FEBRUARY 1992

COMMISSION DECISIONS & ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

FEBRUARY 1992

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

Secretary of Labor, MSHA v. Peters & Garman Construction, Docket Nos. WEST 91-87-M, WEST 91-370-M. (Chief Judge Merlin, Default Orders of June 17, 1991 and January 2, 1992 - unpublished).

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

Mettiki Coal Corporation v. Secretary of Labor, MSHA, Docket Nos. YORK 89-10-R, 89-26. (Reconsideration of Commission decision of January 10, 1992).

Wayne Turner v. New World Mining, Docket No. VA 90-51-D. (Judge Weisberger, March 28, 1991)

David Stritzel v. MSHA, Charles Rath & Mark O. Eslinger, Docket No. LAKE 91-633-D. (Judge Fauver, January 21, 1992)

COMMISSION DECISIONS/ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 11, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-87-M
PETERS & GARMAN CONSTRUCTION	:	

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

ORDER

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on June 17, 1991, finding respondent Peters & Garman Construction ("P&G") in default for failure to answer the civil penalty petition filed by the Secretary of Labor and the judge's order to show cause. The judge assessed the civil penalty of $227 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On January 28, 1992, the Commission received a letter dated January 22, 1992, in which counsel for the Secretary requests, on behalf of both parties, that Judge Merlin rescind the previously issued default order and enter an order confirming the settlement agreement negotiated between the parties. Counsel for the Secretary explains that he was delayed in submitting the settlement agreement because respondent's counsel was temporarily out-of-state.

The judge's jurisdiction over this case terminated on June 17, 1991, when his decision was issued. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). P&G did not file a timely petition for discretionary review within the 30-day period, nor did the Commission direct review on its own motion. 30 U.S.C. § 823(d)(2)(B). Thus, 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 January 22 letter to be a request for relief from a final Commission decision and to incorporate a late-filed petition for discretionary review. See J.R. Thompson, Inc., 12 FMSHRC 1194, 1195-96 (June 1990). Relief from a final judgment is available to a movant under Fed. R. Civ. P. 60(b)(1) on the basis of mistake, inadvertence, surprise

or excusable neglect. See, e.g., Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It appears that an explanation for P&G's failure to respond to the judge's order to show cause may have been raised and that the parties have been engaged in settlement negotiations. We are unable to evaluate the merits of the explanation on the basis of the present record. We will afford P&G the opportunity to present its position to the judge. See, e.g., Blue Circle Atlantic, Inc., 11 FMSHRC 2144, 2145 (November 1989). If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. § 820(k).

Accordingly, we 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

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 11, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-370-M
PETERS & GARMAN CONSTRUCTION	:	

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

ORDER

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on January 2, 1992, finding respondent Peters & Garman Construction ("P&G") in default for failure to answer the civil penalty petition filed by the Secretary of Labor and the judge's order to show cause. The judge assessed the civil penalty of $40 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On January 28, 1992, the Commission received a letter dated January 22, 1992, in which counsel for the Secretary requests, on behalf of both parties, that Judge Merlin rescind the previously issued default order and enter an order confirming the settlement agreement negotiated between the parties. Counsel for the Secretary explains that he was delayed in submitting the settlement agreement because respondent's counsel was temporarily out-of-state.

The judge's jurisdiction over this case terminated on January 2, 1992, when his decision was issued. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Here, the letter received by the Commission on January 28, 1992, seeks relief from the judge's default order. We will treat that letter as a timely petition for discretionary review of the judge's default order. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

It appears from the record that an explanation for P&G's failure to respond to the judge's order to show cause may have been raised and that the parties have been engaged in settlement negotiations. We are unable to evaluate the merits of the explanation on the basis of the present record. We will afford P&G the opportunity to present its position to the judge. See, e.g., Blue Circle Atlantic, Inc., 11 FMSHRC 2144, 2145 (November 1989). If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. § 820(k).

Accordingly, we grant P&G'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

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 18, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 89-10-R YORK 89-26
METTIKI COAL CORPORATION	:	

ORDER

On January 10, 1992, the Commission issued its decision in this case and remanded the proceeding to the presiding administrative law judge. On February 3, 1992, Mettiki filed with the Commission a Petition for Reconsideration. See 29 C.F.R. § 2700.75. On February 10, 1992, the Secretary of Labor filed a response. Upon consideration of Mettiki's petition and the Secretary's response, the Petition for Reconsideration is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 19, 1992

IN RE: CONTESTS OF RESPIRABLE DUST :
SAMPLE ALTERATION CITATIONS : MASTER DOCKET NO. 91-1
:
:

ORDER

On November 13, 1991, the Commission granted petitions filed by the Secretary of Labor and the contestants represented by the law firm of Jackson & Kelly, for interlocutory review of orders entered by Commission Administrative Law Judge James A. Broderick in these proceedings. Petitioners have filed their briefs and response briefs. On January 9, 1992, contestants Great Western Coal (Kentucky) Inc., Great Western Coal, Inc., and Harlan Fuel Company filed a motion to join in the briefs filed by Jackson & Kelly. These contestants did not join in Jackson & Kelly's petition for interlocutory review and have not previously sought to participate in this interlocutory proceeding.

These contestants do not attempt to explain in their motion why they waited until all briefs were filed to seek to participate in this interlocutory review proceeding. They have been aware of this appeal since it was filed and could reasonably have sought to participate on a more timely basis. Parties who wish to participate in appeals to this Commission must do so promptly after review has been granted. See In re: Contests of Respirable Dust Sample Citations, 14 FMSHRC _____, No. 91-1 (January 14, 1992); see generally Mid-Continent Resources, Inc., 12 FMSHRC 2399, 2404-05 (December 1989).

Accordingly, the above-referenced motion to join in the briefs filed by Jackson & Kelly is denied.

For the Commission:

Ford B. Ford
Chairman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 26, 1992

RONNY BOSWELL	:	
	:	
v.	:	Docket No. SE 90-112-DM
	:	
NATIONAL CEMENT COMPANY	:	

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). National Cement Company ("National Cement") seeks review of a decision by Commission Administrative Law Judge Roy J. Maurer concluding that National Cement unlawfully disqualified Ronny Boswell from his position as a utility laborer in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 13 FMSHRC 207 (February 1991)(ALJ). The Commission granted National Cement's petition for discretionary review. For the reasons that follow, we affirm the judge's decision in part, vacate it in part, and remand.

I.

Factual and Procedural Background

At the time of the alleged discrimination, Boswell had worked for National Cement at its cement plant in Ragland, Alabama, for about 14 years, including ten years in the position of utility laborer. During the preceding six years, and at the time of the events in question, his supervisor was James Allen.

National Cement disqualified Boswell from his position as a utility laborer pursuant to a "Disciplinary Action Report" ("Report") dated January 11, 1990. The Report indicated five grounds for Boswell's disqualification: (1) a kiln incident on August 8, 1989; (2) a clay shredder incident on October 1 and 2, 1989; (3) a radio incident on October 22, 1989; (4) a kiln incident on December 22, 1989; and (5) a bobcat and wheelbarrow incident on January 1, 1990.

With respect to the kiln incident of August 8, 1989, Boswell and Allen presented conflicting versions at the hearing. The judge credited Boswell's account. 13 FMSHRC at 208-09. On the day in question, two miners had been working in the kiln, tearing down brick and coating. Allen directed three other employees, including Boswell, to enter the kiln and throw the debris

back up the kiln. 13 FMSHRC at 208-09. Boswell testified that, at the time of the incident, he believed it was unsafe to have more than two miners at a time working in the kiln when pulling down brick and coating. Tr. 20-21. Boswell refused Allen's direction to go inside the kiln and requested a safety review.[1] The company subsequently dropped the matter and the three miners, including Boswell, were not required to enter the kiln.

In the clay shredder incident of October 1, 1989, Allen asked Boswell to operate the shredder.[2] Boswell replied that he did not want to operate it because he had never used it before, had no knowledge of how it worked, and had never received any training in its operation. Allen then told Boswell that he was willing to show Boswell how to operate the machine. Boswell responded that he would not "be responsible ... for what tears up." Tr. 27. After further discussing the matter with Boswell, Allen assigned Boswell to another task. The following day, Allen again asked Boswell to run the shredder. Boswell testified that "about the same thing happened" as had occurred the previous day. Tr. 27. Eventually Allen started the shredder and Boswell agreed to watch it run. 13 FMSHRC at 209-10.

As to the radio incident of October 22, 1989, Allen testified that he tried to call Boswell on the radio and received no answer. Allen then went looking for Boswell and found him on the eighth floor of the preheating tower "sitting with the radio on." Tr. 103, 128. Allen testified that he then asked Boswell if he had heard him calling on the radio and Boswell said he had not. Allen then checked the radio and it seemed to be in working order. Tr. 104. In contradiction, Boswell testified that no such incident had occurred, and that he was not at work on October 22, 1989. Tr. 28-29, 30, 31. See also N.C. Exh. 4. Allen conceded the date could be incorrect but stated that the incident had occurred. Tr. 127.

In the kiln incident of December 22, 1989, Boswell worked at the hood of the kiln for about eight hours, installing beams and building a platform. He testified that he had been having ear problems for a month and the cold made his ears worse. Boswell told Allen about his ears and was excused.

The bobcat and wheelbarrow incident of January 1, 1990, arose when Allen directed Boswell to use a bobcat to remove steel mill grinding balls from the

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[1] Under the collective bargaining agreement at the mine, a miner has the right to call for a safety review if he believes that a situation is unsafe, and cannot be disciplined for refusing to perform an unsafe task. Under the safety review procedure, representatives of the union and company meet to review the situation. If the two sides cannot agree, they may request a review by the Department of Labor's Mine Safety and Health Administration.

[2] Clay is typically encountered in large chunks. At National Cement's mine, the clay is carried up a conveyor belt, dumped into a revolving tub, and shredded. Tr. 26.

mill basement.[3] The task involved traveling on a 20 to 30 degree inclined concrete ramp that was strewn with loose clinkers. The ramp was 12 feet wide and 30 to 40 feet long. There were six to eight inches of water at the bottom of the ramp in a ditch with a metal-eared safety barrier. Boswell responded that it was unsafe for him to operate the bobcat because he had no training on the machine. Allen then told Boswell to use a wheelbarrow to perform the task and Boswell refused on the grounds that it was unsafe to push the wheelbarrow. Allen testified that he then explained to Boswell various ways of performing the task safely. Boswell called for a safety review but Allen dropped his request and sent Boswell to push rock for the balance of the shift.

On January 11, 1990, management and union officials met to discuss Boswell's job performance. Boswell was then advised that, based on the five incidents referenced in the Report, he was disqualified as a utility laborer due to his unsatisfactory performance. National Cement decided that Boswell would be permitted to "roll" to another job. Boswell elected to roll to the job of payloader operator, which paid a base rate of $12.50 per hour. The utility laborer's job paid a base rate of $13.58 per hour.

On February 26, 1990, Boswell filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") based on the disqualification. By letter dated May 4, 1990, MSHA notified Boswell that it had determined that he had not been discriminated against in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). On June 18, 1990, Boswell filed a complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).

National Cement filed a motion to dismiss Boswell's complaint as untimely, on the basis that it had been filed with the Commission more than 30 days after MSHA's determination that no discrimination had occurred.[4] The judge summarily denied the motion on the grounds that the filing time was not jurisdictional. Tr. 13. On the merits, National Cement primarily argued that Boswell's disqualification was justified by the five incidents set forth in the Report. National Cement also provided testimony and other evidence to the effect that Boswell's prior work history was poor and that the underlying cause of the problem was the fact that Boswell and Allen could not get along.

The judge determined that Boswell had engaged in protected activity. 13 FMSHRC at 213. With regard to the kiln incident of August 8, 1989, the judge found that Boswell's refusal to work and his request for a safety review

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[3] The bobcat is a four-wheeled vehicle with a bucket in front that is used to pick up, transport, and dump loose material. The vehicle does not have a steering wheel and is operated with hand and foot controls. See Tr. 34.

[4] In relevant part, section 105(c)(3) of the Mine Act provides: "If the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference...." 30 U.S.C. § 815(c)(3).

were made in good faith and were reasonable and, hence, were protected. 13 FMSHRC at 209, 213. In reaching his conclusion, the judge also relied on the testimony of James Noah, a fellow employee, who testified that he informed National Cement's safety director that, if Boswell had not requested the safety review, he would have. 13 FMSHRC at 209. The judge found that the work Boswell was scheduled to perform was "patently unsafe." 13 FMSHRC at 213.

The judge further determined that Boswell's refusal to work in the bobcat and wheelbarrow incident of January 1, 1990, was a protected work refusal, and that his request for a safety review was also protected activity. 13 FMSHRC at 213. The judge found that Boswell had very limited experience operating the bobcat, and no experience operating it on a 20 degree slope. Id. In addressing Allen's wheelbarrow alternative, the judge noted that the results of a safety review were unknown because Boswell's request was not acted upon and Boswell was given another assignment. Id.

The judge concluded that Boswell's disqualification was motivated, "at least in major part," by his protected activity.[5] 13 FMSHRC at 213. Based on that conclusion, he found that Boswell was discriminated against in violation of the Mine Act. Id. The judge held that Boswell was entitled to reinstatement to his former position as utility laborer and to have his personnel file purged of any derogatory information pertaining to his disqualification. 13 FMSHRC at 215. The judge found that Boswell was not entitled to any back pay because, as a result of 56 more hours worked, he had earned $919.54 more as a payloader operator than he would have earned as a utility laborer. 13 FMSHRC at 214-15.

On review, National Cement argues that the judge erred in not dismissing Boswell's complaint because of its untimely filing. It contends that Boswell's refusal to use the wheelbarrow to remove the steel balls from the mill basement was not protected activity and justified his disqualification and transfer. National Cement also argues that the judge erred in failing to address its defense that, notwithstanding Boswell's alleged protected activity, it would have disqualified and transferred him in any event based on his prior work history and his poor job performance. It points to the judge's failure to address Boswell's poor working relationship with Allen and his other work history, apart from the incidents listed in the Report. Finally, National Cement asserts that Boswell's disqualification and transfer were not adverse actions, since Boswell actually earned more as a payloader operator.

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[5] The judge found no protected activity involved in the other three incidents discussed in the Report. With regard to the clay shredder incident, the judge did not find any protected activity on Boswell's part nor did he find any unprotected justification for disqualifying Boswell based on this incident. 13 FMSHRC at 210. With respect to the radio incident of October 22, 1989, the judge found the evidence that the incident actually occurred to be extremely weak. Id. The judge determined that the kiln incident of December 22, 1989, neither helped nor hurt either party. 13 FMSHRC at 211.

II. Disposition of Issues

A. Timeliness of Boswell's discrimination complaint

We affirm the judge's denial of National Cement's motion to dismiss Boswell's complaint. The Commission has made clear that the filing periods for section 105(c) discrimination complaints are not jurisdictional in nature. See, e.g., David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 24 (January 1984), aff'd mem. 750 F.2d 1093 (D.C. Cir. 1984) (table) (60-day time limit under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), for miner to file discrimination complaint with the Secretary); Secretary on behalf of Donald R. Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986)(Secretary of Labor's filing responsibilities). Thus, on a case-by-case basis, the Commission may excuse filing delays in appropriate circumstances. See Hollis, 6 FMSHRC at 24.

Under section 105(c)(3) of the Mine Act, Boswell was required to file his complaint "within 30 days of notice of the Secretary's determination" of no discrimination. The statute makes clear that the time for filing begins to run upon "notice" of the Secretary's action. Here, the record does not indicate when Boswell actually received MSHA's May 4, 1990, letter notifying him of its determination but, assuming three days for its receipt through the mail, Boswell's complaint, filed on June 18, 1990, was at most, 12 days late. The record also shows that on June 6, 1990, Boswell erroneously mailed his complaint to MSHA at its Arlington, Virginia, office and that MSHA forwarded it to the Commission.

Under these circumstances, we conclude that the lateness of Boswell's filing was de minimis and appears to have resulted, at least in part, from mistake, inadvertence, or excusable neglect. Most significantly, National Cement has shown no prejudice in connection with this brief delay (see Hale, 8 FMSHRC at 909), nor has there been any showing that Boswell knowingly slumbered on his rights. Cf. Hollis, 6 FMSHRC at 25. Accordingly, Boswell's late filing is excused.

B. The Alleged Discrimination

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford

Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

1. Protected Activity

The judge found that Boswell engaged in two instances of protected activity: (1) his work refusal and request for a safety review in the kiln incident of August 8, 1989; and (2) his work refusal and request for a safety review in the bobcat and wheelbarrow incident of January 1, 1990. National Cement argues on review that the judge erred in finding that Boswell engaged in protected activity in connection with his refusal to use the bobcat and wheelbarrow to remove the steel balls from the mill basement on January 1, 1990.

For a work refusal to come within the protection of the Mine Act, the miner must have a good faith, reasonable belief that the work in question is hazardous. See generally, Robinette, 3 FMSHRC at 807-12. In determining whether the miner's belief in a hazard is reasonable, the judge must look to the miner's account of the conditions precipitating the work refusal and also to the operator's response. An operator has an obligation to address the danger perceived by the miner. Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). As stated in Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), once it is determined that a miner has expressed a good faith, reasonable concern, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern "in a way that his fears reasonably should have been quelled. In other words, did management explain to [the miner] that the problems in his work area had been corrected?" 866 F.2d at 1441. See also Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-99 (June 1983); Thurman v. Queen Anne Coal Co., 10 FMSHRC 131, 135 (February 1988), aff'd, 866 F.2d 431 (6th Cir. 1989)(table). Accordingly, a miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition.

National Cement's argument suggests that by itself Boswell's refusal to use the bobcat was outside the Act's protection but the thrust of its argument focuses on the wheelbarrow aspect of that work dispute. With respect to the bobcat incident, the judge concluded that Boswell's work refusal was protected. 13 FMSHRC at 213. We are satisfied that substantial evidence supports the judge's finding. Boswell had very limited experience operating the bobcat and none on a 20 degree slope. Tr. 34-36. Boswell testified that he was afraid to run the bobcat and that it was unsafe for him to attempt to do so. Tr. 34-36. See also Tr. 83-84. Boswell indicated in his written response to the Report that he had never been trained to operate the bobcat, and that he might have run it on flat ground for a total of eight hours. N.C. Exh. 4. See also Tr. 35-36. National Cement did not provide training for operation of a bobcat. Tr. 35, 84. We agree with the judge that Boswell's

refusal to operate this equipment under the conditions involved lies within the zone of protected activity.

National Cement's principal challenge to the judge's finding of protected activity centers on the wheelbarrow dispute. As noted, after Boswell refused to operate the bobcat, Allen then directed him to use a wheelbarrow to remove the steel balls. When Boswell refused because of the clinkers on the ramp, Allen told Boswell to sweep it off. Allen also offered help to Boswell in removing the steel balls and told Boswell that he could carry loads as small as ten pounds. The operator argues that, under these circumstances, its direction to use the wheelbarrow did not require performance of an unsafe task, and that the judge failed to address the reasonableness of its response to Boswell's continuing work refusal.[6]

Boswell testified that the danger presented was the clinkers on the ramp, which, in his view, made it difficult to get traction while walking up the incline. Allen testified that he told Boswell to "move the clinker[s] from the ramp" and "sweep it down [so that] you have a flat surface." Tr. 85. The judge did not address Allen's testimony in this regard, nor did he discuss Allen's testimony that Boswell was told someone would be sent to help him remove the steel balls with the wheelbarrow and that he could carry loads of about ten pounds in the wheelbarrow. Tr. 84-85.

Thus, there is testimony in the record that suggests National Cement may have adequately addressed the fears giving rise to Boswell's work refusal and that, therefore, his continued work refusal may no longer have been reasonable. If so, his work refusal lost its protected status and could provide a legitimate justification for Boswell's disqualification and transfer as well as the basis for an affirmative defense. We express no view as to whether Boswell's fears were quelled. We conclude, however, that the judge should reconsider his findings in view of the testimony referred to above and any other relevant evidence of record and determine whether Boswell's fears were adequately addressed by National Cement.

2. Adverse action

National Cement argues that no adverse action was taken against Boswell because he earned more in the job to which he transferred than he would have earned as a utility laborer. We disagree. The Report specifically states that Boswell was disqualified as a utility laborer due to unsatisfactory performance and that he was reprimanded. It states further that, in order to avoid discharge, the employee should review his work performance history. This Report clearly constitutes an adverse action subjecting Boswell to discipline or detriment in his employment. See generally Secretary on behalf of Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842, 1847-48 (August 1984).

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[6] National Cement does not argue that the judge erred in finding that Boswell's request for a safety review regarding the bobcat and wheelbarrow incident was protected.

Further, although Boswell earned $920.04 more in his new job than he would have in his previous one, his job transfer from a utility laborer to payloader operator reduced Boswell's base pay by $1.08 per hour. The annual difference in earnings found by the judge was due to additional hours worked by Boswell and premium pay received for Sunday and holiday work, shift differential, and overtime. See Tr. 43-46, 168. Thus, the evidence shows that Boswell earned more because he worked more, but that he nevertheless suffered a loss in his base pay rate. We conclude that Boswell suffered an adverse action.

3. Nexus

We agree with the judge's conclusions that National Cement's action against Boswell was motivated at least in part by Boswell's protected activity. The Report specifically refers to Boswell's August 8, 1989, refusal to remove brick from the kiln, Boswell's January 1, 1990, refusal to remove the steel balls from the mill basement using the bobcat and Boswell's requests for safety reviews associated with these work refusals. National Cement does not dispute that these activities were part of its bases for disciplining Boswell. Thus, we affirm the judge's conclusion that Boswell was disciplined, at least in part, for these protected activities and that he, therefore, established a prima facie case of discrimination.

4. Affirmative Defense

On review, National Cement argues that it would have disciplined Boswell, in any event, for his unprotected activity alone and that the judge did not address this affirmative defense. The operator presents two bases for its affirmative defense: (1) Boswell's allegedly poor work history including the wheelbarrow incident and the three other incidents set forth in the Report (the clay shredder, radio and December 22, 1989 kiln incidents) as well as his earlier work history;[7] and (2) the inability of Boswell and Allen to get along. The judge found little evidence that the radio incident actually occurred and therefore determined that it did not affect the issue at bar. We agree. The judge also found that the clay shredder and December 1989 kiln incidents did not involve protected activity and individually did not provide the operator with justification for disciplining Boswell. He did not, however, analyze whether National Cement had established an affirmative defense, based on the totality of unprotected activity set forth in the Report. Nor did he mention the earlier work history or Boswell's relationship with Allen. Accordingly, we remand this case to the judge for analysis of this issue. On remand, the judge shall evaluate the evidence of record on these points in light of the Pasula-Robinette affirmative defense framework. Pasula, 2 FMSHRC at 2799-800; Robinette, 3 FMSHRC at 817-20. If the judge finds that Boswell's refusal to use the wheelbarrow was not protected, he should also consider this incident when evaluating National Cement's affirmative defense.

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[7] According to National Cement, Boswell had a long history of performance problems, involving seven additional incidents. See N.C. Exhs. 5-11. We note, however, that these incidents were not mentioned in the Report.

III.

Conclusion

Accordingly, on the foregoing bases, we affirm the judge's decision in part, vacate it in part, and remand for further proceedings consistent with this opinion. The judge shall consider whether the wheelbarrow incident constituted a protected work refusal. The judge shall also analyze whether National Cement proved that it would have disqualified Boswell in any event for any unprotected activities the judge may find in reconsidering the matters raised in this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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Administrative Law Judge Roy J. Maurer
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 31 1992

CLIFFORD MEEK, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 90-132-DM
	:	MSHA Case No. UC MD-90-06
v.	:	
	:	
ESSROC CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION

Before: Judge Fauver

This discrimination proceeding was brought under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

On December 24, 1991, a decision on liability was entered finding that Respondent discriminated against Complainant by refusing to employ him because of his protected activities. As stated at page 12 of the decision, "This decision shall not be a final disposition of this proceeding until a supplemental decision is entered on monetary relief."

Further proceedings are in process on issues of monetary relief due Complainant.

Before considering the parties' proposals and arguments on monetary relief, I observe that a motion to dismiss has not been formally ruled upon; however, its denial is implicit from the decision on liability. This supplemental decision addresses the motion to dismiss, and sets a time for the parties to submit their final proposals and documents on monetary relief.

At the close of Complainant's evidence at the hearing, Respondent moved to dismiss the complaint on the ground that Complainant had not made out a prima facie case of discrimination.

Denial of this motion is implicit in the decision on liability, which credits Complainant's evidence and finds that it establishes a prima facie case of discrimination. For the record, the motion to dismiss is hereby formally DENIED, for reasons included in the findings, conclusions and discussion in the decision on liability.

This case is pending further procedures and a final order on monetary relief. If needed, a supplemental hearing will be scheduled on factual issues concerning monetary relief. The parties shall have 15 days from the date of this decision to submit their final proposals and supporting documents on monetary relief.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 4 1992

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-210-R Citation No. 3105298; 2/7/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Robinson Run No. 95 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1961 A.C. No. 46-01318-04008
v.	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION
and
ORDER OF DISMISSAL

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner/Respondent;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

The captioned civil penalty proceeding concerns a proposal for assessment of civil penalty 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 a civil penalty assessment of $379, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.400. The case was consolidated for hearing in Morgantown, West Virginia, with the captioned contest Docket No. WEVA 91-210-R, and with several other dockets concerning these same parties.

Discussion

The parties agreed to settle the civil penalty case, and the petitioner was afforded an opportunity to present the proposed settlement motion orally on the record pursuant to Commission Rule 30, 29 C.F.R. § 2700.30.

In support of the proposed settlement, the petitioner stated that the respondent has agreed to pay the initial proposed penalty assessment of $379, in full. I took note of the fact the violation was the result of moderate negligence, and that the cited condition was rapidly abated with an hour of the issuance of the citation.

Conclusion

In view of the foregoing, and after careful review of the pleadings and the arguments in support of the proposed settlement disposition of the alleged violation, the proposed settlement was approved from the bench. I conclude and find that the settlement is in the public interest, and my bench decision is reaffirmed. The settlement IS APPROVED.

ORDER

Docket No. WEVA 91-1961. The respondent IS ORDERED to pay a civil penalty assessment of $379, in satisfaction of section 104(a) Citation No. 3105298, February 7, 1991, 30 C.F.R. § 75.400. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

Docket No. WEVA 91-210-R. In view of the settlement disposition of the companion civil penalty case, the docketed contest case IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 4 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1980 A.C. No. 46-01318-04013
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-211-R Citation No. 3105685; 2/7/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 91-212-R Citation No. 3105686; 2/7/91
	:	Robinson Run No. 95 Mine
	:	Mine ID 46-01318

PARTIAL DECISION

ORDER OF DISMISSAL

ORDER STAYING PROCEEDING

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner/Respondent;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

The captioned civil penalty proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to the Federal Mine Safety and Health Act of 1977. The petitioner seeks civil penalty assessments for five (5) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The case was docketed for hearing in Morgantown, West Virginia, with

several other civil penalty and contest cases, and two of the citations were consolidated with Contest Docket Nos. WEVA 91-211-R 2and WEVA 91 212-R, (Citation Nos. 3105685 and 3105686). One Citation (No. 3105328) concerning an alleged violation of the safeguard standard 30 C.F.R. § 1403(8)(b), was previously stayed by me by a stay order issued on November 1, 1991. The remaining citations (Nos. 3313225 and 3313227) concern alleged "excessive history" violations and the parties requested that they be stayed pending the Commission's decision in Drummond Coal Co., Inc., 13 FMSHRC 339, and 13 FMSHRC 356 (March 1991), and Zeigler Coal Company, 13 FMSHRC 367 (March 1991).

Settlement

Section 104(a) "S&S" Citation No. 3105685, concerns an alleged violation of 30 C.F.R. § 75.807. Section 104(a) "S&S" Citation No. 3105686, concerns an alleged violation of 30 C.F.R. § 75.316. They were both initially assessed at $310 for each alleged violation.

In support of the proposed settlements, petitioner's counsel stated that upon further review of the facts and circumstances which resulted in the issuance of the citations, the inspector now believes that the citations should be modified as non-"S&S" citations due to mitigating circumstances with regard to the question of gravity. Under the circumstances, counsel agreed that a reduction in the initial penalty assessments is warranted, and the respondent agreed to pay civil penalty assessments in the amount of $186, for each of the citations.

After careful review and consideration of the pleadings and arguments in support of the proposed settlements, including the civil penalty assessment criteria found in section 110(i) of the Act, the settlement dispositions were approved from the bench. My bench decisions are herein reaffirmed.

ORDER

Pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the proposed settlement IS APPROVED. The respondent IS ORDERED to pay a civil penalty assessment of $186 for citation No. 3105685, and a civil penalty assessment of $186 for citation NO. 3105686. Payment is to be made to MSHA within thirty (30) days of the date of this partial decision and order, and upon receipt of payment, the petition for assessment of civil penalty for these citations is dismissed. In view of the settlement approval, the companion contest Docket Nos. WEVA 91-211-R and WEVA 91-212-R, ARE DISMISSED.

IT IS FURTHER ORDERED THAT excessive history Citation Nos. 3313225 and 3313227 (Docket No. WEVA 91-1980) issued on June 10, 1991, alleging violations of 30 C.F.R. § 75.1000-3, ARE STAYED.

George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 10 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 91-660-M A.C. No. 08-01139-05501
v.	:	
HIGHLANDS COUNTY BOARD OF COMMISSIONERS, Respondent	:	Charlotte County Shell Pit Mine

DECISION

Appearances: Michael K. Hagan, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Petitioner;
J. Ross MacBeth, Esq., Sebring, Florida, 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 in the amount of $40, for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. A hearing was held in Sebring, Florida, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. 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. § 801, et seq.

2. Commission Fules, 29 C.F.R. § 2700.1, et seq.

3. Mandatory safety standards 30 C.F.R. § § 56.14107(a) and 56.14101(a)(2).

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is subject to the jurisdiction of the Act, the Secretary of Labor, and the Commission.

2. The respondent is a small mine operator employing approximately two people at the subject mine site.

3. The proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

4. The respondent's history of prior violations for the period February 14, 1989, through February 13, 1991, is reflected in an MSHA computer print-out, and it indicates that the respondent has no prior violations (Exhibit P-1).

5. The two contested violations in this proceeding were timely abated in good faith by the respondent.

Discussion

Section 104(a) Non-"S&S" Citation No. 3431917, issued on February 14, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14107(a), and the cited condition or practice is described as follows:

> The belt drive was not guarded on the pit discharge pump in the pit area. As a rule employees do not go in this area while pump is running.

Section 104(a) Non-"S&S" Citation No. 3431918, initially issued on February 14, 1991, and subsequently modified on April 15, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14101(a)(2), and the cited condition or practice is described as follows:

> The parking brake on the 950 Caterpillar front-end loader was not capable of holding the loader with its typical load on the maximum grade it travels.

Petitioner's Testimony and Evidence

Citation No. 3431917, 30 C.F.R. § 56.14107(a).

MSHA Inspector J.J. Crisp testified that he inspected the mine for the first time on February 14, 1991. He proceeded to the pit area and encountered the dragline operator. While standing at the top of the bank with the operator, Mr. Crisp observed that the belt drive of the dewatering pump was not guarded. The guard was laying in the walkway and the pump was running and the belt drive was in motion. The unguarded drive was "waist high to chest high", and Mr. Crisp believed that the lack of a guard posed a hazard of someone loosing a finger or a hand if they inadvertently contacted the belt drive pinch points while it was running. He described the pinch points as the area between the drive and the sheaves (Tr. 7-11).

Mr. Crisp stated that the dragline operator told him that the guard was off because he had to replace some belts, and that pit foreman Gene Durrance told him that as a general rule employees did not go to the pump area while it was running (Tr. 12). Mr Crisp believed that if someone were next to the unguarded drive he could possible be caught and hurt. However, he took Mr. Durrance's word that no one is in the area unless the pump is turned off, and that is why he determined that an injury was unlikely and that the violation was not significant and substantial (Tr. 13). He considered the respondent's negligence to be "moderate to normal", and he confirmed that the violation was abated and that the guard was on when he next returned to the mine (Tr. 14).

Mr. Crisp explained the procedure for aligning the belts when new ones are installed and he stated that the belts are not self-adjusting and someone has to adjust them. The operator can determine whether the belts are adjusted properly by observing the belts while they are running, and if they are misaligned, "you could throw a belt or you could see misalignment instantaneous and you have to do the job all over again" (Tr. 15).

On cross-examination, Mr. Crisp identified photographic exhibit R-2, and he confirmed the location of the cited pump and motor on a platform on the water. He stated that the pump motor was turned off by a switch located on a switch box installed on a pole at the top of the bank. He estimated that the switch was approximately 20 feet away from a stairway leading down the embankment, and that the stairway was approximately 15 to 20 feet from a 15-foot walkway leading to the platform where the pump was located. The platform holding the pump was approximately eight-to-ten foot square (Tr. 17).

Mr. Crisp agreed that there would be no hazard or danger from the pump if anyone were in the pit and the pump was not running. Mr. Crisp believed that the guard should have been put back on as soon as the belt was turned on. However, if no one is in the pit and the pump is not on, it would not be negligent (Tr. 20).

Mr. Crisp acknowledged that subsection (b) of the cited standard provides an exception that does not require a guard when the exposed moving part is at least seven feet away from a walking or working surface. He confirmed that access is required in order to maintain and check the pump, that two people work at the pit, and they would maintain or check the pump as needed (Tr. 22).

In response to further questions, Mr. Crisp stated that the pump was readily accessible and that there was no barrier or locked gate preventing access to the platform area where the pump was located. He characterized the platform area around the pump as a "working platform", and he conceded that he did not measure the platform (Tr. 25).

Citation No. 3431918, 30 C.F.R. § 56.14101(a)(2)

Inspector Crisp stated that he observed Mr. Durrance operating the cited front-end loader on a slight incline at the top of the levee coming out of the pit. He checked the backup alarm and fire extinguisher and found them satisfactory. He told Mr. Durrance that he wanted to check the service brakes. Mr. Durrance applied the service brakes while the machine was moving, and the brakes functioned properly and stopped the machine (Tr. 36-37). Mr. Crisp stated that the machine was not stopped completely when he asked Mr. Durrance to apply the parking brake and then let off the service brakes. When he did, the parking brakes would not hold the machine and he "rode freely on the slight incline". Mr. Crisp confirmed that the brakes were tested on a slight incline with an empty bucket, and that Mr. Durrance told him that he thought the parking brake was working (Tr. 36-38).

Mr. Crisp confirmed that he made a determination that an injury was unlikely because the service brakes were operable, and if they failed, the operator (who had a seatbelt) could steer the machine and bring it to a stop. However, if an injury did occur, it would be "lost work days and restricted duty". He did not consider the violation to be significant and substantial (Tr. 40). He considered the negligence to be "moderate to normal" because the operator is supposed to check his equipment before the shift begins and he should have known of the condition. Mr. Crisp stated that Mr. Durrance told him the parking brake was adjusted, and on a subsequent inspection visit, Mr. Crisp tested the parking brake and abated the violation.

Mr. Crisp confirmed that he initially cited a violation of subsection (a)(3) of section 56.14101, but that his supervisor subsequently modified it to reflect a violation of subsection (a)(2) (Tr. 38, 41-42; 46-47).

On cross-examination, Mr. Crisp stated that when he next returned to the mine to abate the citation, he asked Mr. Durrance to engage the parking brake and the machine did not move. In response to a question as to whether he actually had Mr. Durrance test the parking brakes or simply asked him whether or not they worked, Mr. Crisp stated that "as I recall, I inspected it" (Tr. 44). In response to further questions, Mr. Crisp stated that the loader was used to load trucks, and that the loader operator would not use the parking brake during loading. However, he would use the parking brake on a ramp if he lost his service brakes, and although the trucks are normally loaded in flat areas, there are "dips and slight inclines" (Tr. 45-46). Mr. Crisp further explained the initial testing of the parking brake by Mr. Durrance as follows at (Tr. 48-50):

> A. No, sir. I checked it--he had come up out of the pit area to where he loads trucks. It was right on top of the levee on a slight incline and he stopped it in this area. That's where the test was performed.
>
> Q. And it was empty?
>
> A. It was empty.
>
> Q. He had his service brakes on and the engine was running?
>
> A. Right.
>
> Q. When he released the service brake was the transmission in neutral or drive or what?
>
> A. In neutral.
>
> Q. He released the service brakes--
>
> A. The machine rolled.
>
> Q. And it rolled. How far did it roll?
>
> A. Well, he put his brakes on pretty quick.
>
> * * * * * * *
>
> Q. It's easier to pass the test if there's no load?
>
> A. Right.

Q. And if it won't hold it and it says it has to hold it on that maximum grade, if you tested it on a slight grade is that an easier test for the equipment to pass?

A. Yes.

Q. So, in terms of what the standard requires, it failed to pass an even lower standard?

A. A minimal test, yes.

Respondent's Testimony and Evidence

Citation No. 3431917. 30 C.F.R. § 56.14107(a)

Gene Durrance testified that he is employed by the respondent county road and bridge department as a finish operator at the Charlotte county shell pit operation. He confirmed that photographic Exhibit R-2, depicts the pump which was cited by Inspector Crisp on the day of his inspection. Mr. Durrance stated that the guard is located at the top of the motor at the belt drive. He stated that the platform is approximately ten feet square and that the walkway from the platform to the shore is approximately 20 feet long. The stairway leading from the end of the walkway to the top of the bank is approximately 30 feet long, and the distance from the top of the stairs to the post holding the pump switch is 20 feet. The on-off switch is located on the side of the electrical box mounted on the post, and the master switch is on the front of the box on the same post (Tr. 51-53).

Mr. Durrance stated that once the pump motor is turned off at the switch it cannot be turned on from the platform area, and one would have to return to the switch pole to turn it back on. He stated that he generally does the usual maintenance on the pump motor, and there is a rule or procedure that "you don't go there with the motor running" (Tr. 54). He confirmed that other than repairs, there is no reason for anyone to go out on the platform, and that no one goes there with the motor running (Tr. 54).

Mr. Durrance acknowledged that the guard was off the cited pump motor belt drive at the time of the inspection. He explained that he had taken the guard off in order to replace three belts. The guard was left off while the shop was obtaining the belts, and the next morning he installed the belts after turning off the motor. He then left the platform and turned the motor back on with the guard off because he wanted to let it run awhile in order to check the tension, and if it required adjustment he would have put the cover back on. However, before he could finish and put the guard back on, he had to load some trucks, and in the interim, the inspector arrived and saw that

the guard was off and that the pump motor was running (Tr. 54-55). He explained the procedure as follows at (Tr. 55-56):

Q. In terms of procedure you turn the pump off or not when you went in there?

A. Off.

Q. You turn it off, you go down in there and you said you replaced three belts; is that correct?

A. Yes, sir.

Q. And then you have to go back out to turn it back on; is that correct?

A. Yes, sir.

THE COURT: Excuse me just a second. Did you replace three belts? You said it had three belts.

A. Yes, sir.

Q. Now, did you leave? Did you turn it on and leave it on to check the alignment?

A. The alignment was pretty well in line. All I had to do was just replace the belts and readjust the tension on the belt.

Q. If the alignment was okay why would it be necessary to run the equipment for a little while before putting the guard back on?

A. Just like a car. If you change a fan belt you run it a little while then you check it for tension. If you feel it needs to be tightened up some more--

Q. So, it was to make sure the tension was right and if the belts were all loose you could tighten it back up?

A. Yes, sir.

Q. And then put the guard back on; is that correct?

A. Yes, sir.

On cross-examination, Mr. Durrance stated that the pump motor switch can be locked out by inserting a lock in the lever, but that he doesn't use a lock and simply pulls the switch down. He stated that there is no written rule or procedure that no one

goes on the platform with the motor running, and that "I don't like to go out there with all that electricity in the water" (Tr. 57). He stated that the belt broke the day before the inspector arrived, but that the pump continued to run with only two belts while the guard was off the day before the inspection. The new belts were put on at 7:30 a.m., the day of the inspection, and the pump was turned off while he did the work. No one else was in the area. After replacing the belts and tightening them, the guard was still off, and he went ashore and turned the motor back on and looked at the machinery from the bank and "it ran fine". He then left to load a truck and the inspector arrived at 10:30 a.m. The belts were running unguarded for approximately three hours. After the inspector left, he turned off the motor, checked the belt tension and found that it required no more adjusting. He then replaced the guard and turned the motor back on. He confirmed that he explained his belt changing work to the inspector, but that "he said he already saw it and had to write a citation" (Tr. 62-64).

In response to further questions, Mr. Durrance stated that there was no particular reason why he did not replace the guard after he replaced the new belts, but that there are four bolts which need to be removed or replaced when taking the guard on and off. He further stated that if the trucks had not come in for loading he would have finished with the belts and replaced the guard, but he would have waited 15 to 20 minutes to make sure the belt tension was correct. He told the inspector that he was going to replace the guard as soon as he finished, but the inspector left and did not know that he had replaced the guard (Tr. 65-67).

Louis Pollard, Jr., employed by the respondent as a dragline operator at the cited pit in question, testified that he was present when Mr. Crisp conducted his inspection on February 14, 1991. He stated that after Mr. Durrance learned who the inspector was he asked him if there was anything wrong, and the inspector informed Mr. Durrance that he could not run the pump without a guard. Mr. Durrance offered to replace the guard, and the inspector stated that he had already seen it (Tr. 86). Mr. Pollard confirmed that he and Mr. Durrance are the only persons who work at the pit, and that he has never been in the pit alone with the pump motor running. He has been with Mr. Durrance when pump maintenance was required, and the pump had to be removed on two occasions for maintenance (Tr. 87). Mr. Pollard stated that the ten foot platform where the pump is located is only used for the repair of the equipment, and that at the time of the inspection he was operating the dragline on the other side of the pit and Mr. Durrance changed the pump belts alone (Tr. 89).

Citation No. 3431918. 30 C.F.R. § 56.14101(a)(2).

Mr. Durrance stated that after checking the reverse alarm and horn, and with the loader on a slight incline downhill with the engine running, Inspector Crisp told him "to put it in neutral and pull out the parking brake. And the brake didn't hold". The foot service brakes were good and they held the machine, but the parking brake wouldn't hold the machine and he had to stop it with the foot brakes (Tr. 68-69).

Mr. Durrance stated that the terrain where he normally operates the loader is usually level with a few pot holes, and he explained that when the loader is initially started he must first wait for air pressure to build up before the parking brake can be automatically turned on, and the machine cannot be placed in gear until the pressure is up and the brake is turned off. When the machine is parked the bucket is lowered to the ground and the parking brake is on. The parking brake is not used when the loader is loading trucks on level ground (Tr. 70-71).

Mr. Durrrance identified pages from the loader operating manual (Exhibit R-1), including the procedures for testing the parking brake, and he confirmed that the inspector did not perform this test. He also confirmed that the inspector asked him to apply the parking brake while the machine was moving, and that this is contrary to the manual which states that the parking brake should not be applied while the machine is moving except in an emergency. After the inspector left, the brakes were adjusted the next day and tested the same way as the inspector had instructed him and "it worked fine and would stop the machine while it was rolling" and it held according to the manual instruction (Tr. 72-73).

On cross-examination, Mr. Durance stated that while the pit area was flat at the time of the inspection, the roadway which led in and out was on an incline and the loader was used on that road and was tested there (Tr. 73). He acknowledged that he did not always follow the manual instructions before starting the loader, and he explained the inspector's instructions which he followed in testing the brakes (Tr. 74-77). He stated that after the loader was stopped with the service foot brakes and in neutral gear, the inspector "told me to let it--make it roll again and then pull the parking brake" (Tr. 77). The subsequent tests after the inspector left were made after the parking brake was adjusted and the grease cleaned out (Tr. 78). When the inspector next returned, he did not test the brake again and simply asked if it had been repaired (Tr. 81). Mr. Durrance confirmed that the manual is kept on the loader, but he did not know whether the inspector knew this, and he did not show him the manual (Tr. 83).

Mr. Pollard confirmed that he was present when the loader parking brake was tested, could hear what was going on, and he described what he observed. He stated that the loader was on a slight downhill incline and the inspector told Mr. Durrance "to start rolling and put the parking brake on", and when he did, the loader did not stop. Mr. Pollard stated that he was not involved in the servicing of the parking brake and was not present when the inspector returned to abate the citation (Tr. 90, 92).

On cross-examination, Mr. Pollard stated that he was standing next to the inspector, and that after the loader backup alarm and horn were tested, the foot brake was tested first with the engine running. Mr. Durrance then shut the machine off. He was then told by the inspector to try the parking brake, and the inspector did not tell Mr. Durrance to take his foot off the service brake and let the machine roll. The loader was started again, and the inspector told Mr. Durrance to put it in gear and to apply the parking brake (Tr. 95-98).

David Butler, employed by the respondent as a mechanic, testified that he was instructed to go to the pit in question to perform some repair work on the cited loader and that he first met with Mr. Durrance who informed him "that an inspector had come in and he said that the parking brake it needed to be adjusted up" (Tr. 100) Mr. Butler stated that he adjusted the brake bands and inspected the linkage from the air pod to the brake pads, and found some grease on the outside of the drum. This was normal leakage from the hydraulic hoses, and the grease would not cause the brakes to malfunction. After making the adjustments, he and Mr. Durrance tested the loader following the same procedure as the inspector had previously instructed, and when the parking brake was applied with the machine rolling, it came to a stop. The test was performed on level ground at the bottom of the pit and not on the pit access road (Tr. 101-102).

Inspector Crisp was called in rebuttal by the petitioner, and he confirmed that while he was aware of the loader manual testing information, he did follow the manual testing procedure and he stated that "we have no rule for testing parking brakes" (Tr. 107). He stated that he tests the equipment wherever he finds it. He had no doubt that he did not ask Mr. Durance to put the loader in motion before applying the parking brake. He stated that his procedure while testing a loader on a grade is "to set the parking brake manually, then if it rolls there's no use going through another test" (Tr. 108). He stated that when Mr. Durrance applied the foot service brakes he was fully stopped. He then asked him to put the loader in neutral and to take his foot off the service brake and to apply the parking brake, and the loader rolled (Tr. 109). He confirmed that he has followed this test procedure for parking brakes seven or eight hundred times in his career and that he has never asked the

operator to put the machine in motion because "you can ruin the pads" (Tr. 109-110).

Mr. Crisp could not recall Mr. Durrance turning the machine off and then on again before testing the parking brake. He explained that the machine stopped after Mr. Durrance applied the foot service brakes. Mr. Durrance then put the parking brake on with his foot still on the service brake, and when he released his foot from the service brakes, the machine started rolling. At no time was the machine in motion while the parking brake was applied (Tr. 115-117).

With regard to the guarding citation, Inspector Crisp stated that he had no reason to doubt Mr. Durrance's testimony concerning the replacement of the pump motor belts. He confirmed that since he had already observed the condition he felt compelled to issue the citation, and that he would issue a citation whenever he finds such an unguarded piece of moving machinery in operation. If it were locked out, he would not bother, but if it were simply switched off and not locked out, he would still issue a citation (Tr. 113-114).

Petitioner's Arguments

The petitioner asserted that the evidence presented in this case establishes that the inspector observed that the pump motor belt drive was in motion and not guarded, and that the test performed by the loader operator established that the parking brake was inoperable. Under the circumstances, the petitioner concluded that the violations of the cited mandatory safety standards have been established and that the proposed civil penalty assessments are appropriate in view of the unlikelihood of any injuries, the limited hazard exposure, and a moderate degree of negligence (Tr. 117-118).

With regard to the guarding citation, petitioner asserted that the testimony establishes that there was a period of time when the belt drive was operating without the guard attached, and that the respondent's purported "rule of practice" was simply the operator's habit of not going on the platform when the motor was running and unguarded. Further, the petitioner asserted that in the event of an emergency, "habits may perhaps go", and that the intent of the standard is to protect individuals from their own carelessness. Petitioner disagreed that the exception found in subsection (b) of section 56.14107, applies in this case (Tr. 22, 29, 33-34, 119). The petitioner pointed out that the belt drive was not locked out, and there was no barrier preventing anyone from going to that location (Tr. 127).

With regard to the loader parking brake citation, the petitioner asserted that the inspector followed his normal testing routine when he had the loader operator test the parking

brake on a vehicle which was not in motion. Petitioner maintained that the loader went into motion when the parking brake was applied and it did not control the loader. The petitioner further pointed out that the mechanic testified that adjustments were made to the parking brake after it was tested, and this supports the fact that adjustments were needed to be made (Tr. 119).

Respondent's Arguments

With regard to the guarding citation, the respondent does not dispute the fact that the guard was not on the moving pump motor belt drive at the time Inspector Crisp initially observed the equipment in operation. The respondent's defense is based on an argument that the exception found in subsection (b) of section 56.14107 applies in this case. In support of this argument, the respondent asserted that the purpose of the platform area around the pump motor was to provide access for maintenance and repairs and that the only reason anyone goes to that area is to service or repair the pump. If one were required to stand seven feet away to repair the equipment, the exception would never apply. Given the fact that no one is ever in the area when the pump motor is running, the impossibility of any injury because of the manner in which the pit is operated and managed, and the fact that no one is ever there unless he were servicing the machine while it was off, respondent concludes that for the exception to have any reasonable meaning and application, one must conclude that it clearly applies in this case and that a violation has not been established (Tr. 26-28; 121, 125-126).

Respondent further argued that the platform area is not a working surface for any purpose other than to service the pump, and counsel stated "If it doesn't apply under these circumstances I can't imagine it ever applying" (Tr. 32). Respondent pointed out that subsection (b) does not require any guard or any particular restrictions on access, and it simply provides that moving parts be a certain distance from a working surface (Tr. 35). Further, respondent pointed out that the language of the citation that "as a rule" employees do not go to the platform area is erroneous in that it has been established that as a matter of policy no one ever goes to the area while the equipment is running (Tr. 120).

With regard to the loader parking brake citation, respondent asserted that the testimony suggests that the loader was not retested after the citation was issued, and that the initial test which the inspector supervised did not follow the manufacturer's instructions. Respondent maintains that the loader parking brake was tested while the machine was rolling, and there is no standard to determine how fast it was required to be stopped (Tr. 122). Respondent further argued that the test was conducted on a slight incline, and MSHA has not proved that the parking

brake would not hold the loader in accordance with the manufacturer's design specifications or testing instructions. Further, any adjustments made to the parking brake were made to accommodate a rolling stop (Tr. 123).

Findings and Conclusions

Fact of Violation.
Citation No. 3431918. 30 C.F.R. § 56.14101(a)(2).

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 56.14101(a)(2), because of the alleged failure of the parking brake on the cited loader to hold the machine as required by that regulatory standard. The cited standard provides as follows:

> If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

In Turner Brothers, Inc., 6 FMSHRC 1219, 1259 (May 1984), and 6 FMSHRC 2125, 2134 (September 1984), I affirmed violations of section 77,1605(b), for inadequate parking brakes on a coal haulage truck and an endloader based on tests which consisted of parking the equipment on an incline and setting the brakes to determine whether they would hold. In both instances, the brakes would not hold the equipment, and I concluded that the brakes were inadequate. In the case of the truck, the inspector tested the parking brake by instructing the driver to stop the truck on a small incline and set the brake. When he did, the brake would not hold and the truck rolled. In the case of the loader, the inspector asked the driver to demonstrate the parking brake. The driver set the brake and raised the machine bucket, and the machine rolled.

In Thompson Coal & Construction, Inc., 8 FMSHRC 1748 (November 1986), I affirmed a violation for a defective parking brake on a Caterpillar front-end loader because the parking brake would not hold the loader in place when the brake was set. The inspector had the driver set the brake, and when the machine was accelerated while in reverse gear, it moved backwards with the brake set. Although I observed that the validity of testing the effectiveness of the parking brake by operating the machine in reverse gear on level ground was questionable, I considered the fact that the operator conceded that the parking brake was defective because certain parts needed replacement.

In Concrete Materials, Inc., 2 FMSHRC 3105 (October 1980), and Medusa Cement Company, 2 FMSHRC 819 (April 1980), Judge Melick and former Judge Cook affirmed violations for inadequate brakes on haulage trucks based on tests conducted by the drivers by driving the trucks on inclines to determine their braking and

stopping capability. In the Medusa Cement case, the inspector specified the testing method used to support his determination that the brakes were inadequate. The inspector testified that when the driver placed the vehicle in third and fourth gear, placed his foot on the brake and depressed it to the lower limit of travel and applied acceleration, the truck began to "creep". The judge rejected the operator's contentions that the inspector did not test the truck in a loaded position for stopping and holding on a grade, and that there was no valid correlation between the test performed and the requirement that a loaded truck should stop and hold on any grade over which it had to travel.

The judge in Medusa Cement held that the respondent failed to rebut the expert testimony of the inspector regarding the adequacy of the brakes, and failed to establish that the test yielded an inaccurate result. In response to the operator's further contention that the tests could have resulted in damage to the equipment, the Judge observed that at most, the evidence relied on by the respondent "establishes a disagreement amongst experts as relates to the proper method of testing brakes", 2 FMSHRC 823. The judge further concluded that the test conducted by the inspector and his interpretation of the results obtained sufficiently established a prima facie violation.

In Island Construction Co., Inc., 11 FMSHRC 2448 (December 1989), Judge Broderick affirmed a violation of 30 C.F.R. § 56.14101(a)(2) after finding that a front-end loader which was used on level ground had an inoperative parking brake. In IMC Fertilizer, Inc., 11 FMSHRC 706 (April 4, 1989), the judge affirmed two violations concerning inadequate service brakes on two front-end loaders. The inspector tested the vehicles by instructing the operators to start the loaders and drive forward until he dropped his hand and then to apply the brakes. In both instances, the vehicles continued to travel 7 to 8 feet after the brakes were applied, and the operators stated that the brakes felt "spongy". The first violation was abated after hydraulic fluid was added to the brake reservoir, and when re-tested, the vehicle stopped in 2 to 3 feet. The second violation was abated after the brakes were adjusted, and when retested, the vehicle stopped within two or three feet. Although Judge Broderick agreed that the operator's contention that the addition of brake fluid and the brake adjustments had no effect on the adequacy of the brakes was not free from doubt, he nonetheless accepted the inspector's findings based on his "extensive experience in the industry and as a Federal inspector", 11 FMSHRC 708.

In several other "brake testing" cases, violations for inadequate brakes have been affirmed on the basis of an inspector's observation that a cited truck was "pulling very hard to the right", Mineral Explorations Company, 6 FMSHRC 329, 342 (February 1984); an inspector's observation that a cited truck

was "slow to stop" after the brakes were tested on an incline and the brakes would not hold the truck, Greenville Quarries, Inc., 9 FMSHRC 1390, 1430 (August 1987); and a determination by an inspector that a brake shoe was not making contact with the drum because he could remove a piece of paper which he placed under the drum with the brake depressed, Mineral Explorations Company, 6 FMSHRC 316, 322 (February 1984).

In Wilmot Mining Company, 9 FMSHRC 684, 688 (April 1987), the commission affirmed a judge's finding of a violation of section 77.1605(b), for inadequate brakes on a Terex front-end loader which was involved in a fatal accident. The judge's finding was based on evidence which indicated that the brake master cylinder and an auxiliary brake cylinder were low in brake fluid, even though the brakelines, wheel cylinder and hydraulic brake lines were intact, i.e., they had not leaked because of the accident. When tested at operating speed, the loader would not stop within the normal expected distances. Rejecting the operator's contention that the evidence did not support the judge's finding as to the cause of the inadequacy of the brakes, the Commission stated in pertinent part as follows at 9 FMSHRC 688:

> To prove a violation of this standard, however, the Secretary is not required to elaborate a complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. * * * Whatever the precise cause of the breaking defect, the evidence amply supports the judge's finding that the Terex was not "equipped with adequate brakes," in violation of the cited standard (emphasis added).

I take note of the fact that subsection (b) of section 56.14101, provides detailed instructions and procedures for testing service brakes on self-propelled mobile equipment. The only references to front-end loaders and parking brakes are found in subsection (3)(i), which states that "Front end loaders shall be tested with the loader bucket empty", and subsection (3)(iii), which provides that "parking or emergency (secondary) brakes are not to be actuated during the test" of braking systems which are designed to bring the equipment to a stop under normal operating conditions.

In the instant case, the loader parking brake was tested on a slight incline after the inspector observed it coming out of the pit. The inspector testified credibly that the loader operator would use the parking brake if he were parked on a ramp, or if he lost his service brakes, and that there are dips and inclines in the pit areas. Although the truck loading area was usually flat, loader operator Durrance acknowledged that the then existing roadway in and out of the pit was inclined and that the loader traveled over that road. Dragline operator Pollard, who

occasionally operated the loader, testified that he uses the parking brake after he has stopped working or loading trucks, and he characterized it as an "emergency brake" and "safety device" (Tr. 98).

The respondent's assertions that the citation should be vacated because of the inspector's failure to retest the loader before abating the citation and his failure to follow the manufacturer's manual testing procedures are rejected. While it is true that Mr. Crisp acknowledged that he did not follow the manufacturer's manual testing instruction, I cannot conclude that this renders the citation defective. I take note of the fact that the manual calls for testing the parking brake on level ground, and the cited standard section 56.14101(a)(2) requires that a parking brake be capable of holding the equipment with its typical load on the maximum grade it travels. Under the circumstances, I conclude and find that any test conducted to insure compliance with the standard must take into account the normal production or operating conditions under which the machine may be used. In this case, the machine was tested on a slight incline after the inspector observed it coming out of the pit.

Inspector Crisp has served as an MSHA inspector for 16 years and has conducted in excess of one thousand inspections. Although he indicated that there is no fixed MSHA rule for testing loader brakes, he testified credibly that he has followed the same test procedures that he described in this case seven or eight hundred times during his career as an inspector (Tr. 8, 109). In this case, the inspector determined that no further tests were necessary after the initial test reflected that the parking brake would not hold the loader with an empty load while on a slight downhill grade. Since the empty loader failed to pass this most minimal test, the inspector concluded that the parking brake would not hold the loader with a typical load on the maximum grade of travel.

Loader mechanic Butler agreed that if a parking brake which has been tested on level ground does not hold the equipment, one can probably assume that it probably will not hold on an incline. Under all of these circumstances, I cannot conclude that the inspector's conclusions were erroneous or unreasonable.

With regard to Mr. Crisp's alleged failure to reinspect the loader before abating the citation, I find Mr. Crisp's testimony that he recalled reinspecting the machine and asking Mr. Durrance to engage the brake, and that it stopped when the brake was applied, to be credible. In any event, Mr. Durrance confirmed that he tested the brake after the grease had been cleaned off and certain adjustments made, and that he followed the same testing procedures as the inspector had initially instructed him to follow at the time the citation was issued, and the brake functioned properly. Mechanic Butler confirmed that he adjusted

the parking brake and that he and Mr. Durrance followed the same test procedure as the inspector had previously instructed and that the brake functioned properly.

In Tuscola Stone Company, 11 FMSHRC 447 (March 1989), the mine operator was charged with a failure to correct a defect on a haul truck used to haul rock from a pit to a stockpile. The inspector checked the truck on a slight grade while it was empty and found that the parking brake was inoperative. However, the inspector conceded that the test he performed on the parking brake, i.e., attempting to stop a moving truck with the parking brake, was not the "standard test" used by MSHA, and that a parking brake is not designed to bring a moving haul truck to a stop. Under these circumstances, Judge Melick found that the test utilized by the inspector was not appropriate to determine the adequacy of the parking brake and he vacated that part of the citation which cited the alleged defective parking brake.

In the case at hand, the respondent asserted that the inspector instructed the loader operator to test the parking brake while the machine was in motion and that this was contrary to the testing instructions found in the manufacturer's manual and subjected the machine to possible damage. Mr. Durrance testified that the inspector "told me to put the machine in gear, make it roll down this little incline and put in neutral and pull out the parking brake. And the brake didn't hold" (Tr. 68). He further testified that when he applied the parking brake he was in gear and in motion and that the inspector asked him to put the parking brake on while the machine was moving (Tr. 72).

Mr. Durrance conceded that he did not always follow the loader instruction manual before starting the vehicle, that he did not test the parking brake according to the manual instructions prior to the inspection by Mr. Crisp, and that the parking brake did not work when he tested it following the inspector's instructions (Tr. 74, 82-84). Mr. Durrance testified that before the testing of the loader parking brake began, he and the inspector were on the ground next to the machine which was parked on a grade, and that the engine was off, the bucket was down on the ground, and the parking brake was on. After testing the horn and backup alarm, Mr. Durrance stated that the third test was "to put the machine in motion and turn on the parking brake. Make the machine roll, put it in gear and make it roll and put it in neutral and put on the parking brake". He stated that what the inspector asked him to do next after the horn and alarm were tested was to apply his service brakes, and that after he stopped the loader with the service brakes, he placed it in neutral gear and the inspector then "told me to let it--make it roll again and then pull the parking brake"
(Tr. 75-77).

Inspector Crisp denied that the loader was in motion when the parking brake was applied by Mr. Durrance during the test. He stated that in all of his years of testing parking brakes he has never asked an equipment operator to put a machine in motion before applying the parking brake because it could ruin the brake pads. Although Mr. Crisp initially stated that Mr. Durrance "wasn't stopped completely and I asked him to apply the parking brake and then let off the service brakes" (Tr. 37), his subsequent detailed and consistent testimony in response to further questions on cross-examination and in rebuttal, which I find credible, reflects that Mr. Durrance initially tested the loader service brakes while the loader was moving, and that after the machine was fully stopped, Mr. Durrance engaged the parking brake, with his foot still on the service brakes, and when he took his foot off the service brakes, the machine continued rolling with the parking brake still engaged (Tr. 37-38; 48-50; 109-110; 115-117).

Mr. Pollard, who was present when the loader was initially inspected by Mr. Crisp, and operated by Mr. Durrance, testified on direct examination that after testing the horn, the backup alarm, and the foot brakes, the inspector "told him to start rolling and put the parking brake on" (Tr. 91). Mr. Pollard confirmed that Mr. Durrance was moving when he applied the parking brake and that the loader did not stop (Tr. 92). On cross-examination, Mr. Pollard reiterated that Inspector Crisp told Mr. Durrance "to start it moving and then put on the parking brake" (Tr. 95). However, in response to several follow-up questions, Mr. Pollard confirmed that the service brakes were tested first, and after they held the loader in place, Mr. Durrance "shut it off" and the inspector "told him to try the parking brake. Pull it up" (Tr. 96).

Mr. Pollard confirmed that he had no knowledge that the inspector told Mr. Durrance to take his foot off the service brake and let the machine roll, but he stated that "The equipment is loud and there's no way he could have told him without shutting down that equipment to try the parking brake" (Tr. 96). Mr. Pollard then testified that he actually observed Mr. Durrance apply the service brake while the loader was moving, and when the loader stopped, Mr. Durrance turned the machine off, cranked it up again, and the inspector then told him "to put it in gear and then put the emergency stop on" (Tr. 97). Mr. Pollard confirmed that the "emergency stop" is the "parking brake", and he indicated that if he were to test the emergency brake on his automobile, he would not do it while the vehicle was rolling (Tr. 98).

After careful examination of all of the testimony, I find Mr. Pollard's testimony to be somewhat contradictory. His initial testimony lends support to Mr. Durrance's claim that the

inspector instructed him to apply the parking brake while the machine was in motion. However, Mr. Pollard's responses to more probing questions support the inspector's version of the parking brake test. Although the inspector could not recall that Mr. Durrance turned the loader off between the time he tested the service brakes and the parking brakes, Mr. Pollard's testimony is otherwise consistent with that of the inspector.

After careful consideration of all of the testimony, and having viewed the witnesses during the course of the hearing, and taking into account the inspector's unrebutted and credible testimony concerning his many years of inspection experience, I find him to be a reliable and credible witness and I accept his contention that he did not instruct Mr. Durrance to place the loader in motion before engaging the parking brake or that the loader was moving when Mr. Durrance engaged the parking brake. Accordingly, I conclude and find that the test administered by the inspector which led him to conclude that the cited parking brake would not hold the machine was a reasonably proper and valid test, and one which the inspector had routinely followed during his many prior inspections. Under the circumstances, and in view of all of my findings and conclusions, I conclude and find that the petitioner has established a violation by a preponderance of the credible and probative evidence presented in this case. The citation IS AFFIRMED.

Fact of Violation

Citation No. 3431917. 30 C.F.R. § 56.14107(a).

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 56.14107(a), because of an unguarded belt drive on a pit discharge pump. The cited standard provides as follows:

> § 56.14107 Moving machine parts.
>
> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, 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 respondent does not dispute the fact that the guard was off the cited running pump belt drive when the inspector observed it on the day of the inspection, and the evidence establishes that the pump was running without the guard in place for at least

three hours prior to the inspector's arrival, as well as the day prior to the inspection.

The respondent established that the pump can only be turned on and off by a switch located on a pole on shore. Although the switching lever was equipped to accommodate a lock, the individual who generally serviced the pump (Durrance) acknowledged that he simply pulled the switch down to turn off the pump and did not lock it out before servicing it or going to the platform area. Further, although the respondent suggested that its "policy and procedure" prohibited employees from being on the platform while the pump was running, there is no evidence that this policy was in writing or incorporated in any work procedures given to employees. The "policy and procedure" consisted of Mr. Durrance's "habit and practice" of not going to the platform with the pump running, and his personal dislike for being on a platform over water with electrical equipment in operation.

On the facts of this case, it would appear that the respondent's pit operation is essentially a two-man operation, and that Mr. Durrance performed many job tasks in addition to servicing the pump. The fact that he had to leave the pump motor unguarded and running while awaiting the belts and loading trucks suggests that he was busy. In light of Mr. Durrance's admissions that he did not lock out the pump before servicing it, and that he did not always follow the loader manual instructions before starting the loader, I suspect that these omissions may be attributed in part to the fact that he had many jobs to perform. Although I have no reason to disbelieve that Mr. Durrance always turned off the pump before he actually serviced it, I have some reservations and doubts with his assertions that he always traveled back and forth from the pump switch location on shore to the platform each time he turned the pump on to observe the belt tension and adjustments, and that there was no need for him to be on the platform to observe the running belt because he could see from the top of the bank whether the belts had the proper tension or were properly adjusted.

Thompson Brothers Coal Company, 6 FMSHRC 2094 (September 1984), concerned an interpretation and application of guarding standard 30 C.F.R. § 77.440(a), which provided as follows:

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

Judge Broderick rejected Thompson Brothers' argument that it was virtually impossible for a person not suicidally inclined to

contact the cited unguarded moving parts, and he accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission stated as follows at 6 FMSHRC 2097:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983): Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

In Leblanc's Concrete & Mortar Sand Company, 11 FMSHRC 660 (April 1989), I vacated a citation for an alleged violation of guarding standard 30 C.F.R. § 56.14001, which contained language identical to the section 77,400(a) guarding requirement considered by the Commission in Thompson Brothers Coal Company. The factual setting in the Leblanc's Concrete case was virtually identical to the facts presented in the instant case. Leblanc was a very small sand operator who was cited for failing to guard a belt drive on a "floating" fresh water pump which was located on a 6 x 6 foot barge supported by floats approximately 20 to 30 feet from shore. The pump motor was activated by a switch located in a plant on shore approximately 200 to 300 feet from the barge, and any priming of the pump was done on shore. The inspector believed that it would be unlikely that anyone would be on the barge when the pump started from the plant, and because of the location of the pump, the inspector did not believe that it was likely that anyone would be exposed to a hazard. Leblanc established that no one was required to be on the barge during the normal operation of the pump, and although the pump may have been serviced once a week, it was deenergized and shut down when service was performed. If major repairs were required, the pump was lifted out of the water with a cherry picker and taken ashore

for repairs. Under these circumstances, I found that a violation had not been established, and I vacated the citation for the following reason (11 FMSHRC 678):

> I find no evidence to support any reasonable conclusion that there existed a reasonable possibility of anyone contacting the unguarded pump belt drive unit in question, and the petitioner has presented no evidence to establish that anyone would ever be near the belt drive while the pump was in operation.

I take note of the fact that in the Thompson Brothers Coal Company case, the Commission adopted its "likelihood of contact and injury" test after analyzing the "may cause injury" language of section 77.400(a). The comparable standard for surface metal or nonmetal mines, including open pit mines, 30 C.F.R. § 56.14001, contained the identical language found in section 77.400(a), and it was in effect at the time of my decision in Leblanc's Concrete & Mortar Sand Company. However, section 56.14001, has since been revised and renumbered, and the respondent has been charged with a violation of the newly designated section 56.14107, which does not contain the language which the Commission considered in Thompson Brothers Coal Company, and which I relied on in vacating the citation in Leblanc' Concrete and Mortar Sand Company.

The present language found in the cited mandatory standard, 30 C.F.R. § 56.14107(a), specifically and unequivocally requires guarding for any of the enumerated moving machine parts, as well as any similar moving parts that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a moving part. Although the parties presented no specific evidence with respect to the physical or technical characteristics of the cited pump belt drive, the respondent does not dispute the fact that the cited equipment was not guarded, nor has it asserted that the equipment was not the kind covered by the standard. I conclude and find that the cited pump belt drive was a moving machine part within the meaning of section 56.14107(a), and based on the unrebutted and credible testimony of the inspector, contact by anyone with the unguarded belt drive in question could have resulted in an injury.

After careful review and consideration of all of the evidence in this case, I conclude and find that it supports the petitioner's contention that the cited moving machine part which could have caused an injury if contacted by anyone was not guarded. Although it is true that the pump was located on a platform some 20 feet from shore, access to the stairway, walkway, and platform where the pump was located were not blocked, and the pump was positioned "waist high" within reach or contact by anyone walking or standing next to it. Further, while it may be true that no one is on the platform when the pump is

running, and that it is turned off when maintenance is performed, I conclude and find that these preventive measures may mitigate the gravity and potential hazards against which the standard is directed, but they may not serve as a defense to the violation.

After further consideration of the arguments concerning the application of the exception found in subsection (b) of the cited standard, I agree with the petitioner's position that the exception does not apply, and I reject the arguments of the respondent to the contrary. I conclude and find that the exception is clearly inapplicable on the facts of this case. Under the circumstances, and in view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation and the citation IS AFFIRMED.

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

In conclude and find that the respondent is a very small operator, and that the payment of the civil penalty assessments for the violations in question will not adversely affect its ability to continue in business.

History of Prior Violations

The respondent has an excellent compliance record and has not previously been cited with any violations of the Act.

Gravity

The inspector concluded that any injuries resulting from the violations were unlikely and he concluded that the violations were not significant and substantial. I agree with those determinations, and I conclude and find that the violations were non-serious.

Negligence

The Act imposes a high degree of care on a mine operator to insure compliance with all mandatory safety standards and to preclude injuries to miners. The inspector found a moderate degree of negligence with respect to both of the violations. I conclude and find that both violations were the result of the respondent's failure to exercise reasonable care. I agree with the inspector's moderate negligence finding with respect to the guarding violation, and with respect to the parking brake violation, I conclude and find that it was the result of a low degree of negligence on the part of the respondent.

Good Faith Compliance

I conclude and find that he respondent demonstrated rapid good faith compliance in correcting the cited conditions and abating the violations.

Civil Penalty Assessments

Based on the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $20 is reasonable and appropriate for Citation No. 3431917 (guarding violation), and that a civil penalty assessment in the amount of $15 is reasonable and appropriate for Citation No. 3431918 (parking brake violation).

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $20 for section 104(a) Citation NO. 3231917, February 14, 1991, 30 C.F.R. § 56.14107(a), and a civil penalty assessment of $15 for section 104(a) Citation No. 3431918, February 14, 1991, 30 C.F.R. § 56.14101(a)(2). Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEB 10 1992

LARRY E. SWIFT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 90-198-D
	:	MSHA Case No. PITT CD 90-09
CONSOLIDATION COAL COMPANY,	:	PITT CD 90-19
Respondent	:	Dilworth Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw his complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge

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

FEB 11 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	**CIVIL PENALTY PROCEEDING**
	:	Docket No. CENT 91-101
	:	A.C. No. 41-02847-03525
v.	:	Gibbons Creek Mine
NAVASOTA MINING COMPANY INCORPORATED, Respondent	:	
NAVASOTA MINING COMPANY INCORPORATED, Contestant	:	**CONTEST PROCEEDING**
	:	Docket No. CENT 92-21-R
	:	Citation No. 32422222-03; 9/28/91
v.	:	Gibbons Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine I.D. 41-02847

DECISION

Before: Judge Lasher

These two proceedings (one penalty and one review case) were consolidated for processing by my oral order on December 4, 1991.

In the penalty docket, the Secretary of Labor (herein "MSHA") originally sought assessment of penalties for two alleged violations described in two Citations, Nos. 3242221 and 3242222.

I. Citation No. 324221.

In its Motion to Amend Complaint Proposing Penalty filed October 24, 1991, MSHA moved to withdraw this Citation, the grounds for which motion, I conclude, being that the violation did not occur. Accordingly, MSHA's motion is granted and Citation No. 3242221 will be vacated as reflected in my order at the end of this decision.

II. Citation No. 3242222

A. Chronology

This Section 104(a) "Significant and Substantial" Citation was issued on August 20, 1990, by MSHA Inspector Gerald Stephen, alleging a violation of 30 C.F.R. § 77.1600 (c), more particularly specified subsequently herein. It was "Terminated" on August 22, 1990, by Inspector Stephen after Navasota took corrective action to abate the allegedly violative condition originally cited. On August 30, 1990, a first Modification issued to change the date of the alleged violation from "8-18-90" to "8-17-90." The second modification, numbered 3242222-03, which is the subject of the dispute here, was issued by Inspector Stephen on September 30, 1991, changing the standard allegedly infracted from 77.1600(c) to 77.1600(b).

B. Nature of the Modification

The alleged violation, as originally charged to be an infraction of 30 C.F.R. § 77.1600(c) [1], described such as follows:

> Side clearance of the A-1 haul road proceeding to and exiting from the truck dump is hazardous to mine workers and such area was not adequately and conspicuously marked and warning devices were not adequately installed to insure the safety of the workers. On 8-18-90, two Watco CH-120 haul trucks collided at a location approximately one-fifth mile south of the truck dump on the A-1 haul road after failing to complete a lane change, resulting in fatal injuries to a coal truck operator.

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[1] This standard, under the general heading "Loading and Haulage" provides:

> (c) Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers.

Abatement of this alleged violation, as described in the Termination issued on August 22, 1990, was achieved as follows:

> Stop signs and warning devices such as location markers and safety cones were installed as required. Side clearance of the road was improved by reducing the topsoil stockpile height to provide better visibility. Traffic patterns were modified to prohibit lane changes.

After the first modification on August 30, 1990, described above, the second modification (3242222-03) was issued 13 months later, changing the violation charged to one of 30 C.F.R. § 77.1600(b) [2], to wit:

> After additional review of this investigation, this Citation is modified as follows:
>
> 1. Change Section 1 - Violation Data, Item No. 8, condition or practice to: Standardized traffic rules, signals, and warning signs were not posted at a location approximately one-fifth mile south of the truck dump, on the A-1 haul road where a lane change had been permitted by management. A fatal powered haulage accident occurred at this location, resulting in fatal injuries to Gloria Smith, a coal haulage truck operator.
>
> 2. Change Item 9.c. Part/Section of Title 30 C.F.R. to: 77-1600(b).

In addition to its contention that a terminated citation cannot be subsequently modified, Navasota also contends, inter alia, that:

a. The Secretary cannot modify unilaterally or otherwise Citation No. 3242222 (which was abated, terminated, and contested before the Commission)

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[2] 1600(b) provides:

> Traffic rules, signals, and warning signs shall be standardized at each mine and posted.

by changing, more than 13 months after its issuance, the condition or practice allegedly constituting a violation from an alleged failure to provide adequate side clearance on a haul road to an alleged failure to post standardized traffic rules, a condition or practice completely different in nature from the condition or practice described in the original citation, and

b. Modification No. 3242222-03 was not issued with reasonable promptness and Navasota is prejudiced by its issuance.

It is preliminarily noted that MSHA has conceded that a violation of 30 C.F.R. § 1600(c) did not occur. [3] This takes care of the original charge in the original Citation, No. 3242222, and permits focusing on the remaining charge of violation--that contained in the modification, No. 3242222-03. Is a charge of violation of a new safety standard containing a description of a different violative practice or condition properly brought by modification of the original citation after such has been abated and terminated?

The "Termination" in question was achieved here by the MSHA inspector's completion of MSHA Form 7000-3a (Mar. 85 revised) on August 22, 1990, and his checking on Line 8 C thereof (from a choice of "Vacated," "Terminated" and "Modified") [4] that the

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[3] At page 2 of its Motion to Amend Complaint, it states "At this time, the Secretary will not allege that side or overhead clearances on the haulage road which was the subject of the investigation were hazardous. More specifically, on page 2 of its Amended Complaint, MSHA states:

> It does not appear that a violation of 30 C.F.R. § 1600(c) occurred; however, the Secretary believes that the regulation which should have been cited is 30 C.F.R. § 1600(b), which deals with traffic rules, signals, and warning signs.

[4] In addition to these options, including the noteworthy alternative of modification, MSHA also at this time could have proceeded to issue other newly numbered Citations for any additional violations it believed were committed.

original Citation was being "Terminated." On the form, the Inspector indicated that the justification for the action was the action taken taken by the mine operator to abate the conditions and practices initially alleged to be an infraction.

Since the "Termination" does not vacate (or modify) the Citation, what then does a termination accomplish? Its clearest purposes and effects are:

(a) MSHA's acknowledgement that the mine operator has satisfactorily abated the violation charged;

(b) an ending of the mine operator's duty to engage in further abatement,

(c) a termination of the mine operator's exposure to "failure to abate" enforcement action under Section 104(b) of the Act.

Most certainly, allowing modification of a Citation to change the safety standard and the description of the violation would cancel "(a) and revive the mine operator's duties amd exposures under "(b)" and "(c)."

In any event, and as Navasota points out, I have previously ruled on the issue presented here in a prior matter which is presently on Commission review. [5] In my Order Denying Motion for Partial Summary Judgment (January 22, 1991) therein, it was held that "... a Citation can be modified after its termination to alter or amend allegations relating to penalty assessment factors but not to materially change the nature of the violation charged, or the description of the violation charged ... ." Since this Order was not published, a copy thereof is attached as Attachment "A" hereto.

That ruling is found applicable to the situation in the instant proceeding, where the safety standard itself was unilaterally changed to charge a different violation, and the description of the alleged infraction also was unilaterally modified after abatement and termination to indicate a violation of a different nature than that originally charged.

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[5] Cyprus Tonopah Mining Corp., 13 FMSHRC 1523, 1527 (September 1991), review granted, November 1, 1991.

Navasota's position [6], replete with a factual background and points and authorities, has been reviewed and found meritorious. It is therefore adopted. [7] Since all of MSHA's enforcement documentation (two citations and one modification) are involved herein, and the issues raised thereby are resolved favorably to Navasota, the subsequent order disposes of the two proceedings at hand.

ORDER

1. MSHA's motion to modify the original Citation, No. 3242222, is **DENIED.**

2. Navasota's contest in Docket No. 92-21-R is found meritorious and Modification No. 2432222-03 is **VACATED.**

3. Citation No. 3242221 is **VACATED.**

4. Citation No. 3242222 is **VACATED.**

5. Docket No. CENT 91-101 is **DISMISSED.**

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

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[6] Set forth in its "Opposition to Secretary's Motion to Amend Complaint and Navasota's Motion to Dismiss."

[7] The posture of this matter as framed by the Motion, Opposition, admissions, and pleadings, makes possible final trial-level determination of the issues by decision rather than by an order denying MSHA's motion.

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DENVER, CO 80204
January 22, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-202-M A.C. No. 26-02069-05507
v.	:	
CYPRUS TONOPAH MINING CORP., Respondent	:	Cyprus Minerals

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

After the Citation was issued indicating one miner was exposed to the hazard created by the alleged violation, Respondent abated the conditions constituting the alleged violation and MSHA issued a "termination" of the Citation. Thereafter, MSHA issued a modification of the Citation to show five miners were exposed. Respondent moves for summary judgment on the principle that a Citation, once terminated, cannot be modified. The Secretary opposes this motion. The Secretary's position is found meritorious and is adopted here as though set forth herein.

Briefly, a Citation is usually issued during an inspection based on an Inspector's observation and understanding of what occurred. The Citation has two general aspects--the first describes the nature of the alleged violation, for example, roof control, electrical, etc., the regulation allegedly infracted, and sets a time within which the mine operator must abate the allegedly violative conditions. The second aspect of the Citation sets forth penalty assessment factors which are not readily apparent, i.e., negligence and gravity (including the likelihood of the contemplated hazard coming to fruition and the number of miners exposed). [1] Finally, as noted below, the Citation, in

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[1] Two points are noted at this juncture: of the four remaining mandatory penalty assessment factors, two factors are not mature or ripe at the time of inspection; the mine operator's good faith in abatement, and whether the mine operator is going to assert an economic defense (inability to pay penalties) in mitigation of penalty. Another factor--the operator's previous history of violations--is not obtainable until after the inspection and computerized information is tabulated up to the date of the inspection. The fourth factor--the operator's size--is usually not ascertained at the time of the inspection which is focused on safety and health determinations, rather than on penalty assessment factors. (continued)

Commission procedure and trial practice, serves more as an initial pleading and informs the mine operator and others as to the details of MSHA's allegations of violation more fully than does the so-called Complaint (Proposal for Penalty) commonly filed by MSHA in penalty proceedings. MSHA's administrative termination of a Citation does not **VACATE** it.

Keeping these points in mind, it is clear that permitting MSHA to amend (modify) the Citation in the manner shown is in effect an amendment of its initial pleading, does not change the nature of the violation alleged, and does not prejudice the Respondent Mine operator. It sets forth MSHA's version of a fact question: How many miners were exposed? Respondent can challenge MSHA's version and present its own evidence on this question.

Accordingly, having considered the matter, it is held that a Citation can be modified after its termination to alter or amend allegations relating to penalty assessment factors but not to materially change the nature of the violation charged, or the description of the violation charged set forth in the Citation.

Respondent's Motion for Partial Summary Judgment is **DENIED.**

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fn. continued

The second point noted parenthetically is that the number of miners exposed to an alleged hazard--in conection with the subject violation charged--is not an element of the alleged violation, that is, it is not a critical consideration in determining whether the violation charged did occur. Should this matter be litigated at formal hearing and the evidence showed that three--not one or five--miners were exposed to a hazard, the proper procedure would be for the prosecution to move to amend its pleading (in Commission practice, the Citation itself) to conform to the evidence and such should be done at hearing and granted.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEB 12 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 91-1113
	:	A.C. No. 15-14422-03553D
v.	:	
	:	Docket No. KENT 91-1114
WALKER COAL COMPANY, Respondent	:	A.C. No. 15-13359-03565D
	:	
	:	No. 1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On January 21, 1992, the Secretary filed a motion to approve a settlement between the parties in the above cases. The cases include five alleged violations of 30 C.F.R. § 70.209(b), each of which was originally assessed at $1000. The Secretary continued to assert that the violations resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to the reduction in the total penalties from $5,000 to $4,000.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement motion is APPROVED. The operator is ordered to pay within 30 days of the date of this order the sum of $4,000 for the violations charged in these proceedings.

James A. Broderick
Administrative Law Judge

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FEB 12 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 91-636
	:	A.C. No. 11-00586-03654
v.	:	
	:	Murdock Mine
ZEIGLER COAL COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Zeigler Coal Company, Fairview Heights, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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 a civil penalty assessment of $329, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.507. A hearing was held in St. Louis, Missouri, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2), whether the violation was "significant and substantial," and (3) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. 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. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1, et seq.

3. Mandatory safety standard 30 C.F.R. § 75.507.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Commission has jurisdiction in this proceeding.

2. The respondent owns and operates the Murdock Mine, an underground mine extracting bituminous coal, and the mine affects interstate commerce.

3. The respondent extracted 14,918,109 tons of coal at all of its mines ending on February 5, 1991. The Murdock Mine extracted 994,759 tons of coal from February 5, 1990 to February 5, 1991.

4. Respondent had 183 violations in the preceding 24 months ending on May 30, 1991, at the Murdock Mine and Mine No. 11.

5. The payment of the full civil penalty assessment for the citation in question will not impair the respondent's ability to continue in business.

6. On May 1, 1991, Mine Engineers Richard Gates and Mark Eslinger conducted a petition investigation of the Murdock mine. A chemical smoke cloud was used to trace air from the No. 1 and No. 2 working places through the check curtain in the No. 3 entry and outby in the No. 3 entry over golf carts parked in the entry. The golf carts were located outby the last open crosscut. This condition was in unit 2 which was driving 1 main west entries off the 2 north off the 3 main west off the main south. Mr. Gates issued Citation No. 3535675 for an alleged violation of 30 C.F.R. § 75.507.

Discussion

Section 104(a) S&S" Citation No. 3535675, issued on May 1, 1991, cites an alleged violation of 30 C.F.R. § 75.507, and the cited condition or practice states as follows:

> The air current used to ventilate the working places of unit No. 2, ID 002, was being coursed over non-permissible power points outby the last open crosscut.

A chemical smoke cloud was used to trace the aircurrent from the No. 1 and No. 2 working places through the check curtain in the No. 3 entry and outby in the No. 3 entry over golf carts parked in the entry. The golf carts were located outby the last open crosscut.

Petitioner's Testimony and Evidence

MSHA Supervisory Engineer, Mark O. Eslinger testified that he is a ventilation supervisor and his duties include supervising three ventilation inspectors, and evaluating and approving mine ventilation plans. He also serves as a member of an MSHA committee that is revising subpart D of the ventilation regulations, and he holds a college degree in civil engineering and is a registered professional engineer in the State of Indiana. Mr. Eslinger confirmed that he was at the mine on May 1, 1991, with MSHA engineer Richard Gates conducting an investigation in connection with a section 101(c) modification petition concerning the application of section 75.1105, and the ventilation of transformer stations (Tr. 4-8).

Mr. Eslinger confirmed that Mr. Gates issued the citation, and that he is his supervisor and was with him at all times. Mr. Eslinger stated that upon arriving on the No. 2 unit he observed that the check curtains that were placed across the neutral entries were "standing out like a sheet in the wind" and were leaning in an outby direction away from the face, which indicated that air was coming in and around and under the curtain. He identified Exhibit R-7 as a sketch of the prevailing conditions as he observed them, and he confirmed that the air was blowing in the outby direction away from the face at the "pull-through curtain" and he marked the location of that curtain on the sketch (Tr. 8-12).

Mr. Eslinger stated that he traced the movement of the air with a smoke tube test to verify that it was pulling through the curtain in question in an outby direction in the direction of the arrows shown in entry No. 3 as shown on the sketch. He also found air flowing in, around, and under another curtain in the entry and it was standing out "like a sheet in the wind on a clothes line". Two company officials were present when he performed his tests. He also determined that the air was flowing from the last open crosscut into the No. 3 entry, and he traced the air between the No. 2 and No. 3 entry and found that the air was coming out of the working place of the No. 2 entry into the last open crosscut (Tr. 13-15). He further explained the smoke tests which he conducted to confirm where the ventilation air was coursing through the entries, and he marked these locations on his sketch (Tr. 15-18).

Mr. Eslinger stated that after conducting the tests he informed mine superintendent Russ Carpenter that "I have a

problem here. You've got a violation of 75.507". Mr. Carpenter questioned his test results, and Mr. Eslinger then decided to conduct a tracer gas study to determine the actual course of the air and to confirm his belief that the air was coming out of the No. 2 entry working place and was flowing into the neutral returns (Tr. 19). Mr. Eslinger explained how he and Mr. Gates conducted the tracer gas test, including the collection of bottle samples to test the atmosphere. He identified exhibit P-4 as the laboratory results of this testing, and he confirmed that they established that there was a violation of section 75.507, because air had passed the working faces and was being coursed over nonpermissible power connection points, which he identified as carts, rectifiers, belt drives, transformers, and starter boxes. In short, the air was passing over all of this nonpermissible equipment and power points located in the neutral entries (Tr. 19-23).

Mr. Eslinger stated that the air coming off the face was return air which was coursing over and into the mine. Section 75.507, provides that all power connection points outby the last open crosscut shall be in intake air. Since the air had passed two working faces, it would be considered return air for purposes of section 75.507, and a violation. He explained the location of the last open crosscut, and marked it on the sketch (Tr. 24),

Mr. Eslinger stated that after informing Mr. Carpenter of the violation, Mr. Carpenter opened a door in the No. 3 travel entry, and this permitted more air to flow in the neutral entries and it put pressure against the pull-through curtain. Mr. Eslinger confirmed that he then determined that the air no longer pulled under and around the curtain. He also determined with a smoke test that the air no longer coursed down the No. 3 entry. He considered this to be abatement, and Mr. Gates abated the violation (Tr. 25-26).

Mr. Eslinger stated that the violation was the result of moderate negligence because the unit was new and mining had just started at that location and management should have taken care to see that the air was coursed in the proper direction (Tr. 26). He believed that the likelihood of an injury was "reasonably likely" because less than two months earlier there was an ignition in the same part of the mine, and an investigation of that incident disclosed that there was in excess of one percent methane in the working places and in the neutral entries. However, he found no excessive levels of methane on the section on the day of his inspection (Tr. 27).

Mr. Eslinger stated that he considered the violation to be significant and substantial because he believed there was a possibility of an explosion, and there was a reasonably likely chance of this happening because of the methane which was found

two months earlier in all of the sections driving in a westerly direction. He also confirmed that he considered the "real seriousness" of the situation in light of the fact that methane is produced in the working places and it could drift over the non-permissible power points in the neutral entries in question. He confirmed that the pre-shift and on-shift books were checked on the day of the inspection and there was no indications of any excessive methane violations (Tr. 29-31).

Mr. Eslinger stated that the No. 6 and No. 7 entries were return air courses, and that entries No. 2 thru 5 were neutral entries (Tr. 32-43). He confirmed that a violation of section 75.507, rather than the ventilation plan, was cited because the air was coming from the last open crosscut and flowing over power connection points (Tr. 35). After the door was opened, the pressure was going in the other direction and the air was coursed down the last open crosscuts. He confirmed that with the door closed, the air coursing down and across the non-permissible power points had already passed working faces and it was therefore return air at that point coursing down over the non-permissible equipment (Tr. 36). For purposes of section 75.507, the air that has passed a working face is considered to be return air (Tr. 37). Mr. Eslinger described the door which was open and subsequently closed to abate the violation, and he stated that "I was told that the door was normally left closed" (Tr. 38).

On cross-examination, Mr. Eslinger confirmed that once the intake air in the No. 1 entry passes the first working face in that entry it is considered return air for purposes of section 75.507, but not for the purposes of separate splits, and separate intake splits would not be necessary for the other entries. He explained that one continuous air split can be used for the one unit in question, which is comprised of seven entries, but all of the equipment inby the last open crosscut has to be permissible, and he further explained as follows at (Tr. 39-41):

> Q. Well, permissibility aside for just a moment, if I understand your testimony correctly then, as soon as we hit entry No. 1 we've got return air for purposes of 507?
>
> A. Correct.
>
> Q. We don't have return air for purposes of ventilating the remaining 5, 6 working faces?
>
> A. For the purposes of separate splits you do not have. It is still intake air, sir.
>
> Q. I thought intake and return had to be separate. They're not here though, are they?

A. Intake and return air courses have to be separated by stoppings.

Q. Well, it sounds to me like there are two different definitions of return air then, is that fair to say?

A. No, I think there is one definition of return.

Q. And what is that definition?

A. I think -- well, excuse me for a second. You know, I look at return air as air that has ventilated the last working place on any split of any working section, any work that area, whether pillar or non-pillar.

If air mixes with air that has ventilated the last working place on any split on -- of any working section or any work area, whether pillared or non pillared, it is considered return air.

For the purpose of the existing 75.507, air that has been used to ventilate any working place in a coal mine producing section of pillared air or air that has been used to ventilate any working space, if such air is directed away from the immediate return is return air.

Q. Where are you coming up with that second definition of return air?

A. Out of the -- our program policy manual.

And, at (Tr. 45, 51):

Q. Now, for purposes of the citation in 75.507, the air that went over those golf carts you've told us would be considered return air?

A. That's correct.

Q. What about for purposes of ventilation? What would the air be considered?

A. That air is return air, sir.

Q. It's past all the working faces when it got to the golf carts?

A. No. I'm going off of 507. Really there is no definition of that air between those -- between those two check points. That is to me return air because it came off the last open cross-cut.

* * * * * * *

Q. But you yourself described earlier in your direct testimony that the air in these neutrals was I believe neutral intake air.

A. Yes. The air that traveled in outby this first main west working unit was intake -- neutral intake air.

Q. So what do you call the air that passes over the golf carts is all I want to know.

A. I call it return air, sir.

Q. And that is for purposes of 75.507?

A. That's correct. We have a problem here. The air is coming off the last open cross-cut. If the air was flowing in the other direction, yes, then it would have been intake. But then the air would have been going to the working places and you had a violation of 75.326.

Mr. Eslinger confirmed that in the context of ventilation, and for purposes of separate air splits, the intake air passing the No. 1 entry from the No. 1A entry remains intake air until it travels outby and down the No. 6 and No. 7 entries. However, for purposes of permissibility and section 75.507, the air is considered return air after it passes over the first working face (Tr. 57). He explained that this air is gaining methane and coal dust as it goes across the face and it is important that it not flow over nonpermissible power points (Tr. 58).

Mr. Eslinger stated that he found no deliberate attempt by the respondent to course the air down the No. 3 entry, and he confirmed that the ventilation check curtains and stoppings were properly located pursuant to the mine ventilation plan (Tr. 42).

Mr. Eslinger confirmed that the problem concerning the violation was return air leakage from the No. 1 and No. 2 entries into the No. 3 entry (Tr. 43). He confirmed that the golf carts referred to in the citation were the first power connection points that the return air flowed over, and this was the most serious aspect of the violation because people could drive into a possible explosive mixture of gas and ignite the methane (Tr. 45). Methane could have come out of the No. 1 or No. 2 entries and flowed over the golf carts (Tr. 52).

Mr. Eslinger confirmed that tests were made to determine the volume of air-passing the check curtain and that the tracer gas essentially showed that air was moving from one location to another. Conceding that air leakage around check curtains is not

unusual, he would, however, not expect to find tracer gas outby two sets of curtains if the section were properly ventilated (Tr. 55-56). He also confirmed that he made no tests to determine the amount of coal dust in suspension, and that the methane he found was less than one percent and was not in the explosive range (Tr. 56).

Respondent's Testimony and Evidence

Michael L. Woods, section foreman, stated that at the time the citation was issued he was serving as the mine manager of safety and training (Tr. 71). He confirmed that he was with Mr. Eslinger and Mr. Gates the entire time during their inspection and he explained what transpired, including the gas tests. He confirmed that he took an air quantity reading in the last open crosscut before the citation was issued and found "29,500 and something". He confirmed that Mr. Eslinger informed Mr. Carpenter that "we had a problem, that there was return air. The air that had swept rooms 1 and 2 was going outby over power connection points which is a violation" (Tr. 74). Mr. Eslinger then told Mr. Gates "I'll have you write this" (Tr. 74).

Mr. Woods stated that attempts were made to put a solid curtain across the No. 2 entry and putting up a curtain regulator across the No. 1 entry. However, this did not correct the problem and the only way to correct it was to open the door and this took care of the problem to the inspectors satisfaction (Tr. 76). Mr. Woods stated that the door was normally kept closed "to hold the air". The door was on a haulage room, and after equipment passed in and out, the door would be opened and then closed (Tr. 77).

Mr. Woods stated that he did not discuss whether he believed there was a violation with Mr. Eslinger or Mr. Gates, but that Mr. Carpenter did. Mr Woods did not believe that there was a violation because he was always taught that intake air does not become return air until it passes the last working place. He considered the air passing over the golf carts to still be intake air (Tr. 78).

On cross-examination, Mr. Woods stated that he saw nothing wrong in the air passing through working entries No. 1 and No. 2, and then going over non-permissible points because "It's intake air. It's not return air yet" (Tr. 80). He believed that this was an acceptable mining practice and that he would not knowingly allow return air to pass over power connection points (Tr. 81).

Mr. Woods stated that methane monitors are located on the continuous mining machines and the monitor will shut down a machine if excess methane is liberated (Tr. 81-82). The machines will deenergize before a methane problem develops (Tr. 84).

David Stritzel, respondent's director of health and safety, testified that he has been involved in coal mining for 24 years and that he designed the mine ventilation system and plan. He testified that it is common knowledge that "return air" is air "that has passed the last working place on a section and it exits the mine toward the mine fan" (Tr. 89). This was the definition he learned from an "engineering standpoint" while in college and during his prior employment with MSHA. He stated that although the air in the No. 3 entry where the golf carts were located is termed "neutral air", it is nonetheless "all in the same as intake air" because of its location and proximity to the return air course and intake air course and the direction that the air courses in those set of entries" (Tr. 90).

Mr. Stritzel was of the opinion that the section 75.507 application of the definition of return air, if applied in a general mining context, would cause severe problems throughout the industry with respect to the location of underground power distribution, belt lines, leakage, and stoppings. Most of the problems would center around mines employing a blowing ventilation system operating off positive pressure. The natural air flow direction on a positive system forces the air in an outward direction on neutral entries and it is physically impossible to maintain absolute control over the ventilation movement through the mine, and there will be leakages (Tr. 91).

Mr. Stritzel stated that the intent of the law is that it is to be applied in a practical sense manner so that mine operators can comply and stay in business. In his opinion, compliance with section 75.507, as interpreted by MSHA in this case, would basically put a mine operator who employs the blowing ventilation system out of business. He stated that the respondent has such a mine in Illinois (Tr. 91-92).

Mr. Stritzel stated that sections 75.308 and 75.309 refer to specific mine locations where air quality and methane tests must be made, and section 75.309 requires methane tests to be made from the last working place outby where the air returns from the section out to the point where it enters another return air split. At that point, the air is considered to be return air (Tr. 93).

Mr. Stritzel stated that the prior methane ignition referred to by the inspector was not remotely similar to the existing conditions at the time the citation in this case was issued and be explained the differences (Tr. 93-94).

Mr. Stritzel stated that according to the mine ventilation plan the air traversing across the last open crosscut is classified as intake air because "its specified in the plan and it meets the definition outlined in the law" (Tr. 94). He believed that opening the door or putting up regulators to abate

the violation presented problems. He stated that opening the door was a direct violation of state law and "goes against all of our training Programs that we've had in existence for years whereby we've preached to our people to always close the door" (Tr. 95). He further stated that there have been many instances where ventilation doors were inadvertently left open and the air was short circuited throughout the mine, resulting in fatal methane ignitions and explosions. The erection of intake regulators or curtains which would result in the elimination of 30% of the ventilation being delivered to the section, poses a methane control risk at the face area because of lower air velocities. There was no doubt in his mind, within a reasonable degree of engineering certainty, that the air coursing over the golf carts was intake air (Tr. 96).

On cross-examination, Mr. Stritzel acknowledged that he would be concerned about air that has passed by the first entry working face passing over nonpermissible power points or equipment because it could contain methane, and he indicated that methane tests are made for this reason (Tr. 98). Referring to the sketch which depicted the section or unit at the time the citation was issued (exhibit R-7), Mr. Stritzel stated that the air passing the No. 1 entry working face would not cause him great concern because the ventilation is sufficient in those areas and methane which may be liberated is diluted (Tr. 100). He stated that he would not place nonpermissible equipment in that area because the law prohibits it, but under proper testing procedures, he would not be concerned (Tr. 101). However, there is always the possibility of a methane ignition, and methane may be liberated at higher concentrations (Tr. 103).

Mr. Stritzel confirmed that some of the air coursing across the No. 1 and No. 2 working faces was coursing down the No. 3 entry and making the curtains stand out, but that the majority of the air was still sweeping the other faces (Tr. 106). He characterized the air coursing down the No. 3 entry as "an imbalance in the pressure", and he explained that it was near impossible to have absolute control over all of the air because of the presence of two splits of air at one location within three or four crosscuts of the face and the air is going in many different directions and is regulated by pressure. He did not disagree with the inspector's finding with respect to the direction of the air as confirmed by his smoke tests, and he did not dispute the fact that the air was passing over the nonpermissible golf carts (Tr. 108).

Mr. Stritzel stated his position as follows at (Tr. 108-110):

> THE WITNESS: I didn't feel there was a violation of of law or a problem to start with, that there was a need for

anything. The imbalance would be corrected as we further developed those entries and got them away from that split.

JUDGE: Is the reason that you though that there was not any problem or not any ventilation because of your definition of intake air?

THE WITNESS: No, sir. It was because of what the definition is explained in the law of return air as well as what we outlined in our ventilation plan where we identify on the sketches the location for the 9,000 CFM air reading on the unit on each unit.

And that area under 301 of the law specifies that air is to be taken in the line of pillars that separates the intake from the return. At that point it doesn't become return air until it passes that point.

* * * * * * *

JUDGE: In other words, does your ventilation plan allow for air that has passed over two working faces to course down a neutral entry and over nonpermissible equipment? Is that allowable under your ventilation plan?

THE WITNESS: I don't think it's spelled out anywhere even in the law.

Mr. Stritzel further believed that the air coursing over the golf carts was still intake air, and not return air, and that under these circumstances, there was no violation of section 75.507 (Tr. 111-112).

Petitioner's Arguments

Petitioner asserted that the facts in this case are not in dispute and that the crucial issue is the question of what constitutes intake air and what constitutes return air. Petitioner argued that pursuant to the mine ventilation plan, when mining is taking place in the seven entries, the air sweeping through entries No. 1 through No. 7 is recognized by MSHA as intake air so that the respondent does not have to establish air splits at the different intake entries.

Petitioner asserted that it is recognized that when air passes through a working face it becomes contaminated. If this contaminated air seeps down to the neutral areas where non-permissible equipment is located, miners would be exposed to a methane ignition hazard because contaminated air sweeping the face and then passing over nonpermissible equipment can cause an explosion. Petitioner concludes that regardless of whether the

air is characterized as "intake, neutral, A,B,C,D, whatever word you want to give that air", for purposes of section 75.507, the contaminated air is no longer intake air. It is return air (Tr. 118-120).

Respondent's Arguments

Respondent disagreed with the petitioner "calling the air what we like". Respondent argued that pursuant to section 75.507, there must be a standard by which an operator can determine whether not it is in compliance with the law.

Respondent asserted that one cannot say that "it doesn't matter if this is intake or return air. It's just possibly got methane in it and that potentially leads to an explosion" (Tr. 121). Respondent agreed that the issue here is "what is return air", and it pointed out that Judge Weisberger considered the definition of "return air" in Secretary of Labor v. Shamrock Coal Company, 10 FMSHRC 2098, 2105, and relied on the definition found in the Dictionary of Mining, Minerals, and Related Terms.

Respondent asserted that the dictionary definition of return air "is air which has circulated the workings and is flowing towards the main mine fan". Respondent stated that "that's not what we have here", and it took the position that in this case the air has not circulated the workings, and at most, it had only passed by two or three working places. (Tr. 121-122).

Respondent concluded that MSHA's reliance on the definition of return air in its policy manual is not necessarily enforceable and places the respondent at a great disadvantage "because it essentially allows MSHA to fliplop its interpretation of terms". Respondent concluded further that with respect to the air going by two or three working places "all of a sudden its return air when its' clear that when this particular issue has come up before the definition that Mr. Stritzel talked about, the common sense description definition, is the one that has been fallen back on " (Tr. 121-122).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.507, which provides as follows: "Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air". The inspector issued the citation after finding that the air current used to ventilate the working places was being coursed over non-permissible power points (golf carts) outby the last open crosscut. The citation reflects that a smoke cloud test was conducted to trace the air current from the No.1 and No. 2 working places through a check curtain in the No. 3 entry and outby over the golf carts parked in that entry.

The record reflects that in the course of an inspection on May 1, 1991, in connection with a section 101(c) modification petition, MSHA mining engineers and authorized representatives of the Secretary Mark Eslinger and Richard Gates observed the conditions which resulted in the citation issued by Mr. Gates. Although Mr. Gates did not testify in this case, Mr. Eslinger, who is Mr. Gates' supervisor, and who was with him when the citation was issued, testified credibly as to the conditions which they jointly observed, and Mr. Eslinger concurred that the cited conditions constituted a violation of section 75.507. Although the narrative description of the alleged violative conditions is not a model of clarity, it seems clear to me that the parties are in agreement as to the critical issues presented in this case, including their respective positions concerning the alleged violation.

The record establishes that the area where the alleged violation occurred consisted of seven entries as shown on a map and sketch (Exhibit R-7), referred to by the witnesses. The No. 1 and 1A entries were intake entries, entries No. 2 through No. 5 were neutral entries, and the No. 6 and No. 7 entries were return air courses. The petitioner takes the position that the intake air which passed through the No. 1 and No. 2 working places and faces, and then coursed its way outby the last open crosscut and down the No. 3 neutral entry through some check curtains and over nonpermissible power connection points (golf carts and other electrical equipment described by Mr. Eslinger) was return air for purposes of section 75.507. Since that regulatory section requires that all power connection points be located in intake air, the petitioner concludes that a violation occurred when the return air passed over the nonpermissible equipment, and that the citation should be affirmed.

The respondent takes the position that the air passing over the nonpermissible power connection points outby the last open crosscut in the No. 3 neutral entry was intake air when it passed through the No. 1 and No. 2 working places and remained intake air as it was coursed through the No. 3 entry and through the check curtains in question. Respondent characterized the air as "leakage" which often occurs in a mine because of pressure changes, and it insists that the intake air did not become return air until it passed by and through all of the remaining working places and reached the return entries. Under these circumstances, the respondent concludes that a violation did not occur and that the citation should be vacated.

The parties are in agreement that the critical issue in this case lies in the definition of "return air". In this regard, the Dictionary of Mining, Mineral, and Related Terms, U.S. Department

of the Interior, 1968 Edition, provides the following relevant definitions:

> Intake. The passage by which the ventilation current enter a mine. * * * Any roadway underground through which fresh air is conducted to the working face. * * * Ventilating passage through which fresh air is conducted . . . . to the workings.
>
> Return. Any airway in which vapid air flows from the workings to the upcast shaft or fan. * * * Any airway which carries the ventilating air outby and out of the mine.
>
> Return air. Air traveling in a return. * * * Air which has circulated the workings and is flowing towards the main mine fan; vitiated or foul air.
>
> Return aircourse. Portion of ventilation system of mine through which contaminated air is withdrawn and evacuated to surface.

MSHA's July 1, 1988, Program Policy Manual, Volume V, Part 75, page 55, provides the following definition of the term "return air" as used in section 75.507, as well as other guidance for the application of this section:

> "Return air" . . . . means air that has been used to ventilate any working face in a coal-producing section or pillard area, or air that has been used to ventilate any working face if such air is directed away from the immediate return. (Emphasis added).

In Shamrock Coal Company, Inc., 12 FMSHRC 2098 (October 1990), Judge Weisberger affirmed a citation which was issued to the mine operator for a violation of 30 C.F.R. 75.507-1, for locating a nonpermissible power center in a return entry ventilated by return air. In affirming the citation, the judge held that the dictionary definition of "return air" (Air which has circulated the workings and is flowing towards the main mine fan) was consistent with the inspector's credible and unrebutted observation, that the power center was located in an entry through which return air from the working section was being coursed in violation of the cited standard.

In Eastover Mining Company, 4 FMSHRC 123 (February 1982), the Commission affirmed a violation of 30 C.F.R. § 75.507, because the mine operator placed a nonpermissible pump control box in a return airway. Although the box was not energized, the Commission nonetheless affirmed the violation and pointed out that the record did not show that the equipment could not or

would not have been energized in return air. In this regard, the Commission stated as follows at 4 FMSHRC 123-124:

> The purpose of this regulation is to prevent methane gas explosions. In the presence of methane gas, a source of ignition, such as arriving from power connections, can course an explosion.

In Pyro Mining Company, 7 FMSHRC 517, (April 1985), Judge Fauver affirmed two violations of 30 C.F.R. § 75.507, after finding that the mine operator allowed return air that had been used to ventilate the active mine workings to mix with neutral air flowing through two track entries where nonpermissible electrical equipment (conveyor belt drive motors, battery charger, water pumps) were located. In one instance, return air was mixing with neutral air in part because stoppings had been removed and were not replaced, and in the second case, return air was being dumped into neutral air at a damaged overcast.

In Southern Ohio Coal Company, 1 FMSHRC 1642, 1663 (October 1979), I affirmed a violation of section 75.507, after finding that a nonpermissible battery charging unit was located in a return air course. I rejected the operator's contention that the unit was located in intake air. The unit was located in an area where a curtain had been installed as a temporary stopping in order to separate the intake from the return. The inspector testified that the crux of the violation was the fact that the air sweeping over the battery charging unit was return air, and that it prevented or reduced intake airflow over the charger. The inspector concluded that ventilating the nonpermissible charger in return air posed an explosion hazard. I concluded that the positioning of the curtain determined whether the unit was located in intake or return air.

Mr. Eslinger's hearing testimony regarding the essence of the violation in this case is consistent with his pretrial deposition testimony of October 31, 1991 (Exhibit R-4). At deposition Mr. Eslinger testified that the path of the intake air which had traveled up the intake entries and past the No. 1 and No. 2 working places was such that it flowed over nonpermissible power connection points. He stated that a violation of section 75.507 occurred when he determined by a smoke test that the air which had passed through the two working places in question was going down and through a check curtain in the No. 3 neutral entry and over the nonpermissible electrical equipment (Dep. Tr. 4, 9-11). He took no tests to determine the air volume passing through the curtain because "The violation exists when the air goes from the working place into the neutral entry" (Dep. Tr. 25).

At the hearing, Mr. Eslinger testified that for purposes of section 75.507, and in connection with the definition and

application of the term "intake air", once the intake air in the No. 1 entry passed the first working face in that entry, it is considered return air and remained return air as it passed by the No. 2 place and down the No. 3 entry through the curtain and over the nonpermissible equipment. Mr. Eslinger relied on MSHA's section 75.507 policy definition of "return air" which defines such air as "air that has been used to ventilate any working face in a coal producing section". In support of the policy definition, petitioner's counsel relied on the fact that intake clean air which has passed by one or more working faces where coal is being mined has become contaminated air which can longer be considered clean intake air. Counsel characterized this air as return air, and he maintained that this contaminated air poses a potential explosion hazard when it passes over nonpermissible electrical power connection points.

Mr. Eslinger testified at hearing that the definition of return air in connection with the application of the requirements of section 75.507 (air which has passed any working face), does not apply in the context of ventilation on separate air splits. In this context, he stated that return air is air which has ventilated the last working place on any split (Tr. 39-41; 57-58). This testimony is consistent with Mr. Eslinger's deposition testimony where he offered several definitions of "return air", in other contexts, as follows at (Tr. 12-13):

> Q52. Okay. What -- tell me if you will what constitutes return air?
>
> A. Return air for the purposes of 507 is air that has ventilated a working place.
>
> Q53. You said for purposes of 507 it's air that's ventilated a working place. Does return air have a different meaning in another context?
>
> A. There is another context that talks about air that goes all the way across the faces or the places as -- as not being return air until it passes -- passes the last working place. And that's for the purposes of ventilating where you're mining coal.
>
> Q54. So there's two different definitions of return air?
>
> A. Well, I could see the policy under 507, the definition there.
>
> Q55. Right.
>
> A. I believe there's another accepted definition. I -- you, know, I don't find it written.

Q56. Was -- where is that definition coming from?

A. That's just a general use definition. I mean, that's what we've been taught, that it's not return air until it passes the last working place on a section.

* * * * * * *

The other definition of -- of return air provides from the fact that you have to use intake air to ventilate your faces, which means that you cannot take return air from other -- some other unit.

So it's just a -- the definition that's used to say that when you're mining, let's say in -- on -- I don't know what you're calling this, Sketch No. 8 page 17. When you're mining coal in face number nine, you don't have a different split from mining face number nine versus face number eight and face number seven. That's so you can use one continuous split of air across all the faces.

Q58. Okay. And that's -- that's another definition -- I mean, that's separate from the definition of return air that you're using for Section 507?

A. That's correct.

Referring to Sketch No. 8, page 17, of the mine ventilation plan (exhibit R-1), which depicts a nine entry section, Mr. Eslinger explained that in the context of an idle section and without regard to section 75.507, the air traveling up the No. 1 intake entry and then sweeping across all of the nine working faces is considered intake air for the purpose of ventilating a unit with a separate intake air split, and it does not become return air until it passes the last working place at the No. 9 return. If active mining were taking place, the intake air would still be considered intake air until it sweeps past the last No. 9 working place, and it may be used to ventilate any mining machine cutting at the face (Depo. Tr. 14-17). However, for purposes of section 75.507, the intake air which has ventilated the No. 1 working place is considered return air, and he explained in relevant part as follows at (Depo. Tr. 17-20):

Q84. Tell me when this intake air becomes return air that's coming down entry one.

A. When it reaches number one working place because that air is used to ventilate number one working face. So that air that has entered into this working place here passes a face and becomes return air for the purposes of 507. Any

equipment that is inby this rib line right here has to be permissible equipment.

Q88. All right. So we can have a situation then where if we're mining coal in one of these nine entries, we don't have return air for purposes of ventilating the working place, but we do have return air for purposes of 75.507 and permissibility?

A. Correct.

Q89. (By Mr. Keltner) Okay. What are the -- will you tell me what -- and I guess pick your definition and tell me which one you're talking about -- what are the characteristics of return air? What do you find in return air? What do you expect to find in return air?

* * * * * * *

A. Well, first of all, different rules apply to return air. Return air is carrying away from a working section the gases, such as methane, dust, respirable dust, float dust. Carrying those dusts away from where the mining is taking place.

Q92. Well, for purposes of 75.507, what -- what makes it return air? I mean, is it --

A. Well, it makes it return air when it's ventilated one working face.

Q93. Okay. And -- and if you were to do an analysis of that air, I mean, what -- what kinds of things could you expect to find in it? And I'm speaking in terms of generalities.

A. Well, return air can carry methane --

Q94. (By Mr. Keltner) Okay.

A. -- and respirable and float dust.

Q95. Do you think anything else that you can -- that you find in return air?

A. Just air from the --

Q96. Oxygen you mean?

A. Well, you have your, you know, oxygen, nitrogen, carbon dioxide, may be carbon monoxide, a few PPM carbon monoxide in coal mines.

Q97. Any other harm -- harmful or explosive gases that you might find in it?

A. Ethane. Ethane is found. Usually other than methane and ethane, we don't find them. That doesn't mean you can't find them, but generally all you ever see is methane and ethane.

In Jim Walter Resources, Inc., 11 FMSHRC 21 (January 1989), the critical issue presented was the definition of the term "last open crosscut". In the absence of any statutory or regulatory definition of that term, the Commission applied one of the definitions of "crosscut" found in the Mining Dictionary to the mining configuration which existed at the time the violation was issued. In the instant case, the terms "return air" and "intake air" are not defined in the mine Act or in MSHA's part 75 regulations. They are also not defined in the applicable ventilation plan.

Section foreman Woods testified that he "was always taught" that intake air does not become return air until it passed the last working place. He relied on this interpretation of "intake" and "return" air in forming his opinion that the intake air which had initially swept by the No. 1 and No. 2 entries and then passed outby down the No. 3 neutral air entry and over the nonpermissible golf carts and other electrical equipment was still intake air and remained intake air until it passed the last working places at the No. 6 and No. 7 return entries. Mr. Woods saw nothing wrong with using the air which had passed by the No. 1 and No. 2 working places to ventilate the no. 3 working places where the nonpermissible electrical equipment was located, and he believed that this was an acceptable mining practice.

Safety director Stritzel testified that it was "common knowledge" that "return air" is defined as "air that has passed the last working place on a section and it exits the mine toward the mine fan", and that he learned this "engineering standpoint" definition while in college and during his prior employment with MSHA. Thus, Mr. Stritzel agreed with Mr. Woods that intake air does not become return air until it has passed by the last working place. However, unlike Mr. Woods, Mr. Stritzel acknowledged his concern that air which has passed by the No. 1 entry face and then found its way outby over nonpermissible power points might contain methane, and he indicated that he would not locate nonpermissible equipment in that area because "the law prohibits it". Further, Mr. Stritzel did not disagree with the inspector's smoke tests, which confirmed the direction of air travel after it swept the two working faces in question, nor did he dispute the fact that the air was indeed passing over the nonpermissible golf carts.

Mr. Eslinger acknowledged that he too "was taught" that intake air does not become return air until it passed the last working place on a section. Although he characterized this definition as an acceptable "general use definition", he indicated that pursuant to MSHA's policy definition, and insofar as section 75.507, is concerned, "return air" is considered air which has ventilated a working place or one working face. In short, Mr. Eslinger relied on the 1988 policy definition of return air (air which has been used to ventilate any working face) to support the violation.

I take official notice of the fact that MSHA's Underground Inspection Manual, March 9, 1978, states in relevant part that "For the purpose of Sections 75.507 and 75.507-1, return air means air that has been used to ventilate the last working face in a coal producing section or pillared area, . . ." (emphasis added). Every prior underground coal manual from December 1971 through June 1974, also define "return air" for purposes of section 75.507, as air that has been used to ventilate the last working face in a coal producing section. Thus, it would appear that MSHA's longstanding inspector's manual definition of "return air", prior to the current 1988 policy manual definition, was identical to the "general use" and "common knowledge" definition which all of the witnesses were "taught" during their mining careers, but contrary to the current policy definition. However, the parties offered no background information or explanation for the initial policy definition of the term "return air" or for the change of definition which apparently became effective when the July 1, 1988, manual was published.

In Old Ben Coal Company, 2 FMSHRC 2806, 2809 (October 1980), and King Knob Coal Company, Inc., 3 FMSHRC 1417, 1420 (June 1981), the Commission held that instructions and directives found in MSHA's inspectors' manuals are not officially promulgated and do not prescribe rules of law binding on an agency. In King Knob, the Commission noted that the Manual "is a relatively informal compilation not published in the Federal Register, and those factors weigh against deference", 3 FMSHRC 420 fn.3. However, the Commission also stated that in appropriate situations "Cases may arise where the manual . . . . reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect", 3 FMSHRC 1420. Likewise in Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989), the Court stated that while MSHA's policy manual may not be binding on the agency "we consider the MSHA Manual to be an accurate guide to current MSHA policies and practices".

In support of its defense in this case, the respondent relies on the Mining Dictionary definition of "return air" (air which has circulated the workings and is flowing towards the main mine fan) applied by Judge Weisberger in Shamrock Coal Company,

supra. During closing arguments at the hearing, respondent's counsel pointed out that the application of the definition of return air in Shamrock Coal, is consistent with the common sense definition advanced by Mr. Stritzel, and that it should be followed and applied in the instant case.

The Mining Dictionary definition relied on by Judge Weisberger in Shamrock Coal is but one of several relevant definitions of "intake" and "return". The term "intake" is defined as "Any roadway underground through which fresh air is conducted to the working face". The term "return" is defined in part as any airway in which vapid air flows from the workings, outby and out of the mine. "Return air" is also defined as vitiated or foul air, and "return aircourse" is defined as a portion of the ventilation system through which contaminated air is withdrawn. The common thread in all of these definitions is the fact that ventilation air which has circulated or passed by active working places is not fresh air, but air which is fouled or contaminated. In short, intake air is "clean and uncontaminated", while return air is "dirty and contaminated".

The respondent does not dispute the fact that the air which had passed the No. 1 and No. 2 working places and faces was passing over nonpermissible electrical equipment. Further, the respondent has not rebutted Mr. Eslinger's credible testimony that air which has passed any working face is carrying away contaminants such as methane, coal dust, and other mine gasses, and that such air poses a potential explosion hazard if it were to sweep over nonpermissible electrical power-connection points and equipment. Indeed, respondent's safety director Stritzel agreed that methane ignitions are always possible and that he would be concerned about air which has passed one working face passing over nonpermissible power points.

On the facts of this case, and taking into account all of the aforementioned circumstances, the respondent's assertion that the intake air which had swept only one or two working places and faces, remained intake air at all times and under all circumstances until it had swept all of the working places and faces and exited out of the returns IS REJECTED. The intent and purpose of section 75.507, is to insure that nonpermissible electrical power connection points, which are potential sources of ignition, are located only in areas which are ventilated by uncontaminated and clean intake air. Although I recognize the fact that methane tests, proper ventilation, and other precautionary measures may be taken to insure against potential explosions or fires, the acceptance of the respondent's interpretation of "return air" would permit the use of contaminated air to ventilate nonpermissible electrical equipment which is a recognized potential source of ignition, particularly where unexpected levels of methane may be released at any time during mining. Under the circumstances, I conclude and find that

MSHA's policy definition and application of the term "return air", for purposes of section 75.705, is reasonably sound and not inconsistent with the aforementioned dictionary definitions. I further conclude and find that the inspector's reliance on MSHA's policy definition was reasonable and proper, and that the petitioner has established a violation of section 75.507, by a preponderance of all of the credible evidence adduced in this case. The contested citation is therefore AFFIRMED.

Significant and Substantial Violation

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

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In United States Steel Mining Company, Inc., 7 FMSHRC 327, (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether if left uncorrected, the cited condition would reasonably likely result in an accident of injury.

Mr. Eslinger confirmed that he found no excessive levels of methane on the section on the day of his inspection, and that his review of the pre-shift and on-shift books did not reflect any excessive methane violations. Mr. Woods confirmed that methane monitors located on the mining machines would shut down a machine in the event excess methane were liberated, and Mr. Stritzel believed that the ventilation was sufficient.

Mr. Eslinger's opinion that the violation was significant and substantial was based in part on the fact that two months prior to his inspection an ignition occurred in the same mine area and an investigation disclosed in excess of one percent methane in the working places and neutral entries. He believed that it was reasonably likely that this would occur again and that a possibility of an explosion existed. Mr. Stritzel disagreed and he pointed out that the conditions which prevailed with respect to this past event were different from the ones present at the time of Mr. Eslinger's inspection.

Mr. Eslinger also based his significant and substantial opinion on the fact that methane is produced in the working places, and he was concerned that it could drift outby over the nonpermissible electrical golf carts and power points. He also stated that the golf carts are usually pulled in and parked before any methane tests are made with the push-button methane detectors, and he was concerned about gas coming from the working places, belt drives, and transformers (Tr. 30-31). He stated that "some of the more serious aspects of it (sic) because people could drive into a possible explosive mixture of gas and ignite the methane" (Tr. 45). He also indicated that the air is gaining methane and coal dust as it sweeps across the face, and it is important that it not flow over nonpermissible power points (Tr. 58).

As noted earlier, Mr. Stritzel did not dispute the fact that the air which the inspector believed was return air was passing

over nonpermissible power points, and Mr. Stritzel conceded that there is always the possibility of a methane ignition, and that methane may be liberated at higher concentrations. Under the circumstances, and in the context of continued normal mining operations, I conclude and find that a measure of danger to safety was contributed to by the violation, and that it was reasonably likely that an ignition resulting from the presence of nonpermissible electrical power connection points in contaminated return air would result in injuries of a reasonably serious nature. Accordingly, the Significant and Substantial (S&S) finding IS AFFIRMED.

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

I conclude and find that the respondent is a large mine operator. I adopt as my finding the stipulation by the parties that the payment of the full civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Taking into account the fact that the respondent is a large mine operator, and in the absence of any further evidence to the contrary, I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalty which I have assessed for the violation which has been affirmed.

Gravity

I conclude and find that the violation was serious.

Negligence

Mr. Eslinger testified that he found no deliberate attempt by the respondent to course the air down the No. 3 entry, and he confirmed that the violation was the result of air ventilation leakage. The citation reflects a finding of "moderate negligence", which I find is appropriate, and it is affirmed.

Good Faith Compliance

The record reflects that the cited condition was immediately corrected and the citation was terminated within an hour of its issuance. Under the circumstances, I conclude and find that the respondent exercised rapid good faith compliance in correcting the cited condition.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, I conclude and find that a civil penalty assessment of $275 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $275, for Section 104(a) "S&S" Citation No. 35335675, May 1, 1991, 30 C.F.R. § 75.507. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 12 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 91-1295
	:	A.C. No. 36-01733-03538D
v.	:	
	:	JEDDO No. 7 Breaker
JEDDO-HIGHLAND COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On February 10, 1992, the Secretary of Labor filed a motion to dismiss this proceeding on the ground that Respondent on January 20, 1992, paid the proposed penalty of $1,100 in full.

Premises considered, the motion is GRANTED, and this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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FEB 12 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 91-819
	:	A. C. No. 46-05868-03544
v.	:	
	:	Pinnacle Prep Plant
U. S. STEEL MINING COMPANY, INC., Respondent	:	Docket No. WEVA 91-1607
	:	A. C. No. 46-01816-03771
	:	
	:	Gary No. 50 Mine

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Billy M. Tennant, Esq., U. S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

These consolidated cases are before me based upon petitions for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, these cases were heard on October 16, 1991, in Oak Hill, West Virginia. At that hearing, the parties proposed to settle both of the citations at issue in Docket No. WEVA 91-819. The written motion that was later filed requested approval of the respondent's agreement to pay $112, the full amount of the proposed penalty for Citation No. 3340442. The motion also requested approval of the Secretary's proposed vacation of Citation No. 3340443. Based on the Secretary's representations, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The terms of this settlement agreement will be incorporated into my order at the end of this decision.

There remained for trial one section 104(a) citation contained in Docket No. WEVA 91-1607, and assessed at $20.

Both parties have filed post-hearing proposed findings and conclusions and/or briefs, which I have considered along with the entire record in making the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. The undersigned administrative law judge has jurisdiction to hear and decide this case.

2. Inspector Larry Cook was acting in his official capacity as a federal coal mine inspector on March 27, 1991, when he issued Citation No. 3741045.

3. Citation No. 3741045 was properly issued to respondent's agents.

4. Abatement of the condition cited in the listed citation was timely.

5. The penalty of $20 will not adversely affect the respondent's ability to continue in business.

6. The respondent does not dispute the facts in the proposed assessment data sheet (Petitioner's Ex. No. 3).

DISCUSSION

Citation No. 3741045, as modified, alleges a violation of the mandatory standard found at 30 C.F.R. § 75.512-2[1]/ and charges as follows:

> All underground electric equipment was not being examined weekly as required. Records of examinations for high voltage disconnects, vacuum circuit breakers, transformers and rectifiers show that weekly examinations were made for a three month period from October through December 1990. Beginning in January 1991 through this date (3/27/91) only monthly examinations were made and recorded.

---

[1]/ 30 C.F.R. § 75.512-2 provides as follows: The examinations and tests required by § 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition.

And section 75.512 itself states in relevant part: All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.

The operator does not contest the fact that weekly examinations were not being done on the cited equipment, only that they were required in the first instance. Respondent argues that the cited equipment is required to be examined on a monthly basis only and that is what they were doing at the time the citation was written.

Therefore, the issue presented for decision is whether such equipment as high voltage disconnects, vacuum circuit breakers, transformers and rectifiers are "electric equipment" required to be examined and tested weekly pursuant to 30 C.F.R. § 75.512-2.

Speaking of section 75.512, the MSHA "Coal Mine Inspection Manual: Underground Electrical Inspections," dated June 1, 1983, (Petitioner's Ex. No. 6) at page 29 states that:

> The section requires that each individual piece of electric equipment, including locomotives, personnel carriers, electric track switches and derails, compressors, car hauls, conveyor units, pumps, rock-dusting machines, battery-powered equipment and permissible equipment, be examined and tested. The required examinations and tests must be thorough enough to insure that the electric equipment has not deteriorated through neglect, abuse or normal use into an unsafe condition that could result in a shock, fire, or other hazard to the miners.

The term "electric equipment" is not defined in the MSHA regulatory scheme, but the Secretary has proffered the definition used by the Institute of Electrical and Electronics Engineers (IEEE). In the IEEE Standard Dictionary of Electrical and Electronics Terms (Petitioner's Ex. No. 7), equipment (electrical engineering) is defined as:

> Equipment (electrical engineering). A general term including materials, fittings, devices, appliances, fixtures, apparatus, machines, etcetera, used as a part of, or in connection with, an electrical installation.

Respondent maintains that the term "electric equipment," within the meaning of § 75.512, means electrically-powered mobile or portable equipment which performs a physical task by converting electrical energy into mechanical energy and does not include devices in electrical circuits that perform electrical functions exclusively. Therefore, respondent argues that since transformers, rectifiers, disconnects and circuit breakers are normally sited in a permanent location where they remain as stationary components of an electrical circuit, they are not "electric equipment" contemplated by section 75.512. Furthermore, respondent points out that transformers and

rectifiers perform electrical functions exclusively and unlike electric equipment such as shuttle cars, do not transform electrical energy into mechanical energy.

Also, respondent argues that 30 C.F.R. § 75.800-3 and 30 C.F.R § 75.900-3 require only monthly testing and examination of circuit breakers. But I agree with Inspector Cook that § 75.512 is a general inspection requirement that is to be performed on a weekly basis whereas the § 75.800-3 and § 75.900-3 inspection requirements are additional specific tests to be performed on the equipment on a monthly basis. The two sets of requirements can logically exist simultaneously. They are not mutually exclusive. It is not an either/or proposition.

I believe the Secretary's interpretation of her own regulation is the more reasonable; but even if, for the sake of argument, I felt that both the petitioner and the respondent had an equally plausible interpretation, it is well-settled that an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co. 325 U.S. 410, 414 (1945). A regulation must also be interpreted so as to harmonize with and further rather than conflict with the objective of the statute it implements. Emery Mining Corp. v. Secretary of Labor ("MSHA"), 744 F.2d 1411 (10th Cir. 1984).

In this case, I find MSHA's interpretation of the regulation to be reasonable and consistent with the objectives of the Mine Act and is to be preferred. Accordingly, I find that respondent violated 30 C.F.R. § 75.512-2 because the cited items of electric equipment had not been examined on a weekly basis, as charged in the citation.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $20, as proposed.

ORDER

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

1. Citation Nos. 3340442 and 3741045 **ARE AFFIRMED.**

2. Citation No. 3340443 **IS VACATED.**

3. Respondent, shall within 30 days of the date of this decision pay the sum of $132 as a civil penalty for the violations found herein.

4. Upon payment of the civil penalty, these proceedings **ARE DISMISSED.**

Roy J. Maurer
Administrative Law Judge

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FEB 14 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-683
	:	A.C. No. 11-00612-03556
v.	:	
	:	Spartan Mine
ZEIGLER COAL COMPANY, Respondent	:	

SUMMARY DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Ilinois for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Ilinois for Respondent.

Before: Judge Weisberger

The Secretary's Motion for Summary Decision regarding Citation No. 3847637 is **GRANTED.** The other citations included in this Docket number were disposed of in an Order issued January 15, 1992.

It is **ORDERED** that Citation No. 3847637 be affirmed as a violation of 30 C.F.R. § 75.316 consistent with the Decision of Judge Koutras in Docket No. LAKE 91-635 issued January 24, 1992.

Avram Weisberger
Administrative Law Judge

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FEB 14 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-684
	:	A.C. No. 11-02408-03641
v.	:	
	:	Mine No. 11
ZEIGLER COAL COMPANY, Respondent	:	

SUMMARY DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Ilinois for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Ilinois for Respondent.

Before: Judge Weisberger

The Secretary's Motion for Summary Decision regarding Citation No. 3847634 is **GRANTED.** The other citations included in this Docket number were disposed of in an Order issued January 15, 1992.

It is **ORDERED** that Citation No. 3847634 be affirmed as a violation of 30 C.F.R. § 75.316 consistent with the Decision of Judge Koutras in Docket No. LAKE 91-635 issued January 24, 1992.

Avram Weisberger
Administrative Law Judge

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FEB 14 1992

UNITED MINE WORKERS OF AMERICA ON BEHALF OF DAN NELSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 88-92-D
v.	:	Jim Walter Resources
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and ROBERT KIYKENDALL, Respondents	:	No. 7 Mine
	:	
	:	
	:	
UNITED MINE WORKERS OF AMERICA ON BEHALF OF DAN NELSON, RONALD SONEFF, TOMMY BOYD, STAN ODOM AND CARROLL JOHNSON, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 88-93-D
	:	Jim Walter Resources
v.	:	No. 7 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and JOHN WEEKLY AND, WILLARD (GENE) QUERRY, Respondents	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

In this action commenced pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), Complainants seek to hold MSHA and three of its employees liable for alleged violations of Section 105(c) of the Act. On November 20, 1991, the Secretary filed a Motion to Dismiss arguing that, in essence, the instant proceeding should be dismissed on the basis of the decision of the Court of Appeals, D.C. Circuit, in Wagner v. Pittston Coal Group, et al. (Case No. 90-1335, unpublished decision, November 5, 1991). On December 13, 1991, Complainants filed a Response to this Motion. On December 30, 1991 an Order was issued denying the Motion to Dismiss.

On January 23, 1992, the Secretary filed a Motion to Dismiss the proceeding against both MSHA and the individual employees of MSHA based on the decision of the Court of Appeals in Wagner, supra, and the Commission decision in Wagner, 12 FMSHRC 1178, (June 1990). UMWA filed its response on July 7, 1992.

I. Proceedings against MSHA

The Commission in Wagner, 12 FMSHRC at 1185 supra held that "...MSHA is not a 'person' subject to the provisions of Section 105(c)", and dismissed the complaint that had been brought against MSHA. It is true, as argued by complainants, that this holding of the Commission, 12 FMSHRC supra was not affirmed by the Court of Appeals in Wagner supra, as that issue was not before the Court. However, it is just as clear, for the same reasons, that the Court of Appeals did not reverse the Commission with regard to its decision on this issue. Accordingly, I am bound to follow the decision of the Commission as it is applicable law. Hence, based on the decision of the Commission, 12 FMSHRC supra, I conclude that MSHA is not a "person" subject to Section 105(c) of the Act, and that the portion of the Complaints herein seeking relief against MSHA for alleged violations of Section 105(c) of the Act should be dismissed.

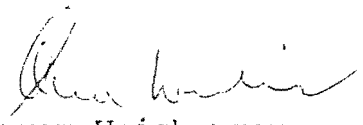
II. Proceedings against individual employees of MSHA

The Commission, 12 FMSHRC supra at 1185 held that "...MSHA employees are not 'persons' subject to Section 105(c) and thus... can not be sued individually under Section 105(c)". Complainants argue that the Court of Appeals in Wagner, supra reversed this holding of the Commission, as it held that an individual MSHA employee can be held liable under Section 105(c) of the Act. I do not agree with this interpretation of the Wagner, decision. The Court in Wagner, supra, slip op. at 4, concluded that "...MSHA employees acting within the scope of their authority are agents of the sovereign, and therefore can not be liable under Section 105(c)" The Court then examined whether the employees therein acted so far beyond the scope of their authority as to become "persons" who may be liable under Section 105(c). The Court, in this connection held as follows: "In the absence of a statutory prohibition against such disclosure, there is no sound basis for the court to conclude that Inspector Sloce exceeded the bounds of his statutory authority by communicating Wagner's identity to Wayne Fields and Clinchfield Coal." (Wagner, supra, slip op. at 5)

In light of this conclusion, it may be seen, as argued by the Secretary, that the Court on Wagner, supra, did not reach the question as to whether individuals who act beyond the scope of their authority are liable under Section 105(c). Further, the Court in Wagner, supra, explicitly affirmed the decision of the Commission which held that MSHA employees can not be sued

individually under Section 105(c). Hence, as correctly argued by the Secretary, the applicable law as set forth in the Commission's decision, 12 FMSHRC, supra and not reversed by the Court of Appeals, requires a finding that the complaints herein against employees of MSHA alleging liability under Section 105(c) be dismissed.

It is ORDERED these cases be DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 18 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-64-M A. C. No. 12-01550-05509A
v.	:	Shick Sand & Gravel Mine
ROBERT SHICK, employed by MUNCIE SAND & GRAVEL, INC., Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Arlington, VA, for Petitioner; Mr. Robert Shick, Muncie, Indiana, Respondent.

Before: Judge Fauver

This is a petition for civil penalty under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., charging Robert Shick, as an agent of a corporate mine operator, with knowingly authorizing, ordering or carrying out a violation by the mine operator. [1]

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable,

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[1] Section 110(c) of the Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act of any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. At all material times, Muncie Sand and Gravel, Inc., a corporation, operated an open pit mine, known as Shick Sand and Gravel Mine, in Delaware County, Indiana, where it produced sand and gravel for use and sales in or substantially affecting interstate commerce.

2. At all material times, Respondent, Robert Shick was Superintendent of the mine.

3. On March 28, 1990, a federal mine inspector (of MSHA, United States Department of Labor) found an imminent danger at the mine in that a Caterpillar 966 front-end loader did not have operable service brakes, and was used to load customers' trucks and to travel on inclined haulage roads into and out of the pit. The inspector issued § 107(a) Order No. 3441750, charging a violation of 30 C.F.R. § 56.14101(a)(1), which provides:

> Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

4. Before this inspection, the equipment operator told Respondent, the mine Superintendent, that the brakes were defective. However, Respondent ignored the request for repairs, and told the operator to continue operating the equipment, knowing that the only way he could try to stop the vehicle was by dropping its loading bucket. The gist of his response to the operator was that management would get around to the repairs later, but there was no hurry because the MSHA inspector would probably not visit the mine for two or three months.

5. In a safety test, the inspector found that the vehicle could not be stopped by its brakes. Dropping the bucket to try to stop a front-end loader is not a safe practice.

6. The brakes on the front-end loader were inoperable. Its use in such condition, to load customers' trucks and to travel on inclined haulage roads, created an imminent danger to mine personnel and customers.

DISCUSSION WITH FURTHER FINDINGS

The Commission has defined the term "knowingly," as used in § 110(c) of the Act, as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.... We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person is a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. [Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).]

I find that Respondent knowingly authorized and ordered a violation of 30 C.F.R. § 56.14101(a)(1), within the meaning of § 110(c) of the Act. He knew that the vehicle had defective brakes, when the driver told him before the inspection, and he knowingly authorized and ordered continued use of the vehicle with defective brakes.

The danger to the driver, other vehicle drivers, and persons on foot near the front-end loader constituted an "imminent danger" within the meaning of the Act. Gravity was therefore more than a "significant and substantial" violation. The violation was due to aggravated conduct beyond ordinary negligence because it was "knowingly" committed.

Considering the civil penalty assessed against the corporation ($1,000) for its violation concerning this incident, and the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $400 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent, Robert Shick, knowingly authorized and ordered the violation of 30 C.F.R. § 56.14101(a)(1) alleged in Order No. 3441750.

ORDER

1. Order No. 3441750 is AFFIRMED.

2. Respondent, Robert Shick, shall pay to the Secretary of Labor a civil penalty of $400 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 19 1992

MOUNTAINEER COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. VA 91-413-R
	:	Through VA 91-414-R
v.	:	
	:	Citation No. 9861170; 4/4/91
SECRETARY OF LABOR,	:	Through No. 9861171; 4/4/91
MINE SAFETY AND HEALTH	:	No. 1 Mine 44-05090
ADMINISTRATION (MSHA), Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-30
Petitioner	:	A. C. No. 44-05090-03589D
	:	
v.	:	Mountaineer No. 4 Mine
	:	
MOUNTAINEER COAL COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Broderick

On December 4, 1991, the Secretary filed a motion to approve a settlement between the parties in the above case. The case includes 2 alleged violations of 30 C.F.R. 70.209(b), each of which was originally assessed at $1100. The Secretary continues to assert that the violations resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to a reduction in the total penalties from $2200 to $1760.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement motion is APPROVED. The operator is ORDERED to pay within 30 days of the date of this order the sum of $1760 for the violations charged in this proceeding.

IT IS FURTHER ORDERED that the contest proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge

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Mr. Carl Hamilton, Secretary-Treasurer, Mountaineer Coal Company, Inc., P. O. Box 9, Castlewood, VA 24224 (Certified Mail)

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FEB 19 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-54 A.C. No. 29-00096-3548
v.	:	McKinley Mine
THE PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Ernest Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., Englewood, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the Pittsburg & Midway Coal Mining Company (P&M), the operator of the McKinley Mine, with two 104(a), non S&S, violations of mandatory regulatory standards found in 30 C.F.R. § 45.48 and § 77.904.

The operator filed a timely answer contesting the alleged violations and the appropriateness of the proposed penalties.

Pursuant to notice, an evidentiary hearing on the merits was held before me, along with other cases involving the same parties and attorneys.

Stipulations

At the hearing, the parties agreed on the following stipulations:

1. P&M is engaged in the mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. P&M is the owner and operator of the McKinley Mine, MSHA ID No. 29-00096.

3. P&M is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect Respondent's ability to remain in business.

8. The operator demonstrated good faith in timely abating the alleged violations.

9. P&M is a large operator of a coal mine for penalty assessment purposes. It's McKinley Mine is a large surface mine producing four to five tons of coal each year.

10. The certified copy of the MSHA assessed violations history filed in Docket No. CENT 91-106 reflects the history of this mine.

Citation No. 3584164

This citation charges Respondent with a 104(a) violation of 30 C.F.R. § 45.4(b). The citation reads as follows:

> The production-operator could not produce the information required by paragraph (a) of this section for each independent contractor of this mine, namely General Electric ISE, this contractor was providing electrical service on contract work at the No. 4 dragline.

The cited safety standard reads as follows:

> § 45.4 Independent contractor register.
>
> (b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make this information available to any authorized representative of the Secretary upon request.

The information which the operator is required to maintain in writing and make available to the inspector is set forth in Section 45.4(a) which in part reads as follows:

> (1) The independent contractor's trade name, business address and business telephone number;
> (2) A description of the nature of the work to be performed by the independent contractor and where at the mine the work is to be performed;
> (3) The independent contractor's MSHA identification number, if any; and
> (4) The independent contractor's address of record for service of citations, or other documents involving the independent contractor.

Conflicting testimony was presented at the hearing as to what information the operator maintained and made available to the inspector and as to when the information was made available.

After the lunch break, the parties stated on the record that they had conferred and reached a proposed settlement of Citation No. 3584164 with an agreed penalty of $20.

On the basis of the evidence presented at the hearing and on the representation of counsel, I approved the settlement from the bench and I hereby reaffirm my approval of the settlement deposition of this citation.

Citation No. 3584192

This citation charges Respondent with a 104(a) non S&S violation of 30 C.F.R. § 77.904.

The citation reads as follows:

> The circuit breaker supplying electrical power to the South East warehouse door was not labeled to show in fact that this circuit supplied electrical power to the South East door. This circuit breaker was energized when this condition was observed. Two of three warehouse personnel could not readily identify the control circuit when question[ed], they had to look at the circuit and trace it to the door motor. (Emphasis added).'

The cited safety standard reads as follows:

> § 77.904 Identification of circuit breakers.
>
> Circuit breakers shall be labeled to show which circuits they control unless identification can be made readily by location. (Emphasis added).

The cited device in question was a disconnect switch in the electrical circuit between a molded-box circuit breaker and a motor for an overhead warehouse door. The undisputed evidence established that this device, cited and referred to in the citation as a "circuit breaker," was not a circuit breaker. The evidence clearly established that it was a fused "disconnect switch."

Petitioner argues that although the specific language of 30 C.F.R. § 77.904 does not mention the term "disconnecting device" the statute should be interpreted to include such devices. Petitioner argues that both devices have the same fundamental function.

The regulations do not define the term "circuit breaker." The term "circuit breaker" is defined in A Dictionary of Mining, Mineral, and related Terms 210, U.S. Department of the Interior (1968), as follows:

> Circuit breaker. a. An overload protective device installed in the positive circuit to interrupt the flow of electric current when it becomes excessive or merely exceeds predetermined value. b. A switch that automatically interrupts an electric circuit under an infrequent abnormal condition (as overload). Webster 3d.

A dictionary of Mining, Mineral, and Related Terms 1111, U.S. Department of the Interior (1968), defines a disconnect "switch," insofar as relevent here, as follows:

> A mechanical device for opening and closing an electric circuit;

It is undisputed that the circuit at issue was a low or medium voltage circuit (Tr. 32). Section 77.904 refers only to "circuit breakers" on low or medium voltage circuits, and does not mention disconnecting devices.

The corresponding provision dealing with high-voltage circuits (Subpart I of Part 77, Title 30) clearly shows that the two phrases are to be used independently:

> § 77.809 - Identification of circuit breakers and disconnecting switches.
>
> Circuit breakers and disconnecting switches shall be labeled to show which units they control, unless identification can be made readily by location.

Thus, the Secretary when promulgating a safety standard for high voltage currents specifically included references to both "circuit breakers" and "disconnecting switches" but when addressing low and medium voltage circuits specifies only "circuit breakers". A term carefully employed in one place in the regulation and excluded in another should not be implied where excluded. KCMC, Inc. v. FCC, 600 F.2d 546 (5th Cir. 1979); Diamond Roofing Co. v. OSHRC, supra; Koch Refining Co. v. United States Dept. of Energy, 504 F. Supp. 593 (D. Minn. 1980), aff'd, 658 F2d 799 (Temp. Emer. Ct. App. 1981).

A question that naturally comes to mind is whether there is a rational reason for the Secretary to specifically require labeling of disconnecting switches in high voltage lines but not in medium or low voltage circuit. The Respondent's expert explained that one reason for this distinction is that a servicing electrician can use a voltmeter to check low and medium voltage circuits, but that a voltmeter cannot be used on high voltage lines. (Tr. 72). Thus, there is a reason for requiring specific labeling of both circuit breakers and disconnect switches in servicing high voltage circuits.

Respondent in denying any violation of 30 C.F.R. § 77.904 summarizes its position as follows:

A. As a factual matter, the electrical circuit controlled by this disconnect switch was readily identifiable by location and it is sufficient that a worker be able to identify the circuit by observation.

B. For purposes of both the regulatory scheme and common usage among electricians, this Switching Mechanism is a "disconnecting device." A disconnecting device serves a different purpose than a circuit breaker, and is distinguishable in practical application.

C. The plain language of Section 77.904 does not require identification of disconnecting devices on low and medium voltage circuits.

D. The plain words of the Secretary's regulation (§ 77.904) are clear and unambiguous; i.e., the standard applies solely to "circuit breakers." Any extension of the standard so as to apply the labeling requirement to disconnecting devices constitutes substantive rule-making without following rule-making procedures.

E. Even if the regulation is susceptible to various meanings, and the Secretary's characterization is merely interpretative, the Respondent had no notice of the Secretary's position.

I find merit in Respondent's contention that as a factual matter identification of the circuit that the disconnect switch controlled could readily be made by location and thus comes within the exception to the labeling requirement specifically stated in the cited safety standard.

Respondent in its post-hearing brief states its position in part as follows:

> I. As a factual matter, the electrical circuit controlled by the Switching Mechanism was readily identifiable by location. It is sufficient that a worker be able to identify the circuit by observation.
>
> Whether or not the Switching Mechanism might be held to be a "circuit breaker," the scene depicted in Respondent's Exhibit 1-B (a large photograph of the disconnect switch and the conduit from the switch to to the motor that raises and lowers the warehouse door) clearly shows that the

circuit controlled by the Switching Mechanism (designated by an arrow in the photograph) can be readily identifiable by observation. Even without reaching the legal issue of whether the Switching Mechanism is a "circuit breaker," this fact should be dispositive of the case.

The Inspector's narrative report contained in the citation suggests that all workers must be able to readily identify the controlled circuit upon questioning, without observing the apparatus. In effect, the inspector imposes the safety standard as if it were a test question posed in a closed-book exam. He concedes that the workers could, in fact, trace the circuit to the door motor by looking at the circuit (Citation; Tr. 36). Thus, the face of the citation itself negates any violation of the standard.

Upon cross-examination, the Inspector further conceded that he could see what circuit was controlled by the Switching Mechanism (Tr. 35). He acknowledged that he had based the existence of the violation on the negative responses offered by two of three workers in the area (Tr. 17). The Secretary did not call those individuals to testify as to the extent of their knowledge or inability to identify the circuit (with or without visual observation).

The Secretary has not provided any legal basis or rationale to support its contention that a worker should be able to "identify" the circuit without actually looking at it. Such a novel interpretation constitutes substantive rule-making without adhering to procedural guidelines, as more fully discussed below. The photograph of the scene, and the inspector's own admissions, establish that the circuit controlled by the Switching Mechanism could be readily identified by location. Therefore, no violation has been shown by the evidence.

II. For purposes of both the regulatory scheme and common usage among electricians, this Switching Mechanism is a "disconnecting device." A disconnecting device serves a different purpose than a circuit breaker, and is distinguishable in practical application.

In addressing the remaining legal issues in this case, an understanding of the function and purpose of the Switching Mechanism is necessary. Much attention was devoted at the hearing to the definition of a "circuit breaker" and of a "disconnecting device"; however, the key points are quite straight-forward.

The terms "circuit breaker" and "disconnecting device" have very different meanings to an electrician. The ordinary and common meaning of words should be applied in the application of regulations, unless such words are defined otherwise. Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977); Whelan v. United States, 529 F2d 1000 (Ct.Cl. 1976). The Respondent's electrical expert established that a "circuit breaker" is a device that automatically provides overcurrent, short circuit, and ground fault protection to the circuit (Tr. 75, 76). A "disconnecting device" enables the servicing electrician to manually deenergize the circuit and visually confirm its disconnection (Tr. 69, 77). Since the electrician can actually see that the electrical line has been physically separated, he or she may then safely proceed with servicing.

It is helpful, then, to distinguish between the respective purposes of a circuit breaker and a disconnecting device. The former affords automatic, unattended protection against electrical faults. The latter enables visually verifiable safe access to the service point of the circuit beyond the disconnecting device. The Respondent agrees that a single apparatus could serve both purposes if so equipped; however, the circuit breaker in use on the circuit in question was a molded-box circuit breaker which did not enable internal inspection; therefore, a separate disconnecting device was required (Tr. 67, 81).

Without a focus on the differing purposes of the two devices, the analysis becomes unnecessarily confused. A disconnecting device can be "fused" or "unfused" by the simple addition of a fuse in the device. Such a fuse adds an additional measure of automatic protection, along with the separate circuit breaker which, in this case, was located on a different floor (Tr. 67, 69, 70). The Secretary argues that by the addition of a fuse, this Switching Mechanism duplicates some of the same functions as a circuit breaker and therefore should be labeled in the same manner as a circuit breaker. This position would have merit if the addition of the fuse introduced some safety hazard or altered the essential purpose of the disconnecting device.

The Secretary's attempt to equate a circuit breaker and a disconnecting device is faulty in several respects. First, the inspector misunderstands the purpose of a disconnecting device; he believes that the device is used to provide emergency shut-off (Tr. 15). However, the Respondent's electrical expert testified that the purpose of the device is to enable visual verification of deenergizing prior to maintenance. The record establishes that the actual on/off switch (which controlled movement of the door) was near-by (Tr. 46, 72).

Even the Secretary's own regulations regarding disconnecting devices emphasize the "visual" evidence of disconnection rather than the need for immediate or emergency disconnection:

> § 77.903 - Disconnecting Devices. Disconnecting devices shall be installed in circuits supplying power to portable or mobile equipment and shall provide visual evidence that the power is disconnected.

The inspector confuses purpose with function. Even with the addition of a fuse, the primary purpose of a disconnecting device remains the same; to enable visual confirmation of a manual

disconnection. The addition of a safety feature (i.e., a fuse that functions similar to a circuit breaker) should not convert an otherwise acceptable apparatus into a safety hazard); this is simply illogical. The Secretary is in the anomalous position of arguing that the addition of a safety feature reduces the safety of the workers. Florence Mining Co., 11 FMSHRC 747 (1989). The Secretary is advocating a legal position that would encourage compliance by removal of a safety feature.

The Secretary offered no expert testimony to refute the common usage of the two terms among electricians, but instead relies upon the legalistic interpretative argument that the phrase "disconnecting device" is interchangeable with "circuit breaker" due to the addition of a fuse. Her case is premised on the description of "circuit breaker" in the 1968 National Electrical Code in Article ("NEC") Section 100 (Tr. 78), which is defined therein to include devices which open and close circuits by both automatic and nonautomatic means. By applying that definition directly to Section 77.904 the Secretary reasons that the phrase "circuit breaker" is all-encompassing.

The substance of the then-current NEC is incorporated into the Secretary's regulations depending on the date that the equipment is installed if after 1971. 30 C.F.R. § 77.516 (1990). Since the NEC is incorporated by reference, the provisions of the full electrical codes, as revised over the years, are available for the Commission's review in deciding this case.

All editions of the NEC since 1975 have included the foregoing definition of "circuit breaker," but have elaborated on that definition for circuits carrying over 600 volts (a low voltage under 30 C.F.R. § 77.2(s) (1990) means up to 660 volts):

Switching Devices:

> Circuit Breaker: A switching device capable of making, carrying, and breaking currents under normal circuit conditions, and also making, carrying for a specified time, and breaking currents under specified abnormal circuit conditions, such as those of short circuit.
>
> * * * * *
>
> Disconnecting (or Isolating) Switch (Disconnector, Isolator): A mechanical switching device used for isolating a circuit or equipment from a source power.
>
> Disconnecting Means: A device, group of devices, or other mean whereby the conductors of a circuit can be disconnected from their source of supply.

Thus, all editions of the NEC for the past fifteen years have made the definitional distinction between a circuit breaker and a disconnecting switch.

Whether the Commission relies on the 1968 version of the NEC or later editions, caution must be taken in literally applying NEC terminology in the context of the MSHA regulations. Respondent agrees that an ordinary circuit breaker includes both manual and automatic energy interruption features. But the Secretary's regulations provide for an additional feature of visual confirmation of disconnection, a provision that the NEC does not require (Tr. 76). The molded-box circuit breakers commonly in use do not permit visual inspection of the internal blades (Tr. 81). This added purpose was not contemplated by the NEC and therefore the NEC definition cannot be freely applied to the Secretary's regulation.

Even though the substance of the then-current NEC is incorporated into the Secretary's regulations, it does not follow that terminology and definitions are directly interchangeable.

The Secretary's regulations clearly apply the phrases "circuit breaker" and "disconnecting device" separately. She cannot simply construe the existing regulations to mean what she may have intended but did not adequately express. Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976).

* * * * *

IV. The plain words of the Secretary's regulation (§ 77.904) are clear and unambiguous; i.e., the standard applies solely to circuit breakers. Any extension of the standard so as to apply the labelling requirement to disconnecting devices constitutes substantive rule-making without following rule-making procedures.

The Secretary offers an alternative argument that whether or not the disconnecting device contains a fuse, the same standard provided for high voltage circuits (§ 77.809) should be applied to low and medium voltage circuits. The inspector offered his opinion that any device which enabled disconnection should be labeled (Tr. 34).

The Secretary relies on the following citation from the 1968 NEC, § 110.22 (Tr. 79):

> Each disconnection means required by this code for motors and appliances and each service meter or branch circuit at the point where it originates shall be legibly marked to indicate a purpose is evident. (Emphasis added).

If this standard were read without the emphasized language, it would indeed appear to require identification of all disconnecting switches (unless, of course, readily identifiable by location), just as the Inspector has applied § 77.904. But as the Respondent's expert pointed out in uncontroverted testimony, the reference to "at the point where it originates" means at the circuit breaker; the Switching Mechanism in question here was not

at the point where the circuit originated (Tr. 69, 70, 80). This is no different than the Secretary's own regulation § 77.904, and adds nothing to this analysis.

A rule as envisioned by the Inspector might well be appropriately adopted by the Secretary under the rule of law set out in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Yet, a plain reading of the two provisions (one dealing with high voltage and one dealing with medium/low voltage) leads to the conclusion that the Secretary has not yet done so. If she intends to impose a new and substantive obligation upon operators, she must follow appropriate rule-making procedures. Drummond Co., 13 FMSHRC 339 (1991).

In determining whether the actions of the Secretary must comply with rule-making procedures, the courts differentiate between interpretive and substantive actions. Here, the Secretary is attempting to enforce a new and substantive obligation upon Respondent. Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189 (9th Cir. 1982).

V. Even if the regulation is susceptible to various meanings, and the Secretary's characterization is merely interpretative, the Respondent had no notice of the Secretary's position.

If the application and construction of the regulatory language is considered to be interpretive rather than substantive in this case, Respondent and all operators must be afforded fair notice of the Secretary's "interpretation." Phelps Dodge Corp. v. FMSHRC, supra. Respondent has been unable to locate any notice of the Secretary's interpretation of "disconnecting switch" in her Program Policy Manual, Program Policy Letters, or previous published enforcement actions.

The enforcement of an interpretation rule which imposes a new and affirmative duty upon an operator without at least giving notice to the industry violates the basic notions of due process.

Conclusions

As previously stated, Respondent's Exhibit 1-B, a large photograph of the work site in question, clearly shows the disconnect switch in question and the circuit it controls. It shows the conduit coming out of the switch box in question and going up the wall to the motor which raises and lowers the warehouse door. On the basis of Respondent's Exhibit 1-B and the testimony presented at the hearing, I find that irrespective of whether or not the disconnect switch is a "circuit breaker" within the meaning of 30 C.F.R. § 77.904 that identification of the circuit that the disconnect switch controlled can readily be made by mere observation of the location of the disconnect switch and the conduit leading out of it going up the wall to the motor.

Assuming, for the purpose of argument, that the switch in question is a "circuit breaker" within the meaning of 30 C.F.R. § 77.904, I find it falls within the standard's specific exception that labeling is not required where "identification can be made readily by location." Citation No. 3584192 is vacated.

ORDER

On the basis of the foregoing findings and conclusions.

It is ordered as follows:

1. Citation No. 3584164, citing a violation of 30 C.F.R. § 45.4(b) is AFFIRMED and a penalty of $20 is ASSESSED.

2. Citation No. 3584192, citing an alleged violation of 30 C.F.R. § 77.904 is VACATED and its related proposed penalty is set aside.

3. Respondent is ORDERED TO PAY to the Secretary of Labor a civil penalty in the sum of $20 within thirty (30) days of the date of this Decision and, upon receipt of payment, this matter is DISMISSED.

August F. Cetti

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 19 1992

LARRY E. SWIFT,	:	DISCRIMINATION PROCEEDING
MARK SNYDER, AND	:	
RANDY CUNNINGHAM,	:	Docket No. PENN 91-1038-D
Complainants	:	MSHA Case No. PITT CD-90-09
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: William Manion, Esq., Legal Counsel, UMWA Region 1, Washington, Pennsylvania, for the Complainants;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Union Safety Committeemen Larry E. Swift, Mark Snyder, and Randy Cunningham, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging violations of section 105(c)(1) of the Act by the Consolidation Coal Company (Consol) in its implementation of its Dilworth Mine "Program for High Risk Employees." [1]/

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[1] Section 105(c)(1) of the Act provides as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners

The Dilworth Mine apparently had during the 1980's the worst safety record of Consol's mines in its Eastern Division (Complainants Exhibit C-12, pp. 13-14). Because of an active and determined union safety committee the mine has also been the subject of many complaints under section 103(g) of the Act and a resulting significant history of Federal citations for the operator's failure to report injuries under 30 C.F.R. Part 50 (Complainant's Exhibits 2, 7 and 9).

According to Dilworth Mine Superintendent, Lou Barletta, because of the high incidence of reported injuries at the Dilworth Mine he first implemented a program for purported high risk employees in October 1988. The "Program for High Risk Employees" implemented January 1, 1990, and here at issue (Appendix A) retains the same provisions of the earlier program for increasing discipline including suspension and discharge for repeated reported injuries.

In essence, the program at issue provides counselling, retraining, and increasing discipline including suspension and discharge of employees based upon "Reports of Personal Injuries" filed in response to any work related incident resulting in injury (Joint Exhibit No. 1-Appendix A). The program also directs employees, as do the shop and conduct rules (Exhibit R-2), to report to management any work related incident which results in injury in a "Report of Personal Injury." These reports may therefore include injuries in addition to those reportable to the Federal Mine Safety and Health Administration under 30 C.F.R. Part 50. [2] In the discretion of management some reported injuries may also be excluded from consideration against an employee.

The Complainants maintain that this "Program for High Risk Employees" is facially discriminatory to themselves and to all other miners subject to this program and that, accordingly, the program itself and any action taken under the program is illegal under section 105(c)(1) of the Act.

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fn. 2 (continued)
or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

[2] Under 30 C.F.R. § 50.2(e) a reportable occupational injury is defined as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transferred to another job."

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also, e.g., Eastern Assoc. Coal Corp, v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act). The Commission has also recognized that certain programs and policies established by a mine operator may be facially discriminatory. See Secretary on behalf of Price and Vacha and UMWA v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (1990); Local Union 1110, United Mine Workers of America and Robert R. Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979).

It is not disputed that a report of a mine injury may constitute a "complaint under or related" to the Act and is the "exercise" of a protected right under the Act. It follows therefore that any interference with the exercise of that right by a mine operator constitutes a violation of section 105(c)(1) of the Act. Clearly, the "Program for High Risk Employees" at the Dilworth Mine, by subjecting its employees to suspension and discharge based upon the filing of Reports of Personal Injury inhibits and interferes with the reporting of mine injuries, and by so doing, constitutes an illegal interference with protected activity.

Consol argues that the program at issue is not based upon the report of personal injury itself but rather upon the underlying injury, and that there is no statutorily protected right to sustain injuries. While it is true there is no protected right to sustain injuries, Consol's argument is bottomed on the erroneous premise that the discipline, suspension and discharge under the program is based upon the actual injury rather than the reporting of the injury. The simple fact is however, that if an injury is not reported it is not counted

against the miner. [3] The program accordingly creates an obvious and persuasive disincentive to report injuries. Sustaining an injury and the reporting of the injury are, moreover, so inextricably interrelated that the unprotected sustaining of an injury cannot under this program be separated from the reporting of the injury.

While it is well established that neither the Commission nor its judges sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of programs such as the Dilworth Program for High Risk Employees they do have the affirmative duty to determine whether such a program or some component thereof conflicts with rights protected by the Act. Under the circumstances of this case it is clear that the Complainants have sustained their burden of proving that the Program for High Risk Employees implemented by Consol at its Dilworth Mine on January 1, 1990, is facially discriminatory in violation of section 105(c)(1) of the Act and does indeed conflict with protected rights. Under the circumstances, there is no need to consider the Complainants' alternate theories of illegality.

ORDER

The Consolidation Coal Company is hereby ordered to immediately cease and desist from implementation of any disciplinary action under the Dilworth Mine "Program for High Risk Employees" and it is further ordered that all records be expunged of any reference to any disciplinary action taken under said program. Since no costs, damages or other remedies have been sought in this case there is no need for further proceedings and therefore this decision represents the final disposition of this case before this judge.

Gary Melick
Administrative Law Judge

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[3] The injury would therefore also go unreported and not be counted against the mine operator under the Part 50 regulations. Under the circumstances another serious consequence of the Program is therefore a likelihood that injuries and potentially serious hazards would go unreported to the operator and to MSHA and that such hazards would remain uncorrected.

APPENDIX A

Dilworth Mine Program for High Risk Employees

1. This Program is effective January 1, 1990; only injuries occurring on or after January 1, 1990 will be counted in this Program.

2. Each employee continues to be obligated to report to Management any work related incident which results in personal injury to the employee and to complete a Report of Personal Injury (RPI) for each such injury.

3. Step I: An employee who experiences four injuries in eighteen working months will be counseled by Management and will be designated as a High Risk Employee.

   A High Risk employee may clear his record under this Program by working twelve working months (from the date of the injury which resulted in his being designated a High Risk employee) without experiencing an injury.

4. Step II: A High Risk employee who experiences an injury within twelve working months (of the date of the injury which resulted in his being designated a High Risk employee) will (a) be counseled, (b) be suspended from work for two days without pay, and (c) will attend a special awareness session prior to returning to work after his suspension.

   A High Risk employee who has been counseled, has been suspended, and has attended a special safety awareness session may clear his record under this Program by working twelve working months (from the date of the injury which resulted in his being counseled, suspended, and sent to the special safety awareness session) without experiencing an injury.

5. Step III: A High Risk employee who has been counseled, suspended and sent to a special safety awareness session (under Step II) who experiences an injury within twelve working months (of the date of the injury which resulted in his being counseled, suspended, and sent to a special safety awareness session - under Step II) will be suspended with intent to discharge.

6. For purposes of this Program, the term working month will mean calendar months, extended by:

   (a) The number of calendar days that the employee is eligible for (or would be eligible for upon proper application) Sickness and Accident Benefits; and

   (b) The number of calendar days that the employee is eligible for Workers' Compensation temporary total disability benefits; and

   (c) The number of Monday thru Friday calendar days on which the mine is idle, for reasons other than Regular Vacation and Holidays, and on which the employee does not perform idle day work; and

   (d) The number of calendar days that the employee is laid-off.

Example: An employee is injured on January 16, 1990. Eighteen calendar months from January 16, 1990, is July 16, 1991. If the employee misses work for a period of four calendar days due to sickness, between January 16, 1990, and July 16, 1991, the July 16, 1991, date would not be extended, since the employee is not eligible for Sickness and Accident Benefits until the eighth day of disability due to sickness. If the employee misses work for a period of thirteen calendar days due to sickness, between January 16, 1990, and July 16, 1991, the July 16, 1991, date would be extended by six days to July 22, 1991, since he would not be eligible for Sickness and Accident for the first seven days of absence due to sickness, but he would be eligible for these benefits for the last six days of the absence.

7. Nothing in this Program prohibits Management from disciplining (up to and including discharge) any employee for any action which, irrespective of the existence of this Program, would in Management's judgment constitute grounds for discipline (up to and including discharge). For example, if an employee sustains an injury due to his violation of a work or safety rule, the injury would be counted in this Program, and the employee would be subject to discipline for violation of the work or safety rule.

8. Management reserves the right to exclude an injury from this Program in a rare situation when Management's investigation of the injury reveals absolutely no culpability on the part of the injured employee and when excluding the injury from the Program appears to Management to be in the best interest of attaining a safe working environment for all employees at the mine. (Joint Exhibit No. 1).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1992

BETTY B COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. VA 91-410-R
v.	:	Through VA 91-411-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9861401; 4/4/91
	:	Through No. 9861402; 4/4/91
	:	Mine No. 12 44-06423
	:	Docket No. VA 91-412-R
	:	Citation No. 9861047; 4/4/91
	:	Mine No. 11 44-04204
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 91-454
	:	A. C. No. 44-04204-03538D
v.	:	
	:	Docket No. VA 91-455
BETTY B COAL COMPANY, INC., Respondent	:	A. C. No. 44-06423-03525D
	:	No. 11 Mine

DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Broderick

On December 4, 1991, the Secretary filed a motion to approve a settlement between the parties in the above cases. The cases include 3 alleged violations of 30 C.F.R. 70.209(b), each of which was originally assessed at $1200. The Secretary continues to assert that the violations resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to a reduction in the total penalties from $3600 to $2880.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement motion is APPROVED. The operator is ORDERED to pay within 30 days of the date of this order, the sum of $2880 for the violations charged in this proceeding.

IT IS FURTHER ORDERED that the contest proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 20, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 91-87-M A. C. No. 04-04684-05510
v.	:	Docket No. WEST 91-370-M A. C. No. 04-04684-05511
PETERS & GARMAN CONSTRUCTION, Respondent	:	Shell Lane Mine

ORDER VACATING DEFAULT
DECISION APPROVING SETTLEMENTS

These cases are now before me pursuant to Orders of the Commission dated February 11, 1992.

As stated in the Commission orders, the parties have reached a settlement in these cases but were delayed in submitting the agreements because the operator's counsel was temporarily out-of-state. Bearing in mind the Commission's repeated admonition that default is a harsh remedy and since the parties have settled these matters, I conclude that relief from default is warranted.

The parties have filed a joint motion to approve settlements in these cases. A modest reduction in penalties from $267 to $253 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is **ORDERED** that the defaults issued in these cases be and are hereby **VACATED.**

It is further **ORDERED** that the motion for approval of settlements be **GRANTED** and the operator **PAY** a penalty of $253 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 21 1992

SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), for AMOS HICKS, Complainant v.	:	DISCRIMINATION PROCEEDING Docket No. VA 89-72-D NORT CD 89-18
COBRA MINING, INC., JERRY K. LESTER, AND CARTER MESSER, Respondent	:	

DECISION

Before: Judge Weisberger

On January 13, 1992, the Commission issued a decision on this matter remanding this case to me for additional reconsideration with regard to the amount of consequential damages Complainant is entitled to in connection with the loss of his pickup truck that was repossessed shortly after he was discriminatorily discharged in May 1989. (Docket No. VA 89-72-D 14 FMSHRC ___) Specifically, the Commission directed that the record be reopened to receive evidence of the value of the truck at the time of repossession.

On January 17, 1992, I issued an Order requiring the parties, by Janaury 31, 1992 to "...confer and attempt to stipulate the fair market value of the vehicle in question at the time of repossession. Should this amount be stipulated to, the parties shall file a stipulation by January 31, 1992. If the parties cannot stipulate to the value of the truck, then, by January 31, 1992, the parties shall file evidence of the market value of the truck at the time of repossession. The evidence filed shall pertain to such factors as the condition of the truck, equipment options, depreciation during the 14 months Complainant owned it, and independent appraisal manuals. Each party shall have the right to reply to the other party's submission of evidence. Such reply shall be filed by February 7, 1992."

Pursuant to a request from Complainant, a one week extention was granted to comply with the terms of the Order.

On Feburary 7, 1992 the Secretary filed a Brief containing a statement regarding the fair market value of the truck in question. Respondents have not filed any submission required by the Order of January 17, 1992.

The representations in Complainant's Brief and the statements submitted in the Brief, regarding the fair market value of the subject truck have not been contradicted or rebutted by Respondent who have not responded to the Order of January 17, 1992. Accordingly, I accept the figures submitted by Complainant and find that the fair market value of the truck when repossessed was $9,927.98 Further, when the amount is reduced by resale amount of the truck ($7,400) and increased by the losts Mr. Hicks incurred during the repossession, the resulting amount, $2,670.42 is the damages owed Complainant.

Complainant also represents that interest has been calculated to be $667 from the "day of repossession through the present date". Respondent have not filed any submission disagreeing with this representation, and therefore it is accepted.

Accordingly it is **ORDERED** that Respondents shall, within 30 days of this Decision, pay Complainant $2,670.42, as consequential damages, for the loss of his truck, plus interest of 667.02.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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FEB 21 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-346-M A.C. No. 04-04925-05503 AMH
v.	:	Royal Mountain King
FORD CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA, for Petitioner;
Robert D. Peterson, Esq., Rocklin, CA, for Respondent.

Before: Judge Morris

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges that Respondent Ford Construction Company ("FCC") violated safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., ("the Act").

A hearing on the merits was held in Sacramento, California on November 13, 1991.

The parties filed post trial briefs.

Threshold Issue

The threshold issue is whether MSHA has jurisdiction in the State of California or has it been preempted by Cal-OSHA.

FCC raised this issue at the hearing but did not pursue it in its post-trial brief. Inasmuch as FCC filed material in the nature of a post-trial brief at the close of the hearing, the Judge believes the threshold issue should be considered.

FCC relies on Troy Gold Industries, Ltd v. Occupational Safety and Health Appeals Board, Division of Occupational Safety and Health 187 Cal. App. 3d 379, 231 Cal. Rptr 861 (Nov. 1986). A summary of the relevent California statutes filed herein is necessary.

Section 6703 vests jurisdiction over employment and places of employment in the California Division of Occupational Safety and Health.

Section 6303 defines "Place of Employment" and "Employment."

Section 6303.5 addresses the exercise of jurisdiction by a federal agency. This section provides as follows:

> § 6303.5. Effect of exercise of jurisdiction by federal agency
>
> Nothing in this division shall be construed to limit the jurisdiction of the state over any employment or place of employment by reason of the exercise of occupational safety and health jurisdiction by any federal agency if federal jurisdiction is being exercised under a federal law which expressly authorizes concurrent state jurisdiction over occupational safety or health issues.

Section 6304 defines "employer."

Section 7950 is the statutory citation for the Tom Carroll Memorial Tunnel and Mine Safety Act of 1972. Title 8, Subpart 17, Section 6950, contains various Mine Safety Orders. These orders appear to establish minimum safety standards at mines.

Title 8, Article 16, Section 7005 addresses drilling operations and jumbos.

Discussion

MSHA has a broad grant of authority to conduct inspections of mining facilities. The statute provides at Section 4 of the Act that "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine, shall be subject to the provisions of this chapter." 30 U.S.C. § 803. The Act further provides in Section 506 that the States may have concurrent jurisdiction with the MSHA to inspect and regulate mining facilities, and are preempted by the federal statute to the extent that any "such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard." 30 U.S.C. § 955(a).

Section 6307 of the California Labor Code provides that Cal-OSHA has jurisdiction "over every employment and place of employment" in the state. That broad jurisdictional grant has been, however, qualified by Labor Code Section 6303(a) which defines the "place of employment" as "any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division." [Emphasis added.] Thus it would appear from the plain meaning of the statutory language that in places where a federal agency is authorized to conduct inspections, and where that federal agency actually does conduct inspections, Cal-OSHA is precluded from exercising concurrent jurisdiction pursuant to state law.

This is the exact result which the California Court of Appeals arrived at in the Troy Gold case. In that case, citations issued by Cal-OSHA were vacated on the grounds that the gold mine where the citations arose was within MSHA jurisdiction, and where MSHA had been actively involved in exercising that jurisdiction. The court reasoned that:

> ... the intent of the Legislature, which we derive from the unambiguous language of section 6303, is for the Division to have potential plenary jurisdiction over the occupational health and safety of the place of employment except where such jurisdiction would duplicate the efforts of another agency. [Emphasis added.]

Troy Gold Industries, Ltd. v. Occupational Safety and Health Appeals Board, 187 Cal. App.3d 379, at 389.

In an apparent response to the Troy Gold decision which restricted Cal-OSHA jurisdiction in places of employment subject to active federal regulation, Labor Code Section 6303 was expanded in 1988 with the adoption of Labor Code Section 6303.5 which provides that "nothing in this division shall be construed to limit the jurisdiction of the state over any employment or place of employment by reason of the exercise of occupational safety and health jurisdicition by any federal agency if federal jurisdiction is being exercised under a federal law which expressly authorizes concurrent state jurisdiction over occupational safety or health issues."

California Labor Code Section 6303.5 is, on its face, at odds with the plain language of Section 6303(a), particularly as

interpreted in the Troy Gold case. This fact notwithstanding, nothing in Labor Code Section 6303.5 divests MSHA of any part of its jurisdiction to conduct inspections of California mines. Consequently, Section 6303.5's only effect is to re-affirm that the state safety and health division may exercise the concurrent jurisdiction already granted in and recognized by the federal statute. 30 U.S.C. Section 955(a); Secretary of Labor v. Brubaker-Mann Inc., 8 FMSHRC 1487 (1986).

It is clear from the foregoing that as a result of the enactment of California Labor Code, Section 6303.5, Cal-OSHA may exercise concurrent jurisdiction with MSHA. In order to assure that concurrent jurisdiction among state and federal agencies not lead to undue confusion, the federal statute sets forth rules to follow in the event that the standards used to cite employers under such dual regulation should conflict with one another. Section 506(a) of the Act provides that the federal standard shall supersede the state standard when the state standard is in conflict with the federal act. 30 U.S.C. § 955(a). That preemptive language is, however, qualified by Section 506(b) which recognizes that there may be situations in which the states have more stringent standards providing a greater degree of worker safety than the federal act. In such circumstances, the statute provides that those provisions of state law which "provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of the Act ... shall not thereby be construed or held to be in conflict with the Act." 30 U.S.C. § 955(b). The same qualification covers the situation where the states have promulgated standards, and the federal act has no equivalent standards at all.

In sum, Cal-OSHA and the MSHA may exercise their jurisdiction over California mines concurrently. That concurrent jurisdiction may be exercised by the state to the extent that state standards are the equivalent of federal standards, are more stringent than federal standards, or cover topics not addressed by federal standards. To the extent that state standards are more lax than federal standards, they will be held to conflict with the federal act, and will be preempted thereby. There is no contrary situation under which the state standards will be held to preempt the federal standards. Thus, although a more stringent federal standard will preempt a less stringent state standard, a more stringent state standard does not preempt the lesser federal standard; it merely co-exists with it. Under this regulatory scheme, the worker is assured the greatest degree of protection which the combination of federal and state regulatory agencies have mandated.

Thus, the fact that Cal-OSHA has jurisdiction over mines has no bearing on this case, nor does the fact that the state plan has provisions covering tunneling (not at issue in this case), nor would it make any difference if the state had more stringent equipment regulations covering the earthmovers at issue in this case.

There is no legal basis for, or authority in support of, the proposition that the MSHA is precluded from inspecting a construction site at a California mine where an independent contractor was in the process of constructing tailings ponds.

Accordingly, FCC's motion to dismiss is **DENIED.**

Summary of the Background Evidence

JAIME ALVAREZ, an MSHA mine safety and health inspector, works in the MSHA field office in Vacaville, California.

Mr. Alvarez, experienced in mining, inspected FCC June 13-15, 1990. The main inspection was being conducted at the Meridian Gold Company, a gold mine. (Tr. 9, 11).

FCC, a contractor, was widening a settling pond [1] and raising the height of the dam in front of the settling pond area.

FCC's work also included laying a pad of clay to prevent toxic substances from leaching into the soil. (Tr. 13, 35, 44). This operation involved a large amount of heavy mobile equipment.

Mr. Alvarez was accompanied by his supervisor, Mr. Willy Davis, also by Mr. Kim Witt, safety representative of Meridian. In addition, Louie Kemp, the FCC foreman was present. (Tr. 14).

In cross examination, the inspector conceded his field notes do not reflect a conversation with Mr. Witt indicating that the inspected area was part of the mine site. However, the inspector had looked at a mine map. (Tr. 36, 37).

Mr. Witt, at the inspector's request, took him to the site of contractors other than FCC. (Tr. 37). The entire Meridian

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[1] A settling or tailing pond is a large pond where mine tailings are dumped. The heavier materials settle to the bottom and the water is normally recycled to other uses. (Tr. 12).

Gold Mine area was fenced. The inspection group had entered through the main gate. (Tr. 38).

On June 13 and 14, Messrs. Witt and Kemp accompanied the inspector. (Tr. 37).

All of the equipment cited by Mr. Alvarez was working in the same general area, about a half mile square. (Tr. 44). Only FCC was working in this particular area. (Tr. 45).

Mr. Witt (Meridian's representative) introduced Mr. Kemp as the FCC foreman. Mr. Kemp also identified himself as the FCC foreman. (Tr. 43).

Citation No. 3458357

This citation was issued when Mr. Alvarez observed the driver of a 630D Moore scraper operating the vehicle without wearing a seat belt. MSHA's regulation, 30 C.F.R. 56.14130, [2] addresses roll-over protective structures and seat belts.

The scraper is approximately 49 feet long, 13 feet wide and 14 feet high. The operator was sitting in the front of the unit. There was no door alongside the operator who was 5 1/2 to 6 feet above the ground. The equipment was operating on a steep incline of 40 to 45 degrees. There were numerous pot holes, bumps and loose material on the road. (Tr. 2, 15-17).

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[2] § 56.14130 Roll-over protective structures (ROPS) and seat belts.

(g) Wearing seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.

Mr. Kim Witt (Meridian) talked to Mr. Kemp (FCC) and in turn they talked to the equipment operator. The operator immediately put on his seat belt.

The inspector considered the gravity to be such that if the operator was thrown from the driver's seat, he could be run over by the rear tires. (Tr 17, 18).

The inspector considered the negligence to be moderate since Meridian had notified FCC that they were under MSHA's jurisdiction. Further, Meridian's rules require the use of seat belts.

Inspector Alvarez conceded his field notes show Mr. Louie Kemp was present but the notes do not reflect the presence of Mr. Witt. The inspector indicated he was basically interested in the company at the immediate scene. (Tr. 40).

Mr. Kemp was present when this piece of equipment was inspected. He did not deny the operator was an FCC employee. (Tr. 66).

Discussion

FCC correctly argues that seat belts are not required to be installed on scrapers. Section 56.14130 requires that seat belts be installed on

(1) crawler tractors and crawler loaders;

(2) graders;

(3) wheel loaders and wheel tractors;

(4) the tractor portion of semi-mounted scrapers, dumpers, water wagons, bottom dump wagons, rear dump wagons and towed fifth wheel attachments;

(5) skid-steer loaders; and

(6) agricultural tractors.

A dictionary of Mining, Mineral and related terms, U.S. Department of Interior 1968 defines a scraper in part as follows:

> b. A steel tractor-driven surface vehicle, 6 to 12 cubic yard capacity, mounted on large rubber-tired wheels. The bottom is fitted

with a cutting blade which, when lowered, is dragged through the soil. When full, the scraper is transported to the dumping point where the material is discharged through the bottom of the vehicle in an even layer; used for stripping and releveling topsoil and soft material at opencast pits. See also scarifier. Nelson. c. A scraper loader of scraper chain conveyor. e. A mechanical contrivance used at collieries to scrape the culm or slack along a trough to the place of deposit. g. An apparatus drawn by horses or oxen for scraping up earth in making roads or canals, and for removing overburden from shallow coalbeds and mineral deposits. Fay. h. An apparatus used to take up coal from the floor of a mine after it has been shot, and deposit it either in cars or in a conveyor. It is pulled back and forth by two ropes attached to separate drums of a hoist; a rubber-tired device used to move earth in surface mining; i. A machine used in mines for loading cars and transporting ore or waste for short distances. There are two basic types of scraper: (1) the hoe or open type, which is particularly suitable for moving coarse, lumpy ore, and (2) the box or closed type, which is particularly suited for handling fine material, especially on a loading slide. j. A blade or blades caused to bear against the moving conveyor belt for the purpose of removing material sticking to the conveyor belt. k. A digging, hauling, and grading machine having a cutting edge, a carrying bowl, a movable front wall (apron), and a dumping or ejecting mechanism. Also called carrying scraper; pan. l. See machine scraper. D.O.T. 1.m. The name applied to a bowl scraper multibucket excavator; also known as scraper excavator.

It may well be that the term "scraper" fits within one of the six paragraphs enumerated in § 56.14130(a) but the record is silent on that issue.

This citation should be vacated.

Citation No. 3458423

This citation alleges FCC violated 30 C.F.R. § 56.14130. At the commencement of the hearing, Petitioner moved to vacate this citation. (Tr. 5, 6).

For good cause, the citation should be vacated.

Citation No. 3458424

This citation involved a CAT dozer towing a multi-bladed rotary tiller. The equipment was secured with a primary tow bar.

However, the regulation, 30 C.F.R. § 56.14209, [3] requires a secondary rigging whether it be a safety chain or cable.

The rotary tiller was 10 feet long by 8 feet wide with numerous axle bonnets containing rotary discs used to scrape the ground. A visual check determined there was no secondary rigging in place. (Tr. 18, 19).

The towing was taking place on ground similar to recently plowed farm-land.

This violation was discussed with Messrs. Witt and Kemp. Abatement was satisfactory and accomplished by installing a safety cable. (Tr. 20).

The inspector considered the gravity, on an injury-illness basis, to be unlikely because if the rope broke, the equipment wouldn't roll far.

The towed equipment had neither its own brake system nor any brake lights. (Tr. 47).

---

[3] § 56.14209 Safety procedures for towing.

(b) Unless steering and braking are under the control of the equipment operator on the towed equipment, a safety chain or wire rope capable of withstanding the loads to which it could be subjected shall be used in conjunction with any primary rigging.

Mr. Kemp was present and talked to the equipment operator. He did not deny that the operator was an FCC employee. (Tr. 67).

Discussion

FCC argues there is no evidence what company owned and operted the equipment. Nor was there any evidence whose employee was operating the dozer.

I am not persuaded by FCC's arguments. This was obviously an inspection of FCC's operations in a half mile square. (Tr. 44). Neither representative denied ownership, possession, control or operator identity. In fact they both produced a safety cable to abate the violation. (Tr. 20).

The uncontroverted evidence establishes the rotary tiller was towed without a safety chain. A violation of C.F.R. § 56.14209 was established.

Citation No. 3458424 should be affirmed.

Citation No. 3458425

This citation involved a large Caterpillar dozer, D8H. The operator violated 30 C.F.R. § 56.14130(g) [4] in not wearing a seat belt. This equipment was traveling in excess of five miles per hour when the inspector observed it.

This citation was discussed with Messrs. Witt and Kemp. After a short conversation, Mr. Kemp talked to his employee who put on his seat belt.

The inspector considered the gravity, based on injury-illness to be unlikely because the dozer was moving slowly on flat ground. (Tr. 23). He considered negligence to be moderate because Meridian had notified FCC of the MSHA rules and regulations. (Tr. 23, 49, 50).

Mr. Alvarez's notes indicate Mr. Edgar Smith, Meridian's foreman and Mr. Louie Kemp were present. (Tr. 48). Kim Witt was also with this inspection group. (Tr. 50).

---

[4] Cited, supra, fn 2

Mr. Kemp talked to the operator during this inspection. Mr. Kemp did not deny the operator was an FCC employee. (Tr. 67).

Discussion

Inspector Alvarez described this dozer as "an earth moving heavy piece of mobile equipment." (Tr. 22).

However, Section 56.14130(a) is equipment specific as to what pieces and types of equipment are subject to the requirements. Dozers are not included in the specific list of types of equipment covered by the seat belt requirements.

Accordingly, MSHA did not carry its burden of proof that the dozer was subject to § 56.14130(a). Since no seat belts are required to be installed, there was no violation of for failing to wear a seat belt.

Citation No. 3458425 should be vacated.

Citation No. 3458426

This citation alleges FCC violated 30 C.F.R. § 56.14132. [5] An Ingersoll Rand, 5D-150B, heavy roller compactor was being operated by FCC without a reverse signal alarm and without spotters. (Tr. 35, 51, 52). The inspector climbed on the equipment and noticed the obstructed view to the rear. The view was obstructed by the length and height of the equipment. (Tr. 23-25). Basically there was a blind spot behind the operator's position. There were one to four employees in the area but the inspector did not learn their identity.

---

[5] § 56.14132 Horns and backup alarms.

(b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have-

(i) An automatic reverse-activated signal alarm;

(ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement;

(iii) A discriminating backup alarm that covers the area of obstructed view; or

(iv) An observer to signal when it is safe to back up.

Messrs. Witt and Kemp were notified of the violation and they confirmed there was no backup alarm on the equipment nor were spotters being used. (Tr. 35-54, 61-62).

Meridian had an alarm installed.

In the inspector's opinion, the possibility of a fatal accident was substantial and reasonably likely. (Tr. 26). He further considered negligence to be moderate because Meridian had notified FCC they were working under MSHA regulations. (Tr. 27).

The inspector did not determine the identity of the operator of this equipment. (Tr. 52).

Mr. Kemp was present during this inspection. He did not deny that the equipment operator was an FCC employee. (Tr. 68).

Discussion

FCC cites portions of the transcript in support of its argument. Specifically, FCC relies on the following exchange at the hearing:

> Q. And did you determine who owned this piece of equipment?
>
> A. No, we just determined who was using it.
>
> Q. And who was using it?
>
> A. Ford Construction Company.
>
> Q. And how did you determine that?
>
> A. Asked the foreman Louie Kemp, who was in charge of all the equipment. There was some question earlier who owned and operated the equipment, and I believe the conversation led to Meridian Gold stating that Ford Construction was the primary contractor there, and they were in charge of whatever went on at that particular mine site area including the maintenance of the equipment.
>
> Q. But in fact that was not the case, was it? In fact Meridian Construction's own people came and fixed those alarms, right?

A. As far as I know they did.

Q. And did you determine the identity of the operator?

A. No.

(Emphasis added).

FCC's arguments are misdirected. Neither ownership of the equipment nor maintenance responsibilities would relieve FCC from the obligation of complying with the regulation since it operated the equipment.

FCC urges an inconsistency exists in connection with this citation.

It is contended that Mr. Alvarez testified that before he climbed up on this piece of equipment he "walked up behind it and noted that it had a lock (sic) to the piece of equipment at a distance of roughly four to five feet. I could no longer see the operator." (Tr. 25 lines 21-24). FCC claims Mr. Alvarez's testimony was contradicted when, in cross examination, he testified he did not believe he walked up to the rear of the equipment. (Tr. 53, lines 22 through 25 and Tr. 54, line 10).

I disagree. No inconsistency exists here. FCC's cross examination completely changes the inquiry when the cross examiner asks "... while this equipment <u>was backing you</u> didn't walk up to the rear ..."

FCC further points to an inconsistency arising from the following testimony by Mr. Alvarez:

Q. You have indicated that Mr. Louis Kemp was a foreman. How did you determine that?

A. I eventually had asked Mr. Kim Witt when he took me out to see where the contractors were and we ran into this Ford Construction Company doing the contract. I advised him that I also wanted to see the foreman or superintendent or whoever was in charge of the operation. He went and got Mr. Kim Witt.

Q. So you tell Mr. Kim Witt the fact that you wanted the guy that is in charge at Ford, he goes and gets Mr. Kim Witt?

A. Yes, sir.

Q. Now, what did you ask Mr. Kim Witt?

A. In regard to what, sir?

Q. In regard to his status with Ford Construction?

A. I basically asked him if he was the man in charge and he said that he was the foreman.

As FCC suggests, Mr. Alvarez may have been confused (Brief page 12 line 26). However, there was an abundance of evidence establishing that Mr. Louie Kemp was the FCC foreman.

FCC's considerable efforts attacking the credibility of Mr. Alvarez are rejected. I found Mr. Alvarez to be quite credible.

Citation No. 3458433

This citation involved a Caterpillar 835 compactor similar to the equipment in the previous citation. The backup alarm on the compactor was not operating on a constant basis, and no spotters were being used. (Tr. 35). At times the alarm worked and at other times it did not. This situation constituted a violation of 30 C.F.R. § 56.14132. [6]

Mr. Witt and Mr. Kemp were in attendance when the equipment was checked.

There was probably a short in the compactor. It was repaired by a mechanic. (Tr. 27-29).

The inspector considered the gravity to be low because the area was flat and there was no foot traffic. He further considered negligence to be moderate since Meridian advised FCC they were subject to MSHA regulations. (Tr. 29).

---

[6] § 56.14132 Horns and backup alarms

(a) Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Mr. Alvarez conceded the back-up alarm wasn't operating automatically. (Tr. 54, 55). The inspector did not identify the operator of the equipment. (Tr. 55).

The inspector's field notes indicate Edgar Smith, Mine Superintendent, was present. (Tr. 56).

Mr. Kemp was also present during this inspection and he did not deny that the operator was an FCC employee. (Tr. 68).

Discussion

In this citation, as with the previous citation, the uncontroverted evidence indicates the back-up alarm was not operating on a constant basis.

The backup alarm was therefore, not in a functional condition as required by 30 C.F.R. § 56.14132.

FCC states the inspector had "no idea" who owned the piece of equipment or who was operating it, citing the transcript at page 55, lines 6 through 12.

As noted herein ownership is not a critical element in MSHA's proof.

A considerable portion of FCC's arguments in this citation and others deals with the failure of the inspector's notes to always reflect the presence, for example, of FCC's Louis Kemp. FCC urges the Judge to totally reject MSHA's cases as not credible.

FCC's credibility views are rejected. An inspector's testimony is not expected to precisely follow his notes. Also the reverse is true. In addition, as Mr. Alvarez testified, his notes are primarily to refresh his recollection when he writes his citations. Mr. Alvarez specifically testified that Mr. Kemp was present when all of the violative conditions were observed. Finally, neither Mr. Kemp nor anyone on behalf of FCC offered any contrary evidence.

FCC contends Mr. Alvarez's credibility suffered when he stated that Kim Witt and Louie Kemp were present during this portion of the inspection. However, the inspector couldn't remember whether Edgar Smith was present. Specifically FCC cites the transcript at page 55, lines 20 through 25 and page 56, lines 1 through 6. The cited portion reads as follows:

Q. How about Edgar Smith?

A. Probably there.

Q. I beg your pardon?

A. More than likely he was there.

Q. And do your field safety notes show that at least in that paragraph entitled accompanied by, does it show only Edgar Smith?

A. Yes, it has Edgar Smith, mine superintendent.

Q. It says what? I am sorry.

A. Beg your pardon?

Q. What does it say?

A. It notes Edgar Smith, mine superintendent.

The main focus of the evidence was not Edgar Smith but Kim Witt and Louie Kemp. I do not find the cited exchange affects the inspector's credibility.

Citation No. 3458433 should be affirmed.

Citation No. 3458434

This citation was issued for a violation of 30 C.F.R. § 56.14132.[7] A Caterpillar model number 641 water wagon had an inoperable backup alarm as required when there is an obstructed view to the rear.

A further inspection by Mr. Witt and Mr. Kemp confirmed the defect. Meridian's mechanic repaired the alarm.

The inspector considered the gravity to be low as the area was flat and there was no foot traffic.

---

[7] Cited, supra, fn 6.

Inasmuch as Meridian had notified FCC of the MSHA regulations, the inspector considered FCC's negligence to be moderate. (Tr. 29-31, 58).

In connection with this citation, Mr. Alvarez's notes indicate the following individuals were present: Edgar Smith (Mine Superintendent); Chris Gagg (Miner's representative); Willy Davis (MSHA) and Kim Witt (Meridian). (Tr. 59). His notes do not reflect that Mr. Louie Kemp was present. (Tr. 60).

Mr. Kemp was present during this inspection and he did not deny that the operator was an FCC employee. (Tr. 69).

Discussion

The uncontroverted facts here establish a violation of the regulation as the water wagon lacked a back-up alarm.

FCC points out that while Mr. Alvarez testified to the presence of both K. Witt and L. Kemp his field notes show E. Smith, Chris Gagg, Willy Davis and K. Witt were present. But Mr. Alvarez concedes that his notes did not show the presence of L. Kemp (Tr. 60, lines 3 through 5).

This issue has been previously considered. FCC offered no contrary evidence and the absence of any contrary witness and Mr. Alvarez's credible testimony causes me to conclude that Mr. Kemp was present.

FCC notes the lack of employee exposure (no foot traffic); however, lack of employee exposure is an issue to be considered in assessing a civil penalty.

Citation No. 3458434 should be affirmed.

Citation No. 3458435

This citation involves two CAT 637B Moore scrapers, one of the scrapers was cited in Citation No. 3458357 (no seat belts).

This equipment, which weighs over 100,000 pounds, was traveling at a high rate of speed to the settling pond construction area. The terrain consisted of loose ground with bumps and pot holes.

Mr. Kemp's vehicle followed one of the trucks and they were clocked in excess of 24 plus miles per hour. (Tr. 31, 32).

The citation alleges a violation of 30 C.F.R. § 56.9100. [8]

Messrs. Kemp and Witt discussed the matter and Mr. Witt stated the mine had a posted speed limit of 15 miles per hour. (Tr. 33). Mr. Kemp felt there was a need to have the vehicles moving as fast as they could.

The vehicles were traveling on a roadway where there was constant foot traffic. If an accident occurred, a fatality could result. (Tr. 33).

Messrs. Witt and Kemp agreed that the vehicles should not travel over 15 miles per hour in this area. (Tr. 34).

The inspector considered negligence to be high because FCC had been made aware of the speed limits.

Mr. Alvarez did not determine the ownership of the truck nor did he identify the driver. (Tr. 57).

Mr. Alvarez's field notes reflect that when the vehicle was clocked, the four men previously mentioned in Citation No. 3458435 were present. These were Smith, Gagg, David, Witt as well as Louie Kemp. (Tr. 60).

The inspector did not observe any posted speed limit signs in this particular area but he had seen the posting. In addition, he did not learn who owned either scraper nor did he identify the driver. (Tr. 33, 61).

Field notes are used as a reference when an inspector later writes his citation. (Tr. 70).

Mr. Kemp was not asked the names of the various operators. However, Mr. Kemp was asked to identify their employer. (Tr. 74).

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[8] § 56.9100 Traffic control.

To provide for the safe movement of self-propelled mobile equipment-

(a) Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine;

Discussion

The regulation requires that rules governing speed etc. for the operation of vehicles be posted and followed.

Mr. Witt stated there was a posted speed limit of 15 miles per hour so the posting is not an issue in this case.

FCC contends the evidence is fatally defective in several respects:

Initially, it is claimed that a speed of 24 mph is not excessive. I disagree. Operating a 100,000 pound vehicle in a construction area at such a speed is excessive as a matter of law, especially when loose ground, bumps and potholes exist in the travelway. (Tr. 32).

Further, was the speed limit of 15 mph established and agreed upon the day of the inspection. FCC cites the transcript at page 34, lines 4 through 9, in support of its view. It provides:

> During the talk Mr. Kim Witt and Mr. Louie Kemp and I, myself had, we finally arrived at that we could not allow these -- due to the conditions involved -- we could not allow these vehicles to travel over 15 miles per hour. And that was settled as the limit in this new work area.

I consider the above evidence to mean that the existing speed limit would be strictly enforced. Mr. Kim Witt, who should be knowledgeable as Meridian's representative told MSHA that the mine had a posted speed limit of 15 miles per hour. (Tr. 32). Mr. Louie Kemp's view did not prevail. He preferred to have the vehicles moving as fast as they could. (Tr. 32, 33). Further, Mr. Alvarez testified that "Meridian Gold Company had 15 miles per hour speed limit posted at various areas throughout the mine." Mr. Alvarez saw the posting himself but not in this area. (Tr. 33). The preponderance of the evidence shows that the site had a posted limit of 15 miles per hour prior to the time when the vehicles were being operated at 24 miles per hour.

Further, was the driver of the speeding truck identified? The uncontroverted evidence shows that Mr. Kemp, the FCC foreman, was present and talked to the driver. He did not deny that the driver was an FCC employee.

On the uncontroverted evidence, Citation No. 3458435 should be affirmed.

Civil Penalties

Section 110(i) of the Act, 30 U.S.C. § 820(i), mandates consideration of six criteria in assessing civil penalties.

There was no direct evidence offered as to the size of the business of FCC.

The effect of the penalties on the ability of the operator to continue in business is a matter to be established by the operator. In the absence of facts to be contrary, I conclude the payment of the proposed penalties will not cause FCC to discontinue in business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974).

The operator's history of previous violations was not in evidence.

FCC was negligent as to each citation since each violative condition was open and obvious.

Gravity was moderate as to Citation No. 3458424, the towed rotary tiller. The equipment would not roll too far even if it came loose.

The lack of a reverse back-up alarm in three of the citations involve high gravity; these are situations that can result in a fatality.

The violative conditions here were promptly abated hence the operator is entitled to statutory good faith.

Accordingly, I enter the following:

ORDER

1. Citation No. 3458357 is **VACATED.**

2. Citation No. 3458423 is **VACATED.**

3. Citation No. 3458424 is **AFFIRMED** and a civil penalty of $25 is **ASSESSED.**

4. Citation No. 3458425 is **VACATED.**

5. Citation No. 3458426 is **AFFIRMED** and a civil penalty of $75 is **ASSESSED.**

6. Citation No. 3458433 is **AFFIRMED** and a civil penalty of $25 is **ASSESSED.**

7. Citation No. 3458434 is **AFFIRMED** and a civil penalty of $25 is **ASSESSED.**

8. Citation No. 3458435 is **AFFIRMED** and a civil penalty of $100 is **ASSESSED.**

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 21, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-1285
	:	A. C. No. 15-13880-03543 D
v.	:	
	:	No. 7 Mine
T & H COAL COMPANY, INC., Respondent	:	

DECISION APPROVING PENALTY
ORDER OF DISMISSAL

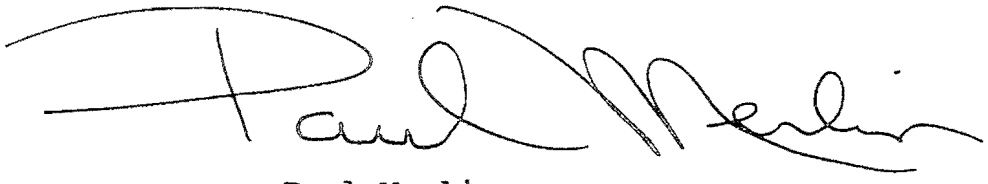
Before: Judge Merlin

The operator has filed a letter advising that it is withdrawing its contest in the above-captioned case and paying the proposed penalty. The Mine Safety and Health Administration has informed the Commission that the penalty has been paid.

Citation No. 9859056 was issued as a 104(a) citation for an alleged violation of 30 C.F.R § 70.209(b). According to the Secretary, the respirable dust samples submitted to MSHA were invalid because respirable dust had been intentionally removed from the samples before they were submitted to MSHA.

I have reviewed the citation in light of the six statutory criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and find that the penalty assessed is in accordance with the provisions of the Act.

Accordingly, I approve the $1,100 penalty assessment in this case and the operator having paid, 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
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

FEB 24 1992

RICHARD SIERRA, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 91-200-DM
v.	:	SC MD 91-05
	:	
PHELPS DODGE CORPORATION, Respondent	:	Tyrone Branch

ORDER OF DISMISSAL

Before: Judge Morris

On February 18, 1992, the day before a scheduled hearing in El Paso, Texas, Complainant advised the Judge that he intended to withdraw his complaint unless he could have more time to secure the services of an attorney.

The Judge declined to grant more time and Mr. Sierra orally withdrew his complaint due to "financial reasons."

Commission Rule 11, 29 C.F.R. § 2700.11 permits a party to withdraw a pleading at any stage of a proceeding with approval of the Commission or the Judge.

In view of Complainant's motion, Counsel for Respondent was advised and the hearing and related arrangements were canceled.

For the foregoing reasons, this case is **DISMISSED.**

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 25 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-245 A.C. No. 42-01697-03627
v.	:	Bear Canyon #1
C.W. MINING COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charges the Respondent, the operator of the Bear Canyon #1, an underground coal mine, with a 104(d)(1) violation of a mandatory regulatory standard 30 C.F.R. § 75.1101-23(a).

The operator filed a timely answer contesting the alleged 104(d)(1) violation, its characterization as serious and significant (S&S) and as unwarrantable failure, and the appropriateness of the proposed penalty.

Pursuant to notice, a hearing on the merits was held before me at Salt Lake City, Utah, on January 28, 1992.

Stipulations

At the hearing, the parties entered into the record the following stipulations which I accept as established fact.

1. C.W. Mining Company is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. C.W. Mining Company is the owner and operator of Bear Canyon #1 Mine, MSHA I.D. No. 42-01697.

3. C.W. Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation and order were properly served by a duly authorized representative of the Secretary upon an agent of C.W. Mining Company on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by C.W. Mining Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect C.W. Mining Company's ability to continue business.

8. C.W. Mining Company is a medium size mine operator with 361,826 tons of production in 1989.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

The Evidence Presented

On September 6, 1990, MSHA issued Section 104(d)(1) Citation No. 3414130 at the Bear Canyon No. 1 Mine operated by C.W. Mining Company. The operator was cited for a violation of 30 C.F.R. § 75.1101-23(a) because the operation on at least one occasion had not complied with the approved plan for the storage of self-contained self-rescuers.

At the hearing the Secretary presented credible evidence that supported a finding that the operator violated the cited safety standard as alleged in the citation. The citation reads in part as follows:

> The currently approved self-contained self-reserve storage plan was not being complied with by the operator.
>
> The 2nd East working section crew and foreman who observed exiting the mine at the end of their shift in a mantrip which did not have a "SCSR" unit for every person riding the mantrip. The mantrip did not have any "SCSR" units for any of the riders.
>
> On questioning the foreman, it was learned that "SCSR" units were not taken into the mine at the start of the shift. The foreman did not check any of his crew members for "SCSR" units nor did he obtain a unit for himself.
>
> The foreman stated, "he was familar with the storage plan" but did not check on units.

The violation was promptly abated within 1/2 hour by providing the mantrip with a sufficient number of SCSR units for persons that would be riding the mantrip.

Respondent presented evidence that each of the mantrips it normally used to carry men in and out of the mine had the required number of SCSR units. On September 6, 1990, the foreman checked the SCSR units on the mantrip intended to be used before the men left to go underground. As the mantrip was readied to go underground, it was discovered that the transmission in the mantrip would not operate properly, so the foreman obtained a spare pickup, parked nearby, and used it to haul the men underground. He did not check to see if this mantrip, the spare pickup, had the required SCSR units.

Respondent also presented evidence that each man in the crew was wearing a filter type self rescuer throughout the shift and extra SCSR units were stored throughout the mine underground including enough SCSR units for all of the men stored at the underground area, which was within 300 feet of the site where the men were working. The men were less than 2,000 feet from the nearest portal. The travel time while riding the mantrip from the surface to the working section was ten minutes, and there were locations along the mantrip travelway where SCSR units were stored and available for use if needed.

Respondent asserts that the mantrip is not required to stay in the working section and very often leaves after delivering the

men to their work station. There has never been an occasion in the history of this mine when a miner has had to use a SCSR for any reason. Respondent contends there were no fire hazards existing at the time of the violation.

Discussion and Disposition of the Issues

At the hearing, after all issues were fully litigated and both sides rested, the Judge with consent of the parties and in open court with the respective attorneys and all witnesses present, stated his impressions of what the evidence presented established. The Judge stated that there was a violation of the mandatory safety standard 30 C.F.R. § 75.1101-23(a) as alleged in the citation, the gravity of the violation was serious with a potential of very serious injury and possible death, that negligence was high and that the violation could well have resulted from the operator's unwarrantable failure. The Judge also stated the evidence established that the violation was not S&S. Even though the violation caused a discrete safety hazard that could result in serious injury or death, the evidence was insufficient to establish that as a result of this isolated violation, there was a reasonable likelihood, evaluated in terms of continued normal mining operation, that the hazard contributed to would result in serious injury.

The parties, nevertheless, at the conclusion of the hearing requested time to prepare and file written post-hearing briefs. Within the 20 days allowed for filing of post-hearing briefs, the parties reached and filed a settlement agreement covering all issues and moved for approval of the settlement agreement. The parties propose to modify the citation from a Section 104(d)(1) citation to a 104(a) non-S&S citation and amend the proposed penalty to $500.

Based upon the evidence presented at the hearing, I find the provision of the settlement agreement are appropriate, supported by the evidence and consistent with the criteria in Section 110(i) of the Act. The amended proposed penalty of $500 is assessed. It will not affect the operator's ability to remain in business.

ORDER

1. Citation No. 3414130 is modified to delete the characterization "significant and substantial" and, as so modified, the citation is **AFFIRMED** and a penalty of $500 is **ASSESSED.**

2. Respondent is **ORDERED TO PAY** to the Secretary of Labor a civil penalty in the sum of $500 in satisfaction of the citation in question within forty (40) days of the date of this decision and order, and upon receipt of payment by the Petitioner, this proceeding is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 25 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CLAYTON LAWSON, WENDELL SLUSHER, and BILLY RAY HENRY, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 91-901-D
	:	CV No. 5 Mine
v.	:	
CUMBERLAND VALLEY CONTRACTORS, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor on May 15, 1991, against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). The complaint was filed on behalf of three former miner employees of the respondent (Clayton Lawson, Wendell Slusher, and Billy Ray Henry), and it alleges that on or about January 22, 1990, the three named complainants "were discriminated against and discharged by the respondent because they had prior to this date, complained about unsafe practices which violated provisions of the roof control plan". The respondent filed an answer admitting that the miners were discharged, but denying that it discriminated against them.

The case was scheduled for hearing in Middlesboro, Kentucky on January 22, 1992. However, the hearing was continued after the parties advised me that they agreed to settle the matter. They have now filed their joint settlement proposal pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement.

Discussion

The parties and the three miner complainants have now agreed to the resolution of all matters set forth in the complaint and have settled the matter. The terms of the settlement agreement are set forth in an agreement executed by counsel for the Secretary, counsel for the respondent, and the three miner

complainants. All of the parties, including the miner complainants, have signed the agreement and they all agree that the settlement terms are fair and proper.

Conclusion

After careful review and consideration of the settlement terms and conditions I find that they reflect a reasonable resolution of the complaint and that the proposed settlement is in the public interest. Since it is apparent that all parties are in accord with the agreement for the settlement disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement IS APPROVED. The parties ARE ORDERED AND DIRECTED to forthwith comply with all the terms of the agreement. Upon compliance, this matter is dismissed with prejudice.

George A. Koutras
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 21 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Master Docket No. 91-1
	:	Docket No. KENT 91-1085
v.	:	A.C. No. 15-16122-03537D
	:	
S & L COAL COMPANY, Respondent	:	Lucky Star No. 1 Mine

ORDER DENYING MOTION TO DISMISS

On February 10, 1992, Respondent S & L Coal Company (S & L) filed a Motion to Dismiss this proceeding because the Secretary's Petition for Assessment of Civil Penalty was not timely filed. The Secretary filed an opposition to the motion on February 19, 1992.

I

The one citation involved in this proceeding was issued to S & L on April 4, 1991. After a proposed penalty assessment was issued, S & L returned its Notice of Contest and Request for Hearing which was received by MSHA on June 28, 1991. On August 19, 1991, the Secretary mailed her Petition for Assessment of Civil Penalty which was received by the Commission on August 21, 1991. The Secretary did not seek an extension of time for filing her penalty proposal, nor did she file an "instanter" (sic) motion to accept late filing. S & L filed its answer on September 16, 1991 (received by the Commission September 20, 1991).

II

Section 105(d) of the Act requires the Secretary, when a timely notice of contest is filed, to "immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing...." Commission Rule 27, 29 C.F.R. § 2700.27, requires the Secretary to file a proposal for a penalty "within 45 days of receipt of a timely notice of contest...." The Commission has stated that "[i]n essence, Rule 27 implements the meaning of 'immediately' in section 105(d)." Salt Lake County Road Department, 3 FMSHRC 1714, 1715 (1981).

Salt Lake set out a two-fold test for deciding whether a late filed penalty case is subject to the "drastic remedy of dismissal": Has the Secretary shown adequate cause for the delay, and, if so, did the delay prejudice Respondent? Salt Lake

at page 717; See also Medicine Bow Coal Company, 4 FMSHRC 882 (1982). Salt Lake involved a 2-month delay; Medicine Bow, a 15 day delay. Dismissal was denied in both cases. The Commission held that adequate cause for the delay was established, but prejudice was not shown. See also Secretary v. M. Jamieson Company, 12 FMSHRC 901 (ALJ); Secretary v. Swindall, 13 FMSHRC 310 (ALJ) (1991). Cases in which motions to dismiss were granted include Secretary v. Washington Construction Company, 4 FMSHRC 1807 (ALJ) (1982) (delay of 1-1/2 years and 2 years), and Secretary v. Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (ALJ) (1984) (delay of 1-1/2 years). In two cases involving River Cement Company, 8 FMSHRC 1599 and 1602 (ALJ) (1986), the Secretary's "justification" for late filing was "inadvertence" and "a change in policy" of the civil penalties processing unit. Neither was found to constitute adequate cause for delays of 7 days and 23 days respectively.

III

On April 4, 1991, the Secretary issued some 4,700 citations to 500 mine operators covering 850 mines alleging violations of 30 C.F.R. § 70.209(b) and 71.209(b). Approximately 4,000 notices of contest were filed with the Commission between April and July, 1991. The Secretary states in her opposition that approximately 800 civil penalty assessments were filed in related cases during "a two month time period" when the late filing occurred in this case. I conclude that the extraordinary volume of cases processed by the Secretary in this short period of time constitutes adequate cause for her late filing in this case.

S & L asserts that it was prejudiced by being denied the opportunity to participate in the depositions held prior to October 21, 1991, and that the delay was inherently prejudicial to S & L's preparation of a proper defense. The Secretary's opposition states that no depositions were taken in these cases prior to October, 1991. She notes that S & L's counsel entered an appearance for a different operator in these cases on July 11, 1991. S & L has not stated how the delay hindered its preparation of a proper defense. I conclude that Respondent has failed to show that it was prejudiced by the Secretary's delay in filing her petition for the assessment of penalties with the Commission.

ORDER

Accordingly, the Motion to Dismiss this proceeding is DENIED.

James A. Broderick
Administrative Law Judge

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FEB 21 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Master Docket No. 91-1
	:	Docket No. KENT 91-1087
v.	:	A.C. No. 15-16122-03532D
	:	
CNB COAL COMPANY, INC., Respondent	:	No. 1 Mine

ORDER DENYING MOTION TO DISMISS

On February 10, 1992, Respondent CNB Coal Company, Inc., (CNB) filed a Motion to Dismiss this proceeding because the Secretary's Petition for Assessment of Civil Penalty was not timely filed. The Secretary filed an opposition to the motion on February 19, 1992.

I

The two citations involved in this proceeding were issued to CNB on April 4, 1991. After a proposed penalty assessment was issued, CNB returned its Notice of Contest and Request for Hearing which was received by MSHA on June 28, 1991. On August 19, 1991, the Secretary mailed her Petition for Assessment of Civil Penalty which was received by the Commission on August 21, 1991. The Secretary did not seek an extension of time for filing her penalty proposal, nor did she file an "instanter" (sic) motion to accept late filing. CNB filed its answer on September 16, 1991 (received by the Commission September 20, 1991).

II

Section 105(d) of the Act requires the Secretary, when a timely notice of contest is filed, to "immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing...." Commission Rule 27, 29 C.F.R. § 2700.27, requires the Secretary to file a proposal for a penalty "within 45 days of receipt of a timely notice of contest...." The Commission has stated that "[i]n essence, Rule 27 implements the meaning of 'immediately' in section 105(d)." Salt Lake County Road Department, 3 FMSHRC 1714, 1715 (1981).

Salt Lake set out a two-fold test for deciding whether a late filed penalty case is subject to the "drastic remedy of dismissal": Has the Secretary shown adequate cause for the delay, and, if so, did the delay prejudice Respondent? Salt Lake at page 717; See also Medicine Bow Coal Company, 4 FMSHRC 882

(1982). Salt Lake involved a 2-month delay; Medicine Bow, a 15 day delay. Dismissal was denied in both cases. The Commission held that adequate cause for the delay was established, but prejudice was not shown. See also Secretary v. M. Jamieson Company, 12 FMSHRC 901 (ALJ); Secretary v. Swindall, 13 FMSHRC 310 (ALJ) (1991). Cases in which motions to dismiss were granted include Secretary v. Washington Construction Company, 4 FMSHRC 1807 (ALJ) (1982) (delay of 1-1/2 years and 2 years), and Secretary v. Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (ALJ) (1984) (delay of 1-1/2 years). In two cases involving River Cement Company, 8 FMSHRC 1599 and 1602 (ALJ) (1986), the Secretary's "justification" for late filing was "inadvertence" and "a change in policy" of the civil penalties processing unit. Neither was found to constitute adequate cause for delays of 7 days and 23 days respectively.

III

On April 4, 1991, the Secretary issued some 4,700 citations to 500 mine operators covering 850 mines alleging violations of 30 C.F.R. § 70.209(b) and 71.209(b). Approximately 4,000 notices of contest were filed with the Commission between April and July, 1991. The Secretary states in her opposition that approximately 800 civil penalty assessments were filed in related cases during "a two month time period" when the late filing occurred in this case. I conclude that the extraordinary volume of cases processed by the Secretary in this short period of time constitutes adequate cause for her late filing in this case.

CNB asserts that it was prejudiced by being denied the opportunity to participate in the depositions held prior to October 21, 1991, and that the delay was inherently prejudicial to CNB's preparation of a proper defense. The Secretary's opposition states that no depositions were taken in these cases prior to October, 1991. She notes that CNB's counsel entered an appearance for a different operator in these cases on July 11, 1991. CNB has not stated how the delay hindered its preparation of a proper defense. I conclude that Respondent has failed to show that it was prejudiced by the Secretary's delay in filing her petition for the assessment of penalties with the Commission.

ORDER

Accordingly, the Motion to Dismiss this proceeding is DENIED.

James A. Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 21 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Master Docket No. 91-1
	:	Docket No. KENT 91-1129
v.	:	A.C. No. 15-05423-03664D
	:	
MANALAPAN MINING COMPANY, INC., Respondent	:	No. 1 Mine
	:	
	:	Docket No. KENT 91-1130
	:	A.C. No. 15-14395-03591D
	:	
	:	No. 4 Mine

ORDER DENYING MOTIONS TO DISMISS

On February 10, 1992, Respondent Manalapan Mining Company, Inc., (Manalapan) filed Motions to Dismiss in the above proceedings because the Secretary's Petitions for Assessment of Civil Penalty were not timely filed. The Secretary filed an opposition to the motions on February 19, 1992.

I

The three citations involved in these proceedings were issued to Manalapan on April 4, 1991. After proposed penalty assessments were issued, Manalapan returned its Notice of Contest and Request for Hearing which was received by MSHA on July 1, 1991. On October 18, 1991, the Secretary mailed her Petitions for Assessment of Civil Penalty which were received by the Commission on October 21, 1991. The Secretary did not seek an extension of time for filing her penalty proposal, nor did she file an "instanter" (sic) motion to accept late filing. Manalapan filed its answers on October 24, 1991 (received by the Commission October 31, 1991).

II

Section 105(d) of the Act requires the Secretary, when a timely notice of contest is filed, to "immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing...." Commission Rule 27, 29 C.F.R. § 2700.27, requires the Secretary to file a proposal for a penalty "within 45 days of receipt of a timely notice of contest...." The Commission has stated that "[i]n essence, Rule 27 implements the meaning of 'immediately' in section

105(d)." Salt Lake County Road Department, 3 FMSHRC 1714, 1715 (1981).

Salt Lake set out a two-fold test for deciding whether a late filed penalty case is subject to the "drastic remedy of dismissal": Has the Secretary shown adequate cause for the delay, and, if so, did the delay prejudice Respondent? Salt Lake at page 717; See also Medicine Bow Coal Company, 4 FMSHRC 882 (1982). Salt Lake involved a 2-month delay; Medicine Bow, a 15 day delay. Dismissal was denied in both cases. The Commission held that adequate cause for the delay was established, but prejudice was not shown. See also Secretary v. M. Jamieson Company, 12 FMSHRC 901 (ALJ); Secretary v. Swindall, 13 FMSHRC 310 (ALJ) (1991). Cases in which motions to dismiss were granted include Secretary v. Washington Construction Company, 4 FMSHRC 1807 (ALJ) (1982) (delay of 1-1/2 years and 2 years), and Secretary v. Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (ALJ) (1984) (delay of 1-1/2 years). In two cases involving River Cement Company, 8 FMSHRC 1599 and 1602 (ALJ) (1986), the Secretary's "justification" for late filing was "inadvertence" and "a change in policy" of the civil penalties processing unit. Neither was found to constitute adequate cause for delays of 7 days and 23 days respectively.

III

On April 4, 1991, the Secretary issued some 4,700 citations to 500 mine operators covering 850 mines alleging violations of 30 C.F.R. § 70.209(b) and 71.209(b). Approximately 4,000 notices of contest were filed with the Commission between April and July, 1991. The Secretary states in her opposition that approximately 800 civil penalty assessments were filed in related cases during "a two month time period" when the late filing occurred in this case. I conclude that the extraordinary volume of cases processed by the Secretary in this short period of time constitutes adequate cause for her late filing in this case.

Manalapan asserts that it was prejudiced by being denied the opportunity to participate in the depositions held prior to October 21, 1991, and that the delay was inherently prejudicial to Manalapan's preparation of a proper defense. The Secretary's opposition states that no depositions were taken in these cases prior to October, 1991. She notes that Manalapan's counsel entered an appearance in these cases on July 11, 1991. Manalapan has not stated how the delay hindered its preparation of a proper defense. I conclude that Respondent has failed to show that it was prejudiced by the Secretary's delay in filing her petitions for the assessment of penalties with the Commission.

ORDER

Accordingly, the Motions to Dismiss this proceeding are DENIED.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEB 27 1992

IN RE:	:	Master Docket No. 91-1
	:	
CONTESTS OF RESPIRABLE	:	
SAMPLE ALTERATION CITATIONS	:	

ORDER RECONSIDERING ORDER DENYING MOTION FOR PROTECTIVE ORDER

On January 17, 1992, I issued an order granting the Secretary's motion for a protective order to prohibit the deposition of Assistant Secretary William J. Tattersall, and denying the motion for a protective order to prohibit the deposition of former Administrator for Coal Mine Safety and Health Jerry L. Spicer.

On February 7, 1992, the Secretary filed a motion for reconsideration of the above order insofar as it denied the motion for a protective order barring the deposition of Mr. Spicer. The motion attached an affidavit of Administrator Spicer and portions of a transcript of deposition testimony of Edward C. Hugler taken on January 16, 1992. Contestants filed an opposition to the motion on February 19, 1992. The Secretary filed a reply to the opposition on February 25, 1992. The affidavit and the deposition testimony attached to the motion present additional relevant material in the light of which I reconsider my prior order.

I

To be asked to testify in a proceeding such as the one before me hardly constitutes harassment or annoyance, as the Secretary's motion implies. This is a very important case for the Government and the coal mining community, miners and managers. Prima facie, any person, in Government or industry, who has relevant knowledge may be required to testify. As my order stated, however, the Federal Courts have held that high level executive department officials may not be required to give oral testimony except in extraordinary circumstances. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985). The courts have not drawn a line separating high level officials from low level officials, nor has the Secretary suggested one, but it is clear that elected officials, Federal and State, are high level. Cabinet officers and other Presidential appointees are presumptively high level. Below that level the picture is not as clear. What is clear is that the extraordinary circumstances required to be shown to justify the deposition of a cabinet officer

or sub-cabinet officer are qualitatively different from those needed to depose a mid-level bureaucrat.

II

The rationale for protecting high level officials from compulsory testimony is, I think, two fold: First, the independence of the executive branch and the insulation of the actions and decisions of top Government officials from judicial (including administrative-judicial) inquiry. United States v. Morgan, 313 U.S. 409(1941); Peoples v. United States Department of Agriculture, 427 F.2d 561 (D.C. Cir 1970). Second, the avoidance of the disturbance that would result to the Government's primary task if officials were required to take time to give oral testimony. Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619 (D.C. 1983).

I mean no denigration of the position of the Coal Mine Administrator when I note that he is a lower level official than an Assistant Secretary, a Presidential appointee. To protect the latter from being required to testify is to recognize the qualified independence of the executive branch and incidentally to avoid the resultant disruption of Governmental functions. The Administrator's position is different: the most important reason to protect him from being required to testify is to avoid removing him from his critical official tasks, and thus interfering with Government business. As my order pointed out, because Mr. Spicer has retired, this reason no longer exists. Taking Mr. Spicer's deposition will not disrupt the Government's functions in the least. Questions which may impinge upon the Government's deliberative process privilege are, of course, subject to objection, which may be dealt with as any other objection at a deposition.

III

The Secretary argues that the testimony of Edward Hugler provides "an alternate source of the information Contestants propose to seek from Administrator Spicer". She states that the deposition shows that Spicer has no knowledge not also possessed by Hugler. Contestants assert that, on the contrary, the deposition shows that Spicer may have relevant knowledge that Hugler does not. In deciding this motion, I need only conclude that Spicer may have relevant information which was not available from Hugler. I am not in a position to analyze Hugler's deposition, only part of which is available to me, or to anticipate potential questions which may be asked of Spicer, but I conclude that the record before me shows that he may have such information. On reconsideration, therefore, I determine that the protective order to prohibit the testimony of former Administrator Spicer should be denied.

I do not, of course, by this order mean to indicate how I may

rule on any question of relevancy or privilege that may be raised at Mr. Spicer's deposition.

ORDER

On reconsideration of my order of January 17, 1992, the Secretary's motion for a protective order to prohibit the deposition of Administrator Spicer is DENIED.

James A. Broderick

James A. Broderick
Administrative Law Judge

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