FEBRUARY 1993

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FEBRUARY 1993

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

Secretary of Labor, MSHA v. C G & G Trucking, Docket No. KENT 92-574. (Chief Judge Merlin, Default Order of November 19, 1992 - unpublished)

Secretary of Labor, MSHA v. Pittsburg & Midway Coal Mining Company, Docket Nos. CENT 91-196, CENT 91-197, CENT 91-202. (Judge Morris, November 27, 1992)

Secretary of Labor, MSHA v. Allan Goode, Docket No. WEVA 91-2096. (Judge Fauver, December 29, 1992)

Secretary of Labor, MSHA v. Rhone-Poulenc of Wyoming Company, Docket No. WEST 92-519-M. (Judge Morris, December 28, 1992)

Secretary of Labor, MSHA v. Davis Shoulders, employed by Pyro Mining Company, Docket No. KENT 92-17. (Judge Barbour, December 29, 1992)

Secretary of Labor, MSHA v. American Mining Services, Inc., Docket Nos. WEST 91-563, WEST 91-624. (Judge Morris, December 30, 1992)

Secretary of Labor, MSHA v. Little Rock Quarry Company, Inc., Docket Nos. CENT 92-202-M, CENT 92-204-M, CENT 92-205-M. (Judge Lasher, January 15, 1993)

Review was not granted in the following case during the month of February:

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 92-84-M. (Judge Barbour, December 11, 1992)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 1, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-574
CG&G TRUCKING, INC.	:	

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

ORDER

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"). Chief Administrative Law Judge Paul Merlin issued an Order of Default on November 19, 1992 to CG&G Trucking, Inc. ("CG&G") for failure to answer the Secretary of Labor's proposal for penalty and the judge's subsequent order to show cause. The judge assessed a civil penalty of $400 as proposed by the Secretary. On December 28, 1992, the Commission received a letter from CG&G dated December 19, requesting that the Commission vacate the default order. In support of its request, CG&G states that, in response to the Secretary's notification of proposed penalty, it filed a "Blue Card" request for a hearing but heard nothing further about the matter until it received the default order. For the reasons that follow, we reopen this proceeding, vacate the default order, and remand this case for further proceedings.

It appears from the record that CG&G, a small operator acting without counsel, filed a Blue Card request for a hearing in this matter in response to the Secretary's notification of proposed assessment of penalty. However, CG&G did not file an answer to the Secretary's subsequent proposal for penalty as was required in order to contest that penalty proposal. See 29 C.F.R. § 2700.28. Accordingly, on September 10, 1992, Judge Merlin issued an Order to Respondent to Show Cause, directing CG&G to file an answer or be found in default. CG&G did not respond to the show cause order, which was returned to the Commission unclaimed.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought within 30 days of its issuance by filing a petition for discretionary review with the Commission. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). CG&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 order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Under these circumstances, we deem CG&G's letter of December 19 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 Commission judgment or order on the basis of mistake, inadvertence, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). See 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in absence of applicable Commission rules). See, e.g., Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1989). See also Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991).

The Commission has indicated that "under appropriate circumstances, a genuine problem in communication or with the mail may justify relief from default." Middle States Resources, Inc., 10 FMSHRC 1130, 1131 (September 1988), quoting Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987). See also Ten-A-Coal Company, 10 FMSHRC 1132, 1133 (September 1988). The record does not contain sufficient information to permit us to rule with respect to CG&G's claim. CG&G has, however, offered a cognizable explanation of its failure to respond to the judge's show cause order. In the interest of justice, we will permit CG&G the opportunity to present its position to the judge, who shall determine whether final relief from default is appropriate under the circumstances presented. Cf. Perry Drilling Co., 9 FMSHRC 379, 380 (March 1987).

Accordingly, we reopen this matter, vacate the judge's default order, and remand this matter for proceedings consistent with this order. CG&G is reminded to serve counsel for the Secretary with copies of its filings in this proceeding. 29 C.F.R. § 2700.7(a).

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20006

February 4, 1993

SECRETARY OF LABOR, on behalf of DONALD BOWLING, Complainant	:	
and	:	
DONALD BOWLING, Intervenor	:	
v.	:	**Docket No. KENT 92-1052-D**
PERRY TRANSPORT, INC., a corporation; STEVIE CALDWELL TRUCKING, INC., a corporation; and STEVIE CALDWELL, an Individual,	:	
Respondents	:	

DECISION

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Sec. 801 et seq. (1988) ("the Mine Act"), respondents Perry Transport, Inc., Stevie Caldwell Trucking, Inc., and Stevie Caldwell have filed a petition for review of Administrative Law Judge William Fauver's December 28, 1992, order of temporary reinstatement issued pursuant to Commission Procedural Rule 44, 29 C.F.R. Sec. 2700.44 (1986). We grant respondents' petition for review and, for the reasons that follow, affirm the judge's order requiring the temporary reinstatement of Donald Bowling.

Complainant Donald Bowling was employed by Stevie Caldwell Trucking, Inc., as a truck driver from February 1990 to February 7, 1992, when his employment terminated.

On April 13, 1992, Bowling filed a discrimination complaint with the Secretary of Labor (Secretary) pursuant to Sec. 105(c)(2) of the Mine Act.1/ Following an investigation, the Secretary determined that the discrimination complaint filed by Bowling was not frivolous. On September 15, 1992, the Secretary filed an application for temporary reinstatement. On October 20, 1992, an evidentiary hearing on the application for temporary reinstatement was held. Sixty-nine days later, 2/ on December 28, 1992, the judge issued his decision concluding that the complaint was not frivolous.

The Secretary and intervenor Donald Bowling allege that Bowling was discharged from his job in retaliation for reporting safety violations to the Mine Safety and Health Administration (MSHA) on two separate occasions. Respondents contend that Bowling was not discharged and that he voluntarily terminated his employment.

As we have previously stated, "the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." Secretary of Labor o.b.o. Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305, 1306 (August 1987), aff'd, Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

1/ Respondents seek now to challenge Bowling's discrimination complaint on the additional ground that it is time barred. This issue was not raised before the judge. The typewritten discrimination complaint attached to the Secretary's application for temporary reinstatement is signed by Donald Bowling and dated April 13, 1992. Thus, the complaint would appear to have been filed six days beyond the sixty day statutory time period for such filing. However, in response to this challenge, the Secretary has furnished a copy of Bowling's handwritten discrimination complaint, signed by Donald Bowling and dated April 2, 1992, which the Secretary maintains was submitted timely. (Exhibit B, Response in Opposition to Petition for Review) Because the judge has not had an opportunity to pass on this issue, we decline to rule on it.

2/ While we recognize that each case is unique, we perceive no basis in this record for the protracted delay and failure to adhere to Rule 44(d), which requires that "Within 5 days following the close of a hearing on an application for temporary reinstatement the Judge shall issue an order granting or denying the application."

After conducting an evidentiary hearing and considering the testimony of the complainant and two witnesses for the respondents, the judge concluded:

> The hearing evidence shows a sharp dispute of the facts concerning the termination of Mr. Bowling's employment. . . . I do not find that Mr. Bowling's testimony is so incredible or unworthy of belief as to amount to a "frivolous" complaint.
>
> I therefore conclude that the special concern Congress has shown to require temporary reinstatement of a miner unless his claim is frivolous requires temporary reinstatement in this case.

Slip op. at 3.

After careful review of the evidence and pleadings, we conclude that the judge's determination that the complaint is not frivolous is supported by the record and is consistent with applicable law. The only issue before us is whether Bowling's discrimination complaint was frivolously brought. We intimate no view as to the ultimate merits of this case. 3/

Respondents have additionally requested that we "stay the effect of the decision of the Administrative Law Judge pendente lite." Petition at 4. To the extent that respondents sought relief pending our consideration of the instant matter, their motion was considered and is denied. To the extent that respondents seek a stay of the temporary reinstatement order pending a final determination of whether a violation of Section 105(c)(1) of the Mine Act has occurred, their motion is denied. Absent some extraordinary circumstance, yet to be advanced, the granting of such a motion would eviscerate the temporary reinstatement provision of the Mine Act.

3/ No other issues raised by respondents, including the judge's back-pay order, are final and, thus, they are not before the Commission at this time.

Accordingly, the judge's order requiring the temporary reinstatement of Donald Bowling is affirmed.

ARLENE HOLEN, Chairman

RICHARD V. BACKLEY, Commissioner

JOYCE A. DOYLE, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. CENT 92-202 M
	:	CENT 92-204-M
v.	:	CENT 92-205-M
LITTLE ROCK QUARRY COMPANY, INCORPORATED	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), Administrative Law Judge Michael A. Lasher, Jr., issued a Decision and Order of Dismissal on January 15, 1993, (the "Dismissal Order") as a result of the Secretary's failure to show good cause why he failed to comply with the judge's Prehearing Order of September 14, 1992.

On January 27, 1993, the Secretary filed with the judge a motion for reconsideration, which was forwarded to the Commission by the judge and received on February 4, 1993. As grounds for reconsideration of the Dismissal Order, the Secretary stated that the parties had "informally settled" the case on January 12, 1993, three days prior to the Dismissal Order.

The judge's jurisdiction over this matter terminated with the issuance of the Dismissal Order. 29 CFR § 2700.65(c). The judge therefore could not have entertained a motion for reconsideration. 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 thirty days of the judge's decision. 30 U.S.C § 823 (d)(2); 29 CFR § 2700.70(a). The Secretary's motion for reconsideration seeks relief from the judge's dismissal of the case. We will, accordingly, treat it as a timely petition for discretionary review of the judge's Dismissal Order. See, e.g., Middle States Resources, 10 FMSHRC 1130 (September 1988).

We are unable to evaluate the merits of the Secretary's pleading on the basis of the present record. Therefore, we will afford the Secretary the

opportunity to present his position to the judge, who will take such action as he deems appropriate.

Accordingly, we grant the Secretary's petition for discretionary review, vacate the Dismissal Order, and remand the matter for proceedings consistent with this order.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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February 25, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 92-84M
V.	:	
BROWN BROTHERS SAND COMPANY	:	

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On December 11, 1992, Administrative Law Judge David F. Barbour issued a decision finding two violations of the Mine Act. On February 1, 1993, the Commission received a letter from Brown Brothers Sand Company ("Brown") challenging the judge's findings of violations. The Mine Act, 30 U.S.C. § 823 (d)(2)(A)(i), and Commission Procedural Rule 70, 29 C.F.R. 2700.70, require that petitions for discretionary review be filed within 30 days after issuance of the judge's decision, in this instance by January 11, 1993.1/ The letter from Brown states that the writer, Carl Brown, was aware of the 30-day time limit to appeal but that he "deliberately waited past this deadline."

The Commission has entertained late-filed petitions for discretionary review in appropriate circumstances. Such relief is evaluated on a case-by-case basis. We have looked to the Federal Rules of Civil Procedure for guidance in such matters. 29 C.F.R. § 2700.1(b). Federal Rule 60(b)(1) provides relief from a final judgment on the basis of inadvertence, mistake, surprise, or excusable neglect. See M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1270-71 (September 1986); Kelley Trucking Company, 8 FMSHRC 1867 (December 1986); A.H. Smith Stone Company, 11 FMSHRC 796 (May 1989).

1/ If the last day for filing falls on a Saturday, Sunday or holiday, the filing date is extended to the following non-holiday weekday. See Gravely v. Ranger Fuel Corp., 4 FMSHRC 799 (April 1984).

Brown's admittedly deliberate late filing does not meet the criteria of Rule 60(b)(1). Accordingly, we deny Brown's petition.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 4 1993

COSTAIN COAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 92-332-R Citation No. 3550973; 2/11/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Baker Mine Mine ID 15-14492
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 92-412 A. C. No. 15-13920-03736
v.	:	Docket No. KENT 92-450
COSTAIN COAL, INC., Respondent	:	A. C. No. 15-13920-03730 Docket No. KENT 92-451 A. C. No. 15-13920-03731
	:	Pyro No. 9 Wheatcroft Mine
	:	Docket No. KENT 92-413 A. C. No. 15-14492-03602
	:	Baker Mine

DECISION

Appearances: Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for the Operator;
Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Costain Coal, Inc. (Costain), filed a Notice of Contest challenging the issuance of Citation No. 3550973 at its Baker Mine (Docket No. KENT 92-332-R). The Secretary of Labor

(Secretary) subsequently filed a petition seeking a civil penalty of $50 for the violation charged in that contested citation (Docket No. KENT 92-413).

Pursuant to a notice of hearing, these two cases were consolidated for hearing and decision with three other Costain civil penalty cases from a different mine and were heard on October 14, 1992, in Owensboro, Kentucky.

At that hearing, the parties proposed to settle the majority of the citations pertaining to the Pyro No. 9 Wheatcroft Mine. In Docket No. KENT 92-412, there was a single section 104(a) citation; Citation No. 3553122 charged a violation of 30 C.F.R. § 75.316 and the Secretary originally proposed a $276 penalty. The parties now propose to settle this case with the payment of a $50 civil penalty. In Docket No. KENT 92-450, the parties propose to settle 9 out of the 10 section 104(a) citations included:

CITATION NO.	30 C.F.R. SECTION	ASSESSED	PROPOSED
3549963	75.1725	$178	$ 50
3549764	75.316	276	276
3549765	75.316	276	50
3549767	75.316	20	20
3549961	75.1403-5(g)	178	50
3550236	75.1403-5(g)	63	50
3546406	75.220	311	50
3546407	75.316	213	213
3549768	77.408	178	178

In Docket No. KENT 92-451, The parties propose to settle all four of the included citations on the following basis:

CITATION NO.	30 C.F.R. SECTION	ASSESSED	PROPOSED
3549771	75.400	$192	$135
3549964	75.316	178	178
3546409	75.220	178	50
3549973	75.316	311	311

Based on the representations of the parties and the trial testimony, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The financial terms of this settlement agreement will be factored into my order at the end of this decision.

There remained for my decision at the conclusion of the hearing, two section 104(a) citations: Citation No. 3550973; contested in Docket No. KENT 92-332-R and assessed in Docket No. KENT 92-413, and Citation No. 3549766, assessed in Docket No. KENT 92-450.

Both parties subsequently briefed the issues concerning the aforementioned two citations and I have considered those along with the entire record herein. I make the following decision.

DISCUSSION AND FINDINGS

I. Docket No. KENT 92-332-R; KENT 92-413: Citation No. 3550973

Citation No. 3550973, issued pursuant to section 104(a) of the Act, alleges a violation of the mandatory standard at 30 C.F.R. § 75.316 and charges as follows:

> A review of the currently approved Methane and Dust Control Plan for this mine dated October 21, 1992 (sic) and a resubmittal dated January 15, 1992 revealed some deficient provisions. Letters dated December 19, 1991 and January 16, 1992 were mailed to and received by the operator requesting that these deficiencies be corrected and to include them in an amended plan. In the letter to the operator dated January 16, 1992 the operator was advised that failure to comply with the requests would result in revocation of the Methane and Dust Control Plan in its present form. As of this date the requested corrections have not been included in an amended plan. This mine is now operating without an approved Methane and Dust Control Plan.

In a nutshell, Costain is charged with operating without an approved methane and dust control plan for the Baker Mine at least as of 0715, February 11, 1992. Of course, it is not quite that simple. Costain had submitted a plan for the Baker Mine for approval back on July 2, 1991. The company was notified by the District Manager on October 21, 1991, that the submitted plan had been reviewed and had met review criteria. Tentative approval of the plan was granted at that time until such later time as an on-site plan review could be conducted by MSHA. The operator was also notified at this time that: "Should any significant deficiencies be detected in the Methane and Dust Control Plan during an inspection or investigation, this approval may be revoked and a revised plan shall be required."

The on-site plan review was completed by MSHA on December 9, 1991. On December 19, 1991, the District Manager notified the company that the plan submitted by them on July 2, 1991, no longer met review criteria. The letter further advised that the plan needed to be revised by the inclusion of three items that were unrelated to dust control (and thus to the case at bar).

Costain submitted a revised plan dated January 15, 1992 that created a new problem which became the focus of this case, and approval of the revised plan was denied. The letter to Costain from the District Manager dated January 16, 1992, stated in pertinent part as follows:

> Your statements under (active working sections) P. 3/4 item (h) "calcium chloride or water with wetting agent shall be applied as needed to haulage roads and supply roads to maintain respirable dust at 2 MG/M3 or less except for roadways in intake airways within 200 feet outby the working faces which will be treated as needed to maintain respirable dust to 1 MG/M3 or less" and under (areas other than active working sections), Page 2 item 4, "water with wetting agent or calcium chloride shall be applied as needed to maintain respirable dust to 2 MG/M3 or less except for haulage ways in intake airways within 200 feet outby the working faces which will be treated as needed to maintain respirable dust to 1 MG/M3 or less", are unacceptable because they cannot be routinely checked during the six month review.

The District Manager further advised by that January 16, 1992 letter that Costain had 10 days after receipt of this latest disapproval within which to submit a plan suitable for approval. He further emphasized to the company that failing to submit such an approvable plan would result in the revocation of their present plan and would place them in the position of operating without an approved Methane and Dust Control Plan. He warned that: "Operating after the revocation date is a violation of the standard requiring an approved plan."

Costain, for its part, admits that at the moment the citation was issued on February 11, 1992, it was, in fact, operating without an approved plan. But, Costain disputes that a violation occurred, in any event, because they argue the plan which had been submitted to the District Manager was a valid and acceptable plan which should have been approved. Costain urges that the District Manager's refusal to approve the plan was an abuse of discretion and the citation should therefore be vacated.

MSHA personnel had several discussions with Costain management between January 16, 1992, and February 11, 1992, concerning plan language that the District Manager would approve. In fact, Costain was expecting and perhaps welcomed the citation when it finally came on February 11. A plan which contained acceptable language was submitted within 30 minutes after the citation at bar was issued. It was given final approval by the District Manager on February 12, 1992. This plan, as finally revised and approved, simply stated that: "Water with wetting agent or calcium chloride shall be applied as needed to control the dust." This simple provision replaced the unacceptable language in both of the two virtually identical paragraphs quoted above from the District Manager's January 16 letter.

The Secretary justifies her insistence on this substituted language on the principle that MSHA policy requires that all plan language be enforceable using current technology. For enforcement purposes, MSHA cannot at this time take an instantaneous or "snapshot" measurement of the dust level in a specific area. The substituted provision, on the other hand, does not require a dust sample (which could take a one to five day period to obtain) before a violation of the provision could be issued. And, of course, once the sampling process was underway, the operator would be aware and could easily take extraordinary steps, such as constant watering of the roadway being tested, to skew the result.

However, it is also true, as the operator complains, that this type of provision is totally subjective, without any objective standards or bench marks to measure the inspector's opinion against. At what point does the roadway become too dusty? At what point is the dust not under control? However, having said this, I would note that the regulatory standards in the mining industry are replete with examples of subjective prescriptions and proscriptions and I believe that experienced coal mine inspectors as well as certified coal mine examiners and foremen can adequately and fairly evaluate the condition of the roadways based on their many years of experience to determine if the roadways are sufficiently treated to control the dust.

Citation No. 3550973 was issued only after a long process of negotiation concerning the dust control plan at this mine. I am satisfied that MSHA and Costain had an adequate opportunity to discuss the various provisions of the plan and propose language that might be acceptable to both parties. The failure of Costain to incorporate a dust control provision acceptable to the District Manager into their proposed plan within a reasonable amount of time inevitably led to the citation which was issued in this case. I understand the operator's concern, but, in the end,

I concur with the Secretary that public policy requires that any provision included in an MSHA-approved plan be enforceable. If it is not, it is worse than useless.

The plan language finally approved by MSHA simply requires the mine operator to take steps to allay the dust which is created on dry underground roadways. It is relatively easy to comply with or to enforce, if necessary. Therefore, I find MSHA's District 10 Manager to have operated well within the bounds of his discretionary authority to approve/disapprove dust control plans in this instance.

Accordingly, since Costain was admittedly operating without an approved plan, Citation No. 3550973 **IS AFFIRMED**, the operator's contest of the same **IS DENIED** and a civil penalty of $50 will be ordered, as originally proposed by the Secretary.

II. Docket No. KENT 92-450: Citation No. 3549766

Citation No. 3549766, issued pursuant to section 104(a) of the Mine Act, alleges a violation of 30 C.F.R. § 75.316 and charges as follows:

> Water or calcium chloride has not been applied to the supply road to the #4 unit ID-004 1st East off 2nd M. North for a distance of 1,000 ft. Roadway dust was observed in suspension creating a hazy condition against a lighted background.

The approved Methane and Dust Control Plan for the Pyro No. 9 Wheatcroft Mine at the time the instant citation was issued contained a provision substantially similar to that finally approved in the plan discussed in Section I of this decision.

Essentially, Costain is charged with having failed to sufficiently wet down or otherwise suppress dust along a supply road in violation of its dust control plan. Inspector Whitfield, who issued this citation, was traveling in a golf cart on a mine supply road at the time he observed the violation. He saw dust being raised on the road from a scoop and another golf cart which created a hazy condition against a lighted background. The inspector testified that the dust involved was "roadway dust, rock dust, probably clay." He further opined that "[i]t is not coal dust. There may be some coal dust mixed in, but it is basically rock dust and fire clay."

Costain does not dispute the fact of violation of the cited standard. Rather, they contest only the "significant and substantial" special finding that was made.

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 825 (April 1981).

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (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 this case, the violation is a given and the discrete safety hazard identified is an indisputable health hazard to some degree for the miners who must breathe in this dusty environment. However, after that the Secretary's burden of proof becomes more difficult because of the very subjective nature of the cited plan provision that she insists is necessary to make it enforceable as

a practical matter by her inspectors on the scene. By including a provision that can be cited on the spot (and get the dust abated) on purely subjective grounds, she is giving up the more rigorous collection of evidence that could perhaps easily establish the third element of the Mathies formula.

The Secretary carries the burden of proof to show by a preponderance of the competent evidence in the record that breathing the dust observed in the roadway by Inspector Whitfield will result in an injury or illness of a reasonably serious nature. The record evidence, however, is to the effect that the major health concern with dust is with respirable dust, and there has been no definitive showing that there was any respirable dust involved with the observed dust being "kicked-up" by the equipment which the inspector cited. We do have the general opinion testimony of two of the Secretary's witnesses that wherever you have dust in suspension, you have respirable dust. But I note that neither of these gentlemen observed the cited condition and in any event their opinion is not quantifiable. It must be remembered that some concentration of respirable dust is allowable under the applicable regulatory standards. Whether or not the dust observed in suspension by Inspector Whitfield contained respirable dust in excess of the allowable concentration is unknown by anyone, even if we assume that "some" respirable dust was in suspension.

Accordingly, I find and conclude that there are insufficient facts proven in this record to support an S&S special finding in this case.

Therefore, Citation No. 3549766 IS **AFFIRMED** as a non S&S violation of 30 C.F.R. § 75.316 and a civil penalty of $100 will be assessed as appropriate under the criteria contained in section 110(i) of the Mine Act.

ORDER

Costain Coal, Inc., shall within 30 days of the date of this decision, pay the sum of $1811 as a civil penalty for the violations found herein. Upon payment of the civil penalty, these proceedings are **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 8 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-816
	:	A.C. No. 46-01455-03882
v.	:	
	:	Docket No. WEVA 92-821
CONSOLIDATION COAL COMPANY, Respondent	:	A.C. No. 46-01968-03989
	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 92-758
	:	A.C. No. 46-01455-03874
	:	
	:	Osage No. 3 Mine

DECISION

Appearances: Robert Wilson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Feldman

In these three proceedings, the Secretary seeks to impose civil penalties on the respondent, Consolidation Coal Company, under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801. et seq., for three alleged violations of the mandatory health and safety standards found in 30 C.F.R. Part 70 and Part 75. The respondent filed timely answers contesting the alleged violations and these cases were docketed for hearing. Pursuant to notice, an evidentiary hearing was held in Morgantown, West Virginia, at which Lynn Arthur Workley testified on behalf of the petitioner and Jeffrey Todd Moore testified for the respondent. The parties' stipulations concerning the pertinent jurisdictional issues and the relevant civil penalty criteria found in Section 110(i) of the Act are of record. The parties filed post-hearing briefs which I have considered in my resolution of this matter.

At the hearing the petitioner moved to settle Docket Nos. WEVA 92-816, and WEVA 92-758. These dockets each involve single citations for alleged violations of Section 70.510(b)(2) concerning the respondent's hearing conservation plan and its responsibility to provide periodic audiograms for selected employees. The proposed settlement agreement involves the respondent's acceptance of liability for the $1,100 assessed

penalty associated with 104(d)(2) Order No. 3716164 which is the subject of Docket No. WEVA 92-816. This order concerns the respondent's failure to provide audiograms for stopper operators. In addition, the Secretary moves to vacate the 104(d)(2) Order No. 3716165 in Docket No. WEVA 92-758 because of an inability to establish a violation of the respondent's hearing conservation plan with respect to its longwall operators. Arguments in support of the settlement agreement were provided at the hearing at which time I issued a bench decision approving the subject motion. The terms of the settlement agreement will be incorporated as part of this decision.

Remaining Docket No. WEVA 92-821 concerns a citation and an associated imminent danger withdrawal order involving a roof condition in the tailgate entry of the respondent's Blacksville No. 2 Mine.

PRELIMINARY FINDINGS OF FACT

Lynn A. Workley has been employed as an inspector with the Department of Labor's Mine Safety and Health Administration for approximately 10 years. He is certified as an underground mine foreman in the State of Ohio. On June 13, 1991, during the course of an inspection of the respondent's Blacksville No. 2 Mine, Inspector Workley issued 104(a) Citation No. 3715953 for an alleged significant and substantial violation of the mandatory safety standard found in 30 C.F.R. § 75.202(a).[1] Citation No. 3715953 charged as follows:

> The mine roof in the 13 M longwall tailgate entry between 4+15 and 4+80 is broken, cracked, and sagged, between the existing supports and is not adequately supported or controlled to prevent the roof from falling in this area and weekly examination of this airway is required. This condition is the contributing factor to issuance of Imminent Danger Order No. 3715952 dated 6/13/91; therefore, no abatement time is set.

Contemporaneous 107(a) Order No. 3715952 provided a further description of Inspector Workley's observations. This Order stated:

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[1] Section 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts (emphasis added)."

> The tailgate entry off of the 13 M longwall section is unsafe to travel between 4+15 and 4+80. The installed roof support (bolts and double row of cribs) has failed to adequately support the roof. The mine roof is cracked, broken, and sagged between the cribs which are crushing badly. Some head coal and roof rock has already fallen and the roof was flaking and audibly cracking at this time. The underlaying (sic) cause of this imminent danger is management's failure to provide adequate support in the longwall tailgate entry.

The above citation and order involve the tailgate entry of the 13 M longwall section. The tailgate entry is located between the active longwall panel and the gob area, where the longwall panels have already been mined. Each development section has four entries. On the tailgate side, only one entry is safe to travel. The tailgate entry is the alternative escapeway from the longwall in the event of a headgate roof failure or fire.

Workley testified that he entered the tailgate entry on June 13, 1991, from the main entry with the respondent's Safety Escort Todd Moore, miner representative Jack Rinehart, and Stephanie Bunn, an inexperienced miner trainee. They proceeded up the tailgate entry in the direction of the longwall face until the roof began to deteriorate. At that point, Workley and Moore left Rinehart and Bunn and proceeded to determine how far it was safe to travel. Workley testified that at approximately 415 feet into the tailgate entry, the roof conditions had deteriorated to such an extent that it became unsafe to continue. In describing the roof condition, Workley testified that:

> We started with approximately 7 feet of [height] where we entered the tailgate entry. As we proceeded forward, the mine floor had squeezed up, the mine roof had squeezed down. At 4+0, the mining height was approximately 4 feet high and ahead of us it got lower yet. The mine roof was broken. There was (sic) visible cracks in it. It was sagged between the cribs and the solid block. (Tr. 33-34).

Workley testified that the respondent's roof control plan requires the tailgate entry to be supported by roof bolts through a board or steel mat, a maximum of 5 feet across and 8 feet apart. The roof control plan also requires that cribs be installed the entire length of the tailgate entry for

supplementary roof support. The cribs are 5x7 inch timbers that are 30 inches in length. The cribs are placed on the ground parallel to each other approximately 30 inches apart. Alternating cribs are then placed upon each other at right angles until they support the tailgate entry from the mine floor to the roof. Wedges are driven into the corner of the cribs for additional support. Workley described the condition of the cribs as follows:

> The wood was crushing into toothpicks. The 5x7's were no longer 5x7's. They started out at 7 [feet] high and were smashed to 4 [feet] high in places. They started out in vertical position from the floor to the roof, some were leaning as much as a 30 [degree] angle towards solid block. (Tr.37).

Based on the above observations, Workley concluded that it was dangerous to continue down the tailgate entry toward the longwall. Therefore, he and Moore retreated up the tailgate entry back around to the headgate entry across the face and then back down the tailgate to determine the extent of the deteriorated area. Workley determined that approximately 65 feet of the tailgate entry was unsafe to travel. (Tr.38). In this 65 foot area, pieces of roof had fallen and continued to fall, the cribs were squeezed and broken and the roof was making audible cracking noises. (Tr.39). Workley testified that the roof and floor were squeezed to such an extent in this 65 foot area that there were places where the vertical clearance was as little as 2 feet. (Tr.81). In short, Workley stated that the roof was ready to fall "at any moment." (Tr.40). He testified that it was highly likely, given the large quantity of roof material, that a roof collapse would result in serious or fatal injuries. (Tr.40).

Workley testified that mine personnel routinely traverse the tailgate entry. For example, he stated that section or longwall foreman occasionally go into the tailgate entry to adjust or repair a block stopping to maximize ventilation of the longwall face. In addition, he stated that 30 C.F.R. § 75.305 requires weekly examination of the tailgate entry for hazardous conditions. Finally, Workley testified that employees must traverse the area in order to drag or rock dust the tailgate floor in accordance with Section 75.403. (See Tr. 40-41,94).

Consequently, Workley issued a 107(a) withdrawal order in addition to a 104(a) citation because of his concern for the safety of workers who would go into the affected area during the

course of normal mining operations. However, the only effect of this withdrawal order was to prevent workers from entering this area. The 107(a) order did not require the cessation of any mine operations. (Tr. 47).[2]

The respondent called Safety Escort Jeffrey T. Moore who accompanied Workley during the inspection. Moore essentially corroborated the observations of Workley. In this regard, Moore testified that:

> "[t]he roof had fallen out, the cribs were crushing. The top was working, you could here it audibly cracking. You could see flakes and pieces of roof material and rib falling to the floor." (Tr.116).

Moore's testimony that he did not believe that the roof condition constituted an imminent danger is belied by his own characterizations of the roof condition. Significantly, Moore indicated that he would not feel very comfortable passing through the area and that he felt the area was "somewhat risky". (Tr.118). He also testified that "it seem[ed] to be hazardous, that I wouldn't want to have a picnic lunch in that area." (Tr.122). Although Moore also characterized the area as "somewhat questionable" and an area of "increased danger" he opined that the danger was not of an imminent nature. (Tr.115-117). Finally, Moore testified that ". . . I myself would readily pass through that area if we had a fire or something." (Tr. 120).[3]

Moore also testified that he and Workley inspected the same area the previous day on June 12, 1991. Moore conceded that the area had deteriorated since the previous day in that a post had fallen and was lying diagonally across the tailgate entry. (Tr. 119). Moore testified that the roof condition was such that it could not be physically supported because it would endanger anyone sent to alleviate the problem. (Tr.124). Despite the deteriorated roof condition Moore testified that he believed danger boards were inappropriate because the area "was not

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[2] The respondent made a motion to dismiss after presentation of the Secretary's direct case. The motion was denied because Workley's testimony adequately established a prima facie case. (Tr. 108-111).

[3] The tailgate entry is the only alternative escapeway in the event of headgate roof collapse or fire. However, Moore's willingness to traverse the tailgate area in question as a last resort in order to escape from the longwall is not relevant to the issue of the fitness of this area as a working environment.

impassable." (Tr.122).[4] Moore testified that the condition was ultimately abated approximately 2 to 4 days after Workley issued the citation and withdrawal order by mining past the area in question allowing the area to become part of the gob as the longwall retreated.

FURTHER FINDINGS OF FACT AND CONCLUSIONS

Fact of Occurrence

The respondent, in its brief, heavily relies on the Commission's decision in Cyprus Empire Corporation, 12 FMSHRC 911 (May 2, 1990) which vacated a citation for an alleged violation of Section 75.202(a). The Commission's action in Cyprus was based on its findings that the Secretary had failed to demonstrate that the compromised roof section in that case was an area "where persons work or travel." In Cyprus, the Commission noted "... that as soon as Cyprus encountered the poor roof conditions it dangered-off the area to prevent miners from entering. In doing so, Cyprus acted in accordance with accepted safe-mining practice." 12 FMSHRC at 917.

The respondent's reliance on Cyprus is misplaced. Unlike Cyprus, in this case the Secretary has established that mine personnel periodically traverse the area in question to adjust or repair block stoppings, to conduct weekly examinations for hazardous conditions and to drag or rock dust the tailgate floor.[5] Moreover, unlike the Cyprus case, the respondent failed to act "in accordance with accepted safe-mining practice" in that it failed to danger-off this roof area despite the apparent deterioration manifested by audible cracking and crushing of the cribs. Significantly, Moore testified that he did not danger-off the area because he believed the area to be passable. Thus, the

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[4] Section 303 (d)(1) of the Mine Act provides: "If [a mine operator] finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "DANGER" sign conspicuously at all points which persons entering such hazardous place would be required to pass. . . No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted." (Emphasis added). 30 U.S.C. § 863(d)(1).

[5] Workley estimated that a section foreman enters this area once each shift and that each day consists of three shifts. He also testified that personnel drag or rock dust the area approximately twice weekly (Tr.58).

respondent has neither alleged nor shown that it took any measure to dissuade personnel from passing under the area. I find, therefore, that the evidence strongly establishes a violation of Section 75.202(a) in that this area was situated in a place where persons work or travel and the respondent failed to take adequate measures to protect such persons from hazards related to roof collapse.

THE ISSUES OF SIGNIFICANT AND SUBSTANTIAL

AND IMMINENT DANGER

The respondent maintains that the cited roof condition does not constitute a significant and substantial violation or an imminent danger because no one was required to work or travel in the tailgate entry. In this regard, the respondent argues that it was unlikely that a roof collapse would occur at the very moment that a miner was in this area. As noted above, I credit the testimony of Workley, which was not rebutted by Moore, that employees did have reason to periodically enter this area. This conclusion is consistent with Moore's testimony that the area was "passable" and, therefore, not dangered-off.

Having concluded that employees were exposed to this hazard, I turn to whether the facts in this instance support a designation of "significant and substantial" and "imminent danger". A violation is properly designated as "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1,3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

A condition is properly designated as an "imminent danger" as defined by Section 3(j) of the Mine Act if the condition ". . . could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). In Utah Power and Light Company, 13 FMSHRC 1617, 1622 (Oct. 1991), the Commission reviewed the legislative history of this definition and concluded that an imminent danger exists if the inspector determines that the condition presents an impending threat to life and limb without considering the percentage of probability that an accident will happen. Thus, to

support a finding of imminent danger, the inspector must conclude that the hazardous condition has a reasonable potential to cause death or serious harm within a short period of time. 13 FMSHRC at 1622.

In its defense of Workley's citations, the respondent apparently relies on a series of cases which question the propriety of presuming the occurrence of an emergency in order to establish a violation as significant and substantial. See Consolidation Coal Company, 15 FMSHRC ___ (January 1993); Shamrock Coal Company, Inc., 14 FMSHRC 1300 (August 1992); Shamrock Coal Company, Inc., 14 FMSHRC 1306 (August 1992); and Beech Fork Processing, Inc., 14 FMSHRC 1316 (August 1992). Consequently, the respondent argues that a significant and substantial or imminent danger finding in this instance requires the impermissible presumption of the presence of mine personnel at the moment of a roof fall.

I find this argument unpersuasive. In this case, the discrete safety hazard, i.e., an unstable roof, created a real and present danger rather than a presumed threat. The fact that miners were not exposed to this roof hazard at the time of inspection is not dispositive of the S&S or imminent danger issues as long as a miner could be at risk during the course of continued mining operations. See Halfway Incorporated, 8 FMSHRC 8, 12 (January 1986) citing National Gypsum Co., FMSHRC 822, 825 (April 1981) and U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In the current case this area was considered "passable" and thus accessible to mine personnel for periodic examination, stopping maintenance and rock dusting. Thus, miners would be exposed to a potential roof fall which, given the observations of Workley and Moore, was reasonably likely to occur at any moment. In the event of such an occurrence, it is reasonable to conclude that the exposed miners would sustain serious or fatal injuries. Thus, the significant and substantial designation was appropriate under these circumstances and is affirmed.

With respect to the issue of imminent danger, it is significant that the condition could not be abated before it could cause death or serious injury during continued mining operations because abatement was accomplished only after further retreat of the longwall past the area in question, which took approximately 2 to 4 days. During this interim period, absent danger boards, personnel continued to be in jeopardy. In fact, Moore's testimony reflects that it was not until Workley issued the imminent danger withdrawal order that Moore advised the longwall personnel not to traverse the area. (Tr.119). Therefore, the imminent danger order was warranted and shall be affirmed.

CONCLUSIONS

Having affirmed the citation and withdrawal order, I find that the gravity associated with this violative roof condition was serious and that the respondent's underlying negligence was moderately high given the fact that it failed to danger-off the area despite obvious manifestations of an unstable roof. Consequently, I conclude that the $1,300 assessment proposed by the Secretary is appropriate and consistent with the criteria in section 110(i) of the Act.

I am also incorporating the previously noted settlement agreement in this decision, which requires the respondent to pay a penalty of $1,100 for Order No. 3716164 and which vacates Order No. 3716165.

ORDER

Based upon the above findings of fact and conclusions of law, it IS ORDERED that

1. Citation No. 3715953 IS **AFFIRMED.**

2. Imminent Danger Withdrawal Order No. 3715952 **IS AFFIRMED.**

3. The proposed settlement agreement concerning Order No. 3716164 IS **APPROVED.**

4. Order No. 3716165 IS **VACATED.**

5. The respondent **SHALL PAY** a civil penalty of $2,400 within 30 days of the date of this decision.

Jerold Feldman
Administrative Law Judge

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FEB 8 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-61-M
Petitioner	:	A.C. No. 08-01046-05511
v.	:	
	:	Green's Pit
GFD CONSTRUCTION COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Anthony Green, GFD Construction Company, Incorporated, Pensacola, Florida, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding arising under Sections 105(d) and 110(a), 30 U.S.C. § 815(d) and § 820(a), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, at seq. ("Mine Act"), the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), seeks civil penalty assessments for seven alleged violations of mandatory safety standards for surface metal and non-metal mines found in Part 56 of the Code of Federal Regulations ("C.F.R."). The Secretary further asserts that four of the alleged violations constitute significant and substantial contributions to mine safety hazards ("S&S" violations). A hearing on the merits of the matter was held in Pensacola, Florida.

JURISDICTION

In order to establish the nature of the operation at issue and Mine Act jurisdiction, the Secretary first called Anthony Green. Green stated that since 1980 he has been the owner of GFD Construction Company ("GFD"), which at its Green's Pit, conducts primarily a masonry sand extraction operation.[1] According to

[1] In addition to the extraction of sand, Green stated that GFD also extracts some clay and is involved in providing fill dirt and top soil to buyers, as well as in land clearing. Tr. 10.

Green, sand is dredged from ponds at the pit, is separated from foreign material and is trucked from the pit to purchasers. Approximately eighty-five percent of the sand is sold to home builders, but GFD also sells to county and federal institutions, such as Eglin Air Force Base. Tr. 11. At the pit, GFD operates heavy equipment such as a dragline, front end loaders, back hoes and trucks. Approximately, ninety percent of the trucks are purchased outside the state of Florida, in Alabama. The trucks transport sand to purchasers' job sites over public highways. Tr. 11-12. In addition, the last front-end loader purchased by GFD was manufactured in Japan. Tr. 11.

Section 4 of the Mine Act, 30 U.S.C. § 814, makes subject to the Act, "[e]ach 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." Given Green's testimony, I conclude that GFD's business affects interstate commerce, that GFD is an operator subject to the provisions of the Mine Act in the operation of Green's pit and that, as a result, the Commission has jurisdiction over this proceeding.

In order to establish the existence of each alleged violation, and, where applicable the violation's S&S nature, the Secretary called to testify Jackie Shubert, a MSHA inspector with approximately 6 years of inspection experience. Shubert, who issued all seven of the alleged violations, also testified regarding the gravity of each alleged violation and GFD's negligence in allowing the violations to exist. GFD's case was presented through the direct testimony of Green and through Green's cross-examination of Shubert.

Section 104(a) Citation No. 3596821, 10/15/91, 30 C.F.R. § 56.14130(a)(3).

EVIDENCE

The citation states:

> The Kobelco 600A front-end loader S/N 02119 was not provided with seat belts.

Exh. P-2. In addition to finding that a violation existed Shubert found that the violation constituted a S&S violation.

Shubert stated that on October 15, 1991, he conducted an inspection of Green's Pit. Upon arriving at the mine, he stopped at the mine office to advise Green of the nature of his visit. Green did not accompany him during the inspection. Tr. 14-15

At the pit, Shubert observed a Kobelco front-end loader ("loader") dumping sand into a truck. Upon inspecting the loader, he noticed that it lacked a seat belt. Tr. 16. Shubert considered this to be a violation of Section 56.14130(a)(3).

Explaining why he regarded the violation to be S&S, Shubert stated that the loader's operator compartment had rollover protection but not a closed cab. Although the loader was being operated on level ground., Shubert nonetheless feared that it could turn over and throw the operator from the compartment, subjecting him to crushing injuries or death should the rollover protection structure strike him. Shubert stated that if the bucket were not loaded evenly and were raised, the loader could become unstable and overturn. Shubert mentioned an incident at a Mississippi operation where this had happened. Tr. 17-20.

Shubert also explained his understanding that GFD did not own the loader, that the loader had been rented by GFD from Pensacola Ford Tractor Co., and that the rented loader had been at the pit for approximately two weeks. Nonetheless, Shubert believed that GFD, as the operator, was responsible for assuring that the loader complied with all applicable federal mine safety regulations when it was operated at the pit. Tr. 57.

Green agreed that the front-end loader was rented. Tr. 81.

THE VIOLATION

Section 56.14130(a)(3) requires that seat belts be installed on wheel loaders. There is no dispute that the cited loader was a wheel loader and that it lacked a seat belt. Moreover, there is no dispute that GFD was the operator of the pit and that the front-end loader, although rented, was under GFD's control and direction at the pit. As Shubert correctly stated, whether or not an operator owns a piece of equipment, the operator is responsible for assuring regulatory compliance while the equipment is in operation at its mine. Therefore, I find that the violation has been established.

S&S

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety

> standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury and, (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

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).

There was a violation of the cited standard. In addition, Shubert's testimony established a measure of danger contributed to by the violation in that the lack of a seat belt contributed to the danger of the loader operator being injured should the loader overturn. Further, I conclude that Shubert's testimony established that the hazard of being thrown and injured was reasonably likely to occur, even though the front-end loader was being operated on fairly level ground. Shubert specifically referenced the danger of loaders overturning due to unevenly filled buckets, and Shubert noted that such an accident had happened before. In addition, and as Shubert also noted, this particular front-end loader lacked a protective cab. Finally, a loader operator who was thrown from the operator's compartment and struck or crushed by the roll-over protection structure surely would be reasonably likely to suffer a serious injury--even death. In sum, I agree with the inspector that this was a S&S violation.

GRAVITY AND NEGLIGENCE

The violation was serious. As the inspector testified, without a seat belt the protection afforded by the front-end loader's roll-over protection "was not worth a dime." Tr. 19. While Green expressed the opinion that a bar in front of the operator's compartment would prevent the operator from being thrown forward, he agreed that nothing would prevent the operator from being thrown or from falling sideways. Tr. 83-84.

Further, I conclude that GFD was negligent in allowing the violation to exist. The seat belt was missing. It is the operator's duty to ensure that the seat belt was in place and was functional. GFD did not meet its duty in this regard.

Section 104(a) Citation No. 3596822, 11/15/91, 30 C.F.R. § 56.14132(a).

EVIDENCE

The citation states:

> The back-up alarm on the Kobelco 600A front-end loader S/N 02119 was not being maintained in working condition.

Exh. P-3.

Shubert stated that while inspecting the same loader, he observed the machine backing up and did not hear the back-up alarm sound. Upon closer inspection, he found that the alarm was in place but was not working. He was not sure why the alarm failed to sound.

Green did not dispute this testimony.

THE VIOLATION

Section 56.14132(a) requires that back-up alarms be provided on self-propelled mobile equipment and be maintained in functional condition. The inspector's testimony regarding the non-functioning state of the alarm was not contradicted, and I conclude that the violation existed as charged.

GRAVITY AND NEGLIGENCE

The violation was not serious. The inspector indicated that he believed it unlikely that the violation would result in injury to any miner. Exh. P-3.

Further, and for the reasons stated with regard to the violation of Section 56.14130(a)(3) previously discussed, I conclude GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3872700, 10/15/91, 30 C.F.R. § 56.1410(a)(2).

EVIDENCE

The citation states:

> The parking brakes on the Kobelco 600A front-end loader[,] Serial Number 02119[,] would not hold the load on level ground with [an] empty bucket, in that the loader rolled freely when [the parking] brakes was [sic] applied.

Exh. P-4.

Shubert stated that during the course of his inspection of the previously discussed loader he asked that the parking brakes be engaged, and he observed that the loader, nonetheless, continued to roll. Tr. 23.

THE VIOLATION

Section 56.1410(a)(2) requires that if self-propelled mobile equipment is equipped with parking brakes, the brakes shall be capable of holding the equipment, with its typical loaded on the maximum grade it travels. Shubert's testimony regarding the lack of effect of the loader's parking brakes was not disputed, and I conclude that the violation existed.

GRAVITY AD NEGLIGENCE

The violation was not serious. As with the lack of a working back-up alarm, Shubert found the non-operational parking brakes unlikely to cause injury. Exh. P-4. Further, and for the reasons stated with regard to the violations of Sections 56.14130(a)(3) and 56.14132(a), I conclude that GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 38728411, 10/15/91, 30 C.F.R. § 56.14132(a).

EVIDENCE

The citation states:

> The front-end loader was not being maintained in functional condition, in that when the horn button was depresses the horn didn't sound an alarm on the Kobelco 600A front-end loader[,] Serial Number 02119. There was no fast traffic in the area.

Exh. P-5.

Shubert testified without contradiction that when he asked the loader operator to blow the horn on the loader, the horn would not sound. Tr. 24.

THE VIOLATION

Section 56.14132(a) requires that horns provided on self-propelled mobile equipment be maintained in functional condition. Shubert's testimony established that the horn would not function. I find that the violation existed as charged.

GRAVITY AND NEGLIGENCE

Shubert stated on the citation form that there was no fast traffic in the area, and he further indicated that it was unlikely an injury would result from the violation. Exh. P-3. I therefore conclude that the violation was not serious.

Further, and for the reasons stated with regard to the violations of Sections 56.14130(a)(3), 56.14132(a) and 56.1410(a)(2), I conclude that GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3596823, 11/15/91, 30 C.F.R. § 56.14107(a).

EVIDENCE

The citation states:

> The main pump drive shaft located on the dredge was not provided with a guard to protect a person from contacting the drive shaft. The operator stands beside the drive shaft to operated the dredge.

Exh. P-6. In addition, Shubert found that the violation was S&S.

Shubert stated that after inspecting the loader he went to the part of the pit where the dredge was located. Shubert went by boat to inspect the dredge. The dredge was not pumping at the time Shubert arrived, but Shubert stated that the dredge operator, Willie Small, told him that it had been pumping earlier that morning and that the dredge was not then operating because the pump had lost its prime. Tr. 24-25. Small was trying to reprime the pump. Tr. 25.

Shubert described the dredge as having a diesel powered main pump, along with a smaller primer pump. According to Shubert, the main pump sucks sand up through a long snout. The snout is lowered into the water and down to the sand floor of the pond by

a winch. The sand is then sucked up to the snout, through the pump and is piped to another area of the pit where it is discharged. Tr. 26.

Shubert stated that the drive shaft on the main pump is 8 feet long and 3 inches in diameter. The shaft rotates very rapidly. The drive shaft turns the main pump. Shubert testified that the dredge operator may sit 10 to 12 inches from the shaft during the course of his duties while operating the dredge. Tr. 27-28. Because, in Shubert's experience, all dredges are subject to oil leaks and water spills on the their decks, Shubert feared the dredge operator could slip or fall in the immediate vicinity of the turning shaft, and the operator's clothing could become caught in the shaft and the operator could be pulled into the shaft. If such were to happen, Shubert feared that a broken limb or even a lost limb could result, as well as possible cuts. Tr. 30.

During cross-examination, Green asked Shubert if he had been told that the dredge was sabotaged shortly before the inspection and Shubert stated that he had not. Tr. 48. Green explained during his testimony that the dredge had been sunk in 35 feet of water, that it had completely turned over and that when Shubert saw the dredge it had recently been refloated but that the pump mechanism was gone and the main pump did not work. According to Green, on October 15, GFD was trying to get the pump fixed. Tr. 68-69.

THE VIOLATION

Section 56.14107(a) requires that moving machine parts that can cause injury shall be guarded to protect persons from contacting such parts. In addition, the regulations enumerates several parts that must be guarded, and shafts are among the parts listed. As Commission's Administrative Law Judge George Koutras has stated, "[t]he language. . . found in [Section] 56.14107(a) specifically and unequivocally requires guarding for any of the enumerated moving parts that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a 'moving part'." Highland County Board of Commissioners, 14 FMSHRC 270.291 (February 1991)(ALJ Koutras).

I conclude that the violation existed as charged. While Green maintained that the pump was not working on October 15, he did not go to the pit with Shubert and was not there to hear Shubert's conversation with Small. Nor did Green mention the sabotage to Shubert when Shubert came to his office on the morning of the inspection. Tr.75-76. Shubert was adamant that Small told him the pump had been in operation that morning, and I credit Shubert's testimony. It seems logical that if the dredge had still been out of operation due to the sabotage, Green would have told Shubert. Moreover, Shubert stated that before

reaching the dredge he had seen sand at the end of the dredge pipeline. Shubert believed the sand had been dredged that morning. Tr. 103. Thus, I conclude that the pump had been in operation on October 15.

The main pump drive shaft was a long and rapidly rotating part. Shubert's fear that the dredge operator could become entangled on the shaft should he slip or fall in its vicinity was reasonable, and it is reasonable to credit his belief that an injury could result. Therefore, I conclude that the main pump drive shaft could cause injury if contacted. It was not guarded, and I therefore find that the violation existed as charged.

S&S

The evidence shows a violation of the underlying guarding standard. There was a measure of danger contributed to by the violation. The unguarded drive shaft, in conjunction with the proximity of the dredge operator and the usual presence of oil and water on the deck of the dredge, was reasonably likely to result in an injury. Further, becoming entangled with the shaft could have resulted in a reasonably serious injury. In sum, I agree with Shubert that this was a S&S violation.

GRAVITY AND NEGLIGENCE

As indicated, Shubert stated that slipping or falling into the shaft and becoming entangled in it could lead to broken or lost limbs and to cuts. These are serious injuries. Further, the dredge operator at times had to work in close proximity to the shaft and, as Shubert also observed, oil and water was usually present on the dredge deck to some degree. Tr. 29-30, 50. While the shaft remained unguarded the conditions under which the dredge operator worked increased the likelihood that he would be injured. I therefore conclude that this was an serious violation.

I credit Green's testimony that the dredge recently had been sabotaged. However, I also credit Shubert's testimony that the dredge had been in operation the day of his inspection. Not only was he told this by GFD's employee, he observed sand that he had reason to believe had been dredged before he arrived at the mine. Green suggested that in the sinking of the dredge, the guard had been lost. Whether or not this happened, once the dredge resumed operation a guard was required and in neglecting to provide it, GFD failed to meet the standard of care required of it as an operator. I therefore conclude that GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3596825, 10/15/91, 30 C.F.R. § 56.14107(a).

EVIDENCE

The citation states:

> The V-belt drive on the small primer pump located on the dredge was not provided with a guard to protect persons from contacting the V-belt.

Exh. P-7. In addition, the inspector found the violation to be S&S.

Shubert described the V-belt drive as consisting of a belt that sits in a pulley. As such, it is similar to a drive pulley. He also explained that the primer pump is the smaller of the two pumps on the dredge and that it pumps water into the main pump in order to get the main pump started. Tr. 31-32. Because the V-belt drive lacked a guard, Shubert believed that should the dredge operator slip or fall, he or his clothing could become caught in the drive. Tr. 32. The dredge deck was usually wet; and as previously noted, Shubert stated that small amounts of oil or diesel fuel and water were present on the deck. Tr. 33. In Shubert's opinion this made it highly likely that the dredge operator would slip or fall into the belt drive. Tr. 33-34. Shubert described an incident in Mississippi where this had occurred and where a miner had lost a thumb. Tr. 32. He also stated that the dredge operator would walk within one or two inches of the V-belt drive during the normal course of a work day. Tr. 34.

THE VIOLATION

Drive pulleys are among those enumerated moving machine parts that Section 56.14107(a) requires must be guarded if they can cause injury. I accept Shubert's testimony that the V-belt drive lacked a guard. I also accept Shubert's testimony with regard to the possibility of injury should the dredge operator slip or fall into the V-belt drive. Although Green maintained that the dredge was not operable when the violation was cited, I have found to be credible Shubert's testimony that the dredge had been operated on October 15. Thus, I conclude that the violation occurred as charged.

S&S

The evidence shows a violation of the cited guarding regulation. There was a measure of danger contributed to by the violation. The unguarded V-belt drive, together with the possible proximity of the dredge operator to the unguarded part and the consistently slippery condition of the dredge deck, made

it reasonably likely that injury to the dredge operator would occur. Further, becoming entangled with the V-belt drive would be likely to cause a reasonably serious injury. In sum, I agree with Shubert that this was an S&S violation.

GRAVITY AND NEGLIGENCE

The violation was serious in that it subjected the dredge operator to the likelihood of loss or injury of a finger or thumb. Once the dredge resumed operation, a guard was required. In neglecting to provide it, GFD failed to meet the standard of care required by the regulation, and thus was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3872742, 10/15/91, 30 C.F.R. § 56.14107(a).

EVIDENCE

The citation states:

> The "V"-belt for the winch that operates the suction pipe was not guarded to protect persons, the dredge operator was working in the area.

Exh. P-8. In addition, the inspector found that the violation was S&S.

As already indicated, the standard requires V-belt drives that can cause injury to persons to be guarded.[2] Shubert described the function of the winch as pulling the cable that was attached to the nozzle of the dredge and thus allowing the nozzle to be raised. When the winch was released the nozzle dropped into the water. The V-belt drive only ran when the winch was engaged. While the dredge operator was normally seated while the winch was engaged, he occasionally had to walk by the V-belt drive to inspect the nozzle and in so doing he passed within inches of the V-belt drive. Tr. 36-39, 51. If the dredge operator were to slip or fall into the V-belt drive, a possibility made likely by the usual presence of water, and of lubricants or fuel on the dredge deck, Shubert feared that the operator could loose fingers or even a limb. Tr. 37.

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[2] Although the citation is written in terms of the belt, Shubert's testimony made clear that his concern was for the unguarded belt drive. Tr. 36-37.

THE VIOLATION

As previously indicated, I accept Shubert's testimony that the dredge had been operating earlier in the day. I also accept his testimony with regard to the lack of a guard and that a person could be injured if entangled in the V-belt drive.[3] There was a violation of the cited regulation.

S&S

For the same reasons as those stated with respect to the preceding violation, I agree with Shubert that this was an S&S violation.

GRAVITY AND NEGLIGENCE

For the same reasons as those stated with respect to the preceding violation, I conclude that the violation was serious and that GFD was negligent in allowing the violation to exist.

CIVIL PENALTY CRITERIA

The criteria that I must consider when assessing civil penalties is contained in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Gravity and negligence have been discussed. With regard to size of the business of the operator, it is clear from Green's testimony that GFD is a small operator. Further, there is no evidence that the size of the penalties assessed will adversely affect GFD's ability to continue in business. The only evidence submitted regarding GFD's previous history of violations are copies of two citations, one issued on July 11, 1989 for a violation of Section 56.14130(a) and one issued on May 31, 1990 for a violation of Section 56.14100. I conclude from this that GFD has a negligible history of previous violations. Finally, GFD abated the violations within the time set by Shubert, and Shubert had nothing but praise for the manner in which GFD complied once it had been cited. I conclude, therefore, that GFD demonstrated good faith in attempting to achieve rapid compliance.

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[3] Green testified that there was no V-belt drive on the winch, rather that the winch was hydraulically operated. Tr. 65. However, Shubert was certain that when he observed the winch the V-belt drive mechanism was present. He stated that a hydraulic system had been installed for the winch but only after he issued the October 15 citation. Tr. 66-67. Green was not at the pond with the inspector on October 15, nor did he testify that he went to the pond that day. Since I have no reason to doubt Shubert's testimony with regard to what he observed on October 15, I conclude Shubert's description of the winch mechanism was accurate.

CIVIL PENALTIES

Considering all of the statutory civil penalty criteria, I conclude the following penalties are appropriate:

1. Citation No. 3596821 - $40

2. Citation No. 3596822 - $20

3. Citation No. 3873700 - $20

4. Citation No. 3872841 - $20

5. Citation No. 3596823 - $40

6. Citation No. 3596824 - $40

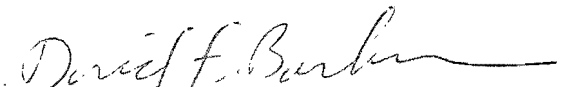
7. Citation No. 3872842 - $40

ORDER

Based on the above it is ordered:

1. The citations at issue are AFFIRMED.

2. GFD shall pay to the Secretary the assessed civil penalties within thirty (30) days of the date of this order and upon receipt of payment this proceeding is DISMISSED.



David F. Barbour
Administrative Law Judge
(703) 756-5232

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/epy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 10 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 92-138 A. C. No. 44-00246-03687
v.	:	
ISLAND CREEK COAL COMPANY, Respondent	:	Virginia Pocahontas No. 1

ORDER OF DISMISSAL

Before: Judge Weisberger

On January 28, 1993, Respondent filed a statement asserting that, when Respondent received the December 16, 1992, Order of Default[1] issued by Chief Judge Merlin in this matter, it decided to pay the $50 proposed penalty under the Order of Default, and to "drop" the contest of the citation in this case. Respondent also asserts that petitioner is in agreement with Respondent that it is appropriate to dismiss this case.

Accordingly, based on the assertions in Respondent's statement this case is DISMISSED.

Avram Weisberger
Administrative Law Judge

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nb

[1]The default order was subsequently vacated and this case was assigned to me.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 12 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CLAYTON NANTZ, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 92-259-D
	:	BARB CD 91-24
v.	:	
	:	Gray's Ridge Job
NALLY & HAMILTON ENTERPRISES, INCORPORATED, Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
David O. Smith, Esq., Marcia A. Smith, Esq., Corbin, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding is before me to determine the relief due the complainant Clayton Nantz based upon my decision of November 19, 1992, finding that the respondent Nally & Hamilton Enterprises, Incorporated, discriminated against the complainant in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., 11 FMSHRC 1858.

The parties were afforded thirty (30) days after my decision was issued to agree to the relief due Mr. Nantz or to submit their separate relief proposals with supporting arguments. By letter dated December 4, 1992, the Secretary informed me that the parties were unable to reach an agreement concerning the amount of damages to be awarded to Mr. Nantz, and thereafter, on December 15, 1992, the Secretary submitted a Post-Decision Brief in support of her claim for money damages on behalf of Mr. Nantz. The Secretary stated that pursuant to an earlier stipulation, the medical expenses which would have been covered by Mr. Nantz's health insurance policy had he remained employed with the respondent amounted to $1,426.76, and that the total amount of money damages owed Mr. Nantz for 1991 and 1992, including back wages and medical expenses, through December 31, 1992, is

$33,194.60. The supporting documentation for the Secretary's claim includes the following:

1. Mr. Nantz's pay stubs while employed by the respondent for the payroll weeks ending on August 11, 1990, through April 1991 (Exhibit PT 1).

2. Mr. Nantz's pay stubs while employed with Cloverfork Mining & Excavating, Inc., for the payroll weeks ending September 8, 1991, through December 29, 1991, including a stub for a production bonus for the payroll period ending January 5, 1992. (Exhibit PT 5).

3. Mr. Nantz's W-2 Wage and Tax Statement for 1991, in connection with his employment with Cloverfork Mining & Excavating, Inc. (Exhibit PT 6).

4. A backpay computation calculated by MSHA Special Investigator Ronnie Brock, including Mr. Brock's notes and an affidavit explaining his computations (Exhibits PT 2, PT 4).

5. A statement by C & L Logging Owner Karen Lewis confirming Mr. Nantz's employment from May 6, 1992, to June 30, 1992, with total earnings of $1,340 (Exhibit PT 7).

On December 21, 1992, the respondent filed a motion to compel the Secretary to provide under oath the tax returns of Mr. Nantz for the years 1990, 1991, and 1992, including all income tax W-2 and 1099 forms, and all information concerning Mr. Nantz's income and benefits he received while not employed by the respondent.

On December 22, 1992, the Secretary filed a response in opposition to the respondent's motion to compel and a request that Mr. Nantz be reinstated no later than January 4, 1993.

On January 4, 1993, the respondent filed a response to the Secretary's claim, and it took issue with the Secretary's position with respect to the gross income earned by Mr. Nantz following his termination, the amount of damages that Mr. Nantz is entitled to, and the methodology and computations used by the Secretary in support of her claim on behalf of Mr. Nantz. Following the receipt of the respondent's January 4, 1993, response, I held a telephone conference with the parties that same day, and they were afforded an opportunity to present further arguments in support of their respective positions in this matter, including the motion to compel, and the request for

Mr. Nantz's immediate reinstatement. Thereafter, on January 5, 1993, I issued an order which included the following rulings and directives:

> 1. The Secretary was ordered to produce a copy of Mr. Nantz's 1991 tax return, and the respondent's motion to compel production of Mr. Nantz's 1990 and 1992 tax returns was denied.
>
> 2. The Secretary was ordered to obtain a sworn affidavit from Mr. Nantz concerning any employments held or income received from the date of the hearing of August 12, 1992, to the present.
>
> 3. The Secretary was ordered to obtain an affidavit or a W-2 tax statement from C & L Logging Company, regarding Mr. Nantz's 1992 income.
>
> 4. The Secretary was ordered to obtain from Mr. Nantz statements concerning any unemployment compensation benefit payments received in 1991 and 1992.
>
> 5. The Secretary's request for Mr. Nantz's immediate reinstatement was denied.

The Secretary was afforded fifteen days to comply with my order, and the respondent was given an opportunity to respond to the Secretary's submissions within fifteen days after the Secretary's filing.

By letter dated January 11, 1993, and received on January 14, 1993, the Secretary filed her response in compliance with my order of January 5, 1993, and submitted Mr. Nantz's 1991 tax return, an affidavit from Mr. Nantz concerning employments since the August 12, 1992, hearing, an affidavit from the owner of C & L Logging Company, and information regarding Mr. Nantz's unemployment compensation payment benefits for 1991 and 1992.

The Secretary's Position

Back Wages

Based on the weekly payroll stubs submitted by Mr. Nantz and the payroll records submitted by the respondent, covering a 32-week period beginning with the pay period ending August 11, 1990, and ending with the week of April 14, 1991, the Secretary calculates that Mr. Nantz worked a total of 1,390.5 hours over this time period, and that his average work week was 43.45 hours. The evidence establishes that while he was employed with the respondent, Mr. Nantz earned $10.50 per hour for up to 40 hours per week, and $15.75 per hour for overtime hours worked in excess of 40 per week. The Secretary's back wage calculations are based

on an average salary of 40 hours per week at $10.50 per hour, plus 3.5 hours of overtime at $15.75 per hour, for a total gross weekly salary of $475.12. The Secretary points out that there are several weeks in 1990 where the pay information submitted is listed as "unknown" because Mr. Nantz did not have pay stubs in his possession for those weeks, and the respondent only submitted payroll information for 1991 at the hearing. These weeks were not included by the Secretary in calculating Mr. Nantz's average weekly pay rate. Further, the Secretary did not use the week of April 20, 1991, in her calculations because this was the week Mr. Nantz was terminated prior to completing the work week.

The Secretary has submitted a back wage computation calculated by Inspector Brock on a quarterly basis with interest computed in accordance with the Commission's decision in Secretary v. Arkansas-Carbona, 5 FMSHRC 2043 (December 1983), and the submission includes Mr. Brock's notes and an affidavit explaining his computations. The Secretary does not dispute the fact that the hourly employees at the subject mine were laid off from August 14, 1991, through September 30, 1991. Under the circumstances, Mr. Brock did not calculate any back wages owed to Mr. Nantz during the layoff period. However, the Secretary points out that Mr. Nantz's interim earnings of $2,565, from his employment at Cloverfork Mining Company during the layoff period were not counted against Mr. Nantz's back wages with the respondent since he would not have been employed by the respondent during that period.

The record reflects that Mr. Nantz had interim work with Cloverfork Mining Company from September through December, 1991. He earned $11,150.53, through the pay period ending December 22, 1991; $186 for the pay period ending December 29, 1991; and he received a production bonus of $115.15, for the pay period ending January 5, 1992. In making his calculations, Inspector Brock added the $186 to Mr. Nantz's 1991 fourth-quarter interim earnings, and included the $115.15, as part of Mr. Nantz's 1992 first-quarter interim earnings.

The record further reflects that Mr. Nantz had interim work with C&L Logging from May 6, 1992 through June 30, 1992, and that he earned $1,340. In making his calculations, Inspector Brock subtracted these interim earnings from the back wages owed Mr. Nantz in the second quarter of 1992.

Mr. Nantz executed an affidavit on January 7, 1993, stating that he has been unemployed since the August 12, 1992, hearing and has not received any interim earnings during this period of time. Based on all of the evidence and information filed by the Secretary, including the calculations made by Inspector Brock, the Secretary concludes that the total back wages owed to

Mr. Nantz for 1991 through December 31, 1992, including overtime and interest, and subtracting all interim earnings, is $31,767.84.

Medical Expenses

It would appear that the parties are in agreement that the amount of medical expenses that would have been covered under Mr. Nantz's health insurance policy had he remained employed with the respondent is $1,426.76. The Secretary has added this amount to the claimed back wages amount, for a total claim of $33,194.60.

Unemployment Compensation Benefits

The Secretary has submitted statements from the Kentucky Department for Unemployment Services reflecting that Mr. Nantz received unemployment compensation benefits in 1992 amounting to $8,005, and 1991 payments amounting to $2,260. The parties agree that the question of whether or not Mr. Nantz's backpay compensation may be reduced by the amount of unemployment benefits paid to him is a matter within the discretion of the presiding judge, Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). The respondent takes the position that had Mr. Nantz's employment not been terminated, he would not have received these benefits and he should not be allowed to reap a windfall by receiving backpay in addition to unemployment insurance benefits with no offset. Under the circumstances, the respondent believes that the benefit payments received by Mr. Nantz should be subtracted from any backpay award. The Secretary takes no position on this question other than to stipulate that it is within the discretion of the presiding judge.

Respondent's Position

Gross Income Lost

In response to the Secretary's claims on behalf of Mr. Nantz, the respondent first addresses the gross income that Mr. Nantz would have received had he continued to be employed by the respondent. The respondent takes the position that any award of backpay for Mr. Nantz should be computed on the basis of the evidence it submitted at the hearing which reflects that for the 15-week period from January 5, 1991 through April 13, 1991, Mr. Nantz's average work week was only 39.6 hours. Since this was the tax year immediately preceding Mr. Nantz's termination, the respondent believes that it more accurately reflects its mining activity at the time of the termination as opposed to the Secretary's computation which includes the preceding year (8/11/90 through 4/13/91, for an average of 43.45 hours).

The respondent is in agreement with the Secretary's computation to the extent that the 6.5 weeks from August 14, 1991, through September 30, 1991, should be omitted since no income was lost by Mr. Nantz during this period because of an undisputed layoff which would have affected him.

The respondent asserts that the 13 weeks for the months of October through December 1991, that are totally discounted by the Secretary's computation is erroneous. The respondent disagrees with the Secretary's apparent position that since Mr. Nantz earned more at Cloverfork than he would have earned had he still been employed by the respondent during this period of time, that difference should not be counted in the backpay computation. The respondent believes that it is illogical and unreasonable not to include all income earned by Mr. Nantz from Cloverfork as part of the backpay computation. The respondent further submits that it is likewise not reasonable to disregard gross wages earned by Mr. Nantz at Cloverfork during August 14, 1991 through September 30, 1991, when he would have been laid off by the respondent.

The respondent suggests that the gross income lost by Mr. Nantz can be computed simply as follows:

1) Based on the respondent's 39.6 hour work week computation at $10.50 per hour, Mr. Nantz's gross weekly earnings with the respondent would have been $415.80. For the week of his termination ending April 21, 1991, Mr. Nantz would have had gross income of $315, with a loss of $100.80 that week. The period from April 22, 1991 through December 31, 1992, consists of 88 weeks, and subtracting the 6.5 lay off weeks would leave 81.5 work weeks at the weekly rate of $415.80, or $33,887.70. Adding the $100.80 loss of income during the week of the termination would then result in a total gross income loss of $33,988.50, for the period April 16, 1991 through December 31, 1992.

2) Based on the Secretary's 43.45 hour work week computation, or gross wages of $475.12 per week, Mr. Nantz would have lost $105 for the week ending April 21, 1991, plus 81.5 weeks at $475.12 per week, or $38,722.28, for a total gross income lost for the period April 16, 1991 through December 31, 1992 of $38,827.28.

Based on the aforementioned arguments and computations, the respondent believes that Mr. Nantz's gross income loss for the relevant periods in question would be no more than $33,988.50 rather than $38,827.28.

Gross Income Received

The respondent agrees that the purpose of damages in this case is to make Mr. Nantz whole. However, it takes the position that since Mr. Nantz had a duty to mitigate his damages by seeking employment, all of the gross income, including unemployment insurance income, that he received for the period April 16, 1991, through December 31, 1992, should be subtracted in determining his compensable damages. The respondent points out that had Mr. Nantz's employment with the respondent not been terminated, he would not have had any of the income he subsequently received during the period April 16, 1991, through December 31, 1992, from the following sources:

Source of income	Amount	Time period
Cloverfork Mining & Excavating	$11,451.68	(9/91-1/5/92)
C & L Logging	$ 1,340.00	(5/6/92-6/30/92)
Unemployment insurance	$ 2,260.00	(1991)
Unemployment insurance	$ 8,005.00	(1992)
TOTAL	$ 23,056.68	

The respondent takes issue with the Secretary's discounting of any income earned by Mr. Nantz during the lay off period covering August 14, 1991 through September 30, 1991, simply because he would not have been employed with the respondent during that time. The respondent believes that whatever income Mr. Nantz earned following his termination should be deducted from the gross wages he would have earned with the respondent.

The respondent points out what it believes is an error in the figures submitted by the Secretary with respect to Mr. Nantz's employment with Cloverfork Mining. The respondent asserts that although the Secretary has stated that Mr. Nantz earned $2,565, during the period August 14, 1991, through September 30, 1991, the payroll check stubs submitted by the Secretary (Exhibit PT 5), for the weeks during this period only total $1,707.

The respondent believes that the Secretary's failure to subtract the difference between Mr. Nantz's fourth quarter 1991 earnings with Cloverfork Mining ($8,771.53), and the backpay he would have earned in that quarter ($6,176.56), in computing backpay (Brock affidavit, Exhibit P 4), on the ground that the interim earnings were greater than the backpay, is unreasonable and unfair. The respondent argues that had Mr. Nantz continued in the respondent's employ, he would not have had this additional income and it should therefore be subtracted in full from any backpay award.

The respondent asserts that although the W-2 payroll records submitted by Mr. Nantz establish that he had gross income from

Cloverfork Mining of $11,451.68, the Secretary only subtracted a total of $6,291.71 for gross income from Cloverfork following his termination. The respondent concludes that this is clearly erroneous, and it believes that in determining any compensable damages due Mr. Nantz, the total gross income he received following his termination ($23,056.68), should simply be subtracted from the total gross income he lost. The respondent's calculations in this regard are as follows:

$33,988.50 (39.6 hours)
-$23,056.68
$10,931.82

$38,827.28 (43.45 hours)
-$23,056.68
$15,770.60

Deductible Weeks

Citing Metric Constructors, Inc., 3 FMSHRC 1260 (February 1984), aff'd, Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985), the respondent argues that Mr. Nantz's backpay claim should be barred because of his admitted failure to immediately seek other employment, or, in the alternative, that at least two weeks of backpay should be deducted in computing damages.

The respondent maintains that any backpay award in this case should be reduced by a four-month or seventeen-week period because of the Secretary's unreasonable delay in bringing this action within a 120-day period as provided by the Act and the Commission's rules. Conceding that it did not attempt to prove that the delay made any of its witnesses unavailable or its defense to the complaint impossible, the respondent points out that it has never agreed that the delay should not be considered in computing a backpay award.

The respondent asserts that by rejecting foreman Farley's offer to return to work, or Farley's offer to attempt to put him back to work unless he was paid his backpay in full, Mr. Nantz has in effect failed to mitigate his damages by not pursuing this offer pending litigation of his claim for backpay. Since the offer took place sometime in June or July 1991, the respondent argues that Mr. Nantz's rejection of the Farley offer disqualifies him for any backpay weeks after June or July 1991. Giving Mr. Nantz the benefit of assuming that the offer was made at the end of July 1991, the respondent concludes that Mr. Nantz should be entitled to backpay for no more than 15 weeks, from April 16, 1991, through July 31, 1991, less the two (2) weeks he did not seek employment, or a total of 13 weeks.

The respondent agrees that the medical damages are $1,426.76, and that they should be added to any backpay award. The respondent submits that the backpay award with interest and medical damages could range from $17,481.23, based upon a 43.45 hour work week and without subtracting any weeks for the Secretary's delay, Mr. Nantz's delay in seeking employment, or his rejection of reemployment, but including unemployment insurance, to a low figure of $6,237, on the basis of a 39.6 hour work week for only the 13 weeks preceding Mr. Nantz's rejection of the offer of reemployment, but not deducting for any income received since the record fails to establish whether he received any income during that period of time, although he may have received some small amount of unemployment insurance benefits. The various possible calculations submitted by the respondent are included as an attachment to this decision.

Findings and Conclusions

In a discrimination case, the amount of backpay to be awarded as part of the remedial remedy is the difference between what the employee would have earned but for his wrongful termination and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598, 602 D.C. Cir. 1976); cert. denied, 429 U.S. 1078 (1977), cited and followed by the Commission in Northern Coal Company, 4 FMSHRC 126 (February 1982), and Belva Coal Company, 4 FMSHRC 982 (June 1982). Further, the employee must make a reasonably diligent effort to mitigate his loss of income or other damages, and his failure to do so may, in appropriate circumstances, result in a reduction of any backpay award, OCAW v. NLRB, supra; Northern Coal Company, supra.

In the Belva Coal Company case, supra, at 4 FMSHRC 994-995, the Commission stated as follows:

> In Northern Coal Co., 4 FMSHRC 126, 144 (1982), we followed precedent established under the National Labor Relations Act and defined back pay as the sum equal to the gross pay the miner would have earned but for the discrimination, less his "actual net interim earnings." "Net interim earnings" is an accepted term of art which does not refer to net earnings in the usual sense (gross pay minus various withholdings). Rather, the term describes the employee's gross interim earnings less those expenses, if any, incurred in seeking and holding the interim employment-expenses that the employee would not have incurred had he not suffered the discrimination. To remove any possible confusion, we will henceforth refer to the term as "actual interim earnings." See OCAW v. NLRB, 547 F.2d 598, 602 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977).

In Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (December 1983), the Commission stated as follows:

> Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined.

Back Wages

The Secretary's back wage calculations are based on an average weekly salary based on a 40-hour week at $10.50 per hour, plus 3.5 weekly hours of overtime at $15.75 per hour, for a total gross weekly salary of $475.12. The Secretary's calculations are based on Mr. Nantz's wage and hour history covering a 32-week period prior to his termination on April 16, 1991, rather than the shorter 15-week period covering only the year 1991, as submitted by the respondent. I take note of the fact that in calculating Mr. Nantz's average weekly pay rate, the Secretary did not include several weeks in 1990 where the pay information was not known or documented, or the week of April 20, 1991, when Mr. Nantz was terminated and did not finish the week.

After careful consideration of the arguments advanced by the parties, I conclude and find that the Secretary's computations are both reasonable and proper and provide a more accurate and realistic base for computing Mr. Nantz's average weekly gross pay for purposes of calculating his damages. I accept and adopt the Secretary's calculation of $475.12, as a reasonably accurate reflection of Mr. Nantz's average gross weekly wages, and I reject the respondent's argument to the contrary.

I take note of the fact that the interim employment information and calculations submitted by the parties basically cover the period beginning the week after Mr. Nantz's termination on April 16, 1991, through December 31, 1992. Any damages due Mr. Nantz will have to be adjusted to account for the subsequent time period before his actual reinstatement or payment of damages.

The parties are in agreement that the 6.5 week mine layoff from August 14, 1991, through September 30, 1991, which would have affected Mr. Nantz, should not be included in calculating the work weeks lost by Mr. Nantz as a result of his termination.

Utilizing the respondent's calculations based on the Secretary's $475.12 weekly gross wage, which I have adopted, I conclude and find that Mr. Nantz would have lost $105 for the week ending April 21, 1991, plus 81.5 weeks at $475.12 per week, or $38,722.28, for a total gross income lost for the period April 16, 1991, through December 31, 1992, of $38,827.28.

Back Wages Adjustments/Deductions

Interim Earnings

The record reflects that Mr. Nantz had gross earnings of $11,451.68, for employment with Cloverfork Mining & Excavating during September, 1991 through February 5, 1992, and gross earnings of $1,340, for employment with C & L Logging during May 6, 1992, through June 30, 1992. I agree with the respondent's position that the sum total of these interim earnings should be deducted from any backpay award to Mr. Nantz. However, I disagree with the respondent's position that the failure by the Secretary to offset $2,565 in Cloverfork Mining earnings by Mr. Nantz during the lay off period was unreasonable. The parties agree that Mr. Nantz would not have been employed during the layoff period, and they have taken this into account by not counting the layoff period as part of their back wage computation. By the same token, if Mr. Nantz had not been terminated, he would have been out of work during the layoff period and could have used that time to either work at another job or stay home. The fact that he worked another job during the time when he would have otherwise been laid off should not be held against him, and he should not be penalized by deducting any wages earned during the layoff from any backpay award. Under the circumstances, the respondent's arguments are rejected, and I conclude and find that the Secretary's discounting of the wages earned during the layoff period was reasonable and proper.

As noted earlier, the amount of any backpay award in a discrimination case is the difference between what the miner would have earned but for the discrimination and his actual interim earnings. Except for my rejection of the respondent's arguments that the $2,565 earned by Mr. Nantz from Cloverfork Mining during the August/September 1991 mine layoff, should be offset from any backpay award, I otherwise agree with the respondent's position that the sum total of Mr. Nantz's interim earnings should be deducted from what he would have otherwise earned had he not been terminated. I reject the Secretary's failure to subtract the difference between Mr. Nantz's fourth quarter 1991 Cloverfork Mining earnings of $8,771.53, and the $6,176.56, backpay he would have earned in that quarter, from his overall backpay award.

I conclude and find that Mr. Nantz's interim earnings of $1,340 with C & L Logging should be deducted from the $38,827.28, income lost for the period April 16, 1991, through December 31, 1992. I further conclude and find that $8,886.68, in interim earnings from Cloverfork Mining ($11,451.68 less $2,565.00) should be deducted from the income lost during this same time period.

Mitigation of Damages

An employee who has been discriminated against by his employer must make a reasonable effort to seek alternative employment following his unlawful termination. Ocaw v. NLRB, 547 F.2d 598, 603 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977). Any determination as to what constitutes a "reasonable effort" is made on the peculiar facts of the case. NLRB v. Madison Courier Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972).

In Metric Constructors, Inc., 6 FMSHRC 232 (February 1984), aff'd, Brock, ex rel Parker v. Metric Constructors Inc., 766 F.2d 469, 473 (11th Cir. 1985), the Commission affirmed a Commission Judge's denial of one week of back pay for an employee who failed to make a reasonable effort to seek employment during the week following his termination. The Commission also approved the Judge's following and applying NLRB cases under the National Labor Relations Act.

The respondent concludes that Mr. Nantz's failure to look for other work for two or three weeks after his employment termination waiting to see if the respondent would call him back to work was clearly nonsensical. Relying on the decision in Metric Constructors, Inc., supra, the respondent submits that at least three weeks of any back pay award should be deducted because of Mr. Nantz's failure to seek employment during the period immediately following his termination.

Mr. Nantz confirmed that he waited two or three weeks after he was terminated before looking for other work waiting to see if the respondent would call him back to work (Tr. 27). Mr. Nantz explained that he heard nothing further from Mr. Farley after his termination of April 16, 1991, regarding any offers of reemployment, and he stated that "I just kept waiting on him to call, and he never called" (Tr. 82-83).

I take note of the fact that the Secretary did not use the week that Mr. Nantz was terminated in calculating his backpay. However, the Secretary does not address Mr. Nantz's admission that he waited for an additional two weeks before looking for other work, nor does the Secretary address the respondent's arguments with respect to this issue.

After careful consideration of the argument advanced by the respondent, I conclude and find that Mr. Nantz's failure to begin his search for work during the three or four days following his termination was not unreasonable. However, I further conclude and find that it was unreasonable for Mr. Nantz to wait an additional two weeks before looking for work. I find no credible evidence to support any conclusion that Mr. Nantz had any reasonable expectation of being rehired by the respondent following his termination, and he admitted that he made no effort to contact mine management to seek reemployment and stated that he "wouldn't work for a man who did not pay him". Under the circumstances, I conclude and find that two-weeks should be deducted from Mr. Nantz's backpay award. Accordingly, I have deducted $950.24 ($475.12 x 2) from Mr. Nantz's backpay award.

Unemployment Compensation Payments

The parties are in agreement that any reduction of backpay due for unemployment payments is a matter of discretion with the presiding Judge. Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), affirming in part its prior decision on this issue in Boich v. FMSHRC, 704 F.2d 275 (6th Cir. 1983).

The respondent maintains that all gross income received by Mr. Nantz subsequent to his termination, including unemployment compensation payments, should be subtracted from his compensable damages. The respondent concludes that if Mr. Nantz had not been terminated and remained in its employ, he would not have received any of the 1991 and 1992 income which has been documented in this case.

A backpay award pursuant to the Act is an equitable remedy intended to make the victim of discrimination in violation of section 105(c) of the Act whole and to restore him to his prior economic status absent the discrimination. I find no compelling reason for providing Mr. Nantz additional recovery for his lost wages over and above his backpay with interest by not deducting the unemployment compensation payments he has received.

The respondent has been assessed a civil penalty of $1,000, for its discriminatory conduct which resulted in Mr. Nantz's employment termination on April 16, 1991. Since the penalty assessment is a punitive sanction intended to deter further discriminatory conduct by the respondent, I find no compelling reason or circumstances for imposing an additional sanction against the respondent by not crediting it with the unemployment payments received by Mr. Nantz. Under the circumstances, I conclude and find that any unemployment benefit payments received by Mr. Nantz should be deducted from his compensable damages. Accordingly, I have deducted $10,265.00, in 1991 and 1992 unemployment compensation payments received by Mr. Nantz from his

backpay award covering the period April 16, 1991, through December 31, 1992.

Delay in Filing Complaint

The respondent's contention that Mr. Nantz's backpay award should be reduced by a four-month or seventeen-week period because of the Secretary's unreasonable delay in filing the complaint with the Commission IS REJECTED. The respondent has not proved that it has been prejudiced by any delay and in fact concedes that any delay did not make any of its witnesses unavailable, or that it had any adverse impact on its ability to defend the complaint. Further, in my decision of November 2, 1992, I rejected the respondent's arguments with respect to any unreasonable delay by the Secretary, 11 FMSHRC 1882-1883, and my findings and conclusions in this regard are herein incorporated by reference and they are REAFFIRMED. I conclude and find that Mr. Nantz's backpay award should not be reduced because of the asserted delay by the Secretary.

Rejected Reemployment Offer

The respondent's assertion that Mr. Nantz should be disqualified for any backpay subsequent to July 31, 1991, because he failed to mitigate his damages by rejecting foreman William Farley's offer to put him back to work, or to "attempt" to put him back to work, IS REJECTED. This issue was previously raised by the respondent and I rejected its arguments and found no credible evidence to support any conclusion that Mr. Farley made any bona fide offer to rehire Mr. Nantz. Indeed, the evidence reflects that Mr. Nantz's replacement was immediately hired by foreman Wayne Fisher when Mr. Nantz was effectively terminated on April 16, 1991, and that this was done with mine superintendent Louis Hamilton's blessing. Under all of these circumstances, my previous findings and conclusions are herein adopted by reference and REAFFIRMED, and I conclude and find that Mr. Nantz's backpay award should not be reduced because of any purported offer by mine management to reemploy Mr. Nantz, or any rejection of this offer by Mr. Nantz.

ORDER

On the basis of the foregoing findings and conclusions, including the reductions made for Mr. Nantz's interim earnings with Cloverfork Mining and C & L Logging, his waiting two weeks after his termination to begin looking for work, and his unemployment compensation payments, I conclude and find that the gross backpay award for Mr. Nantz for the period April 16, 1991, through December 31, 1992, less interest, is $17,385.36. I also conclude and find that Mr. Nantz is entitled to an additional sum

of $1,426.76, for medical expenses which the parties agree he would have been entitled to under the respondent's health insurance plan had he remained employed with the respondent.

IT IS ORDERED THAT:

1. My decision in this case, issued on November 19, 1992, is now final.

2. The respondent shall reinstate Mr. Nantz to his former position with full backpay and benefits, with interest, from April 16, 1991, the date of his termination, and adjusted to the date of his reinstatement, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully terminated. The gross backpay award due Mr. Nantz pursuant to this decision shall be subject to the usual and normal withholdings. Backpay and interest will continue to accrue until Mr. Nantz is reinstated and paid.

The interest accrued with respect to Mr. Nantz's backpay award shall be computed in accordance with the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (December 1983), and at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes.

3. The respondent shall reimburse and pay to Mr. Nantz $1,426.76, with interest, in medical expenses which would have been covered by his medical insurance had he not been terminated.

4. The respondent shall expunge from Mr. Nantz's personnel file and/or company records all references to the circumstances surrounding his employment termination of April 16, 1991.

5. The respondent shall pay to the Secretary (MSHA), a civil penalty assessment of $1,000, for the discriminatory violation which has been sustained.

The respondent shall comply with this Order within thirty (30) days of the date of this final decision.

George A. Koutras
Administrative Law Judge

Attachment

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 32715 (Certified Mail)

David O. Smith, Marcia A. Smith, Esqs., 100 West Center Street, P.O. Box 699, Corbin, KY 40702 (Certified Mail)

/ml

ATTACHMENT

KENT 92-259-D

@ 415.80/week (39.6 hours)		@ $475.12/week (43.45 hours)	
(1)			
81.5 wks	$10,931.82 backpay	81.5 wks	$15,770.60 backpay
+ 100.80	$ 196.77 interest	+ 105.00	$ 283.87 interest
-23,056.68	$ 1,426.76 medical	-23,056.68	$ 1,426.76 medical
Total	$12,555.35	Total	$17,481.23

(Less: 2 weeks for Nantz's delay in seeking employment)

(2)			
79.5 wks	$10,100.22 backpay	79.5 wks	$14,820.36 backpay
+ 100.80	$ 181.80 interest	+ 105.00	$ 266.77 interest
-23,056.68	$ 1,426.76 medical	-23,056.68	$ 1,426.76 medical
Total	$11,708.78	Total	$16,513.89

(Less: 17 more weeks for Secretary's delay but subtracting only $18,445.34 for gross income received)

(3)			
62.5 wks	$ 7,642.96 backpay	62.5 wks	$11,354.66 backpay
+ 100.80	$ 137.57 interest	+ 105.00	$ 204.38 interest
-18,445.34	$ 1,426.76 medical	-18,445.34	$ 1,426.76 medical
Total	$ 9,207.29	Total	$12,985.80

(OR: 15 weeks for period 4/16/91 - 7/31/91 only for Nantz's rejection of re-employment)

LESS: 2 weeks for Nantz's delay in seeking employment

(4)			
13 wks	$ 5,405.40 backpay	13 wks	$ 6,176.56 backpay
	$ 97.30 interest		$ 111.18 interest
	$ 1,426.76 medical		$ 1,426.76 medical
Total	$ 6,929.46	Total	$ 7,714.50

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 16 1993

DONALD PORTER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 93-60-D
	:	PIKE CD 92-11
NORTH STAR CONTRACTORS, INC., Respondent	:	Mine No. 4

DECISION

Appearances: Mr. Donald Porter, Deboard, Kentucky, pro se; Keith Bartley, Esq., Prestonsburg, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Complaint filed by Donald Porter alleging that he was discriminated against by North Star Contractors, Inc., ("North Star"), in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, ("the Act") 30 U.S.C. § 815(c). Pursuant to Notice, the case was heard in Huntington, West Virginia on January 6, 1993, and the transcript of the hearing was filed February 8, 1993. At the hearing, Mr. Donald Porter appeared pro se and testified in his behalf. William Johnson also testified on behalf of the Complainant. At the conclusion of Complainant's case, Respondent made a Motion for summary decision. After listing to argument on the motion, I rendered a bench decision dismissing this case. The decision, with the exception of minor corrections not relating to matters of substance, is set forth as follows:

> I have reached a decision in this matter and I wish to place the decision on the record at this time. The Complainant in this case, Donald Porter, on July 27, 1992, was working as an operator of a miner for North Star Contractors, Inc. On that day, nothing unusual had occurred and all the operations were normal. Mr. Porter operated his continuous miner in the number five heading, entered a break in the number six heading and then proceeded to cut headings one and two in breaks off of the No. 6 heading. In cutting heading number two after taking a cut he noticed a hole in the middle of the break approximately two feet in diameter.

After making the cut in heading number two, he noticed his foreman, Eugene Williams, was hollering at him and he heard him say, "I'm really proud of you boys". After that Mr. Williams then turned to the helper of Donald Porter, Mr. Willy Johnson, and told him that the could not understand why Donald would do something like that. Mr Porter then said that he was going to the house, left the underground mine and went home.

As I stated at the commencement of the hearing, in order to establish a case of discrimination under section 105(c) of the Act the Complainant, and I'm quoting at this point from Boswell v. National Cement Company, 14 FMSHRC 253 at 257,

> ...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. The Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds, sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211, (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Company 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that the protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the prima facie case in this matter, 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 Associated Coal Corporation v. FMSHRC 813 F.2d 639, 642, (4th Cir. 1987); Donovan v. Stafford Construction, 732 F.2d 954, 958-959, (D.C. Cir. 1984); Boich v. FMSHRC 719 F.2d 194, 195-196, (6th Cir. 1983), specifically approving the Commission's Pasula-Robinette test).

I note in this case first of all that the foreman did not expressly fire Mr. Porter and indeed did not make any complaints against him at this point. There is no evidence that the Company took any adverse action against Mr. Porter. There were no remarks that Mr. Williams made to Mr. Porter that could, in any way, be interpreted as indicating that Mr. Porter was fired

or that any other adverse action was being taken against him. Also, although the law provides that a work refusal could be considered as a protected activity, "the miner must have a good faith and reasonable belief that the work in question is hazardous, See generally Robinette supra, 3 FMSHRC at 807-812". Boswell, supra at 258. In addition,

> Once it is determined that a miner has expressed a good faith and 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 the management explained to (the miner) that the problem in his work area had been corrected. Boswell, supra, at 258.

The evidence here does not established any work refusal. There is no evidence that Mr. Porter was required to perform any work that was in any way hazardous. Mr. Porter did not indicate that any work was assigned to him that he believed to be hazardous, nor did he communicate to management any safety concerns that he had.

For all these reasons, I find that there is no basis under the law to sustain a case of discrimination under the Act and accordingly the Complaint must be **DISMISSED.**

ORDER

It is **ORDERED** that this case be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

Distribution:

Mr. Donald Porter, General Delivery, Deboard, KY 41214 (Certified Mail)

Keith Bartley, Esq., 22 Court Street, P.O. Box 1378, Prestonsburg, KY 41653 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 16 1993

DENVER COLLINS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 92-877-D
	:	MSHA Case No. BARB-CD-92-21
ANDALEX RESOURCES, INC., Respondent	:	No. 23 Mine

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, Kentucky, for the Complainant;
Philip C. Eschels, Esq.,Greenebaum, Doll and McDonald, Louisville, Kentucky;
Marcus McGraw, Esq., Greenebaum, Doll and McDonald, Lexington, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon the Complaint by Denver Collins 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 unlawful discharge under Section 105(c)(1) of the Act by Andalex Resources, Inc. (Andalex).[1] In his

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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 a 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 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 of applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

original complaint filed with the Mine Safety and Health Administration (MSHA), Collins alleged that he was fired "for keeping notes of unsafe acts at the underground mine." Mr. Collins' Complaint filed before this Commission on July 24, 1992, presents essentially the same allegation. Subsequently, in an amended complaint filed on October 29, 1992, Collins further alleged that he had "voiced repeated safety complaints during the two years of his employment with Andalex Resources, and that management ignored said complaints to the point that the making of said complaints was futile."

The Commission has long held that a miner seeking to establish a prima facie violation of section 105(c)(1) of the Act bears the burden of persuasion that he engaged in an activity protected by that section and that the adverse action was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (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 803 (1981). The operator may rebut the prima facia case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. Failing that, the operator may defend affirmatively against the prima facia case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra (the so-called Pasula-Robinette test). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983).

The credible evidence in this case clearly supports a finding that the Complainant engaged in protected activities in the two years preceding his discharge on January 21, 1992. Collins testified that over the course of his employment at the Andalex No. 23 Mine, beginning on August 5, 1991, he reported to Andalex management various safety and health problems, including those involving coal dust in the mine atmosphere and the need for rubber gloves to handle a power cable.

In the absence of evidence of contemporaneous adverse action against Collins in response to these alleged protected activities, however, and indeed in the absence of any retaliatory action against him even after a fatal roof fall incident to which company officials believe Collins himself contributed, I find it highly

unlikely that Andalex retaliated against him for any health or safety complaints reported before January 16, 1992. It is further noted that these complaints by Collins were not extraordinary in nature, but rather the type of reports and requests to be expected from miners in the day-to-day operation of an under-ground coal mine. Indeed, even after these complaints had been made, it is undisputed that Collins was being considered for promotion to the position of foreman and was told of those plans. For the above reasons and because of the swift and severe action by Andalex officials on January 21, 1992, in clear response to Collins' activities on January 16, 1992, I conclude that his discharge on the former date was solely the result of his activities on the latter date.

In this regard Collins himself maintains that his discharge on January 21, 1992, was the direct result of the discovery by his foreman on or after January 16, 1992, that he had entered written notations in his logbook of illegal deep cuts he had taken on that date. It is not disputed that on Thursday, January 16, 1992, Collins, while operating the continuous miner, knowingly took at least two illegal and admittedly dangerous deep cuts of 55 feet each -- well in excess of the 30 foot cuts permitted under the applicable roof control plan.

While Collins maintains that he took these deep cuts with at least the tacit approval of his foreman, Charles Smith (though not at Smith's specific order or direction) he admits that he would not take such illegal deep cuts in the presence of upper management including the "superintendents," and Clifford Berry, Division Manager. In this regard Collins testified that "[w]hen you are breaking the law, you know who you can run in front of and who you can't" (Tr. 34). It is clear, in any event, that the illegal practice of taking deep cuts with the continuous miner, as admitted by the Complainant, is not a protected activity. See Secretary of Labor on behalf of Bryan Pack v. Maynard Brunch Dredging Company and Roger Kirk, 11 FMSHRC 168 (1989).

Collins has alleged, and it is undisputed, however, that his Foreman, Charles Smith, and Mine Superintendent Willie Sizemore (the person who notified Collins of his discharge) knew at the time of his discharge that he had been maintaining a daily log, including, among other things, a notation in that log of the illegal deep cuts he had taken on January 16. Whether or not these persons had actually seen this entry or any other log entry, it is clear that these persons had knowledge that he was

maintaining such a log. Under the particular circumstances of this case, I find that this was a protected activity. That Collins may not have intended the contents of his log be reported to MSHA or to Andalex officials or that the entry regarding the deep cuts on January 16 was only inadvertently disclosed to company officials is immaterial. Even a miner who has not actually engaged in a protected activity is nevertheless protected under Section 105(c) if the mine operator retaliates based only on the erroneous belief that the miner did engage in protected activity. See Elias Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982). In addition, the mere threat of disclosure is sufficient to trigger the protections of Section 105(c).

Serious allegations have been made in this case by a number of witnesses that while it was known that upper management would not tolerate deep cuts some foremen not only did not discourage deep cuts but actively encouraged and overlooked such practices at the Andalex Mine. These allegations were made too many times by too many credible witnesses to be without some merit. The fact that continuous miner operators other than Collins were also apparently regularly taking illegal cuts, but only Collins was discharged, suggests that the adverse action against Collins was in fact motivated not merely for taking the illegal deep cuts, but also at least in part for maintaining a written record of the practice.

However, in light of the clear recognition, by even the Complainant himself, that the upper mine management would not tolerate deep cutting, I conclude that those Andalex officials who ultimately discharged Collins, i.e., Sizemore and Berry, did in fact take that action based on his unprotected illegal activities alone -- whether or not low ranking management such as Foreman Smith may have also been motivated in reporting on Collins, by Collins' protected activity. Pasula, supra; Robinette, supra. I find credible Berry's testimony that he had no knowledge of Collins' log entry on the Sunday before the discharge when he directed Superintendent Sizemore to verify the facts and if they proved to be true that Collins did indeed take the deep cuts, then to fire Collins. In any event, even had he such knowledge, it is undisputed that Berry would not tolerate deep cutting and would no doubt fire anyone who did so. It may therefore reasonably be inferred that Berry would have directed Collins' discharge in any event based solely on his unprotected and illegal deep cutting alone.

While Sizemore had knowledge of Collins' log entry (regarding his deep cuts on January 16), I find credible his testimony that he declined to look at the log entry and indeed would have taken the same action against Collins regardless of his knowledge of any such log entry. The only suggestion that Sizemore may have ever approved of deep cutting was Collins' claim that Sizemore was once present near an entry that had been deep cut. Without additional evidence however I cannot infer that Sizemore therefore in fact condoned or encouraged deep cutting. Even if Collins' testimony was true in this regard, there are a multitude of reasons why Sizemore may not have had knowledge that he was near a deep cut. In addition, if Sizemore had in fact condoned the practice of deep cutting, as Collins seems to suggest, it would have been reasonable for Collins to have raised that in his defense when Sizemore told him he was being fired for that identical practice. The fact that Collins did not raise that claim suggests that Sizemore did not in fact condone such a practice and Collins knew that. Collins, of course, also testified that he would not take illegal deep cuts in the presence of the mine superintendents -- apparently because he knew the practice would not be tolerated by any of the superintendents, including Sizemore.

Finally, I find Sizemore to be a credible witness and find credible his testimony that he did not, and would not, tolerate deep cutting and had no knowledge, other than the fatality in 1990 and the instant case, where a deep cut had been taken. I therefore conclude that his decision to discharge Collins was based solely on Collins' unprotected illegal activity on January 16, 1992, of taking deep cuts. Thus, I conclude that the persons responsible for Collins' discharge, namely Berry and Sizemore, were in no way motivated by his protected activities, but based their decision solely on his unlawful conduct on January 16, 1992, in taking illegal deep cuts with the continuous miner. Under the circumstances Collins has failed to sustain his burden of proving that his discharge was in violation of the Act and the Complaint must accordingly be dismissed.

ORDER

Discrimination proceeding Docket No. KENT 92-877-D is hereby dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 18 1993

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 92-445 A.C. No. 36-04175-03560
v.	:	Robena Prep Plant
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: John M. Strawn, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Feldman

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary (petitioner) alleging a violation by the operator (respondent) of the surface mine mandatory safety standard that prohibits dangerous accumulation of coal dust. This matter was heard in Washington, Pennsylvania, at which time Robert G. Santee and Robert L. Campbell testified on behalf of the petitioner and William Geary testified for the respondent.

The issues for resolution are whether the respondent permitted a dangerous accumulation of coal dust at its Robena Preparation Plant and, if so, whether this accumulation was a "significant and substantial" violation and/or the result of the respondent's "unwarrantable failure". Also for consideration is the amount of civil penalty, if any, that should be assessed. The parties have stipulated to my jurisdiction in this matter and to the pertinent civil penalty criteria found in Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., (The Act). The parties' post-hearing briefs are of record.

FINDINGS OF FACT AND DISCUSSION

At approximately 6:50 a.m., on August 22, 1991, Mine Safety and Health Administration Inspector, Robert G. Santee arrived at the respondent's Robena Preparation Plant facility for the purpose of conducting an inspection. This facility consists of several buildings, that receive, transport and process coal from the respondent's Dilworth Mine. The coal is transported up the Monongahela River by barge to the preparation plant where it is processed and stored by means of a series of conveyor belts.

Upon his arrival at the facility, Santee spoke to Mine Superintendent, Pat Zungri who informed Santee that Company Representative, Joe Bailey and Miner Representative, Harry Churby would accompany him on his inspection. Santee proceeded to the foreman's office where he inspected the foreman's log. Santee observed that the last entry in the log occurred on the afternoon shift of August 21, 1991, by Mine Examiner, Ed Bodkin. Bodkin's log entry made no reference to any accumulations of coal dust in the transfer house.

Sometime between 7:00 a.m. and 7:35 a.m., Santee, accompanied by Bailey and Churby, proceeded to the transfer house to conduct an inspection. The transfer house is a building used to transport coal by conveyor belt to and from the river from the preparation plant. Upon arriving on the first floor of the transfer building, Santee observed several areas of accumulation of float dust and loose coal. He noted that the more he looked around the transfer building, the more extensive the accumulations appeared to be. Therefore, Santee issued 104(d)(1) Order No. 3691990 to Joe Bailey for an alleged violation of Section 77.202 which Santee concluded had occurred as a result of the respondent's unwarrantable failure.[1] The order was based on Santee's observations of dangerous amounts of coal dust accumulations at the following locations:

1) Coal dust accumulations ranging from 0 to 1/2 inch deep on top of the electrical motors for the No. 1 conveyor belt.

2) Coal dust accumulations ranging from 0 to 1/2 inch deep on the electrical motors and structures for the river tipple conveyor belt.

3) Coal dust accumulations ranging from 0 to 1/16 inch deep inside of the electrical control panel boxes on

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[1] 30 C.F.R. §77.202 provides: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts." (Emphasis added).

the bottom floor of the transfer building where electrical motors for the No. 1 conveyor belt and river tipple conveyor belt are located.

4) Coal dust accumulations ranging from 0 to 1/2 inch deep on the steel beam structures on the bottom floor of the transfer building and continuing up to the first landing, including the first landing platform.

5) Loose coal and wet coal and mud ranging from 2 to 24 inches in depth at three different locations on the bottom floor of the transfer building including underneath the tail rollers for the No. 1 and river tipple conveyor belts.

6) Coal dust accumulations from 0 to 1/2 inch deep on top of the drive units and structures for the No. 1 and river tipple conveyor belts and on the floor of the platform for the secondary drive for the river tipple conveyor belt.

Santee's citation noted that the No. 1 and river tipple conveyor belts were running at the time the citation was issued at 8:25 a.m. In addition, Santee testified that the electrical boxes were energized at the time he observed these accumulations. (Tr.21,25-26). Santee noted that the accumulations observed were black in color and were not combined with any non-combustible materials. (Tr.44,56,108). Finally, Santee stated that there were footprints in the accumulations which led him to believe that these accumulations should have been observed and were not of recent origin. (Tr.28). Santee estimated these accumulations existed for a period of several shifts to approximately one week. (Tr. 52).

Upon issuing the 104(d)(1) order, Santee informed Bailey to de-energize all power from the electrical motors and boxes so as to avoid any potential for ignition. After the top surfaces of the drive units and structures for the No. 1 and river tipple conveyor belts were washed off, Santee modified Order No. 3691990 to include additional coal dust accumulations he observed ranging from 0 to 1/2 inch deep which were saturated with grease and oil at several locations near the conveyor belt drive units. (Gov. Ex.1). Santee attempted to continue his inspection but realized that plant personnel were assigned to clean other areas of the transfer building before he could inspect them. Therefore, Santee discontinued his inspection at approximately 9:30 a.m. Santee returned to the field office and was contacted at approximately 4:00 p.m., by Zungri who advised Santee that the condition had been abated. Santee returned to the preparation facility at approximately 5:15 p.m., and reinspected the transfer house in the presence of Zungri and Robert L. Campbell, Chairman of the Union Safety Committee.

Robert Campbell testified on behalf of the Secretary. He stated that he also observed extensive amounts of float coal dust on top of the electrical panels, inside of the panels and on the floor. Campbell, who is employed at this facility, estimated that the dust accumulations existing in and around these panels were present for at least 3 weeks. (Tr. 110-111). Campbell corroborated Santee's observations regarding an oil and grease leak near the No. 1 conveyor belt. Campbell estimated that this condition existed for more than one month. (Tr. 108).

Campbell further testified that the transfer house is considered to be a problem area in terms of coal dust accumulations. He stated that the safety committee had raised the issue with the respondent's management on several occasions. (Tr.112-113). Campbell related that regular maintenance of the transfer house is done on weekends. Consequently, he opined that dust conditions deteriorate as the week progresses. (Tr. 110, 122-123). Thus, the nature and extent of the coal dust accumulations observed by Santee and Campbell were consistent with this weekend cleaning policy in that the inspection occurred on a Thursday. (Tr.117). Campbell testified that the weekend cleaning did not include cleaning of the electrical boxes or motors. (Tr. 122-123). Campbell expressed concern about the accumulations and their explosive potential as welding is performed in the transfer house approximately two times per month. (Tr. 120-121).

The respondent called Plant Foreman, William Geary as its only witness. Geary worked the midnight shift on August 22, 1991. This shift began on August 21, at 11:00 p.m., and ended at approximately 7:15 a.m., on August 22. Geary testified that he inspected the transfer house at approximately 6:00 a.m., on August 22, 1991. At that time, he reportedly noted coal dust that needed to be removed on the walkways around the No. 1 conveyor belt. (Tr. 161). Geary testified that he went to the foreman's office at approximately 6:30 a.m. Geary stated that he made a notation in the inspection log at approximately 6:35 a.m., to 6:40 a.m. (Tr.176). The subject notation states, "Transfer house area on both sides of river tipple belt need cleaned-up (sic)."[2] Geary testified that he did not know how this coal accumulation occurred. (Tr.173). Geary stated that he observed Santee on the preparation facility premises on August 22, 1991, prior to his departure at the end of his shift. (Tr.203).

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[2] The respondent did not introduce a certified copy of this log entry at trial. The record was kept open and it was received in evidence as Respondent's Ex. 1 on November 16, 1992.

FURTHER FINDINGS OF FACT AND CONCLUSIONS

Occurrence of Violation

The respondent is cited for violation of the mandatory safety standard in section 77.202 which specifies that coal dust shall not be "allowed" to accumulate in "dangerous amounts" in the air or on the surfaces of structures, enclosures, or other facilities. As coal dust is a natural consequence of the coal preparation process, the issue for determination is whether the respondent "allowed" the accumulations to occur and whether such accumulations constituted "dangerous amounts."

Turning to the question of whether the respondent allowed these conditions to occur, the determining factor is the period of time in which the respondent permitted the coal dust to accumulate. In Utah Power and Light v. Secretary of Labor, 951 F.2d 292, 295 (10th Cir. 1991), the Tenth Circuit, in applying a similar mandatory safety standard for underground mining contained in Section 75.400, stated that coal dust accumulations must be ". . . cleaned with reasonable promptness, with all convenient speed." Obviously, section 77.202 does not contemplate citations for coal dust as it is generated as a by-product of coal preparation. It is only the accumulation of such coal dust, which requires a period of time to occur, which is prohibited. (Tr.84-85). Thus, the operator must be afforded a reasonable period of time to remove coal dust accumulations before a citation can be properly issued.

In its brief, referring to the testimony of Geary, the respondent alleges, without foundation, that "[t]he major accumulation, amounting to an estimated 50 tons of coal, and the dust associated with the spill of that coal, occurred sometime during the afternoon shift of August 21 or the midnight shift of August 22. (Tr. pp. 173 and 174)." (Emphasis added). (Respondent's Br. 1-2). However, the respondent has misquoted Geary's testimony. There is no evidence of record of any recent coal spill that could account for the accumulations observed by Santee and Campbell. In fact, Geary, speaking hypothetically, testified that, given the volume of coal on the conveyor belts it would only take ". . . a few minutes for 50 ton[s] to get there (spill)." (Tr.170-171). Although Geary referred to "a spill there sometime during the night" he also testified that he did not know how these accumulations (referred to by counsel for the respondent as a "spill") occurred or when they occurred. (Tr.168,173). Geary's lack of knowledge about a recent coal spill is consistent with the testimony of Santee and Campbell which makes no reference to any statement by Bailey, Churby or Zungri, mine personnel who accompanied Santee on his inspection,

that a relevant coal spill had occurred. Significantly, Geary testified that he only saw 2 to 24 inches of coal dust accumulations around the No. 1 conveyor belt rather than a catastrophic coal spill. (Tr.172- 173). Thus, the testimony, when viewed in its entirety, supports the conclusion that the subject accumulations developed over a period of time and were not the result of a recent spill.[3] In reaching this conclusion, I note the testimony of Campbell concerning the respondent's policy of cleaning the transfer house on a weekly basis with resultant coal dust accumulations as the week progresses. Moreover, the physical evidence consisting of coal dust layers saturated with oil and grease, coal dust filtering through cracks in electrical boxes, and widespread coal dust accumulations on electrical motors, beams and around the rollers of the conveyor belts, supports the opinions of Santee and Campbell that these accumulations existed for a prolonged period of time.[4]

I also reject the respondent's assertion that the subject accumulation was noted in the foreman's log book by Geary prior to Santee's inspection. Santee's contemporaneous notes reflect that upon arrival at the preparation plant the last entry in the inspection log was by Bodkin on the afternoon shift of August 21, 1991. (Gov. Ex. 2, p.1). Significantly, Superintendent Zungri, Plant Foreman Brian Mahalovich and Plant Engineer Bailey never informed Santee at the beginning of his inspection of the occurrence of a recent spill that required cleanup or of a pertinent entry in the inspection log. The first time Santee was shown Geary's log entry was sometime after 10:15 a.m. (Tr.35). Moreover, Geary testified that he was aware of Santee's presence on the premises prior to ending his shift on August 22, 1991. Thus, Geary had the opportunity to enter the cleanup notation concerning both sides of the river tipple belt after he was aware that Santee had begun his inspection. I conclude, therefore, that the evidence fails to establish the existence of a log entry concerning a cleanup of any of the subject coal dust accumulations until after Santee's inspection and after the 7:15 a.m., day shift on August 22, 1991, had begun. (See Tr. 35-36).

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[3] Respondent's Counsel and Geary have used the word spill and accumulation interchangably throughout this proceeding. However, I find Geary's description of his observations of accumulations ranging from 2 to 24 inches consistent with an accumulation rather than a significant spill.

[4] As previously noted, Santee estimated that the accumulation existed over a period of several shifts to one week. Campbell testified that these accumulations were present from 3 weeks to more than one month. I give greater weight to Campbell's testimony as he is employed at and familiar with the preparation facility.

Finally, assuming arguendo that Geary's log entry was timely, it did not adequately address the widespread accumulations on such locations as in the electrical boxes, on the electrical motors and on the beams. It is noteworthy that it took the respondent an entire day to clean the transfer house. There is no evidence that Geary's entry in the log book was intended as an acknowledgement of the necessity for such an extensive cleanup. Thus, the Secretary has established that the respondent "allowed" this coal dust to accumulate in contravention of Section 77.202 in that it failed to take remedial action until Santee issued the subject 104(d)(1) order.

The remaining issue is whether these accumulations ranging from 1/16 inch inside the electrical boxes, 1/2 inch on the electrical motors and conveyor belt structures and 2 to 24 inches around the conveyor belt rollers, constitute "dangerous amounts". The Commission, in Pittsburgh & Midway Coal Mining Company, 8 FMSHRC 4 (January 1986), has concluded that coal dust accumulations 1/8 inch in depth inside electrical boxes, where there is a potential ignition source, are "dangerous amounts" within the meaning of Section 77.202. Consistent with this Commission decision, I construe the extensive accumulations observed by Santee in close proximity to electrical boxes, motors and moving belts to be "dangerous" accumulations. Accordingly, the Secretary has established a violation of Section 77.202.

SIGNIFICANT AND SUBSTANTIAL

The Secretary asserts that the nature and extent of the coal dust accumulations cited by Santee warrant the finding that this was a significant and substantial violation. A violation is deemed to be "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co.,Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1,3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987).

The respondent concedes that it is ". . . indisputable that an accumulation of coal dust did exist in the transfer house on the morning of August 22, 1991." (Respondent's Br.1). The issue for determination is whether there was a reasonable likelihood that these accumulations would result in combustion causing serious injury. It is fundamental that float coal dust is combustible only if 1) the float coal dust is in suspension; 2) there is an ignition source; and 3) there is an actual ignition or explosion. (Tr.45).

With regard to suspension, Santee testified that although he did not visualize any float dust in suspension, the widespread nature of the accumulations was indicative of suspended coal dust. (Tr.49-50). In addition, he testified that there were several common occurrences which could place the dust in suspension. For example, Santee stated that the starting and stopping of conveyor belts, the movement of those belts and tail rollers, and the opening of doors causing air circulation were all potential causes of float dust suspension. (Tr.63-64).

With respect to the second element of ignition, I accept the unrebutted testimony on behalf of the Secretary concerning the presence of potential ignition sources from arcing or sparks from the electrical boxes or motors, from heat build up and sparks related to friction from the conveyor belts and from occasional welding activities. (Tr. 46-47, 121). The proximity of float coal dust to these sources of ignition further demonstrates the serious nature of this violation.

Finally, in the event of actual combustion, it must be established that a fire or explosion is reasonably likely to cause serious injury or death. Santee's citation noted that one person was affected by this hazardous condition. Apparently, one employee on each shift is assigned to the transfer house where he is responsible for cleaning up the belt areas and hosing down the chute. (Tr.118). The foreman on each shift also travels through the transfer house to inspect the condition of the facility. (Tr. 177). Santee and Campbell also testified that personnel enter the transfer building for maintenance and repair. (Tr.51,121). The potential for explosion and/or fire engulfing the entire building would subject anyone inside to the substantial risk of serious injury or death. Admittedly, while the discrete hazard in this instance, i.e., combustion and resultant injury, requires the coincidence of several events, I find that the Secretary has established a significant and substantial violation by virtue of the extensive nature of the accumulations, their proximity to ignition sources and the likelihood of suspension given the accumulations' exposure to moving conveyor belts.

Unwarrantable Failure

The remaining issue concerns whether the respondent's failure to timely remove the subject accumulations constitutes an unwarrantable failure. The Commission has noted that unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, supra; Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

In Emery Mining, the Commission elaborated on the meaning of the phrase "unwarrantable failure as follows:"

> "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. 9 FMSHRC at 2001.

The evidence in this case reflects widespread coal dust accumulations, including those located on electrical motors and inside electrical boxes, which were permitted to accumulate over an extended period of time. These conditions were indicative of an inadequate cleanup policy which involved periodic cleanup rather than effective cleanup on an as needed basis. The

existence of these accumulations in proximity to ignition sources manifests a reckless disregard of this serious risk of explosion which goes beyond mere inattentiveness or thoughtlessness. Moreover, the presence of these accumulations despite previous meetings with the Safety Committee concerning this problem in the transfer house provides an additional basis for concluding that the respondent's inaction constituted more than ordinary negligence. As such, this violation is attributable to the respondent's unwarrantable failure.

Conclusions

In view of the above, I conclude that the gravity associated with the respondent's violation of Section 77.202 was serious given the risk of life threatening injury and that the underlying degree of negligence exhibited by the respondent was high. I therefore concur with the $1,200 assessment proposed by the Secretary in this matter as it is consistent with the evidence of record and the criteria in Section 110(i) of the Act.

ORDER

Accordingly, Order No. 3691990 **IS AFFIRMED** and the respondent **IS ORDERED TO PAY** a civil penalty of $1,200 in satisfaction of the violation in issue. Payment is to be made within thirty (30) days of the date of this decision, and upon receipt of payment, this matter **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 19, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-226
	:	A. C. No. 15-11292-03582
	:	Mine No. 1
v.	:	Docket No. KENT 92-182
	:	A. C. No. 15-14235-03588
HARLAN-KYVA COAL INC., Respondent	:	Docket No. KENT 92-171
	:	A. C. No. 15-14235-03587
	:	Docket No. KENT 92-170
	:	A. C. No. 15-14235-03586
	:	Mine No. 2
	:	Docket No. KENT 92-169
	:	A. C. No. 15-10818-03531
	:	Mine No. 3

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

These cases are before me upon the petitions for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements. A reduction in penalties from $9,370 to $5,682 is proposed. The reduction is based upon the operator's financial condition. Reports from the operator's accountants show a balance sheet with a net deficit in stockholder equity and a profit and loss sheet with a net operating loss. 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, particularly the criterion of the operator's ability to continue in business.

WHEREFORE, the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the operator **PAY** a penalty of $5,682 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Mr. Carl E. McAfee, Esq., 1033 Virginia Ave., P.O. Box 656, Norton, Virginia 24273-0656

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-586-M A. C. No. 45-00603-05512
v.	:	
BASIN ASPHALT COMPANY, Respondent	:	Moses Lake Pit & Plant

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. A reduction in the penalty from $362 to $181 is proposed. The parties also advise that the Solicitor has agreed to modify Citation No. 3644317 by deleting the significant and substantial designation. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. However, the Solicitor should be aware that in the future she must explain why the significant and substantial finding is being deleted and why negligence is being reduced. A conclusive statement will not suffice.

WHEREFORE, the motion for approval of settlement is **GRANTED.**

It is **ORDERED** that the operator pay a penalty of $181 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Cathy Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101

Albert De Atley, Basin Asphalt Company, 2000 East Beech Street, Yakima, Washington 98901

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

FEB 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-587-M A. C. No. 45-00603-05511
v.	:	
BASIN ASPHALT COMPANY, Respondent	:	Moses Lake Pit & Plant

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. A reduction in the penalty from $362 to $181 is proposed. The parties advise that the Solicitor has agreed to modify Citation No. 3644310 by deleting the significant and substantial designation. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. However, the Solicitor should be aware that in the future she must explain why the significant and substantial finding is being deleted and why negligence is being reduced. A conclusive statement will not suffice.

WHEREFORE, the motion for approval of settlement is **GRANTED.**

It is **ORDERED** that the operator pay a penalty of $181 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

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Albert De Atley, Basin Asphalt Company, 2000 East Beech Street, Yakima, Washington 98901

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FEB 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-686-M A. C. No. 24-00338-05533
v.	:	
MONTANA RESOURCES,	:	Continental

ORDER ACCEPTING LATE FILING
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor's unopposed motion to accept late filing of the penalty petition is **GRANTED.** Salt Lake County Road Department, 3 FMSHRC 1714 (1981).

The Solicitor has filed a motion to approve settlement of the one violation involved in this matter. The originally assessed amount was $431 and the proposed settlement is for $431. An electrical conduit on the side of the conveyor belt was broken exposing employees to possible electrical shock. Upon review, I find that $431 is an appropriate penalty for this serious violation and that it is in accordance with the six statutory criteria set forth in section 110(i) of the Act.

Accordingly, the recommended settlement is **APPROVED** and the operator is **ORDERED TO PAY** $431 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-9-M A. C. No. 04-01829-05530
v.	:	
KERN ROCK COMPANY Respondent	:	Wheeler Ridge Pit & Mill

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me upon a petition for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlements. A reduction in the penalties from $1,610 to $1,449 is proposed. The Solicitor has explained that the original assessments did not adequately take account of good faith abatement. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the operator **PAY** a penalty of $1,449 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 92-1103 A. C. No. 46-07622-03539
v.	:	
K Y V COAL COMPANY, INC., Respondent	:	No. 3

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the one violation involved in this matter. The originally assessed amount was $903, and the proposed settlement is for $903. The ventilation and dust control plan was not being complied with because the pressure of the water sprays was less than required. Upon review I find that $903 is an appropriate penalty for this serious violation and that it is in accordance with the six statutory criteria set forth in section 110(i) of the Act.

Accordingly, the recommended settlement is **APPROVED** and the operator is **ORDERED TO PAY** $903 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 22 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-452
	:	A.C. No. 15-13920-03732
v.	:	
	:	Pyro No. 9 Wheatcroft
COSTAIN COAL INCORPORATED,	:	

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

Statement of the Proceedings

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four(4) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers denying the alleged violations.

The parties have decided to settle this matter, and the Secretary has filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. §2700.30, seeking approval of the proposed settlements. No reduction in penalties is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Proposed Assessment	Settlement
3549975	$ 126.00	$ 126.00
3549976	$ 178.00	$ 178.00
3546673	$ 192.00	$ 192.00
3546677	$ 192.00	$ 192.00

Discussion

In support of the proposed settlement disposition, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the citations in question.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. §2700.30, the motion **IS GRANTED**, and the settlement **IS APPROVED.**

ORDER

Respondent **IS ORDERED** to pay civil penalties in the amount of $688 in satisfaction of the violations in question. Payment is to be made to MSHA within thirty (30) days of the date of this order, and upon receipt of payment, this proceeding **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

Distribution:

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

Catherine Lamey, Esq., Loss Prevention, Costain Coal Incorporated, P.O. Box 289, Sturgis, KY 42459 (Certified Mail)

vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT C. TEANEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 92-867-D MSHA Case No. BARB CD-92-14 No. 1 Mine
ROBERT C. TEANEY, Intervenor v. BLACK MOUNTAIN COAL MINING, INCORPORATED, Respondent	:	
ROBERT C. TEANEY, Complainant v. BLACK MOUNTAIN COAL MINING, INCORPORATED, Respondent	:	DISCRIMINATION PROCEEDING Docket No. KENT 93-264-D MSHA Case No. BARB CD-92-53 No. 1 Mine

DECISION APPROVING SETTLEMENT

Appearances: Donna E. Sonner, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary; Tony Oppegard, Esquire, Appalachian Research and Defense Fund of Kentucky, Inc., for Intervenor, and Complainant Robert C. Teaney; William A. Hayes, Esquire, Middlesboro, Kentucky, for Respondent

Before: Judge Melick

These cases are before me upon Discrimination Complaints under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the Act). Before and at hearings the parties filed motions to approve settlement agreements and to dismiss the cases. The terms of the settlement are attached hereto as Appendix A. I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is appropriate.

WHEREFORE, the motion for approval of settlement is GRANTED. Accordingly, Respondent is directed to: (1) pay Robert Teaney within 30 days of the date of this decision backpay of $3,600 and interest of $400; (2) expunge the employment records of Robert C. Teaney of all references to the circumstances involved in this matter; (3) post a copy of this decision, including Appendix A, at the mine office for 60 days from the date of receipt; and (4) pay a civil penalty (in Docket No. KENT 92-867-D) of $125 to the Secretary of Labor within 30 days of the date of this decision. Furthermore, these Discrimination Proceedings are DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

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William A. Hayes, Esq., 2309 Cumberland Avenue, P.O. Box 817, Middlesboro, KY 40965 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)

/lh

APPENDIX A KENT 92-867-D

*MOTION TO APPROVE SETTLEMENT

The parties, by their undersigned attorneys, hereby move the Administrative Law Judge to approve the settlement set out below. This motion is filed pursuant to 29 C.F.R. § 2700.30. As reasons for this motion the parties state as follows:

1. On July 16, 1991, the Secretary of Labor filed a complaint against Respondent. The complaint alleged that Robert C. Teaney was the victim of unlawful discrimination by Respondent in that he was transferred to a belt head position from a roof bolter operator position after he called the Kentucky Department of Mines and Minerals to report an electrical hazard. Subsequently, the roof bolter operators received an increase in pay of $1.00 per hour, which caused Teaney to suffer a loss of compensation from the time of his transfer until September 18, 1991, when he ceased work due to injury. Teaney also worked from employer from April 27, 1992 until June 2, 1992, when Teaney ceased working due to aggravation of previous injuries. The complaint alleged a violation of § 105(c) of the Act [30 U.S.C. § 815]. The Secretary's complaint sought certain relief, namely a finding that Teaney was unlawfully discriminated against, an order requiring Respondent to pay back wages to Teaney, an order directing that interest be added to the back pay, an order directing Respondent, its officers, agents, servants, employees and all other persons in active concert or participation with them, to cease and desist discriminatory activities directed toward their employees, for an order that Teaney's employment record be completely expunged of all references to the circumstances involved in this matter, and an order assessing a civil penalty. If the Secretary's witnesses were called to a hearing, they would testify as described above.

2. If Respondent's witnesses were called to a hearing, they would admit that Teaney was transferred to the belt head position from the roof bolter operator position, but would assert that the transfer was due to Teaney's being unable to operate the bolter fast enough. They would admit that the roof bolter operators received an increase in pay subsequent to Teaney's transfer.

3. The parties have discussed the alleged violations and the statutory criteria stated in Section 110 of the Act.

4. Pursuant to these discussions, the parties have negotiated a settlement, the details of which follow.

*/ As amended at hearing

5. Respondent does not have a history of previous 105(c) violations in the previous 24 months.

6. The violation was determined to involve high negligence. The gravity of the violation was high.

7. Respondent is a medium-sized operator.

8. The penalty agreed to will not affect the operator's ability to continue in business.

9. Respondent has demonstrated good faith in prompt compliance by agreeing to repay the back wages due plus interest.

10. Respondent agrees to pay Robert C. Teaney back wages of $3,600.00 and interest of $400.00 within 30 days of the date of the decision by the Administrative Law Judge.

11. Respondent agrees that Teaney's employment record shall be expunged of all references to the circumstances involved in this matter.

12. Respondent agrees to comply with the requirements of Section 105(c) of the Act and recognizes the right of miners to make safety complaints. This agreement in no way constitutes an admission of violations of section 105(c) in the instant cases, except for proceedings under the Act.

13. Respondent shall pay to the United States Department of Labor a civil penalty in the amount of $125.00, pursuant to § 105(c)(1) of the Act [30 U.S.C. 815(c)(1)].

14. Complainant, Robert C. Teaney, in Docket No. KENT 93-264-D, further agrees to withdraw his complaint in that case in consideration of the settlement herein.

15. It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Act.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No.LAKE 92-454-M A. C. No. 12-00087-05513A
v.	:	
JAMES KOSIBA, Employed by Rensselaer Stone Co. Inc., Respondent	:	Limestone Mine

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the one violation involved in this matter. The originally assessed amount was $500 and the proposed settlement is for $500. Overload protection was not provided for the electrical circuit supplying power to the main power control center for the crushing plant. Upon review I find that $500 is an appropriate penalty for this serious violation and that it is in accordance with the six statutory criteria set forth in section 110(i) of the Act.

Accordingly, the recommended settlement is **APPROVED** and the respondent having paid, this matter is **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

J. Phillip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

James Kosiba, 936 Maxwell Court, Crown Point, Indiana 46307

rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 93-40-M A. C. No. 33-01526-05506
v.	:	
JEFFERSON MATERIALS COMPANY, Respondent	:	Howitt Plant

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me upon a petition for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement. A reduction in the penalty from $1,200 to $960 is proposed. It appears that the proposed settlement is an across the board twenty percent reduction in assessments which gives no reasons, even though the violations are characterized as highly likely to result in a fatality. Nevertheless, based on the information in the file I approve the settlement in light of the operator's small size and history under the criteria set forth in section 110(i) of the Act.

The Solicitor should be aware however, such across the board reductions are troubling and in the future she must explicitly explain why the recommended amounts are appropriate.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of $960 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Elizabeth R. Ashley, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Bldg., 1240 East Ninth St., Cleveland, OH 44199

John E. Lower, Jefferson Materials Company, 8505 State Route 14, Streetsboro, Ohio 44241

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 23 1993

IRENE TONEY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 92-318-DM
	:	MSHA Case No. SE MD 92-04
IMC FERTILIZER, INC., Respondent	:	Kingsford Mine/Mill

DECISION

Appearances: Irene Toney, Bartow, Florida, pro se;
John E. Phillips, Esq., Holland and Knight, Tampa, Florida, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Irene Toney pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that IMC Fertilizer, Inc. (IMC) discharged her on December 5, 1991, in violation of Section 105(c)(1) of the Act.[1]

---

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

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

More particularly, Ms. Toney alleges that her discharge was the result of her persistent complaints to IMC management about the unsanitary condition of the field toilet facilities and, on at least one occasion, the absence of such facilities. In her complaint pursuant to Section 105(c)(2) of the Act to the Mine Safety and Health Administration (MSHA) and in her testimony at hearing, Ms. Toney cited particularly an incident in August or September 1991 when she purportedly found maggots on the toilet and floor of the portable toilet facility, and reported this condition to her foreman at the time, James Pate. She testified that she told Pate that if the toilet was not cleaned by 3:00 p.m. that day she would report the condition to the Polk County Health Department. Ms. Toney maintains that when the condition was not thereafter corrected she in fact then did call the Polk County Health Department and was referred to the local MSHA office. She subsequently reported those conditions to MSHA through a toll free telephone number and an MSHA inspector thereafter appeared at the mine site.

Ms. Toney's complaint to the Secretary, providing the jurisdictional basis for this case, is set out in full as Appendix A to this decision. This complaint was thereafter denied by the Secretary by letter dated May 21, 1992, and Ms. Toney then filed the instant case with this Commission on June 4, 1992.

Ms. Toney began her employment with IMC in January 1981, as a laborer and was promoted to dragline oiler in 1988. She thereafter commenced a training program for dragline operator and in 1990 became an assistant dragline operator and dragline operator. Ms. Toney recalls that her first complaint at the Kingsford Mine regarding the absence of any toilet facility was made to her then foreman, Jerry Wells. Following her request, a toilet was provided and apparently that was the end of the incident. Other than this first complaint at the Kingsford Mine, which apparently occurred in 1988 and the August or September 1991 complaint to James Pate, previously noted, Ms. Toney did not specify dates or particular circumstances regarding her other complaints about toilet facilities. She testified, however, that she complained about these facilities weekly to a number of management officials, including Mine Superintendent Ron Hartung, and Foremen Jerry Wells, Bonnie Bailey, Darold Weichman and Tom David. She also recalled that on at least one occasion, either due to a lack of toilet facility or unsanitary conditions, she had to go around the dragline and "use the ground." She observed that, in general, for the first day or two after the toilets were serviced they would be clean but that they would thereafter "get dirty fast."

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the 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 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 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 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.

I find in this case that Ms. Toney established a prima facia case that she engaged in protected activities by making health related complaints to IMC management regarding the absence of sanitary toilet facilities and, on at least one occasion, the absence of any toilet facilities. In addition, I find that she has established by undisputed evidence that she engaged in protected activity when she filed a complaint regarding unsanitary toilet facilities to MSHA in August or September 1991. Ms. Toney has also presented evidence which, when considered alone, might suggest that her discharge may also have been motivated by her protected activities. She testified that following her complaint to Foreman Pate in August or September 1991 about the unsanitary toilet facility, Pate was so angry that he almost ran her down with his pickup truck. She also maintains that following this incident and her reporting of the same conditions to MSHA she received eight disciplinary points for leaving the job site early, was given two disciplinary points when

she was late for a safety meeting and was called into the superintendent's office "almost daily."[2]

While this evidence, along with the relatively close relationship in time between her complaints to Pate and MSHA in August or September 1991 and her discharge on December 15, 1991, would tend to support a finding that her discharge may have been based, at least in part, upon her protected activities I find, in any event, that IMC has rebutted such evidence by clearly demonstrating that her discharge was not motivated by her protected activity. Pasula, supra, Robinette, supra.

Doug Wampole has been a personnel supervisor for IMC for 18 years. His job includes reviewing all disciplinary matters for consistency under the IMC point system. The IMC disciplinary program, in effect since January 1, 1986 and about which all employees are notified, provides in pertinent part as follows:

Three-Day Disciplinary Layoff

9 Points - 12 Month Period	12 Points - 12 Month Period
13 Points - 18 Month Period	15 Points - 18 Month Period
15 Points - 24 Month Period	18 Points - 24 Month Period

The IMC Disciplinary Program allows employees to personally make positive inputs to their own record. Specifically :

. . .

3a. If any employee has over 10 years of continuous service ...	- delete 1 point from disciplinary record

. . .

---

[2] While Ms. Toney also testified that she complained about the lack of sanitary toilet facilities to the Equal Employment Opportunity Commission in October 1991, on cross examination she acknowledged that the complaint did not relate to the cleanliness of the toilet facilities (See also Exhibit C-1). On cross examination Ms. Toney also acknowledged that the two disciplinary points she received for failing to attend a safety meeting occurred in April 1991, prior to her complaint to MSHA about unsanitary toilet facilities.

RULE INFRACTIONS

Discipline Points	Title of Discipline	Discipline/ Reference Code
...		
3	Reporting Late for Company Required Meeting	03-06
...		
4	Carelessness in Performing Duties (minimal to moderate loss of product or damaged equipment)	04-01
...		
9	Leaving the Job or Plant Without Permission and/or Proper Relief (has left Company premises)	09-07

(Exhibits R-2 and R-3).

Wampole testified that his role in the disciplinary action against Toney was to determine consistency. The foreman ordinarily initiates the disciplinary action through a "notice of discipline" (R-4) form and classifies the violation while Wampole looks to a computerized history of similar violations to determine whether the same type of violation has received the same penalty. Wampole himself is the official who assesses the disciplinary points.

In reviewing Toney's disciplinary history, Wampole noted that she received two disciplinary points for a violation on April 29, 1991, for being late for a scheduled monthly safety meeting. Ms. Toney acknowledges that she was indeed late for the safety meeting and did not challenge this disciplinary action through the company grievance procedures. Wampole noted that this was a minor infraction for which she received only two points and, considering credit given for one positive point, she was left with only one disciplinary point at that time. (See Exhibit R-5).

Wampole noted that Toney was subsequently disciplined for leaving the job without permission and/or proper relief on September 8, 1991 and received nine disciplinary points.

The disciplinary report regarding this incident reads, in pertinent part, as follows:

> At 6:40 am on Sunday 9/8/91 the Page 3 dragline was called by the day shift foreman in order to have the crews work over. There was no reply to the repeated efforts to contact the dragline and pit. A roving HOH was sent to the area at 6:45 am and found no personal vehicles and the D/L house interior, exterior and boom lights still on, on the machine. It is standard procedure that you cannot leave our assigned work station until properly relieved. On this machine, you were specifically instructed on 9/6/91 to call your foreman as your primary relief. No call was received.
>
> An hour's production was lost because of the delay in manning 3 stations. (Exhibit R-6).

Ms. Toney admits that she did in fact leave her job site early without receiving direct permission from her foreman as charged in the disciplinary notice and acknowledges that she did not challenge this action through the company grievance procedures. Wampole noted that following the issuance of this disciplinary notice Ms. Toney had ten cumulative disciplinary points and received a 3-day layoff. It is not disputed that the two other employees on Toney's work crew who also left early on September 8, 1991, also received the same nine point disciplinary action.

Wampole observed, finally, that as a result of a notice of IMC discipline on December 5, 1991, assessing four disciplinary points, Ms. Toney had, as of that date, accumulated 14 points and, under the IMC disciplinary program, was subject to discharge.

The notice of disciplinary action dated December 5, 1991, reported, in part, as follows:

> On Saturday 11/30/91 you failed to ensure the proper placement of the P-5 power cable which is one of the job duties you are responsible for as a dragline operator. You then got into the cable with the D/L bucket blowing it up causing three hours downtime and on the D/L and two hours down on the pit. (Exhibit R-8)

This disciplinary action was challenged by Ms. Toney through the IMC grievance procedures, including arbitration at which she was represented by the International Chemical Workers Union, Local No. 35. With respect to the factual findings and appropriate disciplinary points charged for the infractions by Ms. Toney, I give the arbitrator's decision significant weight. See Pasula, supra, 2 FMSHRC at 2795. The arbitrator thoroughly analyzed the factual setting given rise to the December 5, 1991, disciplinary action and found just cause for her discharge. (See Exhibit R-1). There is no challenge to the procedural fairness of these proceedings and Ms. Toney was represented by the union. It is also noteworthy that the same number of disciplinary points charged in this incident to Ms. Toney had also been issued to at least three other dragline operators between January 1991 and August 1991 for the same offense, i.e., cutting the dragline power cable with the bucket (See Exhibit R-9). I further find credible Mr. Wampole's testimony that at the time he evaluated the issuance of disciplinary points to Ms. Toney he was unaware of her complaints regarding the lack or the unsanitary condition of the toilet facilities.

Under the circumstances I conclude that in issuing disciplinary points against Ms. Toney, leading to her discharge on December 5, 1991, IMC was not motivated in any part by activity protected by the Act. Accordingly, this case must be dismissed.

ORDER

Discrimination Proceeding Docket No. SE 92-318-DM is hereby dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Ms. Irene Toney, 2962 Morris Drive, GH, Bartow, FL 33830 (Certified and First Class Mail)

John E. Phillips, Esq., Holland and Knight, P.O. Box 1288, Tampa, FL 33601 (Certified Mail)

/lh

I called your office to report bathroom condition in field. I tried to call Safety Personnel first but he did not return call. Within two weeks of that time I received 8 points for so called leaving job site to [sic] early 4 more points were given for a cable that was buried under ten or more feet underground. This cable should have been moved by two earlier shifts. When I told James Pate about bathroom problem he said there was nothing he could do about bathrooms which had maggots on floor on toilet itself and crawling all about the whole bath. I had complained to all said foremen about bathrooms and to no avail did I get any results. There were up to 15 men around the day I complained to James Pate. He even almost ran over me he was angry at me. Will give more details.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 92-187 A. C. No. 44-06593-03522
v.	:	
BAXTER R. NEECE, formerly employed by H B & B EQUIPMENT CO. INC., Respondent	:	Mine No. 4

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlements. A reduction in the penalties from $2,950 to $50 per-month for 10 months for a total civil penalty of $500 is proposed.

According to the Solicitor, the respondent is currently unemployed and has not worked as a foreman for the last year and a half. In addition, the Solicitor states that while the respondent conducted preshift examinations as a maintenance foreman on the midnight shift which should have revealed these violations, it was unlikely that he had the authority to have prevented or corrected the violations.

The reductions are extraordinary and constitute low penalty amounts under section 110(i) of the Act, but relying upon the Solicitor's detailed motion, I find that the amounts are appropriate.

WHEREFORE, the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the respondent, Baxter R. Neece, **PAY** a penalty of $500 according to the payment schedule set forth in the settlement motion.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Baxter R. Neece, P.O. Box 85, Trammel, VA 24289

rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-524-M A. C. No. 45-03119-05509
v.	:	
WESTERN SAND & GRAVEL, Respondent	:	Tenino Pit

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me upon a petition for assessment of the civil penalties for ten violations under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements. A reduction in penalties from $738 to $642 is proposed. Nine of the ten citations involved in this case were assessed $50 and are all non significant and substantial. The parties have agreed to settle these for the original amounts. I approve the findings for these violations and the proposed penalty amounts.

With respect to remaining citation, the Solicitor has agreed to reduce the penalty amount from $288 to $192. I find the $192 penalty reasonable based upon reading of the citation and the statutory criteria set forth in section 110(i) of the Act. However, no reasons are given in the joint motion to support the recommended penalty. The Solicitor should be aware that in the future she must explicitly disclose why the penalty is appropriate under section 110(i) and explain the reduction in a penalty amount. The mere submission of boiler plate language for a reduction will not suffice.

WHEREFORE, the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the operator **PAY** a penalty of $642 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Cathy Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101

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rdj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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FEB 24 1993

STEPHEN D. JUNGERS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 92-226-DM
v.	:	
	:	WE MD 91-03
U.S. BORAX Respondent	:	Boron Mill

DECISION

Appearances: Stephen D. Jungers, North Edwards, California, Pro Se;
Michael G. McGuinness, Esq., Los Angeles, California,
for Respondent.

Before: Judge Cetti

Statement of the Case

This case is before me upon the Complaint by Stephen D. Jungers 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 a five day disciplinary suspension without pay by U.S. Borax

(Borax) in violation of section 105(c)(1) of the Act. [1] More specifically, the Complainant alleges that he was unlawfully suspended without pay commencing 2 hours after the start of his work shift on August 12, 1990, and continuing thereafter through his normal scheduled work days of August 21, 24, 25 and 26th. Complainant contends the disciplinary suspension was imposed on him for having made safety complaints to management on August 12, 1990 concerning the practice and procedures used by Respondent's production foreman Dick Moore in handling the sodium dithionite fires that had been occurring in the White 5 Mol area of the plant where Complainant had been assigned to work that shift.

Mr. Jungers, the Complainant, seeks to have his personnel record purged of the August 12, 1990, Personnel Action Notices and (2) back pay for the 38 hours of work missed on August 12, 21, 24, 25 and 26, 1990 due to the suspension.

Complainant's position with Respondent U.S. Borax in August 1990 and at all relevant times herein was chief production operator at Respondent's Boron Mill earning $15.99 an hour. Mr. Jungers worked at Respondent's Boron Mill for 12 years. He testified he hired on as a laborer and within a few months took a bid under the union agreement with ILWU, Local 30 to Primary Process Plant One, where he started as a helper and then worked his way through the ranks to the chief position in the matter of a year or two.

The Respondent, U.S. Borax, is incorporated under the laws of Delaware as United States Borax Chemical Corporation.

---

[1] Section 105(c)(1) provides:

> 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 proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(Ex. 2). Respondent operates an open pit mine in Boron, California, where it extracts and refines borax.

Mr. Jungers as a chief operator at the Boron Mill monitored the process in which liquid borax and borate elements are removed and separated from solid elements such as rock and silt. Mr. Jungers worked in plant one at the Boron facility, and was assigned primarily to an area commonly referred to as the "mud birds." Mud birds are mechanical devices, shaped like cylinders, which separate the liquid borates from the non-usable rocks and silt as the first step in the refining process.

On August 12, 1990, at the beginning of his shift, Mr. Jungers started to perform his usual duties at the plant's mud birds area when a fellow employee approached him and informed him that she had just received a telephone message directing her to switch positions with the Complainant. The switch would result in Mr. Jungers working at the White 5 Mol area where borax is chemically treated to bleach it and make it have a rich white color. This task requires a miner such as Mr. Jungers to add sodium dithionite, a potentially hazardous chemical, to the refining process. Mr. Jungers, on occasion, had performed this task before.

On August 10, 1990, two days before Mr. Jungers' suspension, there had been a sodium dithionite fire at the White 5 Mol area which is the area Mr. Jungers had been directed to switch to at the beginning of his shift on August 12, 1990. Mr. Jungers felt that the fire had been handled in an unsafe manner. Mr. Jungers believed that the production foreman at White 5 Mol, Dick Moore, used unsafe and hazardous procedures in handling sodium dithionite fires. Dick Moore would be Mr. Junger's supervisor at the White 5 Mol facility in approximately two hours as a result of the August 12th job switch.

It was undisputed that sodium dithionite liberates sulfur dioxide (SO^2) when it decomposes. It decomposes when it contacts moisture such as drops of condensation. It decomposes when it smolders and starts to burn. (Tr. 101-102). There was over 4,000 lbs. of sodium dithionite in the bin at the White 5 Mol.

Even before the White 5 Mol facility was installed in the plant in September 1989, Complainant and other employees heard of the hazards involved in the use of the chemical sodium dithionite. Prior to his suspension Mr. Jungers had access to Occupational Health Guidelines for Chemical Hazards (Ex. 5) and other similar material. To show the reasonableness of his safety concerns Mr. Jungers read into the record, page 14 of Complainant's Exhibit 5 under the subheading "Major Hazards" as follows:

"Sulfur dioxide (SO^2) is a highly irritating gas to the mucous membranes of the upper and lower respiratory tract. Short-term, high dose exposures have resulted in work-related fatalities due to marked airway obstruction. Liquid or gaseous sulfur dioxide can cause both skin and eye burns."

Then continuing on the same page of Exhibit 5, under "Acute Effects", Mr. Jungers read into the record the effects of exposure to different concentrations of SO^2 as follows: "From 50 parts per million, marked irritation to eyes, nose and throat and lower respiratory tract occurs. Exposure to a concentration of 500 parts per million for 30 to 60 minutes is dangerous to life."

"A few fatalities has followed exposure to unknown but very high concentrations of gas. One report describes a case of chemical bronchial pneumonia that ended in death after 17 days."

Mr. Jungers explained that these are the types of concerns he and others had regarding the hazards of exposure to SO^2. He stated that concentrations of SO^2 fumes produced during a sodium dithionite fire are dangerous and hazardous to life.

As previously stated it is undisputed that sodium dithionite liberates sulfur dioxide (SO^2) when it decomposes. It decomposes when it contacts moisture and when it smolders and starts to burn. (Tr. 101-102).

Complainant stated that he and his fellow workers "wouldn't seem to get answers to a number of questions such as how much SO^2 they were being exposed to." (Tr. 29). Several times Mr. Jungers had coughing fits he attributed to the SO^2 fumes even when there was no fire.

Mr. Jungers testified "I wanted to make sure that before I worked with him (foreman Dick Moore) on shift again at the White 5 Mol with the possibility of a fire, that he (Dick Moore) was certain and I was certain that he was certain about what the safe procedures were in handling the fire."

Mr. Jungers stated that one of his main safety concerns was that the foreman, Dick Moore, not ask him to fight a sodium dithionite fire once it started and that he (Jungers) would be allowed to be evacuated along with the other employees and that he would be allowed to bring the hazardous material team in as is and was the stated company policy at the time.

Asked if there was any reason to be concerned that Dick Moore would not follow company safety policy in handling a dithionite fire, Mr. Jungers replied "Yeah. The fire we had on Friday, while we were all evacuated, and even though we were an eighth of a mile, or a quarter -- however far it is from the

White 5 Mol, it was bad enough for us to be evacuated. He (Dick Moore) didn't evacuate Chuck Jones who was working at the White 5 Mol on Friday during the fire." ... .

Dick Moore tried to get Chuck Jones to fight the fire and tried to prevent or at least discourage him from calling the hazardous materials team to fight the fire. (Tr. 34). (Ex. 8 and Ex. 9 are signed statements of Chuck Jones concerning the August 10, 1990 fire.)

Mr. Jungers testified there was a tendency by some people in management to try to circumvent the company's policy on fighting fires in the White 5 Mol. Production foreman, Dick Moore, would request regular untrained and unequipped employees to assist in fighting sodium dithionite fires instead of having all the employees evacuate the area and calling the hazardous material team to handle the fire.

Mr. Jungers testified that two days before he voiced his safety concerns to management, there was a sodium dithionite fire at the White 5 Mol. All the employees were evacuated approximately a quarter of a mile away except Chuck Jones. Mr. Jones told Mr. Jungers that Dick Moore tried to get him (Chuck Jones) to fight the fire and discouraged him from calling the hazardous material team. (Tr. 34). He was also concerned that Dick Moore had stated to Chuck Jones that he (Dick Moore) and Jungers (Complainant) had put out fires by themselves without calling the hazardous material team.

On August 12, 1990, when he heard he was to switch jobs and work at the White 5 Mol Mr. Jungers went to the office of the production foreman on duty at that time, Roy Beaver, to talk about his safety concerns. Mr. Jungers asked Chuck Jones (a union steward) to go with him as a witness. Mr. Jungers testified "I was very concerned and I was pretty -- waiting till Monday, which would have been the next day to bring a concern up to Bob Delyser (Plant One supervisor), who I wanted to have in my presence, in the presence of Dick Moore, make very certain what we were going to do in the event of another fire because I did not want to just have Dick tell me that we're going to do it a certain way. I wanted to make sure that Dick knew that I knew and the supervisor knew that company policy as to the safe procedures would be followed in handling any sodium dithionite fire." Dick Moore was going to be Mr. Jungers foreman on that part of the shift Mr. Jungers would be working at the White 5 Mol.

Mr. Jungers testified as to what occurred in Mr. Beaver's office as follows:

> And we went to the office (of production foreman Beaver) and talked about the whole

thing. I talked about what I was concerned about, what I've already delineated here. Chuck mentioned things that he thought were -- specifically needed to be looked at. He mentioned the teflon liner, because that's one of the ways in the past the fires had initiated, where the liner would slip out, cause the powder to miss its distribution drop and end up on top of a mixing unit and be exposed to moisture at that point, enough to cause a fire.

So he was concerned with the lining and plus the fact that he wasn't very confident working the area. He was relatively new to -- he wasn't -- hadn't had a whole lot of training. So he was kind of scared as far as having the fire on Friday. He was asthmatic to begin with. He had gone through some things, like he had vomited and coughed and he had a bad time on Friday when they had the fire, ...

He came mainly as a -- I asked him to come as a witness but he began to express concerns he had too, that since the subject was safety and from -- this is quite of a side point to this whole case, but I've never refused to work anywhere since I've been at Borax. It's one of my -- one of the things that -- about me.

And I really didn't refuse (to work at the White 5 Mol) that day either. The strongest words I used was I would rather not until we can get this safety question out of the way, my safety question being how the fires would be handled in terms of evacuating the person there and getting the HAZ-MAT team to put the fire out. ... .

I figured that by my example of saying I'd rather not work there for that one day that some -- I would get the attention of Bob Delyser (and we could have) the meeting with Dick Moore. That was my whole intention. ... Roy Beaver said you -- there will be no discipline. You won't be getting in trouble over this. He said he would call some other people in.

> Jungers stated that his foreman, Beaver, told me and Chuck to go back to the dissolvers and help them start up a line that we were starting up. And it -- we did that. And about a half hour later we were called back to the office.
>
> And Chuck and I went back to the office. And Ben Gray (all plant supervisor) was there. ... . And he said we're going to take you to the gate and I -- at that point Roy Beaver was there. I looked at Roy and I said, what is this? And I said, Roy, what about what we just talked about for 30 minutes, that there would be no discipline and on down the whole list there?
>
> He told me that he had called Bob Delyser at home and Bob had made a decision. And at that point I said, right then I said, is it too late And he goes, yes, it's too late. And I just said wow!

I

Discussion

It is undisputed that there had been at least 5 fires involving sodium dithionite at the White 5 Mol. It is also undisputed that when this chemical burns it produces an abundance of potentially hazardous (SO^2) fumes. It is company policy that the area be evacuated and a hazardous material team called to put out the fire even if they are at home because they are experienced and have the training and the equipment such as self-contained breathing apparatus to handle such fires.

I credit the testimony of the Complainant Jungers. I find he had a good faith reasonable safety concern and safety complaints that he wanted to discuss and bring to the attention of management. This is not a work refusal case. I credit Mr. Jungers' testimony that he never refused to work anywhere on August 12, 1990, or any other day. He just wanted it clear to management that he had a serious safety concern and rather not work at the White 5 Mol until as he states it "until we can get this safety question out of the way, my safety question being how the fires would be handled in terms of evacuating the person there and getting the HAZ-MAT team to put the fire out." He wanted to be sure that in the event of a fire, foreman Dick Moore would not require him (Jungers) to stay and help put out the fire rather than permit him to evacuate the area and call the hazardous material team to handle the fire.

The evidence leads me to the conclusion that Mr. Jungers and his fellow employee Chuck Jones wanted to bring to management's attention and discuss with management legitimate safety concerns. They did have a discussion of their safety concerns with lower management and indicated that they preferred not to work at the White 5 Mol until their concerns were dealt with. As soon as they left lower management (Beaver) made a call to upper management. Upper management may or may not have gotten an accurate picture of what the situation was but nevertheless made the decision to take immediate adverse disciplinary action against Mr. Jungers and Chuck Jones.

As Mr. Jungers aptly stated, he and Jones made safety complaints to management with the assurance from lower management that there would be no retaliation and return to the work management (Beaver) assigned to them and 30 minutes later were called into the office, taken to the gate and relieved of their hard hats and badges.

II

Further Discussion and Findings

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an operator's attention hazardous conditions or practices in the workplace or engages in other protected activity.

The basic principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F2d 639, 642 (4th Cir. 1987); Donovan v. Stafford

Construction Co., 732 F2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F2d 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).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom Donovan v. Phelps Dodge Corp., 709 F2d 86 (D.C. Cirl 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

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

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator. Chacon, supra at 2510. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

On the basis of the most credible evidence presented I find that this is not a work refusal case. Mr. Jungers simply wanted to bring to management's attention legitimate safety concerns and either through a deliberate intent to retaliate against Mr. Jungers for this protected activity or possibly through a negligent misunderstanding of the true facts on the part of higher

management, Mr. Jungers was "taken to the gate" and relieved of his badge and hard hat approximately 30 minutes after he voiced his safety concerns and complaints to management.

It is clear from the Commission's analysis in Chacon, supra, that the coincidence in time between the protected activity and adverse action such as we clearly have in this case is strong circumstantial evidence of the retaliatory motivation for the disciplinary suspension Respondent imposed on Mr. Jungers.

On careful evaluation of all the evidence I find Mr. Jungers was "taken to the gate" on August 12, 1990, and suspended in retaliation for Mr. Jungers' protected activity. Respondent failed to rebut Mr. Jungers' prima facie case. Respondent also failed to prove as an affirmative defense that it would have discharged Mr. Jungers in any event for his unprotected conduct alone.

In sum on the basis of the preponderance of the most credible evidence I find that Respondent suspended Mr. Jungers in retaliation for engaging in protected activity in violation of section 105(c) of the Act.

III

Timeliness

Although the issue of the timeliness of Mr. Jungers' complaint was not raised at the hearing, Respondent in its answer contends that "Jungers failed to timely file his complaint with the Secretary." The violation of section 105(c) occurred during the period August 12 - 26, 1990, Mr. Jungers filed his complaint on October 30, 1990. Thus it was filed just a few days in excess of the 60 days period specified in section 105(c)(2).

The purpose of this time limit is to avoid stale claims, but a late filing may be excused. The time limit in section 105(c)(2) is not jurisdictional in nature. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (April 1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (June 1981); Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 240 (February 1989).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the Respondent shows material, legal prejudice attributable to the delay. Cf. Secretary/Hale v. 4-A Coal Company, Inc., supra. No such showing has been made here. Under the facts and circumstances presented at the hearing in this case the late filing is excused. Respondent's request for dismissal of the complaint is denied.

Conclusions of Law

1. Jurisdiction over this action is conferred upon the Federal Mine Safety and Health Review Commission under section 105(c) and section 113 of the Act.

2. Respondent's Boron Mill is a mine, as defined in section 3(b) of the Act, and its products affect commerce under section 4 of the Act.

3. Respondent at all relevant times was an operator within the meaning of section 3(d) of the Act.

4. Steven D. Jungers was a miner at all relevant times within the meaning of section 3(g) of the Act.

5. Mr. Jungers engaged in protected activity when on August 12, 1990 he brought to Respondent's attention his safety concerns and complaints. At the time he articulated his safety concerns he had a good faith reasonable belief as to the hazards involved.

6. Mr. Junger's claim is not barred by his failure to file a written complaint within 60 days of his suspension.

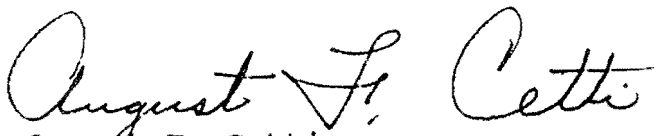
7. Mr. Jungers' suspension was directly motivated at least to a large extent by his articulation to management his safety concerns and complaints.

ORDER

Based on the above findings of fact and conclusions of law, it is **ORDERED**:

1. Respondent shall pay to Complainant Steven D. Jungers within 30 days of the date of this decision the sum of $569.62 representing back pay for 38 hours of work missed during the suspension beginning on August 12, 1990, with interest thereon in accordance with the Commission decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) aff'd, 895 F2d 773 (D.C. Cir. 1990) calculated proximate to the time payment is actually made. In that case interest was calculated at the short-term federal rate used by Internal Revenue Service for the underpayment and overpayment of taxes plus 3 percentage points.

2. Respondent shall expunge from its personnel records maintained on Steven D. Jungers the Personnel Action Notices of August 1990 and all references to the August 1990 suspension of Steven D. Jungers.



August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 24 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-511-M A. C. No. 45-03119-05508
v.	:	
WESTERN SAND & GRAVEL, Respondent	:	Tenino Pit

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. A reduction in the penalty from $431 to $192 is proposed. The proposed reduction is large but the recommended amounts appear proper in light of the operator's small size and negligible history. Therefore, I conclude based on the representations and documentation submitted in this case that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of $192 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

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FEB 24 1993

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 93-29-R
v.	:	Citation No. 3121684; 10/7/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Osage No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 93-63 A.C. No. 46-01455-03960
v.	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.
Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia, for Petitioner.

Before: Judge Barbour

This proceeding involves a Notice of Contest filed on October 23, 1992, by Consolidation Coal Company ("Consol") pursuant to Section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act") and a Petition for the Assessment of a Civil Penalty filed on December 24, 1992, by the Secretary of Labor ("Secretary") pursuant to Section 110(a), 30 U.S.C. § 820(a), of the Act. In the contest proceeding Consol seeks the vacation of Citation No. 3121684, issued on October 7, 1992, pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a). The citation alleges a violation of 30 C.F.R. § 75.520.[1] Consol asserts that the citation was improperly issued because the condition for

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[1] Section 75.520 provides:

All electrical equipment shall be provided with switches or other controls that are safety designed, constructed and installed.

which it was cited did not violate Section 75.520. In the Civil Penalty proceeding the Secretary seeks the assessment of a civil penalty of $50 for the alleged violation of Section 75.520. The specific issue to be resolved is whether a trolley switch with its handle and blade removed but with its fingers attached and being used as a dead block on the main haulage track constituted a safely designed, constructed and installed switch. A hearing on the merits was held in Morgantown, West Virginia, on November 13, 1992.[2] Following the hearing, the parties filed helpful briefs, which I have fully considered in reaching this decision.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. Consol is the owner and operator of the Osage No. 3 Mine.

2. The Osage No. 3 Mine is subject to the jurisdiction of the Mine Act.

3. The Administrative Law Judge has jurisdiction to hear and decide the case.

4. Federal Mine Safety and Health Administration ("MSHA") Inspector Michael Kalich was acting in his official capacity when he issued Citation No. 3121684.

5. True copies of Citation No. 3121684 and subsequent Action No. 3121684-01 (the termination of the citation) were served on Consol and as required by the Act.

6. The condition cited was abated in a timely fashion.

THE EVIDENCE

THE SECRETARY'S CASE

The first witness called by the Secretary was Michael G. Kalich. Kalich, an electrical inspector with MSHA for almost six years, stated that approximately 40 per cent of his time has been spent conducting electrical inspections at Consol mines,

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[2] The hearing was noticed solely for the contest proceeding, the civil penalty proceeding having not yet been filed by the Secretary. The parties agreed, however, that evidence would be taken at the hearing regarding the applicable civil penalty criteria and that the subsequently filed civil penalty proceeding would be consolidated for decision with the contest proceeding.

including the Osage No. 3 Mine. (The mine is located in MSHA District 3, the district that has its headquarters in Morgantown, West Virginia.) Kalich testified that he is currently assigned full-time to inspect the Osage No. 3 Mine and has been so assigned for the past two years. However, even prior to being assigned to the mine, he occasionally had inspected there. Tr. 25-26. Thus, Kalich believed that he was thoroughly familiar with the mine.

Turning to the events of October 7, 1992, Kalich stated that he went to the mine to continue an ongoing electrical inspection. He arrived at the mine around 7:45 AM and went to the mine office where a discussion was underway involving Dale Denning, a regular (i.e., non-electrical) MSHA inspector, Spike Bane, safety director for Consol and Bill Kun, Consol's mine safety officer.

According to Kalich, the discussion centered upon the use as dead blocks of trolley switches when the fingers had not been removed from the switches.[3] Kalich stated that the use of such section switches was an ongoing controversy at the mine and that Consol wanted to be cited for so using the switches in order to contest the citation and resolve through the administrative hearing process whether it had, in fact, violated the cited regulation. Because Denning was a regular inspector, not an electrical inspector, Denning was reluctant to issue the citation; therefore, Kalich agreed to do it. Tr. 27-28.

Kalich proceeded underground accompanied by Kun and the UMWA walkaround representative. The inspection party traveled the main haulageway to the No. 571 Block at the 14 North ITE Breaker where Kalich observed a trolley switch installed and used as a dead block. The switch had its handle and blade removed, and the handle and blade were not located near the switch, but the

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[3] In the context of this case, the term "dead block" refers to an electrical device or control on a mine trolley system that separates portions of the trolley system wiring. Trolley wire enters the device from both of its ends. Each side of the wire is from a separate portion or block of trolley system wiring. The trolley wires do not meet, rather an air gap in the center of the device prohibits any direct current from crossing between the two ends of the trolley wires, in part to assure short circuit protection on each block of power. The air gap between the wires must be wide enough to prevent the current from crossing, and narrow enough so trolley cars will continue to run evenly when traveling along the track and changing from one portion of the electrical system to the other.

The type of trolley switch used as a dead block is depicted in Contestant's Exhibit 3. ("C. Exh."). As the exhibit makes clear, the wires enter both ends of the switch. The air gap between the ends of the wires is bridged by a switch handle and blade, which when opened (i.e., when used to connect the two wires), pivots between two metal flanges or protrusions at the end of the switch and slides into two basically similar metal flanges or protrusions at the other end. These flanges or protrusions are the section switch's "fingers".

switch's fingers were still in place. Kalich believed that the presence of the switch in this condition was a violation of Section 75.520, and he accordingly issued the subject citation. Tr. 29.

The citation states:

> At the 571 + 000 Block along the main haulage at the 14 North ITE Breaker the dead block in use was not properly maintained. A trolley switch with a handle removed was being used as a dead block. The switch fingers were still installed. The dead block is used to separate the 300 Volt DC power feeding from the Moorsville bore hole and the 1 Butt Rectifier. This condition enables the dead block to be easily jumped with the switch handle and poses an electrical arc or burn hazard and possibly renders the trolley short circuit protection useless. These conditions have been found cited at this mine in the past.

Secretary's Exhibit ("S. Exh.") 2.

Kalich testified that the citation was terminated the following day by Denning. To abate the citation, Consol removed the fingers from the switch. Tr. 30, G. Exh. 2 at 2. Kalich also testified that he modified the citation to reflect a finding that the cited condition constituted a significant and substantial contribution to a mine safety hazard. Tr. 30-31, G. Exh. 2 at 3-4.[4] When asked to describe the unsafe nature of the condition cited, Kalich answered:

> [T]he condition is unsafe because with the fingers still installed, it's very easy for anyone to jumper the dead block. The dead block would be jumpered with the switch handle or, . . . it could be jumpered with a fuse even.

Tr. 32.

Kalich was shown copies of pages from a catalog published by Dusquesne Mine Supply Company ("Dusquesne") and was asked to point out the type of switch that was used as a dead block.

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[4] Interestingly, MSHA has proposed a civil penalty assessment of $50, based upon its single penalty assessment provision, a provision inapplicable to S&S violations. 30 C.F.R. § 100.4. See Proposed Assessment, Exhibit A, Docket No. WEVA 93-63.

Kalich identified Dusquesne as a manufacturer of trolley switches and stated that as best he could recall, Model No. 5,000-R was the type that he had cited. Tr. 34, C. Exh. 3 at 2.[5] Using the catalog as a point of reference, Kalich turned to a schematic drawing of a switch and identified where the trolley wires were connected to the switch. He labeled these as positions "A". He also identified the handle and blade depicted in the drawing, which he labeled "B". Tr. 37, S. Exh. 3 at 4. He marked the fingers, "C". Tr. 37, S. Exh. 3 at 4. Finally, Kalich pointed out a diagram that he stated was specifically designed to be used as a dead block. Tr. 39, S. Exh. 3 at 3.[6]

Kalich then described the purpose of a dead block. He stated that it separates and isolates two different sections of trolley wire. Separation and isolation allows trolley wire short circuit protection to be maintained on the isolated sections. Without a dead block the joined sections of wire are too long and short circuit protection may be rendered ineffective. Tr. 39-40.

While Kalich admitted that the use of a trolley switch with the handle and blade removed constituted an effective dead block in that it completely separated the different sections of trolley wire, he was of the opinion that the section switch so used was not safely designed, constructed and installed because the presence of the fingers "makes it real easy to jumpering the dead block." Tr. 40. He explained that the dead block could be jumpered by the reinstallation of the handle and blade into the fingers. He stated that he also had heard of jumping the dead block by laying a piece of trolley wire across the gap or by using jumper cables (i.e., nipped jumpers). Tr. 41. In Kalich's opinion, if power were lost on one of the sections of the trolley wire, rather than correct the condition that had caused the power loss, miners would be tempted to do the easy thing and jumper the dead block to restore power to the affected trolley wire section. While it would be more difficult to replace the handle and blade than to remove it, an untrained person could do it if he or she wanted to. Tr. 43.

Kalich also explained that after initially concluding the violation was not S&S, "I . . . went back to the office and thought about it for a while and . . . realized that we were

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[5] Kalich also explained that there are other manufacturers of trolley switches, notably, Ohio Brass. However, he stated that their switch designs are basically similar. Tr. 35.

[6] This equipment is labeled "Dukane No. 5800 Section Insulator for trolley wire and feeded cables." It is similar to a section switch, except that it lacks the fingers, handle and blade of a section switch. See S. Exh. 3 at 3. Or as Kalich put it, "[the section insulator] doesn't have a place for a switch handle." Tr. 99.

going to use this as a test case not just for . . . the Osage Mines [sic], but all the mines in the district . . . [a]nd . . . I reviewed accidents and . . . fatalities that have happened because of electric shock from the trolley wire or from mine fires. And . . . decided to make it S&S." Tr. 44-45.

He continued, that the dead block was on the main haulage where miners had access to all the operating sections of the mine and that "it would be pretty tempting for somebody to jumper the dead block if the rectifier or bore hole would . . . go down . . . and they would need the power in the area." Tr. 45.

He further explained that in the particular area of the dead block power feeds from two directions - - from the Mooresville Portal bottom to the dead block and from the One Butt rectifier to the dead block. If the power from the bore hole on the rectifier were shut down, "it would de-energize that section of trolley wire for approximately 2,000 feet and then you would still have power on one-half of the dead block. And if you inserted the knife blade . . . into [the fingers of the dead block] . . . then that would provide a path for . . . current to flow from the energized side to the de-energized side." Tr. 46. Kalich maintained that if this happened, frequently there would not be sufficient current available to cause the circuit breaker to de-energize the expanded circuit if there were a short. This in turn could lead to arcing and sparking and the catching fire of combustible materials in the vicinity of the electrical malfunction. Tr. 47. Such a fire could endanger all miners inby the ignition by subjecting them to possible burns and smoke inhalation. Tr. 50.

Kalich believed that 10 years ago a fire caused by inadequate circuit breaker protection due to jumping had occurred at Eastern Associated Coal Corporation's ("Eastern") Federal No. 2 Mine and that 5 years ago a similar fire had occurred at Consol's Arkwright Mine. Tr. 66-67.[7] However, no such fire had ever occurred at Osage No. 3 Mine. Tr. 90.

In addition, Kalich believed that there was a shock and electrical burn hazard visited upon the miner jumpering a trolley switch dead block in that the insertion of the knife blade into the fingers could lead to arcing and sparking at the knife blade, or the miner inserting the blade could accidentally touch the energized portion of the trolley wire and be electrocuted. See Tr. 49- 50, 64, 65.

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[7] Kalich stated that his knowledge of the Arkwright fire was based on what he had been told by another MSHA inspector. Tr. 92.

Regarding negligence, Kalich stated that mine management knew the fingers were on the dead block. Further, he stated that Consol had been cited at other of its mines in the MSHA district for using trolley switches as dead blocks. Tr. 55. He maintained that over the past two years and prior to issuing the subject citation, he had met with Consol management personnel "at least six times" to discuss the unacceptability of using as dead blocks section switches with fingers in place. Tr. 88. Thus, Consol management knew that the practice was unacceptable to MSHA.

Kalich stated that although Consol management advised him the reason the fingers were not removed from the section switches was to be able to jumper the dead blocks fast in case of an emergency need to evacuate an injured miner, he did not believe it. Kalich had never heard of an occasion wherein the two circumstances supposedly feared by Consol -- a miner being injured and a trolley line section being de-energized -- had occurred at the same time. Tr. 61. Rather, he believed the real reason Consol management wanted to keep the fingers on the dead blocks was to be able to continue production and the transportation of men and materials if a trolley wire section de-energized. Tr. 62. In fact, he stated, he had issued citations to Consol for violations of Section 75.520, where dead blocks had been jumpered for this very purpose.[8]

With regard to the extent of the practice in MSHA District 3, Kalich testified that he had seen section switches with fingers used as dead blocks at Consol's Arkwright, Humphrey and Blacksville mines, as well as at Eastern's Federal No. 2 Mine. However, at mines owned by USX Corporation, section insulators had been purchased and installed, and section switches had not been used. Tr. 68.

According to Kalich, the policy in District 3 regarding the use as dead blocks of section switches evolved over the years. He stated that at first he did not recognize the hazards associated with the practice. However, as time passed he became more aware of the hazards. In 1990 he began informing mine

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[8] Kalich also stated that he had issued citations to Consol for violations of 30 C.F.R. § 75.1001 where section switches had been jumpered and short circuit protection had not been provided. Section 75.1001 states:

> Trolley wires and trolley feeder wires shall be provided with over current protection.

operators in District 3, including Consol, that he considered the use as dead blocks of switches with fingers to be violations of Section 75.520. Tr. 71[9]

Kalich reached this conclusion solely on the basis of his own opinion. He stated and that there was and is no MSHA policy memorandum or written instruction of which he is aware regarding the use of section switches as dead blocks. Tr. 101, 104, 116-117.

Kalich believed that he and other inspectors in the district originally brought the problem to the attention of Michael Hall, Kalich's supervisor. Tr. 113. Gradually, it became a district-wide policy not to accept section switches with fingers attached as dead blocks.

With regard to abatement, Kalich stated that operators have an option. Either, they can remove the section switch and replace it with equipment designed to serve only as a dead block (i.e., a section insulator), or they can knock off the fingers with a hammer. Tr. 124.

Kalich acknowledged that prior to jumpering a section switch, short circuit protection could be provided if a miner went to the rectifier and reset the short circuit protection. Tr. 143-144.[10] Kalich also stated that 30 C.F.R. § 75.509 prohibits reinstalling a handle and blade while the trolley wire is energized. Tr. 168-169, 172.[11] He further agreed that if there were compliance with this regulation the electrical hazard to the miner posed by the procedure of jumpering the section switch would be eliminated. However, Kalich believed that once power was restored, the hazard posed by not having proper short circuit protection would remain, assuming that there had been no compliance with Section 75.1001. Tr. 172. Even if there were

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[9] The Secretary offered into evidence citations issued at Osage No. 3 Mine, Humphrey No. 7 Mine,, Blacksville No. 1 Mine, all of which were issued prior to the subject citation and all of which alleged violations of Section 75.520 for the use as dead block of section switches with fingers. G. Exh. 4, G. Exh. 5, G. Exh. 9, G. Exh. 10.

[10] Kalich testified that on some rectifiers, short circuit protection can be adjusted by turning a thumbwheel. Id.

[11] Section 75.509 states:

> All power circuits and electric equipment shall be de-energized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

full compliance with Sections 75.509 and 75.1101, Kalich believed that there would still be a violation of Section 75.520, "because the fingers would still be on the switch. If the fingers are removed from the switch then it's not a violation." Tr. 173.

CONSOL'S CASE

John Burr, the manager of electrical engineering in Consol's Maintenance Electrical Department, was Consol's first witness. Burr stated that he has 22 years of experience as an electrical engineer with Consol. Tr. 176. Burr testified that after the subject citation was issued he was called by Spike Bane and was asked whether he considered the use as a dead block of a section switch with the handle and blade removed and the fingers attached to be a violation of Section 75.520? Tr. 178. Burr stated that he did not and that when used as a dead block such a section switch was safely designed, installed and maintained. Tr. 201. Further, in his opinion, if the blade was reinserted and the procedure was done as prescribed by the regulations - - i.e., power was de-energized in both blocks (Section 75.509) and circuit breaker protection was properly set (Section 75.1001), there would be no hazard. Id. Also, as Burr noted, Section 75.511 requires that such work be done by a qualified electrician. Tr. 216.[12]

Burr described the functional difference between a section insulator and a section switch (or as Burr termed it, a "line switch"). The section insulator is used when it is assumed that under no circumstances the operator will want to tie together the two blocks of power on both sides of the insulator. The section switch is used when the operator feels that there are times when the switch will have to be open and other times when it will have to be closed. Tr. 184-185.

According to Burr, Consol initially left the handles and blades attached to section switches that it had installed. However, MSHA District 3 personnel, subsequently, advised Consol that MSHA would not accept switches with the handles and blades attached because anyone could come along and throw the switches. At that point, Consol agreed to remove the handles and blades because the switches did not have to be opened on a regular basis. Tr. 187. At first, Consol stored the handles and blades

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[12] 30 C.F.R. § 75.511 states in pertinent part:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.

in the area of the section switches because Consol fully intended to use the handles and blades when it opened the switches. After awhile, according to Burr, MSHA objected to this too, and pursuant to MSHA's objection, the handles and blades now are stored in the possession of qualified electricians and maintenance personnel and away from the switches. Tr. 188. Currently, MSHA is requiring the removal of section switch fingers as well.

Burr also stated his understanding of procedures usually undertaken at Consol if a section switch handle and blade has to be installed. The power is de-energized so that the procedure does not present a hazard to the miner doing the work and circuit breaker protection is provided, frequently, by adjusting a thumbwheel switch on the over current relay. Tr. 189, 191. (According to Burr, approximately 90 percent of the relays at the Osage No. 3 Mine have thumbwheel switches. Tr. 218.) In addition, Burr claimed that at every section switch used as a dead block Consol has hung a sign stating "Dead Block Do Not Put Blade In". Tr. 199-200, See C. Exh. 5.

Burr stated that the use of section switches as dead blocks is standard practice throughout Consol's mines. Tr. 209. Removing the fingers essentially destroys the dead block for use as a switch because the fingers, which are welded or wedged in place, must be "hacksawed" off. Tr. 210.

Bill Kun, the safety supervisor at Osage No. 3 Mine and a mine foreman, testified next. Kun described his version of how the contested citation came to be written. He stated that at approximately 7:30 AM, on October 7, 1992, Dale Denning, the regular MSHA inspect at Osage No. 3 Mine, arrived and told Kun he was going to "write every . . . dead block in the . . . mine that didn't have the fingers taken out." Tr. 247. According to Kun, Denning said that he had been told to do it. Kalich arrived about 10 minutes later and Denning said to Kun that he would let Kalich take care of it. Spike Bane then arrived and said that it was "Ok" to have a citation issued because Consol intended to contest the citation in order to "get it straightened out," that Consol contended there was "no violation at all." Tr. 250. Kun estimated that there are approximately 170 section switches at the mine of which 37 to 39 have the handles and blades removed in order to be used as dead blocks. Id.

Regarding the history of the controversy, Kun stated that prior to 1990, the only thing he was ever told by MSHA about the use of section switches as dead blocks was to not leave the blades at the location of the dead blocks. Spencer Shriver was MSHA's electrical inspect then, and he is the person who told Kun. Tr. 253. Later, Shriver also told Kun that the fingers should be removed from the section switches. Tr. 258.

Kun estimated that section switches cost between $360 to $400 apiece and section insulators each cost between $260 to $270. Tr. 255. Kun further stated that when blades are removed they are kept with the maintenance department and with a certified electrician "because they're the ones that have been instructed to put them in if need be." Tr. 260.

Consol's next witness was Gary Mair, general manager of Dusquesne Mine Supply Company. Mair testified that with respect to products that it produces for the mining industry, the company is primarily involved in the manufacture of trolley system items. Tr. 266. Mair also stated that he was advised of the existence of the subject citation by Spike Bane. Tr. 269.

Mair said that he believes that section switches made by Dusquesne are safely designed. Tr. 270. He testified that the basic product design was set 12 years ago and has never experienced a failure. He further stated that each section switch is properly constructed, and he described the process by which each is made. Tr. 271-272. He also stated that at Osage No. 3 Mine, the switches are properly installed. Tr. 172. Because of the way the switches are manufactured, Mair said that there are only two ways to remove the fingers -- saw them off or try to knock them off with a hammer. Tr. 277. He acknowledged that section switches could be replaced with section insulators (Tr. 284), and he confirmed that section switches cost approximately $100 more apiece than section insulators. Tr. 280.

Mair stated that section switches and section insulators differ (aside from the handles and blades on the section switches) only in that the section switches have fingers and the section insulators do not. Their main frames are essentially the same. Tr. 281.

As its last witness, Consol called Michael Hall to testify. Hall is the chief electrical engineer for MSHA District 3. Hall also is the supervisor of the District 3 electrical section and has been since 1978. Tr. 287. As such, he supervises the 7 or 8 electrical inspectors in District 3, including Kalich.

Hall explained that in the 70's and 80's, District 3 had accepted section switches with handles and blades removed as dead blocks. Tr. 293. Then MSHA began getting reports from inspectors that they were finding section switch handles and blades hanging right beside the section switches, an indication that the blades were being inserted to jumper the dead blocks. Tr. 297. Hall explained the problem confronting MSHA as follows:

> "[T]hese switches that . . . had the switch handle - - - switch blade removed, we were finding people were bypassing these switches

> with various devices, either with a switch blade or with a fuse or some other method which caused the person who was doing that to be exposed to unsafe voltages."

Tr. 299. Hall also believed that the practice caused short circuit problems which in turn could cause burn injuries to miners or a mine fire. Tr. 311. Hall admitted that MSHA personnel had done no testing or experimentation to assess any shock, burn and fire hazards associated with the practice. Tr. 302.

Hall stated that MSHA's concern was its fear that the section switch used as a dead block would be used in an unsafe manner. Tr. 326. Hall agreed that with respect to the use as dead blocks of section switches with fingers, a violation of Section 75.520 is premised upon the assumption that miners will not at all times act in compliance with Sections 75.1001, 75.509 and 75.511. Tr. 327. The fingers on the section switches are an incentive to miners to violate those regulations because they make it too easy to jumper the dead block. Tr. 328.

THE VIOLATION

Because I conclude that the cited section switch was safely designed, constructed and installed and that, in any event, MSHA, in regulating a future work practice through the application of Section 75.520, stretched the standard beyond reasonable and permissible bounds, I hold that a violation of Section 75.520 did not exist.

In specifying that "[a]ll electric equipment shall be provided with switches or other controls that are safely designed constructed and installed," Section 75.520 repeats Section 305(o) of the Mine Act. 30 U.S.C. § 865(o). The legislative history of the interim mandatory standard states:

> This section requires that electric equipment be provided with switches or other safe control[s] so that the equipment can be safely started, stopped, and operated without danger of shock, fire, or faulty operation.

S. Rep. No. 411, 91st Cong., 1st Sess. 68, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 194 (1975). No argument has been presented that the cited section switch was not a "switch or other control of electric equipment." Indeed, when used as a dead block, the section switch segregated and

controlled the current available to the power block sections of the trolley wire that it separated. Therefore, I find that the cited equipment had to conform to the requirements of Section 75.520.

That being the case, the question is whether the equipment was "safely designed, constructed and installed." There is no doubt, I think, that in and of itself, the cited section switch was safely designed and constructed. "Design" is defined as "the drawing up of specifications as to structures, forms, positions, materials, texture, accessories . . . in the form of a layout for setting up, building or fabrication." Websters Third New International Dictionary (Unbridged) at 611-612 (1986). "Construct" is defined as "to form, make, create by combining parts." Id. 489. Thus, design and construction of the referenced switches and controls refers to their structural integrity, to the manner in which they have been conceived on paper, modeled and to the manner in which they have been fabricated. In this regard, the question is whether there is anything inherently unsafe about the cited component resulting from its configuration and structure? Clearly -- or so it seems to me -- the answer is "no".

There was general agreement that there is no standard definition of "dead block", but that the purpose of such equipment is to separate blocks of power on a trolley line. To effectuate the separation there must be an effective air gap between conductors that enter the dead block mechanism from both sides. Mair testified that the basic design of a section switch and a section insulator is the same -- except for the blade, its handle and the fingers -- and that the design in question, which has been unaltered for the past twelve years, has never experienced a failure. His testimony was not rebutted. There was simply no evidence offered that the configuration and structure of the cited equipment was, in and of itself, hazardous. I conclude, therefore, that the cited section switch was safely designed and constructed.

The next question is whether the section switch was safely installed? In Mettiki Coal Corp., 13 FMSHRC 760, 768 (May 1991), the Commission noted that the word "install" means "to set up for use or service." Webster's at 1171. The use or service of equipment involves putting the equipment to a given purpose once it is in position to function and thus involves the relationship of miners to the equipment in the ongoing mining process. In the context of Section 75.520, this means that a switch or control, once in place, must not pose a hazard to miners during normal ongoing mining operations.

Of course, the entire thrust of the Secretary's case is that the cited section switch posed such a hazard. Kalich repeatedly explained that the use as a dead block of a section switch with

its fingers attached made it too easy for the dead block to be jumpered with resulting hazards possible both to the miner performing that operation and to other miners as well. In Kalich's opinion, the miner jumpering the switch could be subjected to a shock hazard from working in close proximity to the energized trolley wire. Tr. 44-45, 64-65. Further, other miners could be subjected to the fire hazards presented when adequate short circuit protection was not provided in conjunction with the jumpering of the dead block. Tr. 43, 47, 50. Hall echoed Kalich's concerns. Tr. 311.

While I do not doubt that these hazards can and do exist, they are anticipatory. As both Kalich and Hall freely admitted, they rest upon the assumption that miners will purposefully act in derogation of regulations which, if complied with, eliminate the hazards altogether -- i.e., that they will not de-energize the circuits and equipment as required by Section 75.509, that they will not provide adequate short circuit protection once the section switch has been jumpered as required by Section 75.1001, and that jumpering will not be done by a qualified person or under the direct supervision of a qualified person as required by Section 75.511. See Tr. 49, 168-169, 172, 327.

Further, there are safe ways to jumper a section switch, even if the fingers are attached to the switch, See e.g., Tr. 49. As the testimony of Kalich and Hall made clear, it is not the use of the section switch as a dead block and its jumpering that is unsafe, it is the manner in which the jumpering is done. Thus, -- and this gets to the heart of the matter -- it is not the design, construction or installation of the cited equipment that is the focus of the contested citation and the reason for its issuance but a work practice that may in the future be associated with the equipment -- a practice that would be eliminated by compliance with existing regulations.

There are serious flaws with this approach to compliance. One is that MSHA must cite existing violations of regulations, not those that it anticipates may occur at some unspecified time in the future.[13] Another is that prohibition of a hazardous work practice is best regulated through specifically addressing the practice -- as, for example, in the standard regarding

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[13] The citation of existing violation is, of course, exactly what MSHA does when it finds that in jumpering a section switch, an operator fails to de-energize the circuit, fails to have the work performed by a certified person, or fails to provide short circuit protection. See e.g, Secretary of Labor v. Ronald Weaver, 14 FMSHRC 1647, (September 1992) (citation issued for failure to comply with Section 75.1001).

repairs or maintenance on mobile and stationary machinery (30 C.F.R. § 75.1725(c)) -- rather than by trying to prohibit the practice through stretching beyond reasonable limits the interpretation of an existing regulation.

This is particularly true when, as here, the regulation MSHA seeks to expand is broad to begin with. The Commission has noted that Section 75.520 is the type of broadly worded standard that is not unenforceably vague, provided a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition requirement of the standard. Mettiki, 13 FMSHRC at 768-769. It has further stated that the standard cannot be "so ...uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Id. at 768 (quoting Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)).

As the testimony establishes, the history of MSHA's enforcement actions with regard to the use as dead blocks of section switches with their fingers attached is one premised upon changing interpretations of what the standard requires. First, the section switches were accepted provided their handles and blades were removed. Tr. 118-119, 293. Next, they were accepted, provided the handles and blades were removed and were kept elsewhere. Tr. 127, 187-188, 253. Finally, they were accepted provided the handles and blades were kept elsewhere and the fingers were removed. Tr. 258, 301. It seems to me that this changing interpretation of what is required by the standard establishes that, at least as applied to the facts of this case, persons of common intelligence must necessarily guess at its meaning and reasonable could differ as to its application.

I am sympathetic to the concerns of Kalich and Hall regarding the dangers they believe to be inherent in the practice of jumpering dead blocks when such work is not done by a certified person or under the supervision of a certified person and when there has not been compliance with Sections 75.509 and 75.1001. I do not doubt for an instant that in establishing a "fingerless section switches" policy for MSHA District 3 they were motivated by a commendable concern for the safety of those miners who come within their jurisdiction and of whose well-being they are required ever to be mindful. Lacking a specific regulation concerning the practice and, perhaps, lacking guidance from MSHA as well, they acted to protect miners from themselves. While their motives were laudatory, their means were not; for in so doing I believe that they acted beyond the proper scope of Section 75.520.

In view of the foregoing, I conclude and find that Citation No. 3121684 does not set forth a violation of Section 75.520 and accordingly must be vacated.

ORDER

It IS ORDERED that Section 104(a) Citation No. 3121684, dated October 12, 1992, and citing an alleged violation of 30 C.F.R. § 75.520, is VACATED. Consol's contest of the citation is GRANTED.

It is further ORDERED that MSHA's proposed civil penalty assessment for the alleged violation of Section 75.520 is DENIED and its petition is DISMISSED.

David F. Barbour
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 26, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-563 A. C. No. 02-01195-03502 KCK
v.	:	Kayenta Mine
CONN PEST CONTROL INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a letter advising that the operator has paid $150 in settlement of the penalty originally assessed at $300. The Solicitor asks that his letter be treated as a motion to dismiss.

The subject citation indicates that it was issued for a violation of 30 C.F.R. § 48.28(A) because a miner had not received the required annual refresher course. The Solicitor represents that negligence is less than first thought because there is some question whether or not the operator was in fact aware that the miner had not been trained.

The Solicitor's letter is treated as a motion for settlement and I accept the advice set forth therein. Based thereon I conclude that $150 is an appropriate penalty under the six criteria set forth in section 110(i) of the Act. Accordingly a settlement in that amount is approved.

The Solicitor is reminded that under section 110(k) of the Act no proposed penalty that has been contested before the Commission can be compromised, mitigated or settled without the approval of the Commission. All such matters are before the Commission de novo. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Therefore, in all cases a motion to approve settlement should be made rather than a request for dismissal.

In light of the foregoing, it is **ORDERED** that the recommended settlement be **APPROVED** and that the operator **PAY** $150 within 30 days of the date of the order.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 0 5 1993

UNITED MINE WORKERS OF AMERICA ON BEHALF OF LOCAL UNION NO. 1588, Petitioner	:	COMPENSATION PROCEEDING
	:	Docket No. WEVA 92-1006-C
	:	Blacksville No. 1 Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

PARTIAL DISMISSAL OF COMPLAINT

In this proceeding, arising under Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821, ("Mine Act"), the United Mine Workers of America ("UMWA") on behalf of Local Union 1588 seeks compensation under the first two sentences of Section 111 for miners idled by an order of withdrawal issued on March 19, 1992, pursuant to Section 103(k) of The Mine Act following an explosion that occurred the same day at Consolidation Coal Company's ("Consol") Blacksville No. 1 Mine. The UMWA also seeks compensation under the third sentence of Section 111 for miners idled by an order issued on March 22, 1992, pursuant to Section 107(a) of the Mine Act, for an allegedly imminently dangerous condition arising out of the same explosion.

Because counsels were involved in settlement negotiations concerning the UMWA's claims regarding the Section 103(k) order and because the Secretary's Mining Enforcement and Safety Administration (MSHA) had yet to complete its investigation of the explosion and consequently, had not issued any citations or orders alledging that the Section 107(a) withdrawal order closed the mine "for a failure of the operator to comply with any mandatory health or safety standards", the parties moved that the case be stayed, and I granted the motion.

The UMWA now seeks dismissal of its complaint with respect to its claims under the first two sentences of Section 111. The UMWA asserts that in essence the parties have settled these claims and that payment has been made to claimants in accordance with the terms of the agreement. The UMWA has attached a joint "Stipulation of Partial Settlement and Partial Release of Claims" to its motion. Counsel for Consol had advised me that he concurrs with the UMWA's motion.

ACCORDINGLY, the motion is GRANTED. The UMWA's complaint with respect to the first two sentences of Section 111 is DISMISSED. The proceeding involving its third sentence claims continues to be stayed pending a determination by MSHA whether citations or orders alleging violations of any mandatory health or safety standards should be issued in conjunction with the subject Section 107(a) order and the issuance by MSHA of such citations or orders.

David F. Barbour
Administrative Law Judge
(703) 756-5232

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 12 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-714
	:	A.C. No. 04702-03566
v.	:	
	:	No. 14 Mine
VIRGINIA CREWS COAL COMPANY, Respondent	:	

ORDER DENYING MOTION FOR CONTINUANCE OF HEARING

By letter dated February 10, 1993, the respondent's counsel requests a continuance of the hearing scheduled in this matter in Charleston, West Virginia on Tuesday, March 16, 1993. As grounds for the request, counsel states in pertinent part as follows:

> The captioned matter is scheduled for hearing on March 16, 1993 at 9:00 a.m. in Charleston, West Virginia. I am also scheduled for hearing in Secretary of Labor v. Laurel Coal, Inc., Docket No. WEVA 92-1282 (ALJ Melick) for the same date. The Laurel Coal matter has already been rescheduled twice and Judge Melick has said that he will grant no further continuances.

The Notice of Hearing in this case was issued on October 23, 1992, prior to Judge Melick's scheduling of the hearing in the Laurel Coal case, and the subsequent continuances which he granted. I have other hearings scheduled in Charleston for the remainder of the week of March 15, 1993, and continuing this case is simply not cost effective. My trial calendar is full through the first week of May, 1993, and it does not include any hearings in Charleston. Under the circumstances, further delay in this case pending the scheduling of hearings in Charleston at some future unknown time is not warranted. Further, given the size of the firm representing the respondent in this matter, I am not convinced that counsel of record is the only attorney available to proceed with this case. In addition to its Charleston office, Jackson & Kelly has four other offices in West Virginia, and the issues in this case do not appear difficult or unusual. Under all of these circumstances, the request for a continuance of the hearing IS DENIED, and it will proceed as scheduled.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 17 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-1025
	:	A.C. No. 46-03374-03732
v.	:	
	:	Maple Meadow Mine
MAPLE MEADOW MINING COMPANY, Respondent	:	

ORDER DENYING MOTION FOR CONTINUANCE OF HEARING

By letter dated February 15, 1993, the respondent's counsel requests a continuance of the hearing scheduled in this matter in Charleston, West Virginia, on Wednesday, March 17, 1993. As grounds for the request, counsel states in pertinent part as follows:

> The captioned matter is scheduled for hearing on March 17, 1993, in Charleston, West Virginia. Administrative Law Judge Melick has scheduled a hearing in Secretary of Labor v. Laurel Coal Corporation (Docket No. WEVA 92-1282) for March 16. That matter involves approximately ten witnesses and has been continued twice before. Judge Melick has informed the parties that he will grant no further continuances in that proceeding.

The Notice of Hearing in this case was issued on October 23, 1992, prior to Judge Melick's scheduling of the hearing in the Laurel Coal case, and the subsequent continuances which he granted. I have other hearings scheduled in Charleston for the remainder of the week of March 15, 1993, and continuing this case is simply not cost effective. My trial calendar is full through the first week of May, 1993, and it does not include any hearings in Charleston. Under the circumstances, further delay in this case pending the scheduling of hearings in Charleston at some future unknown time is not warranted. Further, given the size of the firm representing the respondent in this matter, I am not convinced that counsel of record is the only attorney available to proceed with this case. In addition to its Charleston office, Jackson & Kelly has four other offices in West Virginia, and the

issues in this case do not appear difficult or unusual. Under all of these circumstances, the request for a continuance of the hearing IS DENIED, and it will proceed as scheduled.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 18 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-358-M A. C. No. 39-00226-05506
v.	:	
CONCRETE MATERIALS, Respondent	:	Summit Pit

ORDER DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement of the one violation involved in this case. The Solicitor seeks approval of a reduction in the penalty amount from the original proposal of $690 to $50.

Citation No. 3909835 was issued for a violation of 30 C.F.R. § 56.12067 because the fence surrounding an electrical substation was not six feet in height. According to the citation, the substation contained six mounted transformers with exposed energized components. The inspector concluded that contact with the energized high voltage components might result in a fatality. In her motion the Solicitor alleges that negligence is less than originally assessed and that because the violation was unlikely rather than likely to contribute to an accident the significant and substantial designation should be deleted.

The Solicitor however, gives no reasons to support the conclusions she would have the undersigned adopt. She has instead filed her usual form motion. In this instance where the Solicitor recommends a 93% reduction in the penalty amount she must do more. Even more importantly, a $50 penalty would be totally at variance with what the inspector wrote on the citation which would require a far higher penalty under the criteria set forth in section 110 (i) of the Act.

The Solicitor is reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcom-

mittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the Commission's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the Solicitor's motion, I cannot conclude that the recommended penalty of $50 is warranted. The Solicitor must provide explicit reasons for the action she wishes this Commission to undertake.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit additional information to support her motion for settlement. Otherwise this case will be assigned and set for hearing.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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