-2).

On Page 4 of Exhibit P-3 Mr. Callor marked in red the area of the original citation. (Tr. 241, 241, Ex. P-3). The company put in an additional 50 wooden cribs (Tr. 242). The cribs were about five feet apart for 550 feet. (Tr. 243). Prior to using the area as a recovery room the company installed 8 foot roof bolts between 6 foot bolts. Also chain link fence was installed as shown in Exhibit S-7a. (Tr. 244). The company also installed wood cribs between all of the fiber cribs. (Tr. 245).

The No. 7 entry was not used to recover the longwall but the area adjacent to the No. 7 entry was mined out for that purpose. (Tr. 245, 246).

The entry is still standing but all the shields have been removed so the longwall face is now a part of the gob except at the very bottom of the headgate entry. (Tr. 248).

MSHA modified the order to allow the company to apply mobay chemical. This was previously approved in the roof control plan. (Tr. 251).

CHARLES W. MCGLOTHLIN, Vice-President and general manager of WFC, reports directly to Chuck Batty, CEO of WFC. ⁶

Mr. McGlothlin, a person experienced in mining and management, has been employed by Kaiser Coal, Atlantic Richfield, Bethlehem Coal, and others. He holds a degree in mining engineering from West Virginia University.

⁶ At the hearing a portion of Mr. McGlothlin's testimony was inadvertently taped over. However, the parties were able to reconstruct the lost testimony without requesting a reopening the hearing. (See Judge's orders of August 24, 1990 and January 18, 1991.)

The witness explained in detail the type of rock formation in the mine, as well as the company's mining plan in relation to the predriven recovery room.

Mr. McGlothlin was aware of the section 107(a) order issued in this case, as well as the condition in the mine. Mr. McGlothlin further examined the panel of photographs previously received in evidence, as well as Exhibits P-4 and P-12.

In the witness's opinion, no condition of imminent danger existed. The cribbing, as demonstrated by the photographs, was contorted, bent, and twisted. Moreover, no wooden pillars had failed. The bent, twisted, and contorted wooden pillars were basically performing their function of supporting the roof. One can anticipate pressure on the wooden pillars will produce some contortion in the pillars.

Mr. McGlothlin agreed that some fibercrete pillars had failed. Further, the company had anticipated there would be pressure on the wooden pillars; however, it underestimated the extent of the pressure that actually occurred.

The witness described the engineering studies that had been done by the United States Bureau of Mines on the application of a predriven recovery rooms for longwall equipment recovery at the Golden Eagle mine. A copy of the Bureau of Mines study on the use of predriven recovery room for longwall recovery was received into evidence. It was the opinion of the witness, based on his experience as a mining engineer and the technical information he had reviewed, that use of a predriven recovery room was a safe and acceptable method for longwall recovery.

Mr. McGlothlin explained the longwall mining equipment had to come out the headgate entry. Also maintenance and safety precautions were implemented in the headgate entry (Tr. 255).

The company felt that the best alternative, with convergence at the longwall face, was to remove part of the barrier pillar, secure that area and reconstruct a suitable recovery room (Tr. 257).

Exhibit P-7 shows, in the background, a predriven and designated recovery area in No. 7 entry. The photograph was taken around May 15th (Tr. 258, 259).

Cribs and meshing material supported the roof in the recovery room (Tr. 260, Exs. P-8, P-9, P-10).

Exhibit P-12 shows the first shield pulled out. Only two shields flushed in to the point were they did not put any crib blocks under it (Tr. 264).

The Secretary's photographs Exs. S-4A, S-4B, S-4C and S-4E are not in the area effected by the section 107(a) order (Tr. 265).

Mr. McGlothlin believed Inspector Shively had a concern for the way the cribs were being built. That concern was satisfied in a matter of hours and from that time forward no imminent danger existed (Tr. 266).

He did not see any reason for the continuance of the imminent danger order. (Tr. 267).

Mr. McGlothlin agreed the section 107(a) order impacts the No. 7 entry and the longwall support shield system (Tr. 268).

The No. 7 entry was originally the planned recovery room (Tr. 270). The company had mined into the barrier pillar. The barrier that remained varied from zero to a maximum of eight feet, or an average of four feet (Tr. 271). To successfully complete the longwall recovery the company planned to remove all of the barrier pillar and end up in the recovery room, i.e., the No. 7 entry. The plan was not completely successful nor was it a complete failure (Tr. 272). This method has been used in four different mines, in West Virginia and Pennsylvania (Tr. 273).

On May 5th there were cracks and cutters in the roof. Because of the cracks the company set additional supplemental supports on May 5th (Tr. 274, 275).

The cutters in the roof indicated the abatement pressure had completely traversed the No. 7 entry and had come to rest outby the pillar between No. 6 and No. 7 entry. The pillars are the primary roof support in a mine.

On May 4th and 5th, Mr. McGlothlin noticed fiber cribbing failure but no wooden cribs had failed prematurely.

The wooden cribs in photographs S-7B, C and D had not failed. They could not have been knocked out with anything short of a 100 ton hydraulic jack (Tr. 276, 278).

On May 3rd the roof was converging. After May 6th there was isolated roof movement (Tr. 277). In two instances when removing the shields the roof "crushed in". This was not a roof failure (Tr. 279).

Mr. McGlothlin agrees that on May 5th the mechanically anchored roof bolt had lost complete effectiveness. However, the resin bolts had not lost full integrity (Tr. 280).

The crib in Exhibit P-4 was installed between May 3rd and May 6th (Tr. 280, 281). Exhibit P5 indicates a convergence of four and a half feet in the entry.

It was Mr. McGlothlin's decision to mine this area using the new longwall method as opposed to the barrier pillar method (Tr. 282).

Page 4 of Exhibits P-1 states it is not possible to give the exact type and amount of supports required to insure recovery room stability. Mr. McGlothlin underestimated the amount of support needed to effectively transfer the roof pressure across the recovery entry (Tr. 284).

The longwall was recovered in five and one half weeks; this is average time in the United States (Tr. 287, 288).

The fiber cribbing appearing in Exhibit P-7 was present in the area before the section 107(a) order was issued. The wooden cribs to the right in Exhibit P-7 were put in place after the order was issued (Tr. 292).

The wooden cribs, in Exhibit P-9, were installed after the section 107(a) was issued but they were not part of the order (Tr. 294).

The recovery room shown in Exhibit P-8 did not exist when the section 107(a) order was issued (Tr. 295).

FURTHER FINDINGS OF FACT

47. BILLY OWENS, on MSHA mining engineer, is a person experienced in mining (Tr. 296-298).

Mr. Owens is Chief of the Ground Support Division. He visited the Golden Eagle Mine on May 8th (Tr. 298).

48. The witness described the area subject to the order and, he marked the area on Exhibit P-3 (Tr. 300, 301).

49. In the No. 7 entry fibercrete cribs had totally failed. They had blocking on top that was completely squeezed out. Wooden cribbing down the right side of the entry was in a state of failure. Many of the crib blocks had rolled. Timbers were barren. A cutter ran the entire right side of the entry. The main roof had suffered a shearing failure and was torn along the pillar line (Tr. 303).

50. The failed fibercrete cribs are shown in Exhibits S-7I, S-7H, S-7G. The failed timber is shown in Exhibit S-7J and the failed wooden cribbing is shown in Exhibits S-7B and S-7C (Tr. 305).

51. The wooden cribs in S-7B and S-7C are designed so the load will be parallel to the vertical axis of the cribbing. More loading, as on S-7C, can blow the crib out at any time (Tr. 306).

52. On May 8th there were no large tension cracks in the roof. The roof had roof bolts and wire mesh in it (Tr. 306).

53. There was evidence of severe roof movement. The mining height of the entry was 6-1/2 to 7-1/2 feet; or a resulting 3 feet of convergence (Tr. 307). This is enough movement to destroy supports, cribs, posts and timbers (Tr. 309).

54. There was also horizontal and vertical movement in the roof which was in a state of failure. The roof was not stabilized (Tr. 308, 309).

Management told MSHA that the shields, from No. 70 to No. 90, were down about 42 inches (Tr. 309). Over two or three days this is a large amount of convergence.

55. The majority of the roof bolts appeared in good shape; however, along the cutter area the last row of bolts in the entry provided no support (Tr. 310).

56. Exhibit S-11, a photograph, depicts an area along the edge of the coal pillar between entry No. 7 and No. 6. It shows the cutter raveling out of the roof (Tr. 311). The tearing of the roof and the formation of the roof cutter exposed the roof bolt (Tr. 314).

57. Cutters were beginning to migrate in the crosscuts from entry No. 7 to entry No. 6. In entry No. 6 there were no cutters or roof problems but the pillars were beginning to show weight and sloughage was starting (Tr. 316).

58. The company told MSHA that shields No. 70 to No. 90 were all the way down. This indicated a crushing out of the entire pillar (Tr. 318).

59. When a cutter exists along the sides of an entry, such as in the Golden Eagle Mine, it essentially wipes out the support from one side of the entry to the other side. The entire roof support system can fail (Tr. 319, 320).

60. The area between the tips of the longwall shields and the new cribs in No. 7 entry were in a state of failure (Tr. 322). Given what he knew of the conditions on May 5th, Mr. Owens did not consider it safe to attempt the longwall recovery. However, additional supports and Mobay Chemical had improved the situation (Tr. 322).

61. If a portion of the roof fell it would be 10 to 12 feet thick. The majority of roof falls are 18 inches thick. (Tr. 325).

62. Photograph S-3F shows Mr. Pulse across the longwall face with the shields sitting down on the spill plate. The tensor mesh was trapped so tight that you could not move the mesh between the shield and the spill plate (Tr. 327).

63. The roof bolts are exposed as shown in Exhibit S-4A (Tr. 329). The witness discussed Exhibits S-5A, S-5B, S-6 and S-7 (Tr. 229, 230).

64. Given the conditions shown in Exhibit S-7 you would expect a roof fall but you would not know when (Tr. 330).

65. There were two meetings with management. The company brought up nine or ten points. MSHA's District Manager approved the points to be included in the modification of the 107(a) order (Tr. 333).

66. Modification No. 5 required, among other things, a steel I-beam from above the shields and over the cribbing (Tr. 334).

67. The ten items in modification No. 5 were discussed with management on May 8th. Recommendations were made by MSHA since this was the operator's plan for recovery (Tr. 335, 336).

65. All of the items were proposed by WFC. MSHA made recommendations for four of the items (Tr. 336). There was no pressure and the matter was expedited (Tr. 337).

68. Unexpected problems mandated that the situation be carefully watched (Tr. 339).

69. The method of longwall recovery as shown in Exhibit P-1 is experimental and needs to be treated as such (Tr. 340). It needs to be monitored (Tr. 341).

DISCUSSION

The Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). This definition is unchanged from the definition contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) (the "1969 Coal Act"). The Senate report on the Mine Act explains that the Secretary's authority to issue imminent danger orders "should be construed expansively by inspectors and the Commission." S. Rep.

No. 181, 95th Cong., 1st Sess. 38 (1977), 626. Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978) (Legis. Hist.).

In discussing the concept of imminent danger the Commission recently stated:

In analyzing [the] definition [of imminent danger], the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See, e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that 'an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.' 491 F.2d at 278. (Emphasis in original.) The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989).
Cyprus Empire Corporation, 12 FMSHRC 911, 918 (May 1990).

The Seventh Circuit has further recognized the importance of the inspector's judgment in issuing an imminent danger order:

Clearly, the inspector is in a precarious position. He is entrusted with the safety or miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added)

Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh, 11 FMSHRC at 2164.

The hazards of roof falls are well known. See, e.g., UMWA v. Dole, 870 F.2d 662, 664 (D.C. Cir. 1989) (citing the preamble to the promulgation of MSHA's current roof support standards, 53 Fed. Reg. 2354 (January 27, 1988)).

Here, Inspector Shively observed miners installing wooden cribs in entry No. 7. The unstable condition of the roof (described in detail in Facts 3 through 7) caused him to believe that a roof fall would cause a fatality if the miners did not install the cribs from a safe location. In short, he directed them to "crib their way" into the entry.

WFC's witnesses Callor and McGlothlin differed from Inspector Shively's views that a condition of imminent danger existed in the No. 7 entry. However, they both conceded the inspector had a "concern" for the way the cribs were being built (McGlothlin at 266). Callor believes Inspector Shively sincerely felt a condition of imminent danger existed (Callor at 203). In any event, WFC's witnesses failed to testify as to any credible facts to rebut Inspector Shively's testimony.

For the above reasons, I conclude that imminent danger order Number 3241309 issued May 5, 1990, should be affirmed and the contest relating thereto should be dismissed.

WFC contends the mere good faith belief of the inspector is not enough to sustain the section 107(a) order for an extended period of time. There must in fact be an imminent danger and such determination must be based on an objective standard and a consideration of all of the facts (Brief, page 1).

WFC's arguments require a review of the evidence as to the scope of the imminent danger when the modifications were issued.

The situation in the Golden Eagle mine came about when the company tried an experimental longwall recovery procedure. Simply put, WFC attempted to mine through the 200 foot barrier pillar and use No. 7 entry as a predriven recovery room. The effort was less than fully successful and the shears stuck leaving only a minimal barrier pillar, some zero to eight feet. Mining through the pillar caused massive damage and instability to the roof. The credible evidence established the conditions as found in the facts. (Shively, Facts 3-8; 18-22.) Inspector Shively described the area affected by the order to be No. 6 to No. 13 entry and No. 6 to No. 13 crosscuts (Fact 9). Compare with overview of Exhibit P-3, pg. 4).

Two days later witness Lee Smith, a roof control specialist, described the unstable roof conditions (Facts 24-39). If anything, the roof conditions had deteriorated in the two days since Inspector Shively issued his order. Billy Owens, an MSHA engineer, also fully detailed the roof conditions (Facts 45-61).

I am not unmindful of the testimony of Mr. McGlothlin which runs contrary to MSHA's evidence. However, I do not find his testimony as to the condition of the roof and the cribs to be credible. The photographs clearly rebutt his views. For example, see Exhibits S-5A, S-5B, S-6B, S-7A, S-7B, S-7C, S-7D, S-7E, S-7J, S-7I, S-7H, S-7G, S-7L, S-7K. Further, see Exhibit S-8C showing a severely twisted I-beam. I-beams simply are not made to conform to such a configuration.

Mr. McGlothlin also attempts to persuade the Judge that the Secretary's exhibits S-4A, S-4B, S-4C and S-4E were not in the area affected by the order. (Tr. 265.) However, I reject that view. The Secretary's agents were not shown to have been elsewhere in the mine. Further, the photographs were an evidentiary focus of the Secretary's case.

Mr. McGlothlin's testimony further conflicts with the company's letter to MSHA issued the day the order was issued. The letter states, in part, "[t]he abduement [sic] pressure has caused the shields to yield to the point where the shearer cannot continue cutting. The pressure has also caused the supplemental support (fibercrete and wooden cribs) in the recovery room to fail." (Exhibit P-3).

I credit MSHA's evidence that the condition of imminent danger due to roof fall continued to exist in the 700 foot area encompassing Entry No. 7, the remains of the barrier pillar and the shields of the longwall.⁷

In sum, a preponderance of the substantial, reliable and probative evidence establishes the facts as set forth in paragraphs 1 through 69 of this decision.

WFC contends that MSHA cannot impose mandatory obligations when it issues a section 107(a) order.

Case law precedent supports WFC's position. In Eastern Associated Coal Corporation, 4 IBMA 1 (1975) the Interior Board of Mine Operations Appeals considered such an issue. 4 IBMA at 21.

However, MSHA falls within the exception as explained by the Board:

Although we hold that section 104(a) allows only an order to withdraw persons and does not authorize the Secretary to issue any other kind of direct order, the Board

⁷ The area affected by the order was identified on Exhibit P-3, Page 4.

emphasizes that, in drafting a section 104(a) order, an inspector has the discretion and ought, after consultation with responsible mine officials, to include the terms upon which the withdrawal order will be terminated, that is to say, the actions which must be taken to remove at least the 'imminence' of the subject hazard. While these terms would in no sense be mandatory or subject to enforcement in a federal district court, they would notify an operator as to what must be done if it wishes to resume operations rather than close down permanently the area described in the order. 4 IBMA at 25.

In the instant case Mr. Callor was "upset" because he believed MSHA interfered with management decisions (Tr. 227, 228). However, it is uncontroverted that WFC submitted the plan for recovery of the longwall. All items were proposed by the Company. There was no pressure and the matter was expedited (Tr. 335-337).

The above facts indicate that WFC was complying with MSHA's conditions for withdrawal of the § 107(a) order.

WFC further asserts that MSHA's actions were inconsistent with the claim of imminent danger. Specifically, it is claimed MSHA permitted travel over the area for five weeks and also let the work force retrieve longwall equipment over a period of several weeks.

Under section 107(a) MSHA may permit individuals in an area of imminent danger. These individuals are named in section 104(c).

It is true the longwall equipment was removed. However, considerable efforts had been made at abating the imminence of the danger. Accordingly, I am unable to conclude that MSHA permitted miners to work under the unstable roof.

WFC also states that the mere existence of signs of dangerous conditions do not establish existence of an imminent danger.

I disagree. The signs of dangerous conditions can and often do establish a basis for expert witnesses to reach their conclusions of the underlying hazard.

WFC finally claims that MSHA abused its discretion in leaving the order in effect when an imminent danger no longer

existed. The facts concerning the unstable roof have been previously explored.

For the foregoing reasons, WFC has not sustained it's burden of proof in this contest case.

Accordingly, I enter the following:

ORDER

1. Order No. 3241309 and all modifications thereof are **AFFIRMED**.

2. The contest of Order No. 3241309 is **DISMISSED**.


John J. Morris
Administrative Law Judge

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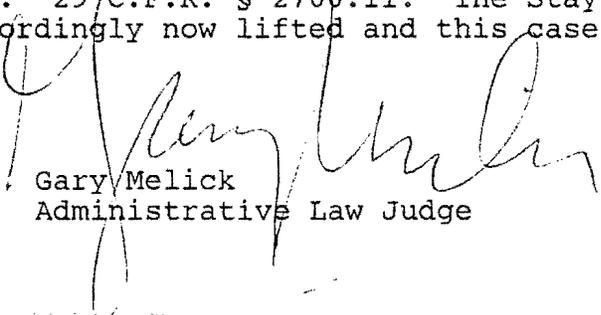
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JOHN A. GILBERT, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 86-49-D
 :
 : MSHA Case No. BARB CD 85-61
SANDY FORK MINING COMPANY, INC., :
Respondent :

ORDER LIFTING STAY AND DISMISSING PROCEEDINGS

Before: Judge Melick

Complainant John A. Gilbert requests approval to withdraw his Complaint the captioned case. Under the circumstances herein, the request is granted. 29 C.F.R. § 2700.11. The Stay Order previously issued is accordingly now lifted and this case is therefore dismissed.


Gary Melick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

FEB 25 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 90-140-M
Petitioner : A.C. No. 38-00007-05560
v. :
Giant Mine :
GIANT CEMENT COMPANY, :
Respondent :

DECISION

Appearances: Leslie John Rodriguez, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Petitioner;
Burton L. Ardis, Jr., Safety Director, Giant Cement Company, Harleyville, South Carolina, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", charging the Giant Cement Company (Giant) with two violations of mandatory standards and proposing civil penalties of \$40 for those violations. The general issue before me is whether Giant violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3612429 alleges a violation of the mandatory standard at 30 C.F.R. § 56.14100(b) and charges that "[t]he windshield wipers on the 125B Cat. F/E Loader, Company No. Q11 were not in working condition". The cited standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

In its Answer filed in these proceedings Giant does not dispute the existence of the cited defect nor that it affected safety but maintains that such a defect would have ordinarily been discovered during pretest procedures and that a work order would subsequently have been written and the defect corrected before the cited equipment would have been placed in service. The evidence shows in this case that the cited loader was not

operating (though it was capable of being used) and had been parked and not operated for eight days before the citation at bar was issued on June 4, 1990.

The cited mandatory standard requires that safety defects "shall be corrected in a timely manner to prevent the creation of a hazard to persons" (emphasis added). The term "timely" has been defined as "done or occurring at a suitable time". Webster's Third New International Dictionary of the English Language, Unabridged, 1986, Merriam-Webster, Inc. In order to determine whether the operator herein corrected the cited defects in a "timely" manner it should be determined when the defects were discovered or reasonably should have been discovered. On the credible record before me, it may reasonably be concluded that the cited loader was last operated eight days before the citation was issued. There is no evidence that when the loader was last operated the cited defect was observed or even existed. Since the required inspection of the equipment is done before the beginning of the shift the wipers could very well have become defective sometime during that last work shift. Moreover since the next preshift inspection would not be expected to be made until just before the loader would again be operated, it is also unlikely that the defect would have been, or necessarily should have been, discovered before such time.

Considering that corrections only need to be made under the cited standard in a "timely" manner I cannot find that a violation existed herein. Since the preshift examination had not yet been made nor was it required before the cited loader would next be operated it would be premature to find a violation under this standard. Citation No. 3612429 must accordingly be vacated.

In reaching this conclusion I have not disregarded the Secretary's reference to the case of Secretary v. Mountain Parkway Stone, Inc., 12 FMSHRC 960 (1990) involving the interpretation of a different standard, 30 C.F.R. § 57.9002 (1988), with language requiring that "[e]quipment defects affecting safety shall be corrected before the equipment is used." It is not disputed in this case that the cited equipment was not tagged out and was capable of being used within the meaning of the Mountain Parkway decision. The result in this case depends however on the unique language of the standard at 30 C.F.R. § 56.14100(b).

Citation No. 3612430, as amended, charges a violation of the mandatory standard at 30 C.F.R. § 56.14132(a) and charges that "[t]he service horn was not in working condition on the 125B Cat. F/E Loader, Company No. Q11". The cited standard provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

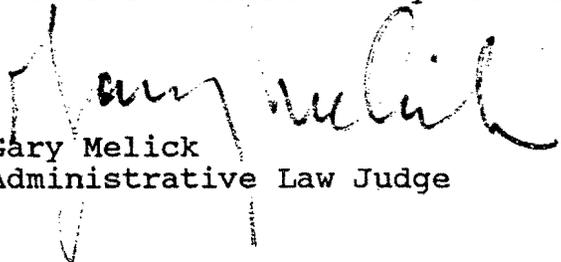
This standard, unlike the standard at 30 C.F.R. § 56.14100(b) previously considered, does not require consideration of timeliness. Indeed it is clear from the plain language of this standard that the operator is made a virtual guarantor that "manually operated horns... shall be maintained in functional condition". In this case again it is apparent that the operator does not dispute that the cited horn was not functioning on the cited loader as charged but maintains that during its pretest procedures it would have discovered that defect and a work order would have been written and the defect corrected before the equipment would be operated.

The cited loader was admittedly not "tagged out" of service and was therefore clearly available for usage at the mine site. Under the circumstances the violation is proven as charged. It is clearly immaterial in proving a violation of the cited standard that the operator may have in existence a "pre-test" procedure that, if properly followed, might very well lead to discovery of such defects before the equipment is operated. The existence of such a procedure, if proven effective in the past, may very well reduce the negligence and gravity findings relating to a violation charged under the cited standard but it cannot negate a violation of the standard.

The evidence in this case of a significant number of prior equipment safety violations at this mine indeed suggests that the "pre-test" procedures have not been effectively implemented. Accordingly I can give but little weight to the claims that such procedures would likely result in detecting and correcting such a violation as charged herein. More significantly, however, Giant's mobile equipment repair foreman, Danny Westbury, testified that the discovery of a defect such as the inoperable horn cited herein nevertheless would not prevent the usage of the equipment if repair parts were not available and the equipment was needed. For this additional reason then it is clear that the mere existence of the alleged "pre-test" procedures is irrelevant and not a viable defense to the charges herein nor in mitigation of the penalty. Under the circumstances and considering all of the criteria under Section 110(i) of the Act I find that a civil penalty of \$100 is appropriate.

ORDER

Citation No. 3612429 is vacated. Citation No. 3612430 is affirmed and the Giant Cement Company is directed to pay a civil penalty of \$100 for the violation therein within 30 days of the date of this decision.


Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 1991

DAVID H. BREWER,	:	DISCRIMINATION PROCEEDING
	:	
Complainant	:	
	:	Docket No. VA 90-58-D
	:	NORT CD 90-11
v.	:	
	:	
WESTMORELAND COAL COMPANY,	:	Wentz # 1 Mine
	:	
	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On September 18, 1990, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On November 14, 1990, a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 26 1991

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-76-D
on behalf of	:	
JOHN A GILBERT,	:	MSHA Case No. BARB CD 85-61
Complainant	:	
v.	:	No. 12 Mine
	:	
SANDY FORK MINING COMPANY, INC.,	:	
Respondent	:	

DECISION AND ORDER

Before: Judge Melick

This case is before me on remand by the Commission on June 28, 1990, following the decision of the Federal Court of Appeals, District of Columbia Circuit, in Gilbert v. FMSHRC, 866 F.2d 1433 (1989). By decision dated November 8, 1990, I subsequently held that, based upon the Circuit Court's specific findings, I was constrained to find that Mr. Gilbert was discharged in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, the "Act." Mr. Gilbert subsequently agreed to a settlement of costs and damages in his individual complaint under Section 105(c)(3) of the Act and that case was thereafter dismissed. (See Docket No. KENT 86-49-D). The Secretary does not oppose that disposition of Mr. Gilbert's section 105(c) claim but seeks in this case, in addition, a civil penalty of \$2,000 from the Respondent for Gilbert's unlawful discharge.

Evaluation of the relevant criteria under section 110(i) of the Act is necessary to determine an appropriate civil penalty. I do not find negligence in this case because Respondent had no notice that its conduct would constitute a violation of section 105(c), and it took no direct adverse action against the Complainant. I am satisfied from the record herein that Respondent had no intent to act against Gilbert in violation of section 105(c) and indeed both myself as the trial judge and a unanimous Federal Mine Safety and Health Review Commission initially concluded that Respondent did not violate section 105(c). It was not until the United States Court of Appeals for the District of Columbia Circuit effectively expanded existing law that Respondent's actions were deemed subject to a finding of discrimination. Prior Commission decisions had established that

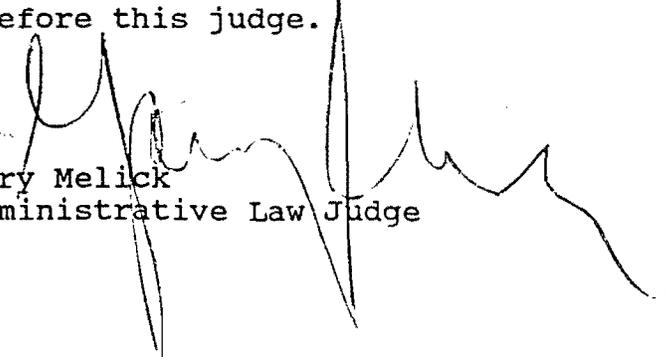
there was no legal obligation for a mine operator to verbally articulate, or otherwise demonstrate in advance, what specific action was being taken to remedy hazardous conditions unless the operator intended to insist that a miner return to work under those conditions. See Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529, 1534 (1983); Secretary of Labor on behalf of Hogan & Ventura & UMWA v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (1986). Only now can it be said that there may exist a newly delineated legal obligation for mine operators to explain to employees in detail anticipated remedial actions no matter when asked.

In addition, the evidence shows that Respondent never forced Gilbert to work under conditions which he believed to be hazardous. Essentially, according to the Court of Appeals, this case involves a failure of communication on the part of the company, and more particularly a failure to give adequate future assurances. Respondent also ceased operations in February of 1988, no longer employs any miners, and produces no coal. There is no evidence of any prior violations of section 105(c) at this mine.

Finally, it is not disputed that once the decision finding a violation of Section 105(c) was entered, the Respondent worked in good faith with the Complainant to negotiate a fair resolution of remaining issues, including compensation for costs and damages. Indeed these negotiations recently resulted in a settlement agreeable to Mr. Gilbert.

ORDER

The Stay Order issued February 7, 1991 is hereby lifted. Under the unique circumstances of this case I hereby order Sandy Fork Mining Company, Inc. to pay a token civil penalty of \$1.00 within 30 days of the date of this decision. This is the final disposition of these proceedings before this judge.


Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
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FEB 26 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 90-194-M
Petitioner : A.C. No. 05-03985-05511
: :
v. : El-Jay Mine
: :
SKELTON INCORPORATED, :
Respondent :

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Ruth Gray, Secretary, Skelton, Inc., Norwood,
Colorado,
for Respondent.

Before: Judge Lasher

In this matter the Secretary of Labor (Petitioner) seeks assessment of penalties for 10 alleged violations (described in 10 Citations) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977).

At the outset of hearing in Montrose, Colorado, on November 14, 1990, Respondent agreed to pay in full MSHA's initially proposed penalties for Citation No. 3452866 (\$74) and Citation No. 3450113 (\$20) and, the Petitioner concurring, this disposition was APPROVED from the bench.

With regard to the remaining eight citations (3 citing electrical violations, 3 citing alleged "inadequate guard" situations, 1 "berm" matter, and 1 "failure to report" matter), the parties presented testimonial and documentary evidence at hearing and waived filing post-hearing briefs. Respondent concedes the occurrence of the 3 electrical violations but challenges the level of MSHA's penalties therefor. As to the remaining 5 citations, both the "occurrence" and "amount of penalty" issues are viable and were litigated.

GENERAL BACKGROUND

Respondent established no economic defense in mitigation of penalty.

a. Stipulated Penalty Assessment Factors.

Based on the written stipulation (Court Exhibit 1) submitted by the parties, it is found that Respondent is (1) a small sand and gravel operator with (2) a history of 17 violations during the two-year period (12/6/87 to 12/6/89) preceding the issuance of the first Citation involved in this proceeding, and (3) that Respondent, after notification of the alleged violations, proceeded in good faith to promptly abate such conditions.

b. Respondent's Operation.

Respondent operates a portable rock-crushing unit (which can be moved to different locations by tractor-trailer), with a primary jaw crusher, conveyance, and load, haul, and dump equipment. (Tr. 55-56, 145-149).

PRELIMINARY MATTERS

Respondent, as I understand its position, contends that it should not be assessed penalties since it was not afforded the right to request a CAV (Compliance Assistance Visit) and did not have prior electrical inspections prior to the subject inspection. (Tr. 15, 136, 165, 166, 167).

The CAV process is not provided for in the Mine Act and is not a mine operator's absolute right. In this connection, it is noted that the record reflects that MSHA was not notified by Respondent as to the site at which it was operating prior to the time the inspectors discovered its operation, inspected it, and issued the subject citations. In any event, the mine in question is clearly subject to the Mine Act and inspections thereof are mandated by such Act, Section 103(a), 30 U.S.C. § 815. Further, Sections 104(a) and 110(a) of the Mine Act require that a citation be issued and a penalty assessed when a violation occurs. See Old Ben Coal Co., 7 FMSHRC 205208 (1985). Accordingly, the various contentions of Respondent based on its failure to receive a prior CAV are found to lack merit and are REJECTED.

It is noted that Respondent in this matter was not represented by legal counsel. Thus it is appropriate that another aspect of the CAV issue be considered even though not specifically raised. That is, does the fact that a CAV was not conducted prior to the time the subject Citations were issued estop the government enforcement agency from citing violations? Quite simply, the answer to this question is that the Mine Safety and Health Review Commission has rejected the doctrine of equitable estoppel in Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981):

The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.

Respondent also expresses concern about the "inconsistency" of the MSHA inspectors. (See Respondent's letter dated June 18, 1990; Tr. 34-35, 154, 155, 294). Again, insofar as this position constitutes raising the defense of equitable estoppel, it is rejected. However, as the Commission in King Knob, supra, also noted, such factors as prior non-enforcement or confusion caused by MSHA enforcement policy, can, in the abstract, be considered in mitigation of otherwise appropriate penalties. Such has been done in this decision.

THREE "ELECTRICAL" VIOLATIONS

As above noted, Respondent concedes the occurrence of these three Section 104(a) violations cited March 6, 1990, in Citations numbered 3449865, 3449867, and 3449868. The Secretary seeks penalty assessment of \$91 for each of the three which involve infractions of 30 C.F.R. § 56.12008. 1/

1/ 30 C.F.R. § 56.12008 provides:

Insulation and fittings for power wires and cables.

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables

The record shows that MSHA Inspector Ronald J. Renowden accompanied Inspector Michael T. Dennehy on a regular inspection of Respondent's operation near Blanding, Utah, from March 6 through March 8, 1990. Inspector Renowden, an electrical specialist with impressive qualifications, performed the electrical part of the inspection. (Tr. 49-58, 59).

Based on the preponderant reliable and substantive evidence, I make the following findings:

A. Citation No. 3449865.

Because there was an improper fitting, i.e., no fitting, on the power cable entering the motor terminal box, i.e., a metal enclosure (Tr. 64), the hazard of a shock, burn, or electrocution was created. The power cable (moving back and forth and flexing) could be damaged by the metal edge and energize the metal framework of the conveyor involved, which would, in turn, energize the framework of the crushing unit. (Tr. 65-69, 70, 82, 85).

Since it was reasonably likely that the hazard contributed to by the violation could result in an injury of a reasonably serious or fatal nature (Tr. 77), the violation is found to be not only significant and substantial (S & S) as charged by Inspector Renowden (Tr. 71-73, 74, 87), but also very serious (Tr. 74, 76, 88).

Since the problem was visible to one observing the equipment, I find that the mine operator was negligent in allowing such violative condition to exist. (Tr. 77, 85, 141, 144, 155, 158, 171, 176).

B. Citation No. 3449867.

This violation was cited because there was no fitting where the cable (cord) supplying power to a crossover conveyor entered the metal junction box (terminal housing) to secure the cable from strain and protect it from the sharp metal hole edges of the

(continued from page 3)

shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

junction box. (Tr. 95-97, 98). The cord is referred to as "SO cord" in the Citation, which in turn means "hard surface oil resistant." (Tr. 110).

A ground fault hazard was created because this condition could damage the cable "to a point that one of the energized phase conductors inside the cable could energize the metal casing of the motor ... and energize the framework of the crusher" (Tr. 98, 110) similar to the violation described in Citation No. 3449865, supra. Such hazard could easily come to fruition and result in injuries such as electrical shock and "arc-flash burns" as well as electrocution. (Tr. 99, 100). Because of the amount of vibration and flexing that occurs in the situation involved, it was reasonably likely (1) that the hazard could occur to cause an injury, particularly since there was no other "strain relief" support (Tr. 100-101, 102-107) and (2) that such would cause a reasonably serious injury. This is a serious violation and was charged to be a "significant and substantial" one as well. The violative condition was readily observable and the determination here that this violation resulted from negligence on the part of the mine operator is supported in the record. (Tr. 107, 108, 141, 144, 170, 171, 176). Notably, Respondent's foreman who was responsible for electrical compliance (Tr. 135, 140, 144) testified as follows:

Q. Yesterday, the inspector mentioned there was some confusion when they arrived as to who was in charge. Can you tell us why there was some confusion?

A. Because of stuff like this, having to do this, come to a hearing and things. Who would want to take responsibility, if you have to come to this kind of stuff all the time?

Q. Well, who is the person--according to your management structure--who was the person that should take charge of this?

A. Me. (Tr. 144)

C. Citation No. 3449868.

Here again, as in the prior two electrical violations, this Citation alleged a similar violation of 30 C.F.R. § 56.12008 and such was determined by the Inspector to be "Significant and Substantial." (Tr. 130). And again, there was no fitting for the cable (Tr. 124). Inspector Renowden credibly testified and explained that the hazard from the instant violation was "worse" than the previous two violations (Tr. 125), that the cord was

subject to vibration, flexing, and rubbing, and that severe electric shock resulting in electrocution of miners could easily result. (Tr. 125-126, 130, 131, 132). This is found to be a very serious violation.

The mine operator is again found to have committed this violation as a result of a significant degree of negligence. (Tr. 131, 132, 141, 144, 158, 170, 176).

In mitigation, Respondent established that it had had no prior electrical accidents (Tr. 83), or injuries from electrical problems (Tr. 136).

Perry Rowe, a foreman for Respondent mine operator, testified that he was responsible for the electrical equipment, but that he had no electrical training and was not an electrician. (Tr. 135, 140, 149, 161). Mr. Rowe had "no idea" why there were no fittings on the equipment involved in the three electrical violations (Tr. 141) and thought that "whoever made the machine" was responsible for not putting the fittings in place. (Tr. 141).

CONTESTED CITATIONS

The Respondent challenges the occurrence of the violation charged in the following five Citations. Based on the preponderant reliable and substantive evidence, the following findings are made with regard thereto.

A. Citation No. 3450115.

This 104(a) Citation issued by MSHA Inspector Michael T. Dennehy on March 6, 1990, alleges an infraction of 30 C.F.R. § 56.14107 2/ as follows:

The guard for the head pulley on the undercone conveyor was not adequate to protect a person from contact with the fins on the head pulley. The head pulley was approximately 63 inches from ground level.

2/ 30 C.F.R. § 56.14107 provides:

Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The self-cleaning (with fins) head pulley in question had only a "partial guard" which, while guarding the pinch point, did not cover moving machine parts, i.e., the metal fins. (Tr. 191, 193, 204-205). The guard was thus inadequate. (Tr. 194, 199, 201-204). The fins, being 63 inches from the ground, did not meet the "7-foot" exception contained in the standard. (Tr. 199). The violation charged in the Citation is found to have occurred.

The inadequacy of the guarding around the two-inch fins, which were susceptible to contact on one side of the pulley, created the hazard that a miner could be pulled into the pulley and lose a finger, hand, or arm. (Tr. 195, 200, 201, 202, 207).

Such could be a permanent disabling injury. (Tr. 207). Since there was no foot traffic in the area (Tr. 217, 226), and because of the 63-inch height of the fins off the ground, it was not likely that a person would come into contact with the fins and be injured by the hazard. The violation is thus found to be only moderately serious. (Tr. 199, 203, 207).

The Respondent mine operator is not found to be negligent in the commission of this violation since Respondent showed that it received a Citation in 1987 for not having a guard on the pulley and that such was abated (and the Citation terminated) by the installation of the guard observed by and cited as inadequate by Inspector Dennehy in this matter. (Tr. 197, 198, 207-212, 217, 225-226, 246, 247). It thus appears that MSHA at one time had in effect approved the guard set-up cited in the subject Citation.

B. Citation No. 3450118.

1. The condition cited by Inspector Dennehy on March 7, 1990, as a violation of 30 C.F.R. § 56.14107 is as follows:

The pinch point on the chain sprocket that drives the jaw crusher's feeder was not adequately guarded to prevent a person from contacting the sprocket or pinch point. This drive was near the front access area to the jaw crusher.

2. The violation occurred as cited by the Inspector in the Citation. (Tr. 230, 231, 232, 235, 246).

3. The partial guarding that was in place on March 7, 1990, was inadequate. (Tr. 230, 233, 234, 235, 240, 241, 257). There was no guard on the pinch point. (Tr. 235, 236, 241).

4. The hazard was that a person could come into contact with the pinch point (Tr. 231), i.e., the moving machine part (sprocket and chain), and have a finger, hand, or arm severed. (Tr. 232, 233, 234).

5. The violation was not "significant and substantial." (Tr. 233-234).

6. It was not "reasonably likely" that this hazard would come to fruition. (Tr. 234, 236-237, 239, 240). The violation is found to be serious. (Tr. 234, 236, 237, 239, 240, 241).

7. As in the case of the previous citation, Respondent is not found to be negligent in the commission of this violation since it established that it had received a prior citation in 1986 from a different inspector for a guard violation and that such was abated and the citation terminated by the installation of the guarding cited as inadequate in the subject Citation. (Tr. 242, 245, 246-247, 248-253, 255).

C. Citation No. 3452863.

1. The condition cited by Inspector Donnelly on March 6, 1990, as a violation of 30 C.F.R. § 56.14107 is as follows:

The guard for the under conveyor (jaw) was not adequate where the access ladder to the crusher post near the head pulley belt driven shaft was to protect a person from contact with the pinch point. This pinch point was next to the access landing of the jaw crusher's diesel engine.

2. The record establishes that the pinch point in question was not adequately guarded. (Tr. 264-266, 271, 281). The violation occurred as cited by the Inspector in the Citation. (Tr. 264-268, 290).

3. The hazard, contact of a person with the pinchpoint, could result in loss of fingers and limbs, and there was a "slight chance" such could be fatal. (Tr. 268-269, 271).

4. This was a "significant and substantial" (S & S) violation since the area is traveled and one person is required to be in the area to gain access to the diesel engine which powers the conveyor in question. (Tr. 264, 265, 269, 276-277, 295). It was reasonably likely that the hazard would come to fruition. (Tr. 273, 276-277, 295, 299-300).

5. Although the violative condition was out in the open and obvious (Tr. 274), the Respondent is not found to be negligent in the commission of this violation, since it established that it had received a prior citation from a different inspector for a guard violation and that such was abated and the citation terminated by the installation of the guarding cited as inadequate in the subject Citation. (Tr. 291-192, 297).

D. Citation No. 3450117.

1. The condition cited by Inspector Donnelly on March 7 1990, as a violation of 30 C.F.R. § 56.9300 is as follows:

The elevated roadway used to gain access to the jaw crusher's feed hopper was not provided with a berm to prevent the Kawasaki front end loader from dropping off the unprotected sides. The top of the roadway had a 5- to 6-foot drop-off. Berms or guardrails shall be at least mid-axle height of the large self-propelled mobile equipment which usually travels the roadway."

2. 30 C.F.R. § 56.9300 provides:

Berms or guardrails.

(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

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

(c) Berms may have openings to the extent necessary for roadway drainage.

(d) Where elevated roadways are infrequently traveled and used only by service or maintenance vehicles, berms or guardrails are not required when the following criteria are met:

(1) Locked gates are installed at the entrance points to the roadway.

(2) Signs are posted warning that the roadway is not bermed.

(3) Reflectors are installed at 25-foot intervals along the perimeter of the elevated roadway.

(4) A maximum speed limit of 15 miles per hour is posted.

(5) Road surface traction is not to be impaired by weather conditions, such as sleet and snow, unless corrective measures are taken to improve traction.

(e) This standard is not applicable to rail beds.

3. On the inspection day, Inspector Dennehy observed a 12-foot wide Kawasaki rubber-tired front-end loader carrying material from the pit area to the crusher along a 16-foot wide "elevated roadway," i.e., at the crusher end of the roadway there was an elevated ramp running approximately 40 feet in length. For the top 10 to 12 feet of the ramp there was a drop-off of 5 to 6 feet. The drop-off gradually tapered off to zero feet as the ramp dropped downward 40 feet from the top end at the crusher to the bottom level where the roadway was flat. There was no berm (or guardrails) along the entire length of the roadway. (Tr. 305-309, 311, 316, 317, 340, 341). Toward the top of the ramp, the drop-off was sufficient to overturn the Kawasaki F.E.L. (Tr. 309).

4. Therefore, the violation occurred as cited by the Inspector.

5. The hazard created by the violation was that the loader would drop over the edge of the ramp and turn over. (Tr. 311-312). Such an accident could result in injuries ranging from minor "lost time" injuries to fatal (Tr. 312-313) to the operator of the F.E.L. (Tr. 315-316). Thus, this is found to be a serious violation.

6. Since the violative condition was obvious (Tr. 319), the Respondent is found to be negligent in the its commission.

7. The violation, however, is not found to be "significant and substantial":

a. Only the one piece of equipment uses the elevated portion of the roadway (ramp) at any given time. (Tr. 321).

b. There was roll-over protection over the operator's cab on the F.E.L. (Tr. 314-315, 321, 341).

c. There have been no prior accidents involving the F.E.L. (Tr. 332, 352).

d. No vehicles have gone over the side of the ramp. (Tr. 333).

e. It is not reasonably likely that the F.E.L. would go over the side of the ramp at the highest point where the drop-off is 5 to 6 feet. (Tr. 335, 337, 338, 339, 341, 342, 344, 346).

It is concluded that it was unlikely that the hazard envisioned by the Inspector to result from the violation would come to fruition to cause injuries and that it is also unlikely that, if the F.E.L. did go over the side of the ramp, it would result in any injuries of a serious nature.

Accordingly, the prerequisites for the determination of a "significant and substantial" violation, as set forth by the Federal Mine Safety and Health Review Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) were not established, and the "S & S" finding on the face of the Citation is vacated. The Citation in other respects, including the Inspector's determination of negligence, is affirmed.

E. Citation No. 3450265.

1. The condition cited by Inspector Leo E. Hotz on December 6, 1989, as a violation of 30 C.F.R. § 56.1000 is as follows:

The operator has failed to notify the proper MSHA office of the recent commencement of operation and location of his portable crusher.

2. 30 C.F.R. § 56.1000 provides:

Notification of commencement of operations and closing of mines.

The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict

Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.

When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

3. The violation occurred as cited by the Inspector in the Citation. (Tr. 360, 361). Specifically, Respondent commenced its operation and failed to notify MSHA by letter or telephone (Tr. 362) that it was going to do so. (Tr. 362-373, 383, 384, 393, 396). When this Citation was written, MSHA did not know the location of Respondent's mining operation. (Tr. 366, 373).

4. The Inspector did not designate, nor is it found, that this violation is significant and substantial.

5. While the violation of this standard could not cause an accident--or directly cause an injury--(Tr. 364), MSHA cannot fulfill its mandate to inspect without such notification and the resultant knowledge where mines are located. (Tr. 363-365). This is found to be a very serious violation. (Tr. 367-368).

6. Since it was Respondent's third violation of this standard and, since Respondent has been in business a sufficient time to know of this requirement, it is found to have been guilty of a significant degree of negligence in the commission of this infraction. (Tr. 367, 370-371, 385-388).

7. MSHA, on the basis of a "special assessment," sought a penalty of \$300 at the administrative level. In view of the history of Respondent's non-compliance with this important regulation--vital to safety enforcement--it is found that the administrative level penalty, even though a special assessment, is below the absolute minimum (\$400) which should be assessed here.

ASSESSMENT OF PENALTIES

Based on the foregoing findings and conclusions, the following penalties are FOUND APPROPRIATE and ASSESSED:

<u>Citation No.</u>	<u>Penalty</u>
3450265	\$ 400
3449865	125
3449867	125
3449868	125
3450113	20
3450115	50
3450117	125
3452863	125
3452866	74
3450118	<u>50</u>
TOTAL	\$1,219

ORDER

Respondent shall pay the Secretary of Labor within 40 days from the date of this decision the penalties above assessed totaling \$1219.00.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80194 (Certified Mail)

Ms. Ruth Gray, Secretary, SKELTON INC., P.O. Box 124, Norwood, CO 81423 (Certified Mail)

/ek

ADMINISTRATIVE LAW JUDGE ORDERS

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

January 15, 1991

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
on behalf of :
MARTIN L. RICHARDSON, : Docket No. WEST 91-143-DM
Complainant :
v. : MD 90-19
F.K.C., INC., : Mine I.D. No. 26-02161
Respondent :

ORDER OF TEMPORARY REINSTATEMENT

The Secretary of Labor has applied for an order temporarily reinstating Applicant Martin L. Richardson to his former position with Respondent.

The file reflects that on December 26, 1990, Respondent was served, by express mail, with a copy of the Secretary's application for temporary reinstatement.

Respondent has not requested a hearing on the Secretary's application and more than 10 days has elapsed since Respondent received the application.

Since no hearing has been requested, the Judge, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and Commission Rule 44, 28 C.F.R. § 2700.44 as amended [51 F.R. 16033 (1986)] is required to immediately review the Secretary's application.

On the basis of the contents of the file, if the Judge determines that the miner's complaint is not frivolously brought, he shall issue an order of temporary reinstatement.

The file herein includes an Affidavit indicating Respondent did business and operated facilities in the production of sand and gravel and is, therefore, an operator within the meaning of Section 3(d) of the Mine Act.

The Affidavit further states as follows:

At all times relevant, Applicant Martin L. Richardson was employed by F.K.C. as water haul truck operator at F.K.C.'s pit and was a miner, as defined by Section 3(g) of the Mine Act.

On August 8, 1990, an MSHA inspector was on the mine site to conduct a regular inspection. On that date, the inspector, after watching the truck in operation, questioned the Applicant about the condition of the brakes on the truck. The Applicant informed the inspector that the truck had no brakes, and he felt it was unsafe to operate the truck without brakes.

The operator was aware of the Applicant's protected activity because he was confronted by Richard Grant, a supervisor. Grant threatened the Applicant with discharge, if he spoke to an MSHA inspector again.

The Applicant was laid off and ultimately fired after the truck he operated was removed from service for lack of brakes.

Mine Management's actions were motivated by the Applicant's protected activity.

Discussion

Based on the contents of the file, it is indicated that the Commission has jurisdiction to consider the request for temporary reinstatement.

Further, talking to an MSHA inspector and informing him of the condition of the brakes on the truck was an activity protected under the Mine Act.

In addition, Respondent took adverse action against Applicant in discharging him.

Finally, the facts indicate Respondent's actions were motivated by Applicant's activity which was protected under the Mine Act.

For the foregoing reasons, I conclude that the application filed herein was not frivolously brought.

Accordingly, I enter the following:

ORDER

1. The application for temporary reinstatement is GRANTED.
2. Respondent is ORDERED to reinstate Applicant Martin L. Richardson to the position he held on August 8, 1990, at the same rate of pay and with the same equivalent duties that were assigned to him immediately prior to his discharge.

3. The undersigned Judge will retain jurisdiction of this case.

4. The parties will be afforded an opportunity to be heard on the merits of any discrimination complaint hereafter filed herein.

5. Correspondence was forwarded by the Judge's office to Martin L. Richardson at the address of 2316 Statz Street, North Las Vegas, Nevada 89030. The letter was returned indicating delivery had not been made. The envelope was marked "ATTEMPTED, NOT KNOWN."

An agent of Airborne Express also indicated to the Judge that they could not locate Mr. Richardson.

Mr. Richardson also called the Judge's office and stated that his telephone had been disconnected because he didn't have money to pay his telephone bill.

In view of the above, a representative of the Secretary is directed to attempt personal service of this order to Mr. Richardson.


John J. Morris
Administrative Law Judge

Distribution:

Mr. Martin L. Richardson, 2316 Statz Street, North Las Vegas, NV 89030 (Regular Mail)

Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Via Facsimile)

Mr. Fred Knobel, President, F.K.C. INCORPORATED, 520 West Sunset Road No. 7, Henderson, NV 89015 (Airborne Express)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 7 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 90-54
Petitioner	:	A.C. No. 44-00271-03571-A
v.	:	
	:	Moss No. 1 Prep Plant
ROBERT V. SWINDALL,	:	
Employed by Clinchfield	:	
Coal Company,	:	
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION
PREHEARING ORDER

On January 7, 1991, Respondent filed a motion for summary decision pursuant to 29 C.F.R. § 2700.64. Essentially, Respondent contends that the Secretary did not file a proposal for a penalty with the Commission within 45 days of the receipt by the Secretary of Respondent's notice of contest. The notice of contest was received by the Secretary on August 31, 1990.

On February 8, 1989, the Secretary issued a section 104(d)(2) order to Clinchfield Coal Company alleging a violation of 30 C.F.R. § 75.200. In August 1990 (the letter is not dated), MSHA notified Respondent by mail that it determined that a civil penalty was warranted under Section 110(c) of the Act against Respondent on the ground that as an agent of Clinchfield Coal Company, he knowingly authorized, ordered, or carried out the violation cited against Clinchfield. On August 18, 1990, Respondent signed a notice of contest and request for hearing with the Review Commission. This was received the Secretary on August 31, 1990.

On October 3, 1990, the Secretary filed a Petition for Assessment of Civil Penalty entitled Secretary of Labor, Mine Safety and Health Administration v. Clinchfield Coal Company, Docket No. VA 90-54. Enclosed with the Petition was a notice of proposed assessment indicating a proposed penalty against Mr. Robert Vernon Sindell, employed by Clinchfield Coal Company. His address is given as P.O. Box 4100, Lebanon, Virginia 24266, which counsel for Respondent states is the Clinchfield corporate office address. A letter dated September 28, 1990 was also addressed to Mr. Robert Vernon Swindell at the Clinchfield corporate office informing him that a petition for a penalty has been filed and serving two copies on Mr. Swindell.

On November 5, 1990, Respondent filed a "conditional response" to the Petition. On November 5, 1990, Clinchfield Coal Company filed an Answer to the Petition in which it asserted that it was previously assessed a penalty for the alleged violation under section 110(a) of the Act, and that the proposed penalty was paid on April 21, 1989. On November 16, 1990, the case entitled Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Robert Vernon Swindell, Employed by Clinchfield Coal Company, Docket No. VA 90-54 was assigned to me. A copy of the order of assignment was sent to Mr. Robert Swindell and to his attorney on the same date.

On November 20, 1990, the Secretary filed a motion to amend her petition for assessment of civil penalty. In the motion, she stated that the petition "was sought in error against Clinchfield . . . (and) the Secretary intended to file against an individual pursuant to section 110(c) of the . . . Act." The Secretary sought an amendment to the caption of the case to reflect that the Respondent is Robert V. Swindell, employed by Clinchfield Coal Company. The Secretary's amended petition seeks a civil penalty against Mr. Swindell because as an agent for the corporate mine operator (Clinchfield) he knowingly authorized, ordered, or carried out the violation for which Clinchfield was cited.

On November 29, 1990, I granted the Secretary's motion to amend and granted Respondent 30 days from the date of service of the amended petition to file an answer.

On December 2, 1990, Respondent filed a conditional Response to the motion to amend. On December 17, 1990, he filed copies of interrogatories which had been served by mail on the Solicitor December 14, 1990. On December 19, 1990, Respondent filed an answer to the amended Petition. On December 19, 1990, I issued a Prehearing Order, compliance with which was extended without date by order issued January 15, 1991.

On January 7, 1991, Respondent (the correct spelling of whose name is Robert Vernon Swindall) filed his motion for summary decision, together with an affidavit of Robert Vernon Swindall and a memorandum in support of the motion. The Secretary filed a response to the motion on February 1, 1991.

The motion for Summary Decision includes an affidavit from Mr. Swindall in which he contends that the delay in filing the petition prejudiced him in that (1) his attorney has been required to devote additional time to the legal issues involved; (2) the proceeding has been delayed, causing Swindall additional worry and concern; (3) bringing Clinchfield in the case heightened Swindall's anxiety and concern; (4) Swindall has been having serious back trouble and has been off work on disability.

Respondent's memorandum states that the plant in which Swindall was employed (and in which the alleged violation occurred) has been shut down since April 5, 1989. It states that the plant's work force was disbursed and "few, if any, of the plant's former workers are now employed by Clinchfield . . ." It states that the steps involved in the citation have been physically deteriorating for approximately two years since the citation. These assertions were not controverted by the Secretary.

The issues raised by the motion are multiple and complex:

1. When was the section 110(c) proceeding before the Review Commission instituted against Respondent Swindall?

2. When did Swindall receive notice that a section 110(c) case was being filed against him?

3. Was the case filed in time under Commission Rule 20 C.F.R. § 2700.27(a).

4. If the case was not timely filed, did the Secretary show adequate cause for the late filing?

5. If the case was not timely filed, was Swindall prejudiced by the date filing?

I

Obviously, when the Secretary commenced the proceeding entitled Secretary of Labor, Mine Safety and Health Administration v. Clinchfield Coal Company with a form petition not referring to Swindall or section 110(c), she did not institute a proceeding against Swindall, whatever her secret intention. I conclude that the case against Swindall was commenced when the Secretary filed her Motion to Amend on November 20, 1990.

II

Respondent was notified in August 1990, that the Secretary intended to file a Petition for penalty against him under section 110(c). He signed and submitted a notice of contest and request for hearing on August 18, 1990. Therefore, he was on notice of the Secretary's intention as of August 1990.

III

Section 105 of the Act covers the enforcement procedure for mine operator violations. It gives the operator 30 days from the date of notification of a proposed penalty assessment to notify the Secretary that he wishes to contest the assessment. When

such a notice of contest is filed, the Secretary is required to "immediately advise the Commission of such notification. . ." Section 110(c) which provides for penalties against agents of corporate operators does not set out any procedures for its enforcement, but provides that an agent who knowingly authorized, ordered or carried out the violation of the corporate operator is subject to the same penalties as the operator. 29 C.F.R. § 2700.27 requires that "within 45 days of receipt of a timely notice of contest [or] a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission." This procedural rule applies to "the operator or any other person against whom a penalty is proposed . . ." § 2700.25.

The Secretary did not file a proposal for a penalty against Swindall within 45 days of the receipt of a timely notice of contest. In fact, it was not filed until more than 30 days after the expiration of the 45 day period.

The Commission addressed the question of the Secretary's late filing of a penalty petition in Salt Lake County Road Department, 3 FMSHRC 1714 (1981). The Commission held, inter alia, that if the Secretary seeks permission to file late (under Rule 9), [she] must predicate [her] request upon adequate cause." Id., 1716. In this case the Secretary did not seek permission to file late, nor did she establish adequate cause: she merely states that the original petition was filed in error and that she "moved to correct the error as soon as she became aware of the problem." Sloppiness in preparing pleadings hardly qualifies as adequate cause.

In the Salt Lake County Road Department decision, supra, the Commission also held that "an operator may object to a late penalty proposal on the grounds of prejudice." This was said to be based on the administrative law principle that "substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." Has Respondent Swindall shown prejudice in this case?

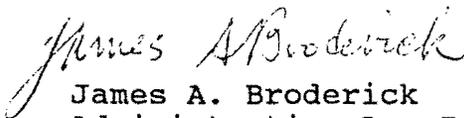
The facts that the delay caused emotional distress to Respondent, and required additional legal work to address the legal issues related to the filing delay do not constitute prejudice in a legal sense. The assertions that the delay resulted in witnesses being "disbursed", memories fading and the deterioration of the physical condition of the area of the alleged violation, raise more substantial questions. The alleged violation occurred on February 8, 1989. In August 1990, more than one and a half years later, the Secretary notified Swindall that she intended to proceed against him under section 110(c). No explanation has been advanced by the Secretary for such an extraordinary delay. The Secretary's argument that the lapse of

time prejudices the Secretary as much as it prejudices Respondent is disingenuous. The delay is the Secretary's, and one should not have to defend stale claims. However, the delay from February 1989 to August 1990 is not the delay for which the instant motion is filed, but rather the delay in filing a penalty petition with the Commission after the notice of contest was received by the Secretary. There is no evidence or any serious assertion that the delay from October 15, 1990 to November 20, 1990, in itself, caused prejudice to Respondent which would handicap him in presenting his defense. I conclude that the delay in filing the action before the Commission, i.e., more than 45 days after Respondent served his notice of contest is not shown to have prejudiced Respondent and does not "justify the drastic remedy of dismissal." Salt Lake County, supra, at p. 1717.

ORDER

Accordingly, the Motion Summary Decision is DENIED.

The parties are FURTHER ORDERED to comply with the prehearing order of December 19, 1990: Paragraph 1 on or before February 25, 1991; paragraph 2 on or before March 15, 1991, and inform me of inappropriate hearing dates in April or May 1991.



James A. Broderick
Administrative Law Judge

Distribution:

Lisa A. Gray, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

W. Challen Walling, Esq., Penn, Stuart, Eskridge and Jones, 306 Piedmont Avenue, P.O. Box 2009, Bristol, VA 24203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 20, 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 91-30
Petitioner : A. C. No. 15-15509-03532
: :
v. : No. 2 Mine
: :
TOLER CREEK ENERGY, :
INCORPORATED, :
Respondent :

ORDER DENYING MOTION TO DISMISS
ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

This case is pending before me on the operator's motion to dismiss.

On October 25, 1990, the Commission received the operator's blue card requesting a hearing.

Thereafter, on December 3, 1990, the Solicitor filed a motion to dismiss a penalty proposal in this docket number with respect to Elite Mining Company. The Solicitor advised that this petition had been filed on November 16, 1990. However, the Commission had no record of receiving a penalty proposal regarding Elite. At the request of my law clerk, the Solicitor forwarded that proposal which was received on January 14, 1991. On January 17, 1991, I entered an order dismissing this docket number with respect to Elite.

Meanwhile on January 10, 1991, a penalty proposal was filed under this docket number against Toler Creek. On January 28, 1991, the operator filed a motion to dismiss based upon the Solicitor's failure to file the proposal within the required 45 days. 29 C.F.R. § 2700.27(a). On February 5, 1991, the Solicitor opposed dismissal and moved to have the late filed petition accepted. The Solicitor referred to the confusion arising from the initial involvement of an unrelated operator in this docket number and represented that the delay in filing the petition against Toler was due to clerical error and was not for dilatory purposes. By letter filed February 6, 1991, the operator again sought dismissal.

There is no dispute that the Secretary's penalty proposal was filed 71 days late. However, the operator's motion is without merit. The Commission's decision in Salt Lake County Road Department, 3 FMSHRC 1714 (1981), relied upon by the operator does not support its position. In that case the Commission

found that clerical problems constituted good cause for the delay and noted that at that time the Secretary was engaged in voluminous litigation. In the instant matter, confusion with the two operators occurs at a time when cases filed with the Commission are once again increasing. In FY 1987 there were 1,579 new filings; in FY 1988, 1,800; in FY 1989, 1,889; in FY 1990, 2,029; and 873 for the first third of FY 1991. An increased case load is not a blanket excuse for not meeting filing deadlines, but it is a relevant factor that may be considered. Finally, and perhaps most importantly, the operator here has not shown any prejudice. Under the circumstances, I conclude that good cause existed to justify the late filing.

In light of the foregoing, it is **ORDERED** that the operator's motion to dismiss be and is hereby **DENIED**.

It is further **ORDERED** the Solicitor's motion to accept the late filing of the penalty proposal be and is hereby **GRANTED**.

It is further **ORDERED** that this case be and is hereby assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6220



Paul Merlin
Chief Administrative Law Judge

Distribution:

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

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