

## FEBRUARY 1999

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**FEBRUARY 1999**

No cases were filed in which review was granted during the month of February:

No cases were filed in which review was denied during the month of February:



COMMISSION DECISIONS, AND ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

January 29, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 93-336-DM
ADMINISTRATION (MSHA)	:	WEST 93-337-DM
on behalf of JAMES HYLES,	:	WEST 93-338-DM
DOUGLAS MEARS, DERRICK	:	WEST 93-339-DM
SOTO, and GREGORY DENNIS	:	WEST 93-436-DM
	:	WEST 93-437-DM
	:	WEST 93-438-DM
v.	:	WEST 93-439-DM
	:	WEST 94-021-DM
ALL AMERICAN ASPHALT	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks, Riley and Beatty, Commissioners

These discrimination proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), are before the Commission for a second time on cross-petitions for discretionary review filed by All American Asphalt ("AAA") and the Secretary of Labor. Both parties seek review of a decision on remand by Administrative Law Judge August Cetti involving two layoffs of miners James Hyles, Douglas Mears, Derrick Soto, and Gregory Dennis. In his first decision in this proceeding, the judge found that a failure to recall the complainants following a 1992 layoff and a subsequent layoff in 1993, after complainants had been reinstated, were discriminatory and violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 16 FMSHRC 2232 (Nov. 1994) (ALJ). The Commission granted AAA's petition for discretionary review of the judge's decision, and the Secretary thereafter moved to remand the case to the judge for further findings and conclusions. The Commission issued its decision in which it vacated the judge's decision and remanded the case for further consideration. 18 FMSHRC 2096 (Dec. 1996) ("*All American Asphalt I*"). The judge subsequently issued his second decision, in which he concluded that AAA's failure to recall the complainants following the 1992 layoff was violative; however, he reversed his prior determination that the 1993 layoff violated the Act. 19 FMSHRC 855 (May 1997) (ALJ). The

Commission granted petitions for discretionary review (“PDRs”) of the judge’s remand decision filed by AAA and the Secretary.

For the reasons that follow, we affirm the judge’s determination that AAA’s refusal to recall the complainants following the July 1992 layoff violated section 105(c) of the Mine Act. However, we reverse the judge’s determination that the March 1993 layoff did not violate section 105(c).

## I.

### Factual and Procedural Background

AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and for sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, Hyles, a leadman on AAA’s third (“graveyard”) shift, learned that AAA intended to start running the new plant even though some safety equipment was not in place. *Id.* Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and a vice-president at AAA. Tr. 314-16, 319, 1131, 1231. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers (“Operating Engineers”), which represented AAA’s employees. 19 FMSHRC at 856; 16 FMSHRC at 2235; Tr. 175. Thereafter, McGuire visited the plant and observed it running without numerous pieces of safety equipment in place. 16 FMSHRC at 2235; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2235-36. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails, and trip cords. *Id.* Dennis, Mears, and Soto, who worked under Hyles on the temporary combined production shift during the startup weekend, complained to Hyles and Gerald Richter, the other leadman on the combined shift, concerning plant conditions. Tr. 338, 370, 685, 826, 957, 2257. Hyles warned them to be careful. Tr. 339. On the evening of Saturday, April 20, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto, among others, about the conditions at the plant. 16 FMSHRC at 2236; Tr. 339, 365-66. Numerous employees, including leadman Richter, observed Hyles openly videotaping the plant. Tr. 365-66.

On Sunday night, Hyles was involved in a minor accident when he fell through a gap in the decking. Tr. 367-70; Gov’t Ex. 23. Later during the shift, Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). They all agreed that the plant’s condition posed dangers to employees and that the tape should be turned in to MSHA. 16 FMSHRC at 2236; Tr. 370. On Monday morning, after his shift ended, Hyles went to the MSHA field office and turned in the

videotape. 16 FMSHRC at 2236; Gov't Ex. 54; Tr. 370, 373. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. 16 FMSHRC at 2236. Subsequently, MSHA issued numerous citations, including 29 citations alleging unwarrantable failure, and shut down the plant for nearly a week. *Id.*; Tr. 55, 375, 1187. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had reported the condition of the plant to MSHA. 16 FMSHRC at 2236.

On April 27, the day the plant reopened, Ryan asked Hyles and leadman Gerry White "if they had any idea who 'turned him in' and . . . told them he wanted to find out who it was and that he would make it so miserable for them, they would be happy to go work someplace else." 19 FMSHRC at 856-57, 862; *see* Tr. 375. While AAA president William Sisemore was in the plant office, Hyles heard him say he would like to "find out who was causing him all the problems and that he would make it worth their while to seek employment elsewhere." 19 FMSHRC at 862. While operating the plant, AAA miner William Smillie overheard Ryan and Sisemore say that they "would like to know who filed the hazard complaint so they could make it worthwhile for them to leave." *Id.*; Tr. 504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under section 110(c), 30 U.S.C. § 820(c).<sup>1</sup> 16 FMSHRC at 2237; Gov't Exs. 2-5.

In October 1991, Hyles was demoted from his position of leadman to that of loader operator. 16 FMSHRC at 2237; Tr. 130-31. When he asked Ryan why he was being demoted, Ryan responded that they "didn't see eye to eye anymore." Tr. 394.

On or about July 8, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. *See* Gov't Exs. 14, 15; Tr. 403, 704. On July 24, MSHA issued its proposed penalty assessment, which was addressed to Ryan, with fines in excess of \$45,000. Gov't Ex. 53; Tr. 1600. Sometime after the initial layoff, Ryan purportedly decided that he needed to cut back the workforce for economic reasons. Tr. 1295-96. By the end of August, AAA had recalled every employee but the four complainants. 16 FMSHRC at 2238. In addition, some employees worked overtime during the period the complainants were on layoff.<sup>2</sup> *Id.* When Hyles and Soto went to the plant and saw less senior

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<sup>1</sup> Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c).

<sup>2</sup> There was initially a fifth employee, Martin Hodgeman, referred to in the arbitrator's decision, who was not called back. Gov't Ex. 15; Gov't Ex. 51 at 4. However, Ryan allowed Hodgeman, who was classified as a loader operator and was junior to Hyles, Dennis, and Mears,

employees working, all four complainants filed grievances under the collective bargaining agreement between AAA and the Operating Engineers. *Id.* The complainants contended that AAA failed to comply with the contract requirement that it conduct a “bumping” meeting prior to layoffs, where employees could bid on jobs held by less senior employees and bump those employees out of jobs for which a more senior employee was qualified. *Id.* at 2238-39. The grievances went to arbitration, and, in December, the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting. *Id.* at 2238. However, the arbitrator concluded that only Hyles possessed the qualifications to bump a less senior employee, and only granted relief to Hyles. *Id.*; Gov’t Ex. 51 at 11-14.

In September 1992, while the grievances were being processed, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. 16 FMSHRC at 2239; Gov’t Exs. 20, 33, 38, 43. Following the institution of temporary reinstatement proceedings, AAA reinstated the four complainants on February 11, 1993. 16 FMSHRC at 2239-40. Upon their reinstatement, the complainants were assigned to perform production work on the day shift. *Id.* at 2240. In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. *Id.* AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at the higher rate of pay they had received as repairmen. 19 FMSHRC at 858. AAA then moved the primary production shift to the day shift, and moved the maintenance shift to the night shift. *See* Tr. 990. Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. 16 FMSHRC at 2240. Rather than reassigning the four repairmen to their prior positions, AAA required the repairmen to participate in a bumping meeting. *Id.* Instead of bumping into repair positions, they bumped each of the complainants, selecting the production positions held by Hyles, Dennis, Mears, and Soto. *Id.* at 2240-41. AAA subsequently hired new employees to fill the vacant repairman positions. *Id.* at 2242; Tr. 457, 480-81, 1693.

The following day, the four complainants were called into a layoff meeting and told that each of them had been bumped by a more senior employee and that they would be permitted to bid on jobs held by less senior employees. 16 FMSHRC at 2241. They were reluctant to exercise their bumping rights at the meeting for fear that Ryan would treat them as unqualified and refuse to allow them to bump into other jobs. *Id.* Hyles and Soto requested that they be given time to consult with counsel from the Solicitor’s office because of the pendency of their discrimination complaints. *Id.* They were permitted to speak with counsel, but were not informed that, by delaying the exercise of their bumping rights, they had forfeited those contractually protected rights. *See id.* Shortly after the meeting, Operating Engineers business agent McGuire called Ryan to inform him that Hyles had decided to bump into the plant operator

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to change his classification to dozer operator and bump a more junior employee, Greg Melvin. *See* Gov’t Exs. 14, 15. Melvin, who was junior to all the complainants, subsequently was hired at the asphalt plant owned by AAA, while the complainants remained on layoff. Gov’t Exs. 13, 14; Tr. 1956, 1965, 2014.

position. *Id.* Ryan refused the request, stating that it was untimely. *Id.* AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. *Id.*

Following the second layoff, Hyles, Dennis, Mears, and Soto each filed a second discrimination complaint. *Id.* at 2242; Gov't Exs. 21, 34, 39, 44. On April 26, 1993, after MSHA had initiated temporary reinstatement proceedings, the complainants were reinstated by agreement of the parties; however, after their reinstatement, management frequently gave the complainants reduced working hours. 16 FMSHRC at 2242. In April 1993, AAA began hiring ten new employees and increased its output of finished material. *Id.* In August 1993, AAA posted a seniority list indicating that Dennis, Mears, and Soto had seniority dates of January 1993. *Id.* When Mears asked why the seniority list did not reflect his original hire date, Ryan responded that Mears had no seniority. *Id.* This was the first time the complainants were told that AAA had removed their seniority.

#### A. Judge's Decision

The Secretary issued four complaints for each of the two layoffs, and an eight-day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (Jan. 1994) (ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including its argument that the complainants' discrimination claims were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994). 16 FMSHRC at 2233-35.

The judge then addressed Hyles' October 1991 demotion from his leadman position to a journeyman loader position. *Id.* at 2247. The judge found that, at the time of the demotion, AAA had no knowledge that Hyles had "turned in" Ryan and AAA to MSHA, but that Ryan "had received credible substantiation of the rumors of Hyles' on the job misconduct," including "sleeping on the job and possible time card fraud." *Id.* Accordingly, the judge determined that AAA did not violate section 105(c) when it demoted Hyles from his leadman position. *Id.*

With regard to AAA's July 1992 layoff and its subsequent recall of the entire workforce except the four complainants, the judge found that sometime prior to the layoff, AAA became aware of the complainants' protected activity. *Id.* He also found that AAA's failure to recall the complainants constituted adverse action, and he concluded that AAA's refusal to recall the complainants was "to obscure its discriminatory animosity towards the Complainants." *Id.*

Finally, the judge considered the circumstances surrounding AAA's unusual post-reinstatement manipulation of job shift assignments which culminated in the bumping of the complainants from their positions in March 1993. *Id.* at 2248. The judge found that "this convoluted series of work assignments was contrived by Respondent to terminate the Complainants, while appearing to comply with the contractual requirement of holding a meeting

with the union.” *Id.* The judge concluded that, based upon reasonable inferences drawn from the record, AAA discriminated against the complainants in March 1993 in violation of section 105(c) of the Mine Act. *Id.* at 2249. AAA petitioned the Commission for review of the judge’s decision.

B. All American Asphalt I

The Commission remanded the judge’s decision and ordered him to address specified issues and evidence not considered or enunciated in his initial decision. *All American Asphalt I*, 18 FMSHRC 2096. We instructed the judge to explain the extent to which he relied on the arbitration decision to reach his determinations concerning the first set of layoffs and AAA’s failure to recall the complainants. *Id.* at 2101. We also instructed the judge to apply the Commission’s *Pasula-Robinette* discrimination framework: whether the complainants established a prima facie case, and whether AAA rebutted or affirmatively defended against the prima facie case. *Id.* at 2102. We called upon the judge to make findings regarding the nature of the complainants’ protected activity preceding each of the layoffs, and to state whether there was a nexus between the protected activity and the layoffs. *Id.* We directed him to reconcile his finding that AAA was unaware of Hyles’ protected activity prior to his October 1991 demotion with his finding that AAA was aware of the protected activity of all four complainants prior to the July 1992 layoff. *Id.* We further ordered the judge to address, with regard to both the 1992 and the 1993 layoffs, AAA’s asserted defenses and any related evidence to determine whether the defenses were valid or merely pretextual. *Id.* Finally, we ordered the judge to render credibility determinations related to “alleged statements and inquiries of AAA officials concerning miners’ protected activities, AAA’s asserted economic and contractual defenses, and the complainants’ qualifications for available jobs.” *Id.* at 2102-03.

C. Judge’s Remand Decision

On remand, the judge addressed the existence of protected activity, whether the operator was aware of the protected activity, and whether there was a nexus between the protected activity and the subsequent layoff. 19 FMSHRC at 855. With regard to the July 1992 layoff, the judge concluded that the protected activity consisted of Hyles’ videotaping of the plant conditions; the safety complaints of Soto, Mears, and Dennis to Hyles and leadman Richter; and Soto, Mears, and Dennis agreeing that Hyles should turn the videotape in to MSHA. *Id.* at 860, 864. The judge found that AAA was aware of the complainants’ protected activity. *Id.* at 860. He also determined that the threats of retaliation directed towards the individuals whose complaints led to the citations against AAA, coupled with the layoffs of the four complainants, constituted the nexus required to support a finding of a 105(c) violation. *Id.* at 860, 863, 865. He further concluded that AAA’s claim that it did not call back the complainants to work because they were

not qualified was pretextual. *Id.* at 866. Because he found that the initial layoff was discriminatory, he held that it did not affect the complainants' seniority. *Id.* at 865.<sup>3</sup>

In addressing the propriety of the March 1993 layoffs, the judge described the complainants' protected activity as "taking an active part in the Section 110(c) investigation of the plant supervisor, Ryan," as well as their "April 1991 protected activity." *Id.* at 861. He found that AAA was aware of this protected activity. *Id.* He concluded that the second set of layoffs was not motivated by the complainants' involvement in the section 110(c) investigation or filing their *second* set of discrimination complaints. *Id.*<sup>4</sup> He concluded instead that it was motivated by the protected activity which led to the first set of layoffs. *Id.* Because the judge concluded that there was no nexus between the second set of layoffs and the complainants' role in the 110(c) investigation, he found no discrimination and dismissed the complaints. *Id.*

In a separate section of his decision, the judge addressed credibility. *Id.* at 861-62. He broadly credited miner Smillie's testimony, specifically finding that Smillie heard AAA president Sisemore and vice-president Ryan discuss their desire to find out who turned them in so that they "could make it worthwhile for [those responsible] to leave" AAA. *Id.* at 862. The judge credited Hyles' testimony that both Ryan and Sisemore threatened to make the working conditions more difficult for the individuals who notified MSHA of safety violations at the plant. *Id.* The judge credited the testimony of all four complainants, including their testimony as to their respective qualifications for available positions, and discredited Ryan's testimony regarding the complainants' qualifications. *Id.* The judge also broadly credited the testimony of McGuire and Martin Collins, the business representatives for the Operating Engineers. *Id.*

Finally, the judge addressed the arbitrator's decision and indicated that he accorded it no weight. *Id.* at 863. Accordingly, he did not consider the arbitrator's findings on the issue of the complainants' qualifications for available positions. *Id.*

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<sup>3</sup> Attached to the judge's May 1997 decision is a stipulation between the parties, in which they agree on back pay and interest due each complainant through the December 1993 hearing. 19 FMSHRC at 870-71 (Ex. A). Assuming liability on the part of AAA, the parties agreed that a civil penalty of \$3,500 would be appropriate for each of the eight alleged discrimination violations. *Id.* at 871-72. The judge accepted this amount for the set of dockets in which he found AAA liable under section 105(c). *Id.* at 861.

<sup>4</sup> We note that the second set of layoffs could not possibly have been motivated by the complainants' filing their second set of discrimination complaints since those complaints were filed in response to the second set of layoffs. Furthermore, the judge erroneously stated that the "second set of dockets . . . arose out of the second set of discrimination complaints that the four complainants filed . . . in September 1992." *Id.* In fact, the *first* set of discrimination complaints (relating to the July 1992 layoffs) were filed in September 1992.

## II.

### Disposition

#### A. Parties' Arguments

The Secretary appeals from the judge's dismissal of the complaints relating to the March 1993 layoffs. S. PDR at 1-2.<sup>5</sup> The Secretary submits that the Commission should, as a matter of law, reverse the judge's finding that the 1993 layoff did not violate section 105(c). *Id.* at 10-11. The Secretary notes that the judge specifically found that AAA manipulated the seniority list in March 1993 for the purpose of terminating the complainants in retaliation for their protected activities that resulted in the plant shutdown, the 29 unwarrantable failure citations, and the subsequent section 110(c) investigation against Ryan. *Id.* at 7. Further, the Secretary argues that, because she never alleged that the March 1993 layoff was motivated solely by the complainants' participation in the section 110(c) investigation, the judge incorrectly relied on the lack of a causal nexus between that participation and the layoff in dismissing the second set of dockets. *Id.* at 9.

In its petition for discretionary review,<sup>6</sup> AAA contends that the judge did not comply with the Commission's remand instructions by failing to make key factual findings and by failing to explain the basis for his credibility resolutions. A. PDR at 7-13. The operator further asserts that the Secretary failed to show that AAA knew of Hyles' protected activity. *Id.* at 6-7. AAA also alleges that the complaints of Dennis, Soto, and Mears to leadmen Hyles and Richter do not constitute protected activity because leadmen are not supervisors or members of management. *Id.* AAA argues that the fact that every other employee was interviewed by MSHA investigator Mesa without suffering retaliation weighs against a finding that AAA retaliated against the complainants. *Id.* at 24. In addition, AAA asserts that the judge failed to reconcile his finding of discrimination related to the July 1992 layoff with the arbitration decision under the collective bargaining agreement. *Id.* at 27-29, 47-48, 67, 69. Finally, AAA objects to the civil penalties ordered by the judge. *Id.* at 73-74.

In response, the Secretary argues that leadmen Hyles and Richter were agents of the operator within the meaning of section 105(c), and that the concerns voiced by complainants Mears, Soto, and Dennis to the leadmen constitute protected Mine Act activity. S. Resp. Br. at 15-18 & n.6. The Secretary submits that analysis of the circumstances surrounding both layoffs

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<sup>5</sup> The Secretary designated her petition for discretionary review as her opening brief.

<sup>6</sup> AAA submitted a 95-page PDR challenging the judge's initial decision, after which we admonished AAA that Commission Procedural Rule 70(d), 29 C.F.R. § 2700(d) requires that "each issue [in a PDR] shall be . . . plainly and concisely stated." In apparent disregard of this warning, AAA's present PDR spans 75 pages.

establishes that the bumping procedure of March 1993 violated section 105(c). *Id.* at 19-22. The Secretary asserts that, while AAA's defenses should be rejected, the judge's failure to analyze AAA's affirmative defenses warrants a remand for further analysis. *Id.* at 22-24 & nn.7-8. The Secretary also contends that the judge's failure to address the complainants' qualifications for available positions requires a remand to analyze this issue. *Id.* at 24-25. Further, the Secretary argues that, while AAA's economic defense is unconvincing, the Commission should remand this question to the judge with instructions to make specific findings on this issue. *Id.* at 25-26. Finally, the Secretary requests a remand to allow the judge to explain the bases for his credibility determinations. *Id.* at 26-27.

AAA replies that the Secretary has failed to rebut AAA's evidence of inconsistencies in the complainants' hearing testimony. A. Reply Br. at 1-2, 14-15. AAA also claims that the 15-month delay between the alleged protected activity in April 1991 and the alleged adverse action against the complainants in July 1992 is too long a period to establish the nexus required for a finding of discrimination. *Id.* at 10-11 & n.7. AAA submits that the ALJ's finding that it "manipulated the shift and job assignments in March of 1993" to terminate the complainants is "based upon nothing more than supposition and speculation" and contradicts his prior finding that the March 1993 discharge was not in retaliation for the complainants filing discrimination complaints. *Id.* at 12-13. AAA contends that, even assuming the Secretary is able to establish a prima facie case of discrimination, the complainants declined to exercise their bumping rights and were unqualified to fill the open positions. *Id.* at 13. Finally, AAA argues that the Secretary failed to rebut AAA's economic justification for the March 1993 layoff. *Id.* at 14 & n.10.

## B. Discrimination

### 1. Governing Principles

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 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. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Under the Mine Act, an administrative law judge's findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992).<sup>7</sup> In addition, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The "possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them." *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent*, 6 FMSHRC at 1138.

2. July 1992 Layoff

a. Prima Facie Case

The judge found that the complainants engaged in protected activity, that AAA learned of the complainants' protected acts and that AAA expressed hostility to this activity before failing to recall them in July or August 1992, and concluded that a nexus existed between the protected activity and AAA's failure to recall. 19 FMSHRC at 860-65. However, he did not frame his analysis in a manner consistent with the Commission's *Pasula-Robinette* analytical framework. Previously, we have excused a judge's failure to apply our discrimination framework, provided the judge's analysis was consistent with this framework. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 130 n.11 (Feb. 1982) (holding that, because judge's analysis was consistent with the Commission's discrimination framework, his failure to organize his analysis within that framework did not require a remand for express application of that analysis).<sup>8</sup> Although the judge's analysis in his remand decision was not formulated within our *Pasula-Robinette* framework, he has provided us with findings sufficient to render a remand unnecessary.

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<sup>7</sup> "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>8</sup> In addressing a similar situation, the National Labor Relations Board affirmed a judge's decision where the judge's findings satisfied the analytical objectives of its discrimination framework expressed in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), enforced sub nom. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981). *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enforced sub nom. *NLRB v. Limestone Apparel Corp.*, 705 F.2d 799 (6th Cir. 1982).

In July 1992, AAA laid off sixteen employees due to an equipment move. 16 FMSHRC at 2238. Over the course of the next several weeks, AAA recalled all of the laid-off workers except the complainants. *Id.* Thus, what started as a temporary layoff for AAA's employees became, in effect, a permanent layoff of Hyles, Mears, Dennis, and Soto. *See All American Asphalt I*, 18 FMSHRC at 2098. It is undisputed that the four suffered an adverse employment action. The main issue on review is whether that employment action was linked to protected activity under the Mine Act.

Based on our review of the credited record evidence, substantial evidence supports the judge's conclusion that each of the complainants engaged in protected activity. Initially, Hyles, while assigned to work as a leadman for a combined production shift during the weekend of the plant startup operation, complained to Ryan about plant conditions he perceived as dangerous. Tr. 316, 319. He also discussed the plant conditions with Richter. Tr. 338. The record further shows that he openly videotaped the plant startup in the presence of numerous other employees, turned in the tape to MSHA, and complained to MSHA about the hazards the plant conditions posed to himself and others. Gov't Exs. 1, 54. Thus, Hyles instigated the events that led to the plant shutdown by MSHA and the issuance of \$45,000 in penalties in July 1992. Later, Hyles cooperated as a witness during MSHA's section 110(c) investigation of Ryan. Gov't Ex. 2.

Similarly, the actions of complainants Dennis, Mears, and Soto constitute protected activity under the Act. Dennis, Mears, and Soto were on Hyles' crew, working under his supervision in the finishing plant during the startup weekend. 16 FMSHRC at 2236. Each of them conferred with Hyles and supported his efforts to complain to MSHA about unsafe plant conditions. Tr. 338, 366, 370. Furthermore, each of them complained directly to leadman Richter regarding the plant conditions. Tr. 685, 826, 957, 2257. In Hyles' initial statement to MSHA, he identified, *inter alia*, Dennis, Mears, and Soto as witnesses.<sup>9</sup> Gov't Ex. 2 at 1. Finally, these three complainants, along with other AAA employees, gave statements to the MSHA investigator when he came to interview miners at AAA's facility. 16 FMSHRC at 2237; Gov't Exs. 2-5. In short, substantial evidence supports the judge's finding that the four complainants engaged in activities protected under section 105(c) of the Mine Act. *See* 30 U.S.C. § 815(c)(1).

AAA's assertion that the complaints of Dennis, Mears, and Soto to leadmen Richter and Hyles do not constitute protected activity because leadmen are not supervisors or members of management conflicts with our precedent. In determining whether a miner is an operator's agent, we have examined such factors as whether the miner was exercising managerial or supervisory responsibilities at the time the allegedly violative conduct occurred (*U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) and whether the miner to whom a safety complaint was made

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<sup>9</sup> Of the six witnesses Hyles identified to MSHA, the three witnesses other than Dennis, Mears, and Soto had been laid off prior to MSHA's section 110(c) investigation of Ryan. *See* Gov't Ex. 2 at 1.

was in a position to affect mining operations and, hence, safety. *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 n.5 (May 1997). Here, Hyles described the duties of leadmen as including being “responsible for the . . . shift . . . and in charge of the employees to see that they did their assigned jobs.” Tr. 278-79. As leadmen, Richter and Hyles acted in a supervisory capacity and were in a position to affect safety, and, therefore, were “agents” of the operator to whom employees would logically voice their complaints. Thus, the safety complaints of Mears, Dennis, and Soto to Hyles and Richter were protected activity under the Act. *See Knotts*, 19 FMSHRC at 837 n.5.

We also find that substantial evidence supports the judge’s finding that AAA’s failure to recall the complainants was in retaliation for their protected acts. As the judge noted, “[d]irect evidence of actual discriminatory motive is rare.” 19 FMSHRC at 860. “[M]ore typically, the only available evidence is indirect. . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *cited in* 19 FMSHRC at 860; *see also Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982) (“[C]ircumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination.”).

Against the backdrop of AAA’s pronounced hostility to employees’ protected acts (19 FMSHRC at 862-63), the record fully supports the judge’s inference that AAA ascertained the complainants’ identities. *See id.* at 864. Many of Hyles’ protected acts, including his complaints to Ryan and his videotaping of the plant were open and highly visible to AAA. Indeed, Hyles did not try and hide his videotaping, and conversed with leadman Richter, inter alia, as he videotaped. *See Gov’t Ex. 54*. In this regard, leadman White, who testified on behalf of AAA at the hearing, stated that it was generally known that Hyles had turned in his videotape to MSHA. Tr. 2077-79. In addition, Richter, another one of AAA’s witnesses, testified that he told Ryan that Hyles had a video camera present at the plant during startup weekend. Tr. 2163. Even more significantly, Ryan testified that he knew that Hyles had videotaped the plant and that he suspected that Hyles had turned in the tape to MSHA. Tr. 1535, 1539. Moreover, given the small size of the AAA plant, and management’s desire to discover the identities of those who turned AAA in, it is reasonable to infer that the operator knew about Hyles’ role in turning in the videotape and complaining to MSHA. *See Chauffeurs, Teamsters and Helpers, Local 633 v. NLRB*, 509 F.2d 490, 497 (D.C. Cir. 1974) (holding that existence of only six employees in bargaining unit is circumstantial evidence that protected activities would come to the attention of

management).<sup>10</sup> In sum, credited record evidence supports the judge's inference that AAA knew of Hyles' protected activity under the Mine Act by the time of the July 1992 layoff.<sup>11</sup>

It was also reasonable for the judge to infer that AAA knew of the protected activity of Dennis, Mears, and Soto. *Id.* Each had worked under Hyles in the finishing plant during the weekend before MSHA shut down the plant on the morning of April 22. 19 FMSHRC at 864-65. Each had complained about plant conditions to Richter. Tr. 685, 826, 957, 2257. Indeed, by the time of the investigation, they, along with leadman Richter, were the only employees still employed at AAA who had worked with Hyles during the start-up operations in the finishing plant. *See* Tr. 337, 379, 548, 2248-54. Richter, to whom they had voiced their complaints, testified on behalf of AAA at the hearing. Tr. 2118-88. Further, there is nothing in the record indicating that any AAA employees other than Dennis, Mears, Soto, and Hyles complained to Richter about the plant conditions during the startup weekend. Finally, Ryan's knowledge of the pivotal role that statements from the three played in the MSHA investigation is borne out by the fact that Ryan solicited Dennis to write a letter to MSHA, while he was on layoff in May 1991, that would support Ryan's claim that no employees were exposed to unguarded equipment during the startup weekend.<sup>12</sup> Tr. 841-44. In view of these facts, we find that it was reasonable for the judge to infer that AAA had determined that, in addition to Hyles, complainants Dennis, Mears, and Soto had engaged in the protected activity that caused it so much trouble. 19 FMSHRC at 865; *see Teamsters v. NLRB*, 509 F.2d at 497.

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<sup>10</sup> The Commission occasionally has looked for guidance to case law interpreting similar provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1994) ("NLRA") in resolving questions arising under the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (deciding discrimination case in part through reference to NLRA case law).

<sup>11</sup> AAA may well have known of Hyles' protected activity by the time of his demotion in October 1991. Indeed, the arguably discriminatory circumstances surrounding his demotion presented a close case. In addition to AAA's knowledge of and hostility towards the protected activity, the record shows that Ryan told Hyles that he and Hyles no longer saw "eye-to-eye," that Ryan did not rely on the reasons that he subsequently gave to MSHA at the time he demoted Hyles, and that the major misconduct on which Ryan purportedly relied in demoting Hyles — sleeping during work hours — was long condoned both for Hyles and other AAA employees. Tr. 64, 394, 402, 1568, 1574-75, 1584-85, 2153. While the demotion is consistent with a pattern of recrimination towards the complainants because of their protected activities, the Secretary did not challenge the judge's finding of no discrimination in the demotion, and the issue, therefore, has not been preserved for review.

<sup>12</sup> Shortly after Dennis wrote the letter, he was recalled from temporary layoff. Tr. 841-42.

We reject AAA's argument that the lapse of time between the April 1991 complaint to MSHA and the July 1992 layoff undercuts any finding that its failure to recall the complainants was in response to protected activity. A. Reply Br. at 10-11 & n.7. We "appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Significantly, in reviewing the record in response to this argument, we note an element of timing on which the judge did not rely in making his determination of discrimination.<sup>13</sup> On July 24, 1992, four days after AAA began recalling employees it had laid off (see Gov't Ex. 15), MSHA issued a proposed penalty of \$45,000 against AAA in an assessment addressed to Ryan.<sup>14</sup> Gov't Ex. 53. By August 3, 1992, Ryan had signed a notice of contest that was returned to MSHA. Gov't Ex. 57. These penalties provide the proverbial "straw that broke the camel's back," and coincide in time with the transformation of a temporary layoff for an equipment move to a layoff of unlimited duration for only the complainants. As we noted in *Chacon*, "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive . . . ." 3 FMSHRC at 2511.

In sum, substantial evidence supports the judge's finding that the complainants engaged in protected activity, that AAA knew of this activity prior to the July 1992 layoff, and that this layoff was implemented in response to the complainants' protected activity. The judge's ultimate finding of discrimination necessarily implied a finding that the Secretary established a prima facie case of discrimination. See *Boswell v. National Cement Co.*, 14 FMSHRC 253, 259-60 (Feb. 1992) (recognizing from judge's conclusion of discrimination an implicit finding that complainant's disqualification constituted adverse action). Accordingly, we find that substantial evidence supports the judge's implicit finding that the Secretary established a prima facie case of

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<sup>13</sup> In other circumstances, we have considered record evidence upon which a judge has not expressly relied. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-95 & n.9 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (finding that evidence upon which the judge did not expressly rely supported his imposition of penalty). Here, while the judge did not expressly consider the coincidence in time between Ryan's receipt of MSHA's proposed penalty and the adverse action taken against the complainants, we find it appropriate to consider this uncontroverted evidence in light of its probative value.

<sup>14</sup> On cross-examination, Ryan testified that he did not recall when he reviewed the penalty assessments, but he did not deny having received them around the time they were issued. Tr. 1597-1602. Ultimately, the dockets involving the citations against AAA and Ryan were settled, and the judge ordered Ryan to pay \$7,600 in satisfaction of his section 110(c) liability and ordered AAA to pay \$36,000 in penalties. Order Approving Settlement, dated February 22, 1994.

discrimination regarding AAA's failure to recall the complainants. *See Dunmire*, 4 FMSHRC at 130 n.11.

b. Affirmative Defense

AAA argues that it did not recall the complainants — effectively terminating their employment — because they were not qualified for any positions held by less senior employees.<sup>15</sup> The judge rejected this defense and concluded that AAA's refusal to recall the complainants violated section 105(c). 19 FMSHRC at 860-61. Substantial evidence supports the judge's conclusion.

“[P]retext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.” *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982)). As we stated in *Price*, “[u]ltimately, the operator must show that the justification is credible and would have legitimately moved it to take the adverse action in question.” *Id.*

It is undisputed that each of the complainants contacted AAA on numerous occasions regarding the duration of and reasons for the layoff. Tr. 403, 706-07, 848, 976-77. It is also undisputed that AAA never told any of the complainants at the time of the layoff that lack of qualification prevented any of them from being recalled. Tr. 407, 708, 849, 978, 1600-03. In fact, the record does not indicate that AAA's management ever told the complainants that they were disqualified from available positions. *See* Tr. 1601, 2085 (testimony of Ryan and White that they never told complainants that they had been disqualified from available positions).<sup>16</sup> Further, as the judge found (19 FMSHRC at 863), in implementing the July 1992 layoff, AAA violated its collective bargaining agreement and thereby avoided holding a contractually mandated bumping meeting where AAA would have been required to address the complainants' qualifications. AAA's consistent failure to tell the complainants, upon repeated inquiry by each of them during the July-August 1992 layoff period, that they were unqualified for available work supports the judge's conclusion (*id.* at 866) that lack of qualification was not the real reason for AAA's refusal to recall them, but rather a pretext. *See Price*, 12 FMSHRC at 1534.

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<sup>15</sup> AAA's refusal to recall the complainants — until they were voluntarily reinstated in February 1993 — resulted in the complainants' loss of seniority under the collective bargaining agreement. 16 FMSHRC at 2239-40, 2247.

<sup>16</sup> The first record evidence of AAA offering lack of qualification as its motivation for not recalling the complainants appears in the arbitration decision, which was litigated beginning on December 16, 1992 — over three months after AAA's recall of all laid off employees except the complainants. *See Gov't Ex. 51.*

Substantial record evidence also supports the judge's finding that the complainants were, in fact, qualified for available positions. First, each of the complainants testified that he had completed the union's apprenticeship training program and had performed a variety of operations at AAA. *See* Tr. 280-92, 658-60, 796-801, 934-45;<sup>17</sup> *see also* Tr. 199-201, 236-38 (McGuire testifying that the complainants had performed numerous other tasks at AAA and were qualified to perform tasks outside their respective classifications). Second, in refusing to recall the complainants, AAA inexplicably deviated from its routine practice of allowing its employees to become qualified for various job classifications through on-the-job training. *See, e.g.*, Tr. 299, 500, 662, 799-800, 946-47, 1656-59 (discussing AAA's practice of training employees on the job to qualify for various positions). *Compare* Tr. 1649 (Ryan denying that dozer operators learned on the job at AAA), *with* Tr. 2262-64 (Hyles testifying that miner Bob Christenson, after bumping into miner Melvin's dozer operator position after the plant shutdown, learned to operate the dozer on the job "to some extent").<sup>18</sup> Third, the judge credited each of the complainants' testimony as to their respective qualifications to operate various types of equipment.<sup>19</sup> 19

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<sup>17</sup> Union business representative McGuire testified that "[g]enerally, after completion of an apprenticeship program, [a miner] should be able to perform any duties at the mine." Tr. 196.

<sup>18</sup> Given the extent of the credited evidence of the complainants' qualifications, it is apparent that Hyles, Mears, and Soto were each eligible to bump into the dozer position occupied by Melvin, who was junior to all the complainants, and subsequently occupied by miner Hodgeman, who was junior to all the complainants except Soto. *See* Gov't Exs. 14, 15. Furthermore, Dennis and Mears were eligible to bump into the shovel positions occupied by Sean and Barry Laycock and Danny Stinson, all of whom were junior to the complainants. *See* Gov't Exs. 14, 15.

<sup>19</sup> Hyles stated at the hearing that he is qualified to run a dozer and that he considers himself "qualified to be a plant repairman." Tr. 286, 299. Hyles further testified that he could run the new plant if he was afforded the same training opportunities as those given to AAA employees White, Bobby Crowell, and Rick McLane for that position. Tr. 296-97. It perplexes us that Ryan allowed Hyles, as leadman, to train other employees, yet did not consider him a candidate for on-the-job training for any available position. Dennis testified that he had received three weeks of training on a shovel and that, if afforded the same duration of shovel training as Allen Richter, he could have become as proficient as Richter on the shovel. Tr. 807-08. Dennis also testified that he was qualified to be a plant operator and could run the new plant if trained. Tr. 800-01. Mears testified that he was capable of operating a dozer and a shovel. Tr. 671. He also stated that if he was allowed the opportunity to train on the job, he could perform any plant repairman duty. Tr. 777. In fact, through on-the-job training, Mears became qualified to operate a crusher and a loader and to perform plant operation and repair. Tr. 660, 1654. Soto stated that he could perform the same dozer work as dozer operators Christenson, Hodgeman, and Melvin. Tr. 945. Soto also indicated that in May 1991, Ryan offered to allow him to bump into a dozer position. Tr. 966. Soto testified that he could learn to be a plant repairman if given the same on-

FMSHRC at 862. In light of “Ryan’s blatant hostility to the [complainants’] protect[ed] activity,” the judge also discredited Ryan’s testimony that the complainants were unqualified. *Id.* Despite the very general nature of the judge’s credibility determinations, the judge nonetheless complied with our remand instruction to render appropriate credibility determinations. *All American Asphalt I*, 18 FMSHRC at 2102-03. We also note that the judge was in the best position to make credibility determinations, and that abundant evidence in the record supports these determinations. In short, we see no basis for reversing the judge’s credibility findings. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995).

Furthermore, the judge did not err in his remand decision by according no weight to the arbitration decision and the credibility determinations made therein. The Commission’s holding in *Pasula* firmly places the decision whether to defer to an arbitrator’s decision in the sound discretion of the judge. *Pasula*, 2 FMSHRC at 2795. As we held in *Pasula*, “[a]rbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling upon the judge.” *Id.*, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In the instant matter, the judge made different credibility determinations than the arbitrator, discrediting Ryan (19 FMSHRC at 862-63), whose testimony the arbitrator credited. Gov’t Ex. 51 at 12, 14 n.6. In addition, the arbitrator did not consider Ryan’s expressed hostility to the complainants’ protected activity. *See id.* at 1-14. Finally, the arbitrator was not asked or permitted under the collective bargaining agreement to consider whether AAA’s claim that the complainants lacked necessary qualifications was a pretext to keep the complainants on layoff because of their protected activities under the Mine Act. *See Resp. Ex.* at 23-24. We see no reason to disturb the judge’s exercise of discretion in declining to accord weight to the arbitrator’s decision.

There is additional record evidence supporting the judge’s rejection of lack of qualifications as a defense to AAA’s refusal to recall the complainants. By the end of August 1992, in addition to the four complainants, one other employee, Hodgeman, was on layoff. Gov’t Ex. 15; Gov’t Ex. 51 at 4. Hodgeman, who was classified as a loader operator, as were Hyles and Soto, was allowed to bump a junior employee, Melvin, who was classified as a dozer operator. 16 FMSHRC at 2238; Gov’t Ex. 14; Tr. 1889-90. Although Ryan allowed Hodgeman to bump, he did not afford any of the complainants the same opportunity. Tr. 423-25, 1316-18. Despite Melvin’s layoff after he was bumped by Hodgeman, he was later rehired to work at AAA’s asphalt plant, which adjoined the rock finishing plant but was under a separate collective bargaining agreement. Tr. 1955-57, 1965, 2013-14. Thus, even though Melvin was initially bumped out of a job, unlike the complainants, he did not remain out of work.

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the-job training as AAA gave to Richter and McLane. Tr. 946, 948. Ryan testified that he did not “know of any reason that [Soto] couldn’t” learn on the job to perform reclamation, grade work or pioneering on the dozer (Tr. 1653), and didn’t know of any reason that Mears could not learn other equipment on the job as well. Tr. 1655.

AAA's disparate treatment of these complainants with respect to employee classifications and bumping further supports the judge's conclusion that the operator's failure to recall the complainants in July and August 1992 was not based upon their alleged lack of qualifications. In short, substantial evidence supports the judge's finding that the complainants' purported lack of qualifications for available work was pretextual. 19 FMSHRC at 862, 865, 866; *see Price*, 12 FMSHRC at 1534.

AAA also argues that it had a valid economic reason for the cutback in its operations that resulted in the permanent layoff of the four complainants. A. PDR at 25-26, 32-33, 66. In light of the judge's rejection of AAA's assertion that the complainants were not qualified for positions held by less senior employees, he did not reach the issue of whether AAA's economic justification for the initial layoff was proper. We agree with the judge's approach. Thus, the issue presented by the July 1992 layoff and failure to recall is not whether there was a valid economic need for a layoff, but rather whether AAA improperly failed to recall the four complainants while recalling all other employees, including employees less senior than the complainants. Accordingly, our rejection of AAA's qualifications argument does not require us to reach AAA's economic defense.<sup>20</sup>

Accordingly, we find that substantial evidence supports the judge's determination that AAA violated section 105(c) by refusing to recall the complainants, while recalling every other employee laid off because of the July 1992 equipment move.

### 3. March 1993 Layoff

In his remand decision, the judge limited his analysis of the complainants' second layoff to a determination of whether the layoff was connected to the complainants' participation in

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<sup>20</sup> Nonetheless, based on facts found by the judge and other evidence from AAA's own witnesses, we believe that AAA's economic defense is suspect. AAA expert witness Dr. Michael Phillips' admission that production increased in July and August 1992, severely undermines the relevance of his assessment that declining economic conditions in California's construction industry as a whole in 1992 necessitated AAA's economic layoff. Resp. Ex. 40A; Tr. 1750-51; *see Gov't Exs.* 25, 50; Resp. Ex. 38A-G; Tr. 1604, 1753, 1760. Moreover, Dr. Phillips had neither been to AAA's facility, nor had he advised AAA concerning the advisability of an economic layoff in 1992. Tr. 1760, 1768, 1771. Also, several employees worked overtime hours outside their classifications while the complainants were on layoff. Gov't Ex. 25; Tr. 1605, 1717-20. While Phillips testified that employers often utilize existing employees to work overtime to save costs, (Tr. 1760), he admitted that he had not reviewed the wage and benefit package in AAA's collective bargaining agreement, so as to know whether that was the situation at AAA. Tr. 1796. In sum, testimony that an economic layoff became necessary at some unspecified date after the temporary layoff is at odds with the testimony of AAA's own witnesses and documentary evidence in the record.

MSHA's section 110(c) investigation of Ryan. 19 FMSHRC at 861. Because the judge concluded that there was no nexus between the second set of layoffs and the complainants' role in the section 110(c) investigation, he found no discrimination and dismissed the second set of complaints. *Id.*

We find that the judge erred in limiting his analysis to the complainants' participation in the section 110(c) investigation. The Secretary did not base her claims of discrimination regarding the second set of layoffs solely upon this participation.<sup>21</sup> See Compl. dated June 2, 1993. Therefore, the judge erred in failing to consider the complainants' other protected activities in analyzing the legality of the March 1993 layoff. See *Carmichael v. Jim Walter Resources, Inc.*, 20 FMSHRC 479, 486-87 (May 1998) (vacating judge's determination that operator did not violate section 105(c) based on judge's error in construing argument asserted by complainant). Further, his conclusion that there was no nexus between the layoffs and the complainants' involvement in MSHA's section 110(c) investigation is contrary to his own findings. See 19 FMSHRC at 866 (finding that AAA manipulated shift and job assignments in March 1993 for the specific planned purpose of terminating the complainants in retaliation for, inter alia, their participation in the section 110(c) investigation of Ryan).

Although both AAA and the Secretary assert that a remand would be appropriate on certain issues related to the March 1993 layoff, the judge has made sufficient factual findings upon which we can decide this issue without remanding to the judge. In our view, the record viewed as a whole compels only one conclusion: that the March 1993 layoff of the complainants violated section 105(c). Accordingly, we need not remand this issue to the judge. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)).

a. Prima Facie Case

As the judge found, by the time of the July 1992 layoff, AAA's management had learned the identity of those employees who participated in the protected activity that it so deeply resented.<sup>22</sup> 19 FMSHRC at 865. The judge also concluded that, in March 1993, AAA "manipulated the shift and job assignments" to terminate the complainants in retaliation for their protected activity "that resulted in the shutdown of the plant, the 29 unwarrantable failure

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<sup>21</sup> In the second discrimination complaint, the Secretary alleges that AAA discriminated against the complainants for "their protected safety activity, including the filing [of] their initial complaints of discrimination with MSHA." Compl. dated June 2, 1993 at 5.

<sup>22</sup> Ryan admitted that, by the time of the second layoff, he knew that it was Hyles who had gone to MSHA prior to the inspection that led to the plant shutdown. Tr. 1690.

citations and the 110(c) investigation of Ryan . . .” *Id.* at 866. Thus, the judge explicitly found a nexus between the March 1993 layoffs and the complainants’ protected activity.

The judge’s finding of a nexus between the complainants’ 1991 protected activity and the 1993 layoff finds abundant support in the record. First, when the events occurring between July 1992 and March 1993 are reviewed, a continuing pattern of discrimination is evident. AAA’s conversion of a temporary layoff to a permanent layoff with respect to only the four complainants occurred about the same time Ryan signed and dated the notice of contest regarding MSHA’s July 1992 issuance of over \$45,000 in proposed penalties stemming from the plant conditions leading to the shutdown.<sup>23</sup> *See* Gov’t Ex. 57. The complainants remained on layoff until their reinstatement in February 1993. 16 FMSHRC at 2240. Less than one month after their reinstatement, the complainants were again laid off. 19 FMSHRC at 858.

Second, the circumstances surrounding the March 1993 bumping meetings compel a finding that the complainants established a prima facie case. In early March — less than one month after the complainants were reinstated — Ryan reestablished a new graveyard shift for production — purportedly because of the extra time needed to mine wet materials from the pit<sup>24</sup> — and unilaterally assigned four of AAA’s most senior repairmen to staff the new shift despite Ryan’s prior acknowledgment that placing repairmen on the production shift would decrease production. Tr. 382, 1390-97; *see* Resp. Ex. 9 at 7-8. The graveyard shift is generally considered the least desirable shift; employees with highest seniority normally choose the day shift when bidding on jobs. 16 FMSHRC at 2240; Tr. 447. Soon after Ryan’s assignment of the senior repairmen to the third shift, AAA moved the primary production shift to the day shift, and moved the maintenance shift to the night shift, an arrangement not present at AAA for at least three years. *See* Gov’t Ex. 15; Tr. 990. Just prior to the March 1993 layoff, Ryan remarked to union business representative McGuire that he had “four operators too many” and that he had “four problem children.”<sup>25</sup> Tr. 203-04. McGuire understood Ryan’s comments to refer to the

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<sup>23</sup> We also note that the \$9,500 proposed assessment for Ryan’s alleged 110(c) violations is dated October 22, 1992. Ryan’s notice of contest is dated October 30, 1992. *See* WEST 93-65-M.

<sup>24</sup> We assume the need for an additional shift because of the increased production time required to process the wet material in the pit. Thus, our disposition of the March 1993 layoff does not require us to reach the issue of the need for the shift or its rapid elimination.

<sup>25</sup> The complainants testified that, following their reinstatement in February 1993, they were subjected to discriminatory working conditions, including increased scrutiny by management and verbal harassment. Tr. 444-45, 468-70, 714 (Mears’ testimony that Ryan kept closer tabs on the complainants after the February 1993 reinstatement), 987-90 (testimony of Soto that he was given reduced working hours and that Ryan purposely caused Soto to miss his ride with Hyles). However, the judge made no findings in this area.

complainants. Tr. 204. On March 24, only three weeks after the creation of the third shift, Ryan eliminated that shift, announced a layoff, and allowed the repairmen to exercise their bumping rights.<sup>26</sup> 16 FMSHRC at 2240. Notwithstanding that there were repair positions available, each of the repairmen bumped one of the complainants and was eventually reclassified as a production worker. Gov't Ex. 16; Tr. 211-17.

AAA's inversion of the production and maintenance shifts so that production would be performed on the more desirable day shift for the first time in at least three years; Ryan's assignment to the temporary graveyard shift of four senior repairmen accustomed to working the day shift; and AAA's subsequent elimination of the temporary shift created a situation in which the four repairmen almost certainly would bump into the day shift when given the opportunity. *See* Tr. 1946 (testimony of senior repairman assigned by Ryan to the temporary third shift that he wanted to return to working the day shift). In fact, prior to the meeting, Ryan admitted that he knew that the senior repairmen would bump into day jobs (Tr. 1687-90) even though they had performed primarily repair work for many years and had not worked production during Hyles' tenure at AAA. Tr. 447.

At the subsequent bumping meeting, Hyles and Soto each requested that he be allowed to consult with the Solicitor's office because of their recent temporary reinstatement and the pendency of their discrimination complaints. 19 FMSHRC at 858; Tr. 452, 995-96. All the complainants believed that Ryan would disqualify them for any position into which they attempted to bump.<sup>27</sup> 19 FMSHRC at 858. In fact, at the December 1992 arbitration, Ryan argued that the complainants were not qualified to perform any available duties at AAA. Gov't Ex. 51 at 10 (arbitrator indicating that Ryan believed that the complainants were unable to perform available work); *see* Tr. 453. Ryan's testimony also leaves no doubt that he was the sole arbiter of an employee's qualification for a given position. *See* Tr. 1420, 1459, 1613 ("I am the judge [of whether an employee is qualified]"). As the judge found, animus tainted Ryan's judgment as to the complainants' qualifications. 19 FMSHRC at 863. These facts lend credence to the complainants' belief that Ryan would have summarily rejected any attempt by them to exercise their bumping rights at the March 1993 bumping meeting. *See* Tr. 452-53, 721, 857, 996 (testimony of complainants that they did not attempt to bump because Ryan would have

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<sup>26</sup> Although Ryan testified that the Operating Engineers and the contract forced him to have a bumping meeting when he eliminated the temporary third shift (Tr. 1396-97), the contract exempts temporary jobs from the bidding and bumping procedures. *See* Resp. Ex. 9 at 19-20; Tr. 241.

<sup>27</sup> Moreover, the Operating Engineers filed grievances against AAA on behalf of Soto and Dennis, as a result of the March 1993 layoff, assertedly because Ryan violated the contractual provision regarding layoff of Operating Engineers' stewards. Tr. 258, 1420-22. The grievances were withdrawn when Soto and Dennis were temporarily reinstated by agreement of the parties. 16 FMSHRC at 2242; Tr. 258.

disqualified them to prevent the bump). When all of the complainants sought to exercise their bumping rights after consulting with the Secretary's counsel, Ryan refused to consider them for any position. 19 FMSHRC at 858. The complainants were the only employees left without a job after the March 1993 bumping process was completed, and AAA subsequently hired new employees to fill the vacant repairman positions. 16 FMSHRC at 2240-41; Tr. 481, 1429, 1693.

Evidence supporting AAA's knowledge of the complainants' protected activities, the timing and circumstances surrounding the bumping of the complainants, and AAA's subsequent refusal to permit the complainants to bump junior employees persuades us that substantial evidence supports the judge's finding that AAA "manipulated the shift and job assignments . . . for the specific planned purpose of terminating the [complainants] . . ." 19 FMSHRC at 866. Accordingly, we conclude that the record compels a finding that the complainants established a prima facie case that their March 1993 layoff was discriminatorily motivated.

b. Affirmative Defense

AAA asserts that the March 1993 layoff was not discriminatory because the complainants chose not to avail themselves of the bumping procedure after they were bumped by the senior employees. A. Reply Br. at 12-13. AAA also alleges that the judge failed to find that permitting the complainants to bump after job assignments already had been rearranged would cause "commotion" and the filing of grievances by the bumped employees. A. PDR at 45.

In finding that AAA used the March 1993 bumping procedure to retaliate against the complainants for their protected activity, the judge implicitly rejected AAA's argument that the complainants' attempts to bump were untimely. We agree that ample record evidence supports rejection of AAA's argument. Bumping requests were made by three of the complainants approximately one week after the bumping meeting, and the remaining complainant three weeks after the meeting. *See* Gov't Exs. 21, 45, 52; Tr. 721, 857. Nothing in the collective bargaining agreement dictates a deadline by which bumping rights must be exercised. Tr. 1699-701. Even Ryan admitted that nothing in the bargaining agreement requires that a miner must bump at the bumping meeting or immediately thereafter. Tr. 1700. Furthermore, nobody from AAA objected to Hyles' or Soto's request to consult with their attorney before deciding whether to bump, nor did anyone inform the complainants that by taking the time to consult an attorney, they were forfeiting their bumping rights under the bargaining agreement. Tr. 218, 244-45, 452. The complainants' decision to bump only after considering the repercussions of doing so was reasonable in light of their unanimous belief that Ryan would disqualify them from any position into which they sought to bump, and their uncertainty regarding whether attempting to bump would jeopardize their previous reinstatement. Thus, we reject AAA's defense that the complainants' bumping requests were untimely.

AAA further defends on the ground that the complainants did not seek to bid on a plant operator job that was posted on March 24, 1993 — the same day as the bumping meeting. A. PDR at 38. After assertedly being laid off on March 24, Crowell, the employee who successfully

bid on the job, was temporarily placed in the job on the same day by Ryan. The job was posted on the afternoon of the day the complainants were laid off, and, not surprisingly, Crowell was the only employee to bid on the job. Resp. Ex. 18A; Tr. 1400-06. AAA's claim that the complainants' failure to bid on the job filled by Crowell indicates their lack of interest in bumping into an available position was presented to the judge (A. Br. at 77 n.67) who nonetheless found that the bumping procedure violated section 105(c). The judge's implicit rejection of AAA's argument is reasonable. There is no evidence in the record that the complainants were even aware of the posting, because, unlike Crowell, when they were bumped on March 24, they were not placed in another job.<sup>28</sup> Accordingly, we find that AAA's arguments fail to establish an affirmative defense to the Secretary's prima facie case.

In sum, the record compels a finding of discrimination regarding the second set of layoffs in March 1993. Ryan was able to manipulate the seniority/job classification so that the complainants were the only employees laid off. In addition to the judge's pertinent findings in his remand decision, he made strong factual findings of discrimination in his initial decision. 16 FMSHRC at 2248-49. Moreover, when the two layoffs and the circumstances surrounding them are viewed together, a clear pattern of discrimination by Ryan and AAA to retaliate against Hyles, Mears, Dennis, and Soto for their protected activity under the Mine Act emerges. We conclude that the credited record evidence compels the conclusion that AAA discriminatorily laid off the complainants in violation of section 105(c).

Accordingly, we reverse the judge's determination that the March 1993 layoffs were not discriminatorily motivated.

### C. Penalties

In the judge's initial decision, in which he found both layoffs unlawful, he did not reach the issues of backpay or penalties. 16 FMSHRC at 2249. In a subsequent decision, the judge accepted a stipulation submitted by the parties, referred to previously (slip op. at 7 n.3), on the amount of backpay due the complainants, while AAA continued to argue against a finding of liability. 17 FMSHRC 799, 800 (May 1995) (ALJ). The parties also stipulated that the penalties should be levied in the amount of \$3,500 per individual violation. *Id.* at 800-01. AAA now objects to the judge's imposition of \$14,000 in penalties as contrary to the stipulation. AAA PDR at 73.

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<sup>28</sup> Further, Ryan's actions in placing Crowell in the job before it was even posted — and thus before the complainants had an opportunity to bid on it — indicates that any efforts by them to bid on the job and be reclassified would have been futile.

In making his penalty assessment, the judge failed to properly apply the penalty criteria set forth in section 110(i)<sup>29</sup> in his penalty assessment. *See* 17 FMSHRC at 801. Likewise, the supporting stipulation of the parties, which the judge attached to his decision, does not address the penalty criteria or offer any supporting rationale for the agreed upon penalty of \$3,500 per violation. *Id.* at 803-08 (Ex. A). In the judge's remand decision, he cited to the parties' earlier stipulation on penalties and stated that, "after consideration of the relevant statutory criteria," a penalty of \$14,000 (\$3,500 per violation for each of the four discrimination violations he found) was appropriate. 19 FMSHRC at 861. The judge did not specifically analyze any of the penalty criteria or offer any supporting reasons for the penalty in accordance with statutory requirements. *See Sellersburg Stone*, 5 FMSHRC at 290-94. Accordingly, we vacate the penalties imposed for the two layoffs and remand to the judge solely for the narrow purpose of reassessment of penalties through application of the section 110(i) penalty criteria. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1539 (Sept. 1997).

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<sup>29</sup> Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

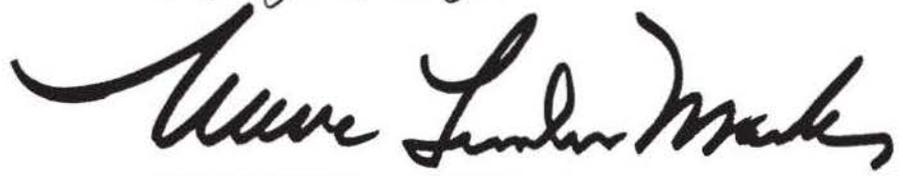
30 U.S.C. § 820(i).

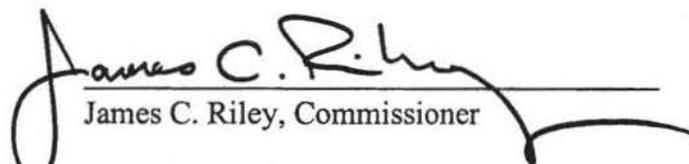
III.

Conclusions

For the foregoing reasons, we affirm the judge's determination that the July 1992 layoff and failure to recall complainants was violative of section 105(c). We reverse the judge's determination that the March 1993 layoff was not discriminatorily motivated, and conclude that the record compels a determination that the March 1993 layoff violated section 105(c). Finally, we remand to the judge for the limited purposes of reinstating his backpay order, 17 FMSHRC at 801, (which adopted the parties' stipulation regarding backpay owed) and direct him to add the interest due on the backpay amounts accruing from the date referred to in the parties' stipulation, pursuant to the Commission's decision in *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2051-53 (Dec. 1983), *modified, Local 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988). We also order the judge to reassess the penalties, reviewing the parties' stipulation, and applying the section 110(i) criteria. *See Energy West Mining Co.*, 16 FMSHRC 4, 4 (Jan. 1994) (considering section 110(i) criteria and approving penalty to which parties stipulated).

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

I dissent from the majority decision because I believe that, in light of the judge's disregard of the instructions set forth in the Commission's original remand order (*see* 18 FMSHRC at 2101-03), his decision must be vacated and the matter remanded. For example, the judge failed to "frame his analysis in a manner consistent with the Commission's *Pasula-Robinette* analytical framework" (slip op. at 10), after the Commission directed him to do so (18 FMSHRC at 2102). Nor did the judge "reach the issue of whether AAA's economic justification for the initial layoff was proper" (slip op. at 18) as directed by the Commission (18 FMSHRC at 2102).

I also believe that a remand is necessary in light of what is in some respects an internally contradictory decision. As my colleagues point out, the judge's "conclusion that there was no nexus between the [March 1993] layoffs and the complainants' involvement in MSHA's section 110(c) investigation is contrary to his own findings." Slip op. at 19. I am not prepared to resolve such issues at this appellate level, issues which I believe must be resolved by the judge in the first instance. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) ("[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence.") (citations omitted).<sup>1</sup>



Theodore F. Verheggen, Commissioner

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<sup>1</sup> I would also vacate and remand the judge's penalty assessment and backpay awards with the instruction to reconsider them in light of any new findings made pursuant to my remand instructions on the merits. I agree with my colleagues that the judge must follow *Sellersburg Stone Co.*, 5 FMSHRC at 290-94, in reassessing any penalty. Slip op. at 24. On remand, the judge thus must enter findings on each of the section 110(i) penalty criteria and assess an appropriate penalty based on his findings. *See* 5 FMSHRC at 292-93.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 1999

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

v.

CENTRAL WASHINGTON  
CONCRETE, INC.

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Docket No. WEST 99-102-M  
A.C. No. 45-03253-05517

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 19, 1999, the Commission received from Central Washington Concrete, Inc. ("Central Washington") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Central Washington.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Central Washington contends that, while it cannot dispute that it received the proposed penalty, "it was not brought to management's attention that the Proposed Assessment had been received." Mot. at 1. Central Washington asserts that it did not learn of the proposed penalty until it received a December 9, 1998 notice from the Department of Labor's Mine Safety and Health Administration demanding payment. *Id.* at 1-2. By that time, however, the thirty-day deadline for submission of the request had already passed. The operator also submits that it intended to contest the proposed penalty and has contested the penalties proposed

in a related case, Docket No. WEST 99-39-M. *Id.* at 2. Finally, the operator requests that the instant matter and Docket No. WEST 99-39-M be consolidated for further proceedings. *Id.*

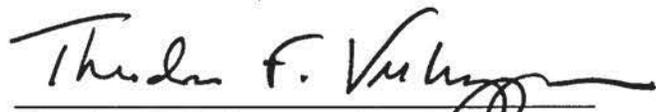
We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Central Washington's position.<sup>1</sup> In the interest of justice, we remand the matter for assignment to a judge to determine whether Central Washington has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

  
Robert H. Beatty, Jr., Commissioner

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<sup>1</sup> In view of the fact that the Secretary does not oppose Central Washington's motion to reopen this matter, Commissioners Marks and Riley conclude that the motion should be granted.

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ADMINISTRATIVE LAW JUDGE DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 1999

MATERIAL SERVICE CORP., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 97-22-RM
	:	Citation No. 4416777; 11/13/96
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Algonquin Sand & Gravel Mine ID No. 11-01117
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. LAKE 98-31-M
	:	A. C. No. 11-01117-05515
MATERIAL SERVICE CORP., Respondent	:	Algonquin Sand & Gravel

## DECISION

Appearances: Richard R. Elledge, Esq., Gould & Ratner, Chicago, Illinois, for Contestant\Respondent;  
Ruben R. Chapa, Esq., Office of the Solicitor, Department of Labor, Chicago, Illinois, for Respondent\Petitioner.

Before: Judge Hodgdon

These consolidated cases are before me on a Notice of Contest and a Petition for Assessment of Civil Penalty filed by Material Service Corporation against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Material Service, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Company contests the issuance to it of Citation No. 4416777 alleging a violation of the Secretary's mandatory health and safety standards. The petition seeks a penalty of \$60,050.00 for the contested and two other citations. A hearing was held in Chicago, Illinois. For the reasons set forth below, I vacate two of the citations and assess a penalty of \$30,000.00.

## Background

The Algonquin Sand and Gravel mine, also known as "Yard 46," is one of several sand and gravel operations owned by Material Service Corporation, a subsidiary of General Dynamics Corporation. It is located in McHenry County, Illinois. The mine is large in area and supplies as many as 13 different grades of sand and gravel to its customers. Trucks owned by Material Service, and operated by employees known as "stockpilers," are loaded with product at the Wash plant and haul it to various stockpiles located throughout the yard. Customer trucks come onto the property and park next to the stockpile of the type of sand or gravel to be picked up and are loaded by a front-end loader. Customer trucks and operator trucks all drive on the same roadways in the yard.

On June 19, 1996, Eugene McPheron was driving a semi-dump truck for Sunrise Cartage. Although he had only worked for Sunrise for 35 days, he had been a truck driver hauling materials for about 30 years. He returned to Yard 46 for his third haul at about 10:00 a.m. and stopped at the binder<sup>1</sup> pile just north of the Wash Plant to be loaded. After observing several other trucks that had come in after him being loaded, McPheron decided that he might be in the wrong place. He got out of his truck and went back to ask the driver of the truck who had pulled in behind him if he was in the right place. As McPheron walked toward the other truck, the driver of that truck, Raymond Remillard, got out of his truck, which was parked next to the Wash Plant, and walked toward McPheron. They met between the trucks.

As the two men talked, they were facing northeast towards McPheron's truck and the binder pile. While they were talking, they were run over from the rear by an R-35 Euclid 35 ton Rear Dump truck driven by Robert Bauman, a Material Service stockpiler. Bauman was returning to the Wash Plant to pick up another load when he felt a bump while passing between the two parked trucks. He looked in his mirror and saw two bodies lying on the ground. He got out of his truck and went to see what had happened. On observing the bodies, he signaled the loader operator to call for help.

The first person from management to arrive at the scene was Frank Anderson, Production Foreman. He got there a few minutes after the accident. He went to the bodies on the ground, told one employee who had come to the accident to go to the front gate to direct the emergency vehicles when they arrived, told Bauman to move his truck and tried to see if there was anything he could do for McPheron and Remillard. Shortly thereafter, ambulances, police cars and fire trucks began arriving.

Remillard's injuries were fatal. McPheron suffered a concussion, two herniated disks, two fractured ribs and numerous bruises and scrapes. As of the date of the hearing, he had not been released by his doctor to return to truck driving.

MSHA Inspector Jerry L. Spruell arrived to investigate the accident on June 20, 1996. Based on his investigation, he issued two citations to the company on June 25, 1996. The first,

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<sup>1</sup> "Binder" is a "substance used to produce cohesion in loose aggregate, as the crushed stones in a macadam road." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 50 (2d ed. 1997).

Citation No. 4416239, alleged that the company had violated section 50.12 of the regulations, 30 C.F.R. § 50.12, because the “mine operator allowed an accident site to be altered without approval of the District Manager or MSHA representative” by moving the Euclid truck from where it had first stopped. (Govt. Ex. 12.)

The second, Citation No. 4416240, alleged a violation of section 56.9100(b), 30 C.F.R. § 56.9100(b), because:

Signs or signals to warn of hazardous conditions were not placed at appropriate locations on the property. There was nothing posted on the mine site to alert customer drivers to stay in their vehicles or that mine equipment have [*sic*] the right-of-way during load-out procedures. On 6-19-96 two customer truck drivers were injured, one fatally, when they were struck by a Euclid R-35 truck (Co # 54-6502) as it was in the process of turning into the mill area. These drivers could not be seen by the haul truck driver prior to the accident. In the area where the accident occurred there was no warnings of truck travel or to remain in your vehicle.

(Govt. Ex. 10.)

On November 13, 1996, the inspector issued a third citation to the company. Citation No. 4416777 asserts a violation of section 56.9100(a), 30 C.F.R. § 56.9100(a), in that:

Rules governing right-of-way were not established and followed on this property. . . . The mine operator failed to establish traffic rules to control right-of-way, a safe traffic pattern and reduce traffic congestion where the Euclid truck normally traveled. They mixed off-road and over-the-road truck vehicles without adequate allowance for the difference in vehicle size. The company allowed a vehicle to be parked in an area that prevented their haul unit driver from seeing the men on the ground before he struck them.

(Govt. Ex. 11.)

### **Findings of Fact and Conclusions of Law**

#### **Citation No. 4416239**

This citation alleges a violation of section 50.12, which requires that:

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue

or recover an individual, prevent or eliminate an imminent danger,  
or prevent destruction of mining equipment.

There is no dispute that the accident site was altered when the Euclid truck was moved 30 feet from where it stopped after the accident. Unless moving it comes within one of the exceptions set out in the regulation, the section was violated. I find that the truck was moved to permit emergency vehicles to recover the victims and to eliminate a possible imminent danger and, therefore, the section was not violated.

Anderson testified that he told Bauman to move the truck “[b]ecause, in my opinion, he was much too close to the immediate scene of the accident and it was impeding the emergency people from getting to the two injured gentlemen.” (Tr. 181.) He further testified on cross examination:

Q. You did not have the Euclid truck moved to prevent imminent danger?

A. I didn’t know the condition of the truck. I didn’t know if the brake was set, and I could not determine if there might not possibly be an imminent danger of the truck rolling back toward me and everybody else on the ground.

(Tr. 248-49.) While this indicates that Anderson was concerned with a possible imminent danger, the evidence is much stronger that he mainly was concerned with access for emergency vehicles.

Other than stating his opinion that the truck did not have to be moved to permit access to the victims, the inspector, who did not view the scene until the day after the accident, provided no reasons or rationale for his conclusion. He also testified as follows:

Q. How many rescue vehicles responded to the emergency, do you know?

A. I have no idea.

Q. Did you inquire?

A. Did I inquire?

Q. As to how many vehicles ---?

A. If I did, I don’t remember.

Q. Okay. Thank you. Now, you spoke in terms of your training in fatality investigations. Have you had any personal experience in actual mine rescue that injured victims were present?

A. No, I have not.

Q. Have you had any personal experience in responding to an automobile or truck or equipment accident other than a mine accident where there were injured parties?

A. No, I have not.

(Tr. 137-38.) Thus, the inspector's opinion appears to be based entirely on the fact that the truck was moved, and not on any investigation to determine whether the movement was necessary to permit access by emergency vehicles.

Essentially, to find a violation in this case, it is necessary to second-guess Anderson's judgment. As he stated:

In hindsight, the ambulance could have accessed the victims without my moving the truck. However, at the time, in the heat of the moment, I felt very definitely, and I do feel today, that it was necessary to move the truck. That was a reaction pursuant to my training to clear the area and secure the area for the ambulance.

(Tr. 244.) I find that his decision at the time was reasonable under the circumstances. It unquestionably was made for the reasons stated and was not a surreptitious attempt to undermine the investigation.<sup>2</sup> Finally, as the inspector admitted, the fact that the truck had been moved "did not impede my investigation." (Tr. 135.)

Since moving the truck, although it altered the scene of the accident, was for reasons permitted by the regulation, was not an attempt to subvert the investigation and did not hinder the investigation, I find that it did not violate section 50.12. Consequently, I will vacate the citation.

Citation No. 4416240

This citation alleges a violation of section 56.9100(b) which requires that "[s]igns or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine." The inspector found that the company violated this section because there were no signs warning customer drivers to stay in their trucks or that mine vehicles had the right-of-way at the mine. I agree.

Material Services admits that there were no signs anywhere in the yard advising drivers to stay in their trucks, but contends that all of the drivers knew that they were not supposed to get out of their trucks, so the lack of signs was not a violation of the regulation. However, this was clearly not the case. The only customer truck driver who testified at the hearing, McPheron, said

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<sup>2</sup> There is no evidence that the operator attempted to hide the fact that the truck was moved from the inspector. Further, the operator's employees showed the inspector where the truck stopped.

that it was common for drivers to get out of their trucks on mine property in the loading area. He related that:

Well, everybody has to, you know, use the bathroom, jump out, and that's the only time you really got to clean your windshield off before you go back out on the highway. And then some guys are sweeping their truck out and then you check your tires to see if you've got a flat tire before you go back out. As soon as they get stopped in line or whatever, they're always jumping out, doing something, you know.

(Tr. 42.) He further testified that Material Services did not give him any warnings or safety precautions to be followed at the yard, nor did anyone advise him about direction of movement or who had the right-of-way. His testimony was unchallenged.

The company makes no claim that drivers getting out of their trucks, at other than designated places, was not a hazardous condition. Obviously, if McPheron and Remillard had not gotten out of their trucks this accident would not have happened. Since there were no signs anywhere directing drivers not to get out of their trucks, I conclude that the company violated section 9100(b). See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 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 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In view of the death of Remillard and the serious injuries of McPheron, there can be little doubt that this violation satisfies the *Mathies* criteria. Therefore, I conclude that the violation was "significant and substantial."

## Negligence

The inspector assessed Material Service's negligence in not complying with the regulation as "moderate" because he believed there were few mitigating circumstances involved. I find this to be an accurate assessment.

### Citation No. 4416777

This citation alleges a violation of section 56.9100(a) which requires that "[r]ules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine." The Secretary has failed to prove this violation.

The inspector testified that this citation was issued because "[t]here were no rules governing the -- who had the particular right-of-way in the area where a fatal accident had occurred the previous June." (Tr. 97.) He further stated that "rules had not been established dictating a safe movement of vehicles in the area where an accident had occurred." (*Id.*) The inspector maintained that he made this determination by talking to people at the scene of the accident.

On the other hand, Jeff Brasuell, the plant superintendent, testified that in the spring of 1991, after he became superintendent he made some changes in the traffic pattern at the yard because "there was some congestion coming off the roadways and the flow wasn't quite as precise or as clear as I thought it could be by implementing some of these changes, and so we looked to make it better." (Tr. 262.) He related that a roadway "was added so that all the traffic moved from east and south and then exited the yard basically on the west side of the yard . . . so that everybody would travel --- everything would travel in a clockwise pattern." (Tr. 263.) Specifically, with respect to the Euclid truck, he stated that it was "a long-standing rule at the plant that the trucks would yield the right-of-way to the Euclid truck." (Tr. 285.)

In support of its claim to have rules governing speed, right-of-way and direction of movement, Material Service offered into evidence a map showing the direction of traffic and the location of traffic signs, which existed prior to the accident, to carry out its plan. (Resp. Ex. E.) It also presented pictures of the signs, which included "stop" signs, "speed limit" signs, "stop ahead" signs, "Do Not Enter" signs, "No Right Turn" signs, "Caution steep grade" signs, "Caution. Speed limit 10 mph" signs, "Keep Right" signs, "Wrong way" signs, "Slow" signs, and "Yield" signs. (Resp. Ex. C.)

That the company's plan was effective is evidenced by the testimony of McPheron. In testifying concerning the area where the accident happened, he stated, "I'm sure it's one-way, but I'm not sure if it was posted there. It's just a given that everybody knew which way, you know, to go in and go out." (Tr. 31.) With regard to the Euclid truck, he testified: "I don't think it's posted anywhere, but everybody knows, you stay out of his way and leave room for him and you don't block any roads, you know where he's going, let him do his job, you know." (Tr. 38.)

Finally, to abate this violation, MSHA did not require Material Services to change the rules concerning right-of-way and traffic already in effect, but only to put up a few more signs

reinforcing the rules previously established. Randall Mucha, Director of Safety for Material Services, testified that after receiving the citation:

We looked at traffic patterns again at Yard 46. We even looked at traffic patterns to maybe reverse the flow of traffic at [this] location and every alteration that we were to try --- that we looked at making, we always ended up going back to the original study that was done and original traffic pattern that was completed in 1991.

(Tr. 329.) Off-road and over-the-road trucks are still operating on the same roadways and nothing was apparently done to prohibit trucks from parking where the trucks were parked at the time of the accident, even though those two items were the specific deficiencies set out in the citation as demonstrating that the company had not implemented traffic rules.

The regulation requires that the company have rules, and in this case there is no doubt that the company did have rules. There has been no showing that those rules were in any way deficient.<sup>3</sup> Moreover, there is nothing to indicate that the accident resulted from a failure of the company's rules of the road. The accident occurred because truck drivers got out of their trucks when they should not have, not because there was confusion as to rights-of-way or who had to yield to whom. The signs that were put up to abate the violation did not change Material Service's traffic pattern or rules of the road and would not have prevented the accident.

Accordingly, I conclude that the Secretary has failed to establish that the operator violated section 56.9100(a). Consequently, I will vacate the citation.

#### **Civil Penalty Assessment**

The Secretary has proposed a penalty of \$40,000.00 for the violation of section 56.9100(b). However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With respect to the penalty criteria, the parties have stipulated that Yard 46 worked 50,906 man hours during 1996 and that all Material Service operations worked 798,297 man hours during 1996; that for the two years prior to the violations in this case Material Service had 169 violations for 13 mine facilities, of which 10 were issued to Yard 46; and that the company's ability to remain in business will not be affected by payment of the proposed penalty for all three citations of \$60,050.00. (Jt. Ex. 1.) From this, I find that Yard 46 is a medium size mine and

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<sup>3</sup> The only evidence on this citation presented by the inspector was that he had talked to people during his investigation about road rules. He did not state to whom he had talked, nor did he relate what they said. Since this citation was issued some five months after the accident, at the direction of the inspector's superiors, and over his reservations, which appear to have been well-founded, it is questionable whether the investigation turned up any evidence to support this citation. If it did, the Secretary did not present it.

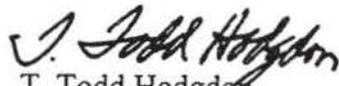
Material Service is a medium size company; that the mine's history of previous violations is average and that the operator's ability to remain in business will not be adversely affected by a penalty in this case.

I have already found that Material Service's negligence in this case was moderate. I further find that the gravity of the violation was extremely serious since a fatality occurred, as well as serious injuries to McPheron. The Secretary has not presented any evidence that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. In fact, based on the available evidence, it appears that Material Service did act in good faith in trying to rapidly abate the violation and I so find.

Taking all of the criteria into consideration, I conclude that a penalty of \$30,000.00 is appropriate in this case.

### **ORDER**

Accordingly, Citation Nos. 4416239 and 4416777 are **VACATED**; Docket No. LAKE 97-22-RM is **DISMISSED**; and Citation No. 4416240 is **AFFIRMED**. Material Service Corporation is **ORDERED TO PAY** to pay a civil penalty of **\$30,000.00** within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

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/fb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-76-M
Petitioner	:	A. C. No. 41-00906-05503 B96
v.	:	
	:	Docket No. CENT 98-166-M
F & E ERECTION COMPANY,	:	A.C. No. 41-00906-05504 B96
DIVISION OF CCC GROUP, INC.,	:	
Respondent	:	Sherwin Plant
	:	
	:	Docket No. CENT 98-113-M
	:	A.C. No. 41-00320-05515 B96
	:	
	:	Bayer Alumina Plant

## DECISION

Appearances: Erica Rinas, Esq., Mary K. Schopmeyer, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Gary Klatt, Assistant Safety Director, CCC Group, Inc., San Antonio, Texas, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petitions seek to impose a total civil penalty of \$825.00 for three alleged significant and substantial (S&S) violations of the mandatory safety standards in 30 C.F.R. Part 56 of the regulations. Also at issue is a 107(a) imminent danger order associated with one of the alleged violative conditions.

These matters were heard on November 17, 1998, in San Antonio, Texas. F & E Erection Company is a division of CCC Group, Inc. (CCC). Gary Klatt, CCC's Assistant Safety Director, appeared on behalf of the respondent corporation. The parties stipulated that CCC's contracting work at the Bayer Alumina Plant located in Port Lavaca, Texas, and the Sherwin Plant located in Corpus Christi, Texas, is subject to the jurisdiction of the Mine Act.

## **I. Findings of Fact and Conclusions**

### **A. Docket No. CENT 98-113-M**

Bauxite is processed into alumina at the Bayer Alumina Mine in Port Lavaca. The alumina process requires the separation and removal of waste materials consisting primarily of mud and clay. The waste material is transported from the processing plant by haulage trucks driven by F&E employees or employees of a subcontractor hired by F&E. The waste material is transported on site and deposited into vast mud lakes that consist of approximately 840 acres. The mud lakes range in depth from 40 to 100 feet. At the edge of the mud lake where waste materials are to be unloaded from the haulage truck bed, a dumping pad is constructed by compacting an area of clay and layers of dry material rising approximately six to eight inches above the level of the mud bank. The waste material is unloaded from the truck on the loading pad where the material is pushed to the rear of the pad and into the mud lake by a bulldozer operator.

On August 19, 1997, Mine Safety and Health Administration (MSHA) Inspector Ralph Rodriguez inspected the Bayer Alumina Mine. Immediately after conducting his opening conference, Rodriguez proceeded to the mud lakes to observe the unloading operation. Rodriguez testified that the unloading pad should be inspected for stability in the morning, and, thereafter, an individual should be assigned as a spotter to direct the dump truck driver to dump his load on a stable portion of the pad, preferably the center of the pad. Rodriguez further testified that the area of compacted material should be delineated with pylons, or other markers, in order to prevent the truck from backing onto an unstable edge, and that each load should be dumped at least one truck length away from the edge of the pad.

At the time of Rodriguez' 9:00 a.m. inspection, nine ten-wheel dump trucks and a dozer were being used at the pad site to dump and deposit the waste material. The haulage dump trucks weigh approximately 20,000 pounds and carry a maximum load of 16,000 to 20,000 pounds. Thus, a loaded vehicle weighs as much as 40,000 pounds. (Tr. 31). At the time of Rodriguez' inspection, eight loads of muddy waste material, totaling approximately 56 cubic yards, had already been dumped on the unloading pad and pushed by the dozer into the mud lake. (Tr. 96-7).

Upon arriving at the dumping site, Rodriguez observed a loaded haulage truck weighing approximately 20 tons begin to lift its bed to dump a load at the "edge" of the pad. However, Rodriguez conceded, absent clear markers identifying the outer perimeters of the pad, it was difficult to determine the edge of the pad because of the residual mud left from the eight previous loads that had been pushed from the pad into the mud lake by the dozer. (Tr. 89). The respondent asserts the stable area of the underlying pad was seen easily by the dozer operator, and that truck drivers could determine the stable pad area by tracks made by the dozer.

As the truck backed onto the pad and its bed began lifting to unload, Rodriguez noted one set of rear dual wheels on the driver's side had sunk approximately ten inches into what he concluded was unstable material. Rodriguez was concerned that the truck could turn over in the mud, thus exposing the driver to serious injury. Consequently, Rodriguez issued Citation No. 4446894 citing an alleged S&S violation of the mandatory safety standard in section 56.93046, 30 C. F. R. § 56.9304(b). Citation No. 4446894 stated:

A 10 wheel end dump truck was observed dumping material on unstable ground at a dump site at the mudd (sic) ponds. The driver side rear dual's sunk app. 10 inches into the **soft material on the dump pad**, creating the danger of a truck turn over to the driver. There is a dozer also working the pad who could be struck by the truck in case of a turn over, the truck bed would be extended. (Gov. Ex. 1) (Emphasis added).

The citation was later modified to reflect that the dozer operator was not exposed to any hazard.

Section 56.9304(b) provides:

Where there is evidence that the ground at a dumping location **may fail to support mobile equipment**, loads shall be dumped a safe distance back from the edge of the unstable area of the bank. (Emphasis added).

Immediately upon observing this condition, Rodriguez requested the driver to stop unloading and to drive forward on the pad. Significantly, when asked if the truck had any difficulty moving forward, in terms of getting stuck, Rodriguez stated, "No. He came right out of there." (Tr. 90-1).

As a threshold matter, the Secretary has not cited the respondent for failing to use markers or a spotter to guide the truck drivers on the dumping pad. Although Rodriguez testified MSHA's policy manual normally requires spotters when there is no truck stop to prevent trucks from going over a high embankment, the evidence does not reflect spotters were required in this instance as the pad was only six inches above the level of the mud lake bank. (See Tr. 82-4). In any event, the Secretary has not charged the respondent with a violation of section 56.9305, 30 C.F.R. § 56.9305, which deals with safety procedures to be followed "if truck spotters are used."

Turning to the operative language of the cited mandatory standard, the issue to be determined is whether the area cited in Citation No. 4446894, upon which the rear wheels of the 40,000 pound truck had sunk ten inches in "soft material on the dump pad," constituted "an area that may fail to support mobile equipment."

The Secretary argues the truck's rear tires were on the unstable outer edge of the pad, or, in the alternative, on an unstable area on the pad that had deteriorated during the course of the dumping operations from the mud that was unloaded and pushed by the dozer. (Tr. 86-8). On the other hand, the respondent asserts the cited area was merely residual mud left by the dozer from previously dumped loads. Consequently, the respondent contends the area cited by Rodriguez was a pad area that continued to provide stability.

In resolving this disputed issue of fact, it is axiomatic that the Secretary has the burden of proving that a violation of a mandatory safety standard has, in fact, occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (*citations omitted*). Since Rodriguez concedes he could not determine the outer perimeter of the dumping pad, the Secretary seeks to establish the instability of the area by relying on circumstantial evidence, *i.e.*, the truck's tires sank 10 inches. However, the circumstantial evidence relied upon by the Secretary, that the 40,000 pound truck sank a grand total of 10 inches, lends greater support to the respondent's assertion that the appropriate inference to be drawn is the subject soft material was mud that had been dumped on the pad, and, that the underlying pad remained stable.

It is unlikely that such a heavy truck would sink only 10 inches if the underlying ground was unstable. It is similarly unlikely that this vehicle would encounter no difficulty in moving forward if the rear wheels were mired in unstable ground. In the final analysis, if the Secretary's version of events is unlikely, it follows that the Secretary has failed to carry her burden of proving the alleged violation occurred. Consequently, Citation No. 4446894 shall be vacated.

B. Docket No. CENT 98-166-M

On October 15, 1997, MSHA Inspector Benny Lara conducted an inspection of the Sherwin Plant in Corpus Christi. Lara observed F&E personnel cutting bolts off of the main structure at the No. 5 digester. The digesters are a series of large circular tanks containing raw materials that are stored during the alumina process. The digesters are supported by surrounding I-beams and angle beams depicted in the illustration in Respondent's Ex. 1. There was an elevated scaffold constructed around the entire inner area of the structure to a height of four feet below the I-beams. (Gov. Ex-6).

During the course of his inspection, Lara, while standing at ground level, observed an F&E employee standing on I-beams, while working on the No. 5 digester structure. Although the employee had wedged his lanyard between I-beams, Lara observed that he was not tied off to a safety line. Consequently, Lara issued Citation No. 7858114 citing an alleged S&S violation of section 56.15005, 30 C.F.R. § 56.15005. This mandatory safety standard, in pertinent part, requires that "safety belts and lines shall be worn when persons work where there is a danger of falling."

Lara also considered this condition to be an imminent danger and immediately ordered the employee to descend from the structure. The citation was abated by installation of a safety cable that was stretched across the I-beams to allow personnel to attach safety belts and lines.

The respondent admits the employee was not tied off to a safety line. However, the respondent, relying on the dimensions of the supporting structure, disputes the imminent danger order issued by Lara, as well as the serious gravity and S&S nature of the violation alleged by the Secretary.

Lara, who had observed the structure from the ground, did not take any measurements of the height or dimensions of the structure. In the absence of measurements by Lara, the respondent's representations concerning the height and dimensions of the I-beams, and the spaces between them must be credited. The respondent states the outer perimeter of the structure's I-beams are approximately 15 feet from the ground, and the I-beams are approximately 16½ inches wide. The respondent also asserts the I-beams are 5½ inches apart. Although Lara could not recall the I-beams being as close as 5½ inches apart, absent evidence to the contrary, I accept the respondent's measurements.

Accepting the respondent's measurements as reflected in Respondent's Ex. 1, the subject employee was exposed to the hazard of standing without being properly tied off on outer perimeter I-beams, including the 5½ inch space between each beam, that were a total of 31 inches in width on the northern perimeter and 38½ inches in width on the western perimeter. (See Ex. R-1).

As noted above, Lara's observation that the employee in question was not properly tied off with a safety belt and line as required by section 56.15005 is undisputed. Having established the fact of the violation, the remaining issues are whether the condition was appropriately designated as S&S and whether the condition constituted an imminent danger.

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

Determining whether a violation is properly characterized as S&S must be based on the particular circumstances of the violation and must be viewed in the context of continued mining operations without the violation having been abated. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogeny & Ohio Coal Company*, 9 FMSHRC 2007 (December 1987); *National Gypsum, supra*, 3 FMSHRC at 327, 329; *Halfway Incorporated*, 4 FMSHRC 8, 12-13 (January 1986).

Applying the *Mathies* criteria, the components in (1), (2) and (4) are clearly present in that the violation (failure to use a safety line) created the hazard of falling 15 feet, and, there is a reasonable likelihood that the consequences of such a fall will result in serious injury. With respect to the third *Mathies* criterion, the Commission has repeatedly stated the Secretary must prove the reasonable likelihood of an injury causing event as a result of the hazard contributed to by the cited violative condition or practice. *Windsor Coal Company*, 19 FMSHRC 1694, 1714-15 (October 1997) (Citations omitted).

Viewed in a light most favorable to the respondent, the subject employee was exposed to the hazard of falling 15 feet to the ground while perched on I-beams that ranged from 31 to 38½ inches in width. While I recognize the respondent's assertion that the employee was not exposed to the outer perimeter when seen by Lara because he was working on angle beams in the center of the structure, continued operation undoubtedly would have exposed the employee to the outer perimeter of the structure at which time momentary carelessness or stumbling could occur. Consequently, it is reasonably likely that the failure to use a safety line during the course of continued operations will result in a fall causing serious injury. Accordingly, the violation was appropriately designated as S&S and the hazard posed by the violation is of serious gravity.

Turning to the issue of imminent danger, section 107(a) of the Mine Act, 30 U.S.C. § 817(a), provides:

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

Section 3(j) of the Act defines an imminent danger as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). This definition is unchanged from that contained in the Coal Mine Health and Safety Act of 1969.

The Fourth Circuit has held that “an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Eastern Associated Coal Corporation v. IBMA*, 491 F.2d 277, 278 (4<sup>th</sup> Cir 1974). This reasoning was also adopted by the Seventh Circuit in *Old Ben Coal Corp. v. IBMA*, 523 F.2d 25, 33 (7<sup>th</sup> Cir. 1975). The Commission applied these holdings in *Rochester & Pittsburgh Coal Company v. Secretary of Labor*, 11 FMSHRC 2159, 2163 (November 1989), where it stated (*quoting Senate Report 187, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (1977)*):

[A]n imminent danger is not to be defined ‘in terms of a percentage of probability that an accident will happen. . . . Instead, the focus is on the potential of the risk to cause serious physical harm at any time.’ The Committee stated its intention to give inspectors ‘the necessary authority for the taking of action to remove miners from risk.’ *Id.* at 2164.

The Commission, in *Rochester & Pittsburgh Coal Company*, recognized that inspectors must be given wide latitude in making on-the-spot determinations of whether an imminent danger exists, noting that:

‘Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners’ lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.’ 11 FMSHRC at 2164, *quoting Old Ben Coal Corp. supra*, 523 F.2d at 31 (7<sup>th</sup> Cir. 1975).

Thus, the controlling question is whether the inspector abused his discretion at the time he determined that an imminent danger existed. *Id.*

In *Utah Power & Light Co.*, 13 FMSHRC 1617 (October 1991), the commission clarified its decision in *Rochester & Pittsburgh*, by stating the imminent danger focus on the potential of a risk to cause harm “at any time” (11 FMSHRC at 2164), was intended to denote a potential to cause harm “at any moment,” that is, “within a short period of time.” 13 FMSHRC at 1622. The Commission did not depart from its previous conclusion that wide discretion must be given to inspectors to issue § 107(a) orders. Thus it stated, in *Utah Power & Light*:

We reaffirm our holding in *Rochester & Pittsburgh* that an inspector must have considerable discretion in determining whether an imminent danger exists. This

is because an inspector must act immediately to eliminate conditions that create an imminent danger. We also reiterate here that the hazardous condition or practice creating an imminent danger need not be restricted to a threat that is in the nature of an emergency, and that section 107(a) withdrawal orders are "not limited to just disastrous type accidents." *Coal Act Legis. Hist.* at 1599. 13 FMSHRC at 1627-1628.

Thus, inspector Lara's imminent danger order is sustainable if he acted reasonably and did not abuse his discretion. Given Lara's alternatives of permitting the employee to remain on the elevated structure without being tied to a safety line, or, ordering his immediate removal, it cannot be said that Lara abused his discretion. In such instances inspectors must be encouraged to err on the side of safety. Accordingly, Imminent Danger Order No. 7858114 shall be affirmed.

Applying the penalty criteria in section 110(i) of the Act, the evidence supports the Secretary's determinations of moderate negligence and serious gravity. The violation was timely abated and it has not been asserted that the \$500.00 civil penalty proposed by the Secretary is disproportionate to the size of the respondent's business, or that payment will effect the respondent's ability to remain in business. Accordingly, the \$500.00 civil penalty initially proposed by the Secretary for Citation/ Imminent Danger Order 7858114 shall be assessed.

Although I have affirmed Citation/ Imminent Danger Order 7858114, I cannot ignore the argument advanced on behalf of the Secretary that Inspector Lara's recollection, as it differs from evidence provided by the respondent, of "fewer beams and more spaces between the beams where the employee could have fallen [and] . . . Inspector Lara's observations and judgment about the immanency of this danger[,] are entitled to deference." *Sec'y's Prop. Findings* at pp.11-12 (emphasis added).

While "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts," S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 49 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978), and deference accorded by the Commission to the Secretary's interpretation of her own regulations is appropriate in certain instances, *See, e.g., Pfizer v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984), the Secretary's claim that she is "entitled" to deference with regard to disputed factual issues is misguided and disturbing. The assertion that deference should be afforded to MSHA's version of disputed events is tantamount to a presumption of guilt. Rather, the burden of proving violative conduct must remain where it belongs - - with the government.

C. Docket No. CENT 98-76-M

Inspector Lara spoke to the subject employee after he descended from the elevated I-beam structure. Based on information provided by the employee, Lara determined the employee had climbed, or pulled himself, through an opening in an angle I-beam from the scaffold located four feet below. The angle I-beam is located in the center of the structure and did not expose the employee to the perimeter I-beams that are 15 feet above ground level. (See Tr. 147; Ex. R-1). Inspector Lara concluded pulling oneself up four feet onto this I-beam from the scaffold was an unsafe means of access. Consequently, Lara issued Citation No. 7858113 citing an alleged violation of the mandatory safety standard in section 56.11001, 30 C.F.R. § 56.11001. (See Gov. Ex. 6). This mandatory standard requires that a "[s]afe means of access shall be provided and maintained to all working places."

As a general proposition, mandatory safety standards cannot contemplate every condition encountered during the mining process. Thus, mandatory safety standards must be broadly adaptable to a myriad of circumstances. *Kerr McGee Corp.*, 3 FMSHRC 2496- 2497 (November 1981). Ordinarily, the Secretary's interpretation of her own regulations should be given deference ... unless it is plainly wrong" so long as it is "logically consistent with the language of the regulation and ... serves a permissible regulatory function." *Buffalo Crushed Stone*, 19 FMSHRC 231, 234 (February 1997) (citations omitted). It follows that the Commission normally should not substitute its own reasonable interpretation of a mandatory standard if the Secretary's interpretation of that standard is also reasonable. *Thunder Basin Coal Company*, 18 FMSHRC 582, 592 (April 1996) (citations omitted).

However, the policy of deferring to the Secretary's reasonable interpretation of a broadly worded mandatory standard is outweighed by the due process requirement that application of the standard must afford an operator adequate notice. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Thus, standards, as applied, cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.*

Thus, while it is difficult to quarrel with the goal of "safe access," the Secretary's application of such a broadly worded mandatory standard cannot be so obscure as to deprive an operator of adequate notice of the condition or practice sought to be prohibited. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). Here, MSHA seeks to broadly apply its safe access standard to a construction site that requires accessing storage tanks by way of scaffolding and I-beams. In determining the propriety of MSHA's application of the "safe access" standard in this case, the test is whether a reasonably prudent person familiar with the task of constructing and maintaining steel tanks and surrounding structure, and the protective purposes of the standard, would have recognized that climbing through steel framework from a scaffold positioned four feet below was prohibited.

The services performed by the respondent are in the nature of demolition or construction work. Such projects do not always lend themselves to conventional means of passage such as stairs, ladders or platforms. I am unconvinced that a person familiar with the contracting industry, as it relates to maintenance and construction of steel tanks and supporting structures, would recognize that entering the center of a steel support structure from a scaffold approximately four feet below, without any danger of falling from the outside perimeter I-beams to the ground, constitutes a violation of the safe access provisions of section 56.11001. Such access would facilitate the transfer of tools and equipment, and may be a preferred method of entry to climbing a ladder, particularly from the ground below.

My conclusion that this method of access, under these circumstances, is not unsafe is entirely consistent with MSHA's abatement action in this case. Significantly, the respondent was not required to provide a different means of access than the one cited to abate Citation No. 7858113. On the contrary, personnel were permitted to continue to access the structure from the scaffold as long as a cable was installed across the I-beams to allow employees to attach a safety belt and line to prevent them from falling once they accessed the structure. This same falling hazard was not a consideration in the process of accessing the structure because the scaffold was located directly below. Accordingly, the Secretary has failed to demonstrate the fact of occurrence of the violation.

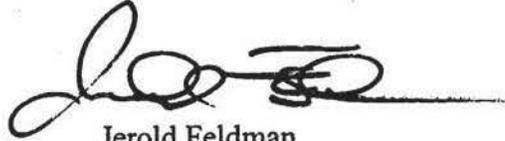
Additionally, even if the Secretary satisfied her burden of proof with respect to the violation, Citation No. 7858113 must be vacated as duplicative. Citations are duplicative if the standards involved do not impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997) citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (August 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). In this case the duty imposed on the respondent in Citation No. 7858113 (installation and use of a safety cable) was identical to the duty imposed in Citation/Imminent Danger Order No. 7858114 affirmed herein. Consequently, the duplicative nature of Citation No. 7858113 is an additional basis for setting it aside.

#### **ORDER**

In view of the above, **IT IS ORDERED** that Citation No. 4446894 **IS VACATED** and Docket No. CENT 98-113-M **IS DISMISSED**.

**IT IS FURTHER ORDERED** that Citation No. 7858113 **IS VACATED** and Docket No. CENT 98-76-M **IS DISMISSED**.

**IT IS FURTHER ORDERED** that the respondent **SHALL PAY**, within 30 days of the date of this decision, a civil penalty of \$500.00 in satisfaction of Citation/Imminent Danger Order No. 7858114. Upon timely receipt of payment, Docket No. CENT 98-166-M **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1999

ROBERT D. ADKINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 98-133-D
	:	MSHA Case No. PIKE CD 98-02
RONNIE LONG TRUCKING,	:	
Respondent	:	Millard Processing
	:	Mine ID 15-17776 HDV

## DECISION

Appearances: James L. Hamilton, Esq., Pikeville, Kentucky, for Complainant;  
Timothy D. Belcher, Esq., Elkhorn City, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Robert D. Adkins against Ronnie Long Trucking, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I find that Ronnie Long Trucking violated section 105(c) when it discharged Mr. Adkins on October 15, 1997.

Adkins filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on October 16, 1997.<sup>1</sup> On February 26, 1998, MSHA informed him that, on the basis of its investigation, it had determined that "a violation of Section 105(c) of the Act has not occurred." Adkins then instituted this proceeding before the Commission on March 11, 1998, under section 105(c)(3), 30 U.S.C. § 815(c)(3).<sup>2</sup>

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<sup>1</sup> Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

<sup>2</sup> Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

## **Background**

Adkins began working for Ronnie Long Trucking as a part-time truck driver in February 1997. His duties included driving to the Ratliff No. 111 mine, owned by Shipyard River Coal Terminal d/b/a Pike County Coal Corporation, getting out of his truck and loading it with coal, using a front-end loader furnished by the mine, driving the load to the Clark Elkhorn Coal Company's Bush Siding or to the Tennessee Construction Company Preparation Plant, dumping the coal, and returning for another load. Sometime after he started, Adkins became a full time employee of the trucking company.

On October 13, 1997, Adkins told Ronnie Long, President of Ronnie Long Trucking, as he was turning his truck in after work, that the front-end loader used on that day to load coal was unsafe because the brakes did not work and the transmission was slipping. On October 14, 1997, Adkins made an anonymous telephone call to the home of MSHA Coal Mine Inspector Thomas M. Charles to complain about the loader. On October 15, 1997, Charles went to the mine site to conduct a health and safety inspection. Adkins met Charles at the mine and identified himself as the person making the complaint. However, because it had been taken out of service, no inspection of the front-end loader was conducted.

October 15, 1997, was Adkins' last day on the job. He contends that at the end of the day Long fired him for complaining about the loader. Long claims that Adkins quit; that he was not fired.

On October 22, 1997, Adkins filed a formal complaint concerning the loader and Charles went out to inspect it. He was told by a mine employee, John Fred Dotson, that the brakes on one wheel of the loader had been "plugged off" a couple of months earlier, rendering the brakes on that wheel inoperative, and that there was a history of transmission problems.<sup>3</sup> Sometime between October 14 and the time of this inspection the loader had been repaired. Nevertheless, based on what he had been told, Charles issued a citation to the mine operator for not correcting safety defects on the loader before it was used.

## **Findings of Fact and Conclusions of Law**

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (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 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on*

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<sup>3</sup> Dotson's normal job was as the outside person for the mine, which included performing maintenance work on the loader. On October 22, he told Charles that he was the acting mine manager.

*behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800.

As discussed below, the evidence demonstrates that Adkins engaged in protected activity in complaining about the safety of the front-end loader on at least four occasions and that he reasonably and in good faith refused operate the loader until it was fixed. The evidence further shows that Ronnie Long was aware of Adkins' complaint, but took no action to allay his worries. Finally, the evidence establishes that Adkins did not quit as contended by the company, but was discharged because of his complaints.

Adkins testified that he told Long on the night of October 13 that he would not operate the end loader in the condition that it was in. He said that Long told him that "he couldn't be there all the time on the job site and that if I didn't want to run the loader he would find someone else to run it and drive the truck and haul the coal." (Tr. 65.) He further related that Long said "that I would just make it rough on him if I said or done anything, you know, about the loader because he would be the one that would have to fix it when it was fixed." (Tr. 90.)

On October 14, Adkins had a 9:00 a.m. doctor's appointment in Prestonsburg. Since this was an hour away from the job site and hauling could not begin until 7:00 a.m., Adkins did not go to work that morning. He did go to work that "evening" and hauled stockpile coal. (Tr. 81.)

Adkins went to work as usual on October 15 and hauled coal all day. He testified that "Ronnie come down and run the loader some that day and that evening. And they told me Charles was there inspecting. Ronnie come and run the end loader. And on the last load he told me that he was replacing me." (Tr. 67-68, *see also* Tr. 102.)

Ronnie Long's version of the events was somewhat different. He testified:

Anyway, he said it's got brake problems. And I said, well, you know, what do you want me to do, like that. Then he said, if that's the only loader you got for me to load with, you may as well find you somebody else is what he said.

Q. And what did you say in response to that?

A. I told him I didn't want him to quit, and he didn't act like he was going to, you know. It was just his usual thing, you know. And he said he had a doctor's appointment, you know, he acknowledged that, you know, and he was supposed to be out the next morning. But he said he was going to come out and haul a few loads. He told me he was going to be off for the doctor's

appointment, but he was supposed to show up for work the next morning.

Q. That was your understanding?

A. Yes.

Q. Now, let's go --- so he didn't show up on --- did you talk to Mr. Adkins on the 14<sup>th</sup>?

A. The 14<sup>th</sup>, yes. I called him because he didn't show up for work. And he said that he didn't --- he wasn't going to run that loader. He said if that's the only loader you've got for me to run, his exact words, you may as well find somebody else to drive the truck. And I said, well, I don't want to, I don't want to us to part like this, you know. I said, you want to haul part time, you know --- I was trying to part on friendly terms, you know. He was mad at me over the loader that I didn't even own or have nothing to do with, you know. And he said, you know, I'm just not going to run that loader . . . .

(Tr. 153-54.)

The Commission has long held that a miner's refusal to perform work is protected activity under the Act if it is based on a reasonable, good faith belief that the work involves a hazard. *Secretary on behalf of Hannah, Payne & Mezo v. Consolidation Coal Co.*, 18 FMSHRC 2085, 2090 (December 1996); *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133-38 (February 1982); *Robinette*, 3 FMSHRC at 807-12; *Pasula*, 2 FMSHRC at 2789-96. See also *Secretary on behalf of Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 321-24 (March 1985), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366-68 (4<sup>th</sup> Cir. 1986); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-30 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11<sup>th</sup> Cir. 1985).

Here, Adkins believed that it was unsafe to operate the front-end loader because it lacked brakes and the transmission slipped. The Respondent presented the testimony of Long and Howard Ramey that in their opinion the loader was safe to operate. In Ramey's opinion, "[i]t didn't have very good brakes, but it had brakes." (Tr. 109.) Long said: "I'm saying that that loader would stop no problem in the place where it was at . . .," that is, on level ground with a rock cliff on one side and a truck on the other. (Tr. 202-03.) These are hardly ringing endorsements. Furthermore, Adkins was not required to prove that a hazard actually existed, only that his belief was in good faith and reasonable. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Robinette*, 3 FMSHRC at 812. In as much as his belief was confirmed by

Inspector Charles' inspection of the loader, there can be little doubt Adkins refusal to operate the loader until it was fixed was a good faith, reasonable position. Consequently, I find that Adkins engaged in protected activity when he refused to operate the loader.

Once a miner has expressed a good faith, reasonable concern about safety, the operator has a duty to address the perceived danger in a manner that should reasonably resolve the miner's fears. *Gilbert*, 866 F.2d at 1441; *Metric Constructors*, 6 FMSHRC at 230; *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983). In this case, Long's response was to tell Adkins not to bother him about the loader and then to terminate him.<sup>4</sup>

Long argues that Adkins was not terminated, but quit. This contention is not supported by the evidence. While it is true that Adkins repeatedly stated his refusal to operate the unsafe loader in terms of quitting, it is clear from the evidence that but for the unsafe loader he would not have been threatening to quit and, in fact, wanted to continue working. Therefore, the testimony of the Respondent's witnesses, Long, Stevens, Easterling and Howard Ramey, that they heard Adkins say that he was going to quit because of the loader, rather than supporting the company's case, corroborates Adkins.

Furthermore, I do not credit Ronnie Long's claim that he believed Adkins was quitting. Based on his manner and demeanor while testifying, inconsistencies in his testimony, the lack of corroboration for the most significant portions of his testimony, his obvious animosity toward Adkins, and his pronounced interest in the outcome of this proceeding, I do not find Ronnie Long's testimony believable.

The main difference between Ronnie Long's testimony and Adkins' testimony is the telephone call Long claims that he made to Adkins on October 14. He claims it was that call that convinced him that Adkins was quitting. This claim strains credulity. In the first place, Long is the only one who mentioned this telephone call, if there was such a call; Adkins was never asked about it on cross-examination.<sup>5</sup> Further, Long purportedly made the call because Adkins had not come to work. Long admitted that he knew Adkins had a doctors appointment, although he was not sure of its time, but claimed that he thought Adkins was coming to "haul a few loads" before the appointment. Adkins denied that he planned to come in before going to the doctor. The time of the appointment and the logistics involved support his version. In the second place, even

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<sup>4</sup> Respondent's argument, in its brief, that since Long did not know that one of the brake lines on the loader had been plugged, he did not have notice of a safety defect on the loader is without merit. He did have notice that the brakes did not work. That was sufficient to put him on notice of Adkins's complaint. The evidence is uncontroverted that Long made no effort either to determine if a problem existed or to attempt to alleviate Adkins' concerns.

<sup>5</sup> At the time Adkins testified, Ronnie Long, and presumably his counsel, were apparently the only ones who had knowledge of this call.

according to Long, the threat to quit was qualified by “if that’s the only loader you’ve got for me to run,” meaning if I have to operate that unsafe loader, I quit. (Tr. 154.)

Throughout his testimony Long made gratuitous remarks concerning Adkins which were apparently intended to discredit Adkins’ character. Some examples of such remarks are: “But it was a normal thing for him to do complaining every day, you know. I mean, it was just a toss-up what the complaint was going to be, you know.” (Tr. 152.) “You know, I just took it to understand that he was going to go back to part time because he’s never been known to stick with any full-time job.” (Tr. 154.) “He smothered to death for a dollar.” (Tr. 157.) “With Mr. Adkins, he always acted like he didn’t need money.” (Tr. 170.) “I wasn’t really worried about the brakes because Robert is a constant complainer, constantly, all the time complaining. I thought that was another one of his complaints.” (Tr. 176-77.) “He’s a good worker for two or three days a week and that’s it.” (Tr. 192.) “I mean, anything that he thought was going to knock him out of a dollar, that’s what he complained about mostly.” (Tr. 203.) “He was finding another excuse not to work.” (Tr. 210.)

Rather than discrediting Adkins, the remarks demonstrate Long's bias against him. Moreover, the statements are contradictory. For instance, throughout the case, the Respondent attempted to imply that the real reason that Adkins was complaining about the loader was that it had a smaller bucket than another loader that was used to load the trucks. As a result, it took longer to load his truck, cutting down on the number of hauls that could be made and, therefore, the amount of money that could be made. Thus, the comments about money. However, it seems peculiar that someone who “smothers for a dollar” would want to work part time or always be finding excuses not to work.

I find that Adkins did not quit, but was fired by Long. The important question for this case, however, is whether he was fired because of his safety complaints about the loader. I find that the only logical conclusion that can be drawn from the evidence is that Adkins was fired as a result of his complaints and refusal to work on the loader.

Adkins engaged in protected activity at least four times in this case: (1) when he told Ronnie Long, on October 13, that he would no longer work if the unsafe loader was not repaired; (2) when he went to the mine and complained about the loader to a representative of the operator on October 14; (3) when he anonymously called Inspector Charles on October 14; and (4) when he identified himself to Charles on October 15, at the mine, and reiterated his complaint. Ronnie Long admitted that Adkins complained to him on October 13. While he was never asked whether he was aware of Inspector Charles’ visit on October 15, it can be inferred from the evidence that he was since he came out to the mine to run the loader, either during or shortly after Charles’ visit.

At the end of the day on October 15, Long told Adkins he was letting him go, and already had a replacement. Even if Long’s version of the events is believed, Adkins only quit because Long did nothing to address his complaints about the unsafe loader. This would be a

constructive discharge and still subject the Respondent to liability. *Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (November 1994). Furthermore, because of the closeness in time between the inspection and the termination, the evidence strongly suggests that Long replaced Adkins because he kept complaining about the loader and went so far as to bring MSHA into the situation.

As the Commission has noted, “[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect.” *Chacon*, 3 FMSHRC at 2510. In the same case, the Commission held that coincidence in time between the protected activity and the adverse action was one element of circumstantial evidence to be considered in determining whether adverse action was motivated by protected activity. *Id.* In this case, the circumstantial evidence only supports one inference, that Long fired Adkins because of his protected activity. Accordingly, I so conclude.

Robert Adkins has demonstrated that he made safety complaints about the front-end loader used to load coal into his haul truck and that these complaints, along with his refusal to work until the loader was repaired, were communicated to his employer, Ronnie Long Trucking. He has further shown that the Respondent did nothing to abate his concerns or to repair the loader, but instead fired him. Finally, the evidence supports his contention that he was fired as a result of these complaints. Therefore, I conclude that he has made out a *prima facie* case of discrimination.

The Respondent has attempted to rebut this case by claiming that it did not have knowledge of the specific defect on the loader and that Adkins was not fired, but quit. While Ronnie Long probably did not know that one of brakes on the loader had been “plugged off” at the time of Adkins’ complaints, he did know that the brakes were not working, which is all that is required. Further, his claim that Adkins quit is not credible, but rather a pretext for firing Adkins. Consequently, I conclude that the Respondent has failed to rebut the Complainant’s case.

In conclusion, I determine that Adkins was discharged on October 15, 1997, in violation of section 105(c) of the Act and is, therefore, entitled to the remedies prescribed by that section.

### **Order**

Accordingly, it is **ORDERED** that:

1. The Respondent **REINSTATE** Mr. Adkins to his former position with full pay and benefits;
2. The Respondent **PAY** Mr. Adkins full back pay, with interest, and benefits for the period from October 16, 1997, until the date of his reinstatement;

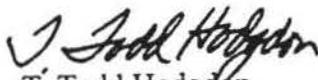
3. The Respondent **REIMBURSE** Mr. Adkins for any other reasonable and related economic losses or litigation expenses, including reasonable attorney's fees, incurred as a result of his discharge;
4. The Respondent **EXPUNGE** from Mr. Adkins' personnel file and from company records the discharge and all references to the circumstances involved in it.

The parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. This may include a lump sum payment as economic reinstatement instead of actual reinstatement. If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief.<sup>6</sup> If a further hearing is required on the remedial aspects of this case, the parties should so state.

In accordance with Commission Rule 44(b), 29 C.F.R. § 2700.44(b), I am directing that a copy of this decision be sent to the Regional Solicitor having responsibility for the Commonwealth of Kentucky so that the Secretary may take the actions required by that rule.

The judge retains jurisdiction in this matter until the specific remedies Mr. Adkins is entitled to are resolved and finalized. Accordingly, **this decision will not become final** until an order granting specific relief and awarding monetary damages has been entered.

  
T. Todd Hodgdon  
Administrative Law Judge

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<sup>6</sup> The proper method of calculating interest on back pay is: *Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term federal underpayment rate. Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2052 (December 1983), as modified by Clinchfield Coal Co., 10 FMSHRC 1493, 1505-06 (November 1988).* The applicable interest rates and daily interest factors may be obtained from the Commission's Executive Director, 1730 K St., N.W., Washington, D.C. 20006.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-78
Petitioner	:	A. C. No. 46-01433-04254
v.	:	
	:	Loveridge No. 22
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner;  
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging three violations of mandatory standards and seeking a civil penalty of \$1,800.00 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. At hearing the Secretary vacated Citation No. 4180924 and proposed, in settlement of Citation No. 4703148, a reduction in penalty to \$900.00. The proposed settlement was accepted at hearing and an order imposing the proposed penalty will be incorporated herein.

The remaining citation, No. 4882584, alleges a violation of the standard at 30 C.F.R. § 75.380(f)(3)(iii)(B) and charges as follows:

The 4 left (O62) long wall section primary escapeway is not properly maintained free of electrical equipment. The entrance from the section into the escapeway is thru a cross cut at #49 Block. An energized set of battery chargers are located in the escapeway at cross cut #41. A distance of 800 ft. outby the current entrance to the escapeway. This distance exceeds any reasonable

definition of on or near the working section.

The cited standard, 30 C.F.R. § 75.380(f)(3)(iii)(B), provides as follows:

The following equipment is not permitted in the primary escapeway:  
... (iii) underground transformer stations, battery charging stations, substations,  
and rectifiers except —

(B) battery charging stations and rectifiers and power centers with transformers that are either dry-type or contain nonflammable liquid, provided they are located on or near a working section or moved as the section advances or retreats.

The material facts in this case are largely undisputed. On February 9, 1998, Inspector Kenneth Tenney of the Department of Labor's Mine Safety and Health Administration (MSHA), visited the Loveridge No. 22 Mine on a routine inspection. Inspector Tenney has twenty-two years experience in the coal mining industry. During the instant inspection, Tenney visited the 4 Left longwall section where he found a battery charging station in the entry used as the primary escapeway located approximately 800 feet outby the entrance to the escapeway. Tenney noted that the entrance to the primary escapeway is essentially parallel to the section loading point which is located in the belt entry. Because the charging station was some 800 feet outby the section loading point, Tenney determined that the charging station was not on or near the working section within the meaning of the cited standard and accordingly issued the subject citation.

During a previous inspection Tenney had observed a battery charging station 1,200 feet outby the entrance to the escapeway. Tenney had then informed mine officials that this location was not consistent with the requirements of the cited standard, i.e., that charging stations located in primary escapeways be kept on or near the section. Tenney explained that the intent of the regulation was to keep the charging station as near as possible to the working section. Tenney nevertheless sought confirmation from his supervisor regarding the acceptable location for charging stations given the conditions and practices at the Loveridge No. 22 Mine. Inspector Tenney and his supervisor, James Satterfield, then met with Mine Foreman Kurt Helms and Safety Supervisor Richard Marlowe. Tenney and Satterfield explained to mine officials that they believed that the second open crosscut outby the crosscut used as an entrance to the escapeway would be an acceptable location for the charging station and that they would confirm this with upper MSHA management within a few days. On January 28, 1998, Tenney and Satterfield confirmed that, given the mining methods being used at the mine and the absence of any unusual circumstances such as adverse roof conditions in the second open crosscut, MSHA's position was that the charging station must be maintained within two crosscuts outby the entrance to the escapeway. Tenney further informed Consol officials that in the event circumstances prevented the installation of the charging station at the second open crosscut, the charging station should be located at the next available crosscut. In this case it is not alleged that there were any conditions that prevented the battery charging station from being located in the second open crosscut.

On February 9, 1998, there were two battery chargers on the 4 left longwall section which were being used to charge scoop batteries. These chargers obtained power from the section power train located in the track entry which was connected to the battery chargers by cable. On February 9, 1998, the primary escapeway in which the battery charger was located was the Number 3 entry. The conveyor belt was in the Number 1 entry and the secondary escapeway was the track or Number 2 entry.

The battery chargers are usually placed in a crosscut so that they do not obstruct the width of the entry. The battery charging station generally includes the area from the edge of the crosscut back to the stopping that separates the entries. This could be 16 feet wide (the width of the crosscut) by as little as 15 to 20 feet (if the chargers are close to the edge of the crosscut) or as much as 75 by 80 feet (if the chargers are deep within the crosscut up against the stopping). Even though the battery chargers on the 4 Left section were located in a crosscut, they were considered to be in the Number 3 entry or the primary escapeway because the ventilating air was part of the air current of the Number 3 entry.

The Secretary is primarily concerned (with chargers located in the primary escapeway) about fire and the resulting contamination of the primary escapeway from smoke and other toxic chemicals. The primary escapeway is an entry that is ventilated with fresh air and designed to provide a fresh air escapeway to the surface in the event of an emergency. In order to minimize the likelihood of smoke and fire contaminating its fresh air it is generally free of electrical equipment. It is also separated from the other entries on the section by a line of permanent stoppings to prevent the air in the primary escapeway from being commingled with the air in the other entries on the section, where most of the mine fires occur. Inspector Tenney testified that it is not uncommon for rectifiers to cause mine fires and that the charging of batteries has been known to cause mine fires. Tenney further testified that the charging of batteries is also inherently dangerous from the threat of an explosion since hydrogen is emitted when batteries are being charged. Tenney noted that a fire could develop in the entry before the fire suppression system and carbon monoxide sensors in the primary escapeway were activated. The carbon monoxide monitoring system located in the primary escapeway sounds an alarm in the dispatchers' office on the surface. Tenney also noted that the carbon monoxide sensor is not hydrogen sensitive and may not be located directly above the charging station. Thus, a fire would have to become large enough to activate the alarm system. Moreover, once the alarm is activated, the section is not immediately evacuated but rather the cause of the alarm is first investigated.

Inspector Tenney testified that a small amount of smoke can obstruct a miner's vision and cause the miner to trip over small rocks or other simple obstructions that he or she would otherwise step over. Moreover, if the smoke is thick, miners will be completely blinded and will have to feel their way out of the mine. Tenney testified that there is also a danger of smoke inhalation and fatalities associated with smoke filled entries.

Tenney noted that locating battery charging stations in the primary escapeway more than two crosscuts out by the loading point extends the distance persons trying to escape would have

to travel in smoke in the event of a fire at the charging station. Thus, the further outby the section that the charger is located in the primary escapeway, the further miners would need to travel in smoke in that entry. In addition, it would be more likely that smoke from a fire in the number three entry would penetrate the air current in the secondary escapeway through leaks in the stoppings. As a result of such leakage, the miners on the section could be left with no fresh air escapeway. Inspector Tenney noted two accidents at two mines in which fire polluted the escapeways and observed that the maintenance of separate escapeways would have prevented injuries to miners.

In this case it is undisputed that the cited battery chargers were of the type described in 30 C.F.R. § 75.380(f)(3)(iii)(B), were located in the primary escapeway and were, therefore, required to be maintained on or near a working section and to be moved as the section advanced or retreated. It is further undisputed that the cited battery chargers were moved as the section retreated and that the 4 left battery charging station was located 800 feet outby the section loading point when the subject citation was issued. The specific issue to be decided in this case is whether the chargers located 800 feet outby the section loading point were too far away to be considered "near" the section within the meaning of 30 C.F.R. § 75.380(f)(3)(iii)(B).

The Secretary maintains that the term "near" must be interpreted to require that the battery charging station be located as close to the working section as practicable. In determining what is as close as practicable, the Secretary does not apply a rigid standard but appropriately considers the size of the blocks or crosscuts on the section, the roof conditions of the entry, whether the charger is permissible and other mining practices such as the maintenance of cribs in the primary escapeway outby the working face.

While recognizing that the use of the term "near" in the cited standard creates an ambiguity Consol argues that the Secretary's proffered interpretation should not be given deference because it is not reasonable citing *Morton International, Inc.*, 18 FMSHRC 533, 539 (April 1996). While I agree that this Commission is not necessarily required to give deference to the Secretary's interpretations, see *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), in this case I agree with the Secretary that her interpretation is reasonable, logically consistent with the language of the regulation and serves a permissible regulatory function. *General Electric Co. v. E.P.A.*, 53 F.3d 1324, 1327 (D.C. Cir. 1995).

As noted, the Secretary interprets "near" to mean as close as practicable and normally to be within two crosscuts. The primary escapeway is designed to provide a fresh air passage to the surface of the mine in the event of an emergency. It is therefore necessary for the primary escapeway to be as free of fire and smoke sources as possible. Because some electrical equipment must be allowed in the primary escapeways, mechanisms have been established so that any fire or smoke in the escapeway may be detected, addressed and extinguished as soon as possible. Thus, battery charging stations of the requisite type are permitted in the primary escapeway under the cited standard but only if they are located "on or near the working section and are moved as the section advances or retreats."

Inspector Tenney credibly testified about the dangers associated with locating the battery

charging stations too far outby the working section. Specifically, Tenney noted that there may be fatalities associated with smoke inhalation when there is no escapeway with fresh air through which miners may leave the mine. Tenney also noted that charging batteries creates a risk of fire and that the closer the battery charging station there is a greater the chance is that the miners working on the section can get outby a fire and its smoke more quickly and a lesser chance that the smoke being generated by the fire would penetrate the other entries on the section. Within this framework of credible evidence I indeed conclude that the Secretary's interpretation herein is reasonable, logically consistent with the regulation and serves a permissible regulatory function.

Consol also argues that it did not receive fair notice of the Secretary's interpretation of the standard as applied herein. In the absence of actual or specific notice to an operator, in order to determine whether such regulations and the Secretary's interpretations of them afford adequate notice, the Commission and the courts look at whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982); *BHP Minerals International*, 18 FMSHRC 1342, 1345 (1996). The factors that bear upon what a reasonably prudent person would do include accepted industrial safety precautions, considerations unique to the mining industry, and the facts and circumstances surrounding the operator's mine. *BHP Minerals* at 1345.

Aside from the fact that Consol was give prior specific notice of the Secretary's interpretation before the citation herein was issued, the cited regulation gives sufficient notice to the reasonably prudent mine operator that it is required to maintain battery charging stations and other similar electrical equipment as close to the working section as is practicable. As applied herein the Secretary's interpretation is supported by the credible testimony of Inspector Tenney, who, it may be inferred, is a reasonably prudent person familiar with the mining industry and the facts herein.

Consol's failure to maintain the battery charging station on the 4 Left longwall section within two crosscuts of the section loading point was clearly the result of its significant negligence. Mine Foreman Kurt Helms was told of MSHA's interpretation regarding the proper location of the chargers on January 28, 1998, more than a week before the subject citation was issued. Loveridge Safety Supervisor Richard Marlowe also acknowledged that he understood MSHA's prior interpretation of the regulation that the battery charging station must be located no more than two crosscuts outby the entry to the escapeway. Consol has offered no mitigating evidence, such as evidence of an intent solely to litigate a disagreement with the Secretary's interpretation of the cited standard or a communications breakdown between management and section personnel who would implement the regulatory requirements. Moreover, as the Secretary correctly observes, mine operators are not free to take the law into their own hands by deciding for themselves what the law means and how it can best be applied. *See Consolidation Coal Co.*, 14 FMSHRC 956 (June 1992).

While the Secretary has noted in her pleadings in this case that an injury or illness was "unlikely" as a result of the instant violation and that the violation was not "significant and substantial" she nevertheless, maintains in her post-hearing brief that the violation was "serious."

Based on Inspector Tenney's credible testimony I find that the violation was of moderate gravity.

It has been stipulated that Consol is a large operator, that Consol demonstrated good faith in abating the violation, and that the maximum permissible penalty that could be assessed would not affect its ability to remain in business. The Secretary maintains that Consol had a moderate history of violations for the two year period preceding February 9, 1998, and this is not challenged.

**ORDER**

Citation No. 4180924 is vacated and Citation Nos. 4882584 and 4703148 are affirmed. Consolidation Coal Company is directed to pay civil penalties of \$1,400.00, for the affirmed violations within 40 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Gary Melick", written in a cursive style.

Gary Melick  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 11, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-128-M
Petitioner	:	A. C. No. 13-02166-05504
v.	:	
	:	
ANDERSON SAND & GRAVEL	:	
Respondent	:	Anderson Sand & Gravel Mine

**DECISION**

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;  
B. Douglas Stephens, Esq., Wessels, Stojan and Stephens, P.C., Rock Island, Illinois, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against the Anderson Sand & Gravel Company (Anderson), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging five violations of mandatory standards and seeking civil penalties of \$14,100.00 for those violations. The general issue before me is whether Anderson committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7812338 alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 56.14130(g) and charges as follows:

On 12-15-97, while conducting load and carry operations with a Case 821 front end loader, the operator was thrown or jumped from the cab, when the engine died while backing down from the crusher feed surge pile. The loader continued down to the pit floor where it rolled over, resulting in extensive damage to the loader. The loader operator landed in a snow drift adjacent to the pit roadway. The operator received 3 broken ribs, a punctured lung, and several head wounds requiring stitches. The seatbelt provided was not being worn by the operator.

The cited standard, 30 C.F.R. Section 56.14130(g), provides as relevant hereto that: "[s]eat belts shall be worn by the equipment operator."

The evidence supporting this violation is undisputed. Anderson employee Alan Kent admitted that he was operating the subject Case 821 front end loader on December 15, 1997, without wearing a seat belt. Kent testified that he did not feel like wearing the belt because of the discomfort with his heavy winter clothes. Kent also acknowledged that on prior occasions when he was wearing heavy winter clothes he would not wear a seat belt. He nevertheless was aware that he was supposed to wear a seat belt and had been told by his supervisor, Bruce Anderson, more than once to wear it. He did not believe that on this occasion Anderson was aware that he was not wearing his seat belt. It is undisputed in this case that Kent was thrown, or jumped, from the cab of the loader when he lost control. He had been backing-up on a steep grade from the crusher feed surge pile. He suffered three broken ribs, a punctured lung and several head wounds requiring sutures. Kent was also rendered unconscious due to his head injuries. The violation has clearly been proven as charged.

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

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

*See also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving the Mathies criteria).

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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (June 1991). On the facts of this case the violation was clearly "significant and substantial."

I also find that the violation was the result of operator negligence. It may reasonably be inferred from Kent's testimony that he had previously and repeatedly failed to use a seat belt. His supervisor had, on several prior occasions, also told him to wear his seat belt but he continued to disobey these instructions. It may be inferred from this evidence that there was insufficient training and discipline of employees for failure to comply with the requirement for wearing seat belts.

Citation No. 7812339 alleges a violation of the standard at 30 C.F.R. Section 50.12, and Section 103(j) of the Act and charges as follows:

On 12-15-97 at approximately 11:30 A.M. an accident occurred in which the loader operator received serious injuries. While conducting load and carry operations with a Case 821 front end loader, the operator was thrown or jumped from the cab, when the engine died while backing down from the crusher feed surge pile. The loader continued down to the pit floor where it rolled over, resulting in extensive damage to the loader. The loader operator landed in a snow drift adjacent to the pit roadway. The operator received 3 broken ribs, a punctured lung and several head wounds requiring stitches. The company failed to preserve the accident site, and the loader involved was removed from mine property, and sent to the equipment dealer for repair prior to the arrival of M.S.H.A. personnel.

Section 103(j) of the Act provides as follows:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

The standard at 30 C.F.R. Section 50.12 provides that "unless granted permission by a MSHA district manager or subdistrict manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment."

It is undisputed that the accident at issue occurred on December 15, 1997. According to Inspector William Owens of the Department of Labor's Mine Safety and Health Administration (MSHA), MSHA learned of the accident only through an anonymous telephone call on December 19, 1997, apparently from a business competitor. Owens confirmed with Bruce Anderson that the accident had in fact occurred. Owens was then informed that the subject front

end loader, which had gone out of control and rolled over, had been removed for repairs. Owens thereafter inspected the damaged loader at a repair shop. During the course of his investigation at the mine site on December 22, Owen also observed, and was told by Bruce Anderson, that one of the berms along the roadway, through which the front end loader had passed, had been rebuilt. I agree with the Secretary's determination that the violation was of low gravity.

In her post hearing brief the Secretary argues that Respondent was highly negligent because it had been in business since 1989 and, implicitly, should therefore have known of its obligations to timely report accidents and preserve accident scenes. The Secretary also claims that Respondent had received the MSHA manual explaining the operator's obligations in this regard but offered no proof of this. In any event I agree that it may reasonably be inferred that Respondent should have known of its obligations in this regard and that it was therefore negligent. Respondent argues only that it was not motivated by an intent to conceal the accident or alter evidence.

Citation No. 7812340 alleges a violation of Section 103(j) of the Act and the regulatory standard at 30 C.F.R. Section 50.10 and charges as follows:

On 12-15-97 at approximately 11:30 A.M. an accident occurred in which the loader operator received serious injuries. While conducting load and carry operations with a Case 821 front end loader, the operator was thrown or jumped from the cab, when the engine died while backing down from the crusher feed surge pile. The loader continued down to the pit floor where it rolled over, resulting in extensive damage to the loader. The loader operator landed in a snow drift adjacent to the pit roadway. The operator received 3 broken ribs, a punctured lung, and several head wounds requiring stitches. The company failed to immediately report to M.S.H.A. the occurrence of this accident. M.S.H.A. became aware of this accident 12-19-97 at approximately 03:30 P.M. by an anonymous phone call to the Fort Dodge Field Office. A phone call to the mine operator confirmed the occurrence and an investigation was initiated at that time.

The standard at 30 C.F.R. Section 50.10, provides as follows:

If an accident occurs, an operator shall immediately contact the MSHA district or subdistrict office having jurisdiction over its mine. If an operator can not contact the appropriate MSHA district or subdistrict office, it shall immediately contact the MSHA headquarters office in Arlington, Virginia, by telephone, at (800) 746-1553.

This violation is unchallenged. As previously noted, MSHA did not learn of the accident on December 15, 1997, until it received an anonymous phone call, apparently from one of Anderson's competitors, on December 19, 1997. For the reasons set forth regarding the previous violation I also find that the operator was negligent. The violation was not "significant and substantial" and was of low gravity.

Citation No. 7812341, alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 56.14100(a), and charges as follows:

On 12-15-97 the operator of the Case 821 front end loader failed to conduct a proper pre-operational inspection of this loader. While conducting load and carry operations with this loader the engine died, while the machine was backing down the crusher feed surge pile. The loader operator was thrown or jumped from the cab at the top of the pit ramp. The loader continued down this ramp to the bottom where the loader came to rest on its side. Inspection of this loader indicates this machine rolled end over end and sideways before coming to rest. Inspection of the service brakes found them operational. Inspection of the emergency/parking brake found it not operational. The actuator cable was broken at the cab lever. Dirt in the cable track indicated this was not a new break. The operator stated he had not checked this brake prior to operating this day.

The cited standard 30 C.F.R. Section 56.14100(a), provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

The evidence supporting this violation is unchallenged. Loader operator Alan Kent admitted that he had not checked the condition of the parking brake on the subject Case 821 loader before operating it on December 15, 1997. In addition, Inspector Owens concluded, based upon the amount of dirt and rust in the cable track for the broken cable on the emergency parking brake, that the cable had been broken for a period in excess of one month.

Based on the accident that actually occurred and the serious injuries suffered by loader operator Kent, it is clear that the violation was also "significant and substantial" and of high gravity. The violation was clearly also the result of high operator negligence based on the unchallenged evidence that the cable to the emergency parking brake had been broken for a month. It may reasonably be inferred from this evidence that the operator had failed to perform inspections required by the cited standard for that period of time.

Citation No. 7812342, alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 56.14101(a)(2) and charges as follows:

The emergency/parking brake on the Case 821 front end loader was not maintained in functional condition. On 12-15-97 at approximately 11:30 A.M. this loader was involved in an accident. While conducting load and carry operations with this loader the engine died, while the machine was backing down the crusher feed surge pile. The loader operator was thrown or jumped from the cab at the top of the pit ramp. The loader continued down this ramp to the bottom where the loader came to rest on its side. Inspection of this loader indicated this machine rolled end over end and sideways before coming to rest. Inspection of the service brakes found them operational. Inspection of the emergency/parking

brake found it not operational. The actuator cable was broken at the cab lever. Dirt in the cable track indicated this was not a new break. The operator stated he had not checked this brake prior to operating this day.

The cited standard provides that "if equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

It is undisputed that with the emergency parking brake cable broken the parking brake was indeed inoperable and accordingly could not have been capable of holding the cited front end loader with its typical load on the maximum grade it traveled. The violation is accordingly proven as charged. Indeed, the undisputed evidence is that even with the parking brake cable intact, the subject brake was incapable of meeting the requirements of the cited standard. It is the operator's duty to determine the capabilities of the braking systems of equipment it intends to use at its mine and its failure to do so in this case constitutes significant negligence. More significantly, however, the evidence is undisputed that the parking brake cable had been broken for a month prior to the accident in this case and that the loader had been used in that condition. This evidence clearly supports a finding of high operator negligence.

The violation was also "significant and substantial" and of high gravity. There is no dispute that operating the subject loader on the steep grades prevalent at the subject mine, including grades of 19.3 degrees and 22 degrees, the parking brake would be unable to hold the loader sufficient to enable the operator to safely escape in an emergency. Thus, even assuming that the service brakes were operational, should an emergency arise, the operator would have been unable to hold and secure the loader at such steep grades, thereby enabling him to escape. Accordingly, the violation herein was without a doubt "significant and substantial" and of high gravity.

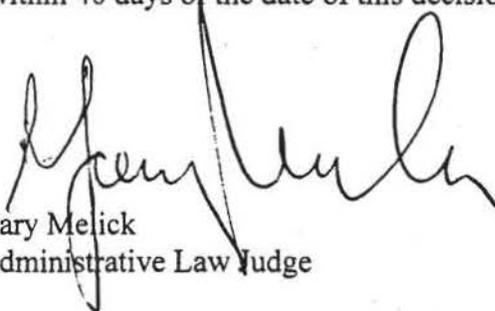
#### Civil Penalty Assessments

In assessing a Civil Penalty under Section 110(i) of the Act, consideration is to be given to the operator's history of previous violations, the appropriateness of the penalty to the size of its business, the effect on the operator's ability to continue in business, good faith abatement, negligence and gravity. Anderson is a small operator. There is no evidence that Anderson's ability to continue in business would be affected by penalties as high as those proposed by the Secretary and there is no evidence that the citations were not satisfactorily abated. The gravity and negligence relating to these violations have previously been discussed. In regard to the operator's history, the Secretary has submitted a printout indicating that Anderson had no violations in the two years preceding December 22, 1997. The printout indicates that Anderson had seven violations for the period preceding December 23, 1995, but, with the exception of one violation, the dates are unknown (See Gov. Exh. No. 11). The Secretary has also presented a copy of Citation No. 4104178, dated August 19, 1993, indicating a prior violation of the standard at 30 C.F.R. Section 56.14101(a). Because that violation was over four years old and because of the unestablished age of the other prior violations I give this history but little weight.

Consideration is particularly given in this case to the small size of this operator and to the absence of any violations in the two-year period preceding the instant violations. Under all the circumstances, the penalties set forth in the order below are deemed appropriate.

**ORDER**

Citations No. 7812339 and 7812340, are affirmed and the Anderson Sand & Gravel Company is directed to pay the civil penalties of \$50.00, proposed by the Secretary, for each of the violations charged therein within 40 days of the date of the decision. Citations No. 7812338, 7812341 and 7812342, are affirmed as "significant and substantial" citations and Anderson Sand & Gravel Company is directed to pay civil penalties of \$2,000.00, \$3,000.00 and \$3,000.00, respectively for the violations charged therein within 40 days of the date of this decision



Gary Melick  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-167
Petitioner	:	A. C. No. 34-01062-03509
v.	:	
	:	Joshua Strip
JOSHUA COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Ned Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for the Petitioner;  
Alan Churchill, Proprietor, d/b/a Joshua Coal Company, Henryetta, Oklahoma, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of \$200.00 for four alleged non-significant and substantial (non-S&S) violations of the mandatory safety standards in 30 C.F.R. Parts 48 and 77 of the regulations.<sup>1</sup> These matters were heard on January 5, 1999, in Tulsa, Oklahoma. The Respondent, Joshua Coal Company, is a sole proprietorship operated by Alan Churchill. Alan Churchill represented himself in this matter.

The parties stipulated that Churchill is a small mine operator who is subject to the jurisdiction of the Mine Act. The evidence further reflects that Churchill has no history of prior violations during the two years preceding the issuance of the citations in issue, that Churchill abated the cited conditions in a timely manner, and, that the \$200.00 civil penalties proposed by the Secretary will not effect Churchill's ability to continue his business.

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<sup>1</sup> A violation of a mandatory safety standard is properly characterized as non-S&S if it is not reasonably likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

At the hearing, the parties were advised that I would defer my ruling on the four citations pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 85-6). Accordingly, this written decision formalizes the bench decision issued with respect to each of the contested citations. The bench decision vacated two citations and affirmed the remaining two citations. A total civil penalty of \$50.00 was imposed for the two affirmed citations. The bench decisions herein are edited versions of the bench decisions issued at trial with added references to pertinent case law.

### **I. Findings and Conclusions**

Churchill operates two surface coal mines located in Okmulgee County, Oklahoma. The Joshua Strip, the subject of this proceeding, is located near Coleton, Oklahoma. The other, newer mine is located near Morris, Oklahoma. Although Churchill has employed as many as three individuals in the past, the only individuals currently working at these mines are Alan Churchill and his son Craig Churchill.

The coal seams at Churchill's mines are approximately 15 to 50 feet under the surface. Coal is extracted by using dozers, scrapers and front-end loaders to uncover and remove the coal. The coal is then taken to the crusher by pit trucks where it is processed and loaded into haulage trucks.

#### **A. Citation No. 4366187**

Mine Safety and Health Administration (MSHA) Inspector Lester Coleman conducted a regular Triple-A inspection of the Joshua Mine, I.D. No. 3401062, in February and March of 1998. A Triple-A inspection is a regular bi-annual inspection of a surface coal mine that is mandated by section 103(a) of the Mine Act, 30 U.S.C. § 813(a). Coleman was accompanied by Alan and/or Craig Churchill during most of his inspection.

During the course of his inspection, Coleman observed the drive belt and pulleys on a ten inch Gorman Rump pump driven by a 471 Detroit diesel engine that was located in the 001-0 pit. The pump had a radiator fan driven by one or more belts and pulleys. At the hearing Coleman recalled seeing an eight inch opening located on the left side, when looking from the rear of the engine, where a person could catch a finger, a shirt sleeve or a glove between the belt and the pulley. The operating controls were on the right side of the pump. Coleman concluded the drive belt and pulley "was not guarded to prevent a person from contacting the exposed moving parts" and issued Citation No. 4366187 citing an alleged violation of the mandatory safety standard in section 77.400(a), 30 C.F.R. § 77.400(a), pertaining to guarding of mechanical equipment. (Gov. Ex. 1).

At the hearing Churchill presented a video of the subject pump.<sup>2</sup> The video revealed the cited “unguarded” pinch point area was 13 inches from the outer perimeter end of the fan shroud and 16 inches from the top of the pump. There was no exposure from the top because there are two bars that run along the top of the pump. The width of the alleged unguarded opening was demonstrated on the video to be approximately the width of a hand and wrist (approximately 4 to 5 inches).

After viewing the video, Coleman conceded there was, at most, a remote likelihood that someone could inadvertently stumble and come into contact with the belt pulley given the location of the belt, the narrow width of the opening, and the fact there were two bars on top of the pump. (Tr. 78-9). In fact the video evidence demonstrated that, short of intentionally placing one’s hand through this narrow opening, 13 inches into the inner workings of the pump, there was no means of inadvertent contact.

In view of the evidence presented, I issued the following bench decision with respect to Citation No. 4366187:

While the Secretary is normally entitled to deference when interpreting her own mandatory safety standards, deference cannot be accorded to the Secretary’s interpretation if it is plainly wrong and inconsistent with the purpose of the cited regulation. *Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10<sup>th</sup> Cir. 1984).

Turning to the purpose of the regulation, the Commission addressed the purpose of the mandatory standard in section 77.400(a) in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984). The Commission stated:

We find the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires taking into consideration all relevant exposure and injury variables. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. 6 FMSHRC at 2097.

---

<sup>2</sup> Churchill presented a multi-volume video of the alleged violative conditions at the hearing. At the trial, the record was left open, and leave was granted, for Churchill to edit the video for the purpose of deleting the video references to citations that were not in issue in this proceeding. (Tr. 183). The edited video was filed on January 12, 1999, and has been admitted as Resp. Ex. 4.

Thus, stumbling and inadvertent contact is the concern the standard addresses. The standard is not intended to require moving parts to be guarded in order to prevent intentional contact. The Secretary has the burden of proving the occurrence of a violation. Although I am sensitive to inspector Coleman's concerns about inadvertent stumbling or other inadvertent contact, the video evidence fails to demonstrate a reasonable possibility of such unintentional contact. Accordingly, Citation No. 4366187 **SHALL BE VACATED**. (Tr. 87-91).

B. Citation No. 4367403

Coleman observed a tan mechanic's truck in the 001 pit that was not equipped with an audible back-up alarm when the truck was put in reverse. Consequently, Coleman issued Citation No. 4367403 alleging a violation of section 77.410(a)(1), 30 C.F.R. § 77.410(a)(1) that requires, in pertinent part, that trucks, except pick-up trucks with an unobstructed rear view, shall be equipped with an audible warning back-up device.

Churchill admits the cited truck did not have a back-up alarm. However, he maintains the driver's rear view was not obstructed. Churchill presented a video of the subject vehicle that demonstrated that, although there was a clear line of vision out the rear window through the center of the truck bed, the driver's view was obstructed by equipment located on the truck bed directly behind the driver and directly behind the front passenger. Although the rear view was partially rather than totally obstructed, common sense dictates that the cited mandatory standard is triggered if there is any obstructed view. For it is little comfort to a victim struck by a vehicle in reverse that he would not have been struck if he had been standing or kneeling in an area that was not obstructed from view.

Accordingly, at trial, I issued the following bench decision concerning on Citation No. 4367403:

The mandatory standard in section 77.410(1)(a) is clear. It requires an audible back-up alarm with the exception of a pick-up truck with an unobstructed rear view. The rear view does not have to be totally obstructed, as the respondent suggests, for a violation to occur. A rear view is either unobstructed or obstructed. A partially obstructed view constitutes an obstructed view under section 77.410(1)(a).

Although I have no doubt that the rear view of the operator of the cited truck depicted in the video evidence was adequate to safely change from the left lane to the right lane on a highway, normal driving hazards are not the hazards addressed in section 77.410(1)(a). Rather, the standard is meant to protect an individual working in close proximity to the rear of the truck. Such a person, at any moment, can bend down behind the truck, for any number of reasons, and be

obscured from the view of the truck operator. In such an instance, the truck would only have to travel several feet for tragedy to occur.

Accordingly, the partial obstruction of view observed and cited by Coleman constitutes a violation of the cited mandatory standard. Consequently, Citation No. 4367403 **SHALL BE AFFIRMED**. I view the placement of the equipment on the truck bed, which left an open area to preserve rear view as a mitigating circumstance that reduces the respondent's degree of negligence to low. Consequently, a civil penalty of \$25.00 will be imposed. (Tr. 107-112).

C. Citation No. 4366193

Section 48.31(a) of the Secretary's training regulations, 30 C.F.R. § 48.31(a), requires yearly hazard training to be provided to all "miners" as that term is defined in section 48.22(a)(2), 30 C.F.R. § 48.22(a)(2). The section 48.22(a)(2) definition of "miner" includes any "delivery . . . worker contracted by the operator." Coleman testified hazard training for fuel delivery truck drivers had been approved by the MSHA district manager. Although Coleman did not testify about the specific terms of the respondent's approved hazard training requirements, Coleman speculated the approved hazard training would include such subjects as elevated road hazards as well as the proper way to mount and dismount the fuel storage tank.

Fuel deliveries occur at the mine site on an irregular basis, usually less frequently than once per month. Coleman asked Alan and Craig Churchill if the last fuel truck driver to make a delivery had received hazard training. Coleman testified that the Churchills indicated he had not received such training. At trial, Churchill argued hazard training was not required. Nevertheless, Churchill also maintained that his and his son's negative response to Coleman's question was intended to convey that the fuel driver had not signed a hazard training certificate although he had, in fact, received the required hazard training.

As a result of the information given to Churchill, Coleman issued Citation No. 4366193 charging, "[t]he operator did not provide the last fuel truck delivery person with any hazard recognition training," as required by section 48.31(a)(1). Apparently, in view of Churchill's insistence that training had been provided although no training certificate had been signed by the driver, Citation No. 4366193 was subsequently modified to reflect a violation of section 48.31(d) that requires operators to maintain, and make available for inspection, signed training certificates.

In view of the above, I issued the following bench decision on Citation No. 4366193:

While I have my doubts that hazard training was provided in view of Alan Churchill's insistence in this proceeding that hazard training of delivery drivers is not required, I will give Churchill the benefit of the doubt that training was provided. Moreover, this conclusion is consistent with MSHA's modification that

removed the assertion that hazard training was not given. However, modified Citation No. 4366193 cites a violation of section 48.31(d) for Churchill's admitted failure to maintain a signed training certificate. Consequently, Citation No. 4366193 **SHALL BE AFFIRMED**. However, I consider the fact that fuel deliveries for this 1,000 gallon fuel tank are made on an irregular basis, sometimes as infrequently as once every few months, as a mitigating circumstance that warrants a finding of very low negligence. Accordingly, a civil penalty of \$25.00 is assessed for Citation No. 4366193. (Tr. 144-49).

D. Citation No. 7599404

Coleman inspected the 1,000 gallon fuel storage tank located on a mound. The video of the tank reveals it to be a circular tank with steel framing around the upper circumference of the tank, approximately 36 inches below the top of the tank. There is a locked fuel filler cap on the top of the tank. The tank has a permanent, heavy duty, vertical steel ladder that is welded or bolted to the tank and steel frame. The person filling the tank normally climbs the ladder and stands on the surrounding steel frame while leaning forward against the tank and holding on to the tank's top.

From Coleman's vantage point at the bottom of the mound where the tank was located, Coleman initially thought the ladder was considerably taller than its approximate seven feet height. Thus, Coleman thought the ladder may be in violation of the provisions of section 77.206(c), 30 C.F.R. § 77.206(c), that require installation of backguards on vertically anchored ladders extending from a point not more than seven feet from the bottom of the ladder to the top of the ladder. A backguard is a tubular device installed on a ladder to prevent a person from falling backwards. However, since the distance from the top of the steel frame to the ground was determined to be seven feet, two inches, Coleman told Churchill that "[he] wasn't going to issue a citation or anything until I did some more research and looked into it and did some measuring and so on." (Tr. 151-52).

Upon further reflection, Coleman assumed the person filling the fuel tank would have to climb this seven foot height by climbing the ladder to the top of the steel frame while holding a fuel hose in his hand. Coleman considered this condition to be an unsafe means of access. Therefore, Coleman ultimately issued Citation No. 7599404 citing an alleged violation of the safe access provisions of section 77.205(a), 30 C.F.R. § 77.205(a). Although the citation was initially issued as an S&S violation, it was later modified by MSHA to reflect a non-S&S condition. Citation No. 7599404 stated:

A safe means of access was not provided to and at the work place on the 1,000 gallon fuel storage installation. The person fueling the storage tank was required to climb up the ladder with a heavy fuel hose in one hand and try to hold on with the other hand. Once the person reached the work place, he was required to lean against the fuel tank with his lower legs while standing on a piece of angle iron that is about two inches wide. No hand holds were provided. The distance from the ground to the filler hole (work place) was about 12 feet. (Gov. Ex. 4).

Craig Churchill testified that the fuel filler cap at the top of the tank is locked by key. He stated that, normally, he climbs the ladder and stands on the surrounding steel frame while leaning forward against the tank and holding on to the tank's top. He then removes the locked filler cap while the fuel driver removes the hose from the truck. The driver then hands him the hose while the driver returns to the truck to open the valve. Thus, Craig Churchill opined that he did not believe this method of filling the tank was unsafe.

After viewing the video tape and considering the testimony, I issued the following bench decision with respect to Citation No. 7599404:

The cited mandatory standard requires that a safe means of access shall be provided and maintained to all working places. A means of access is unsafe when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts particular to the mining industry, would recognize a hazard warranting corrective action. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). So the question is whether a reasonably prudent person familiar with the fuel delivery business would believe the cited condition was unsafe.

In resolving this issue of safety in the context of the Secretary's burden of proof, it is significant that Coleman did not observe anyone accessing the fuel tank at the time of his inspection. While it is true that inspectors need not observe a violation to conclude that a violation has occurred [*Emerald Mines Co.*, 9 FMSHRC 1590 (September 1987), *aff'd*, *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 59 (D.C. Cir. 1988); *see also Nacco Mining Co.*, 9 FMSHRC 1541 (September 1987)], in this case, the citation is based on Coleman's speculation concerning how the individual would access the tank. Although climbing a ladder with, rather than without, the fuel hose may be ill advised, a citation is not supportable solely because an alternative conceivable method of access may be unsafe. *See, e.g., The Hanna Mining Company*, 3 FMSHRC 2045, 2046 (September 1981) (an operator does not have to assure that every conceivable route to a working place is safe). Put another way, equipment is not inherently unsafe simply because it is misused.

Turning to the condition as described in Citation No. 7599404, I believe Coleman's description accurately describes the condition. However, evaluating the nature and extent of the alleged hazard can only be accomplished by viewing the video. While standing erectly, without hand holds, on a two or three inch supporting frame, may sound precarious, the video reflects there is no danger of slipping between the frame or losing one's balance because the individual is leaning forward about 30 degrees while holding on to the top of the tank. Thus, there is little danger of falling forward or backward.

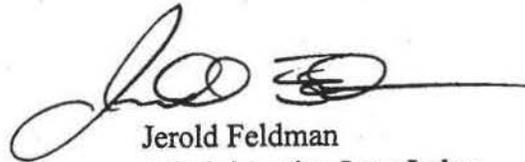
Churchill concedes the hand holds installed on the ladder, and the platform constructed by the metal frame to abate the citation, improve safety. However, because the means of access is now safer, does not, alone, warrant the conclusion that the cited condition was unsafe. Significantly, while a backguard is required by the regulations if a vertical ladder exceeds a certain length, hand holds are not explicitly required. Moreover, Coleman admits he initially was uncertain if a violation existed and that he issued the citation upon further reflection.

Thus, on balance, I conclude that the Secretary has failed to establish, by a preponderance of the evidence, that the cited condition was unsafe. Accordingly, Citation No. 7599404 **SHALL BE VACATED**. (Tr. 175-81).

**ORDER**

In view of the above, **IT IS ORDERED** that Citation Nos. 4366187 and 7599404 **ARE VACATED**.

**IT IS FURTHER ORDERED** that the respondent shall pay, within 30 days of the date of this decision, a total civil penalty of \$50.00 in satisfaction of Citation Nos. 4367403 and 4366193. Upon timely receipt of payment, Docket No. CENT 98-167 **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 17, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-139-M
Petitioner	:	A.C. No. 45-03086-05509
	:	
v.	:	Docket No. WEST 98-178-M
	:	A.C. No. 45-03086-05510
GOOD CONSTRUCTION,	:	
Respondent	:	Good Portable Crusher

**DECISION**

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;  
James A. Nelson, Esq., Toledo, Washington, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Good Construction, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petitions allege four violations of the Secretary's safety standards. A hearing was held in Kelso, Washington.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Good Construction operates a portable crusher at its Brown Road Quarry in Lewis County, Washington. The quarry is owned and operated by Allen L. Good. On October 21, 1997, MSHA Inspector Arnold Pederson inspected the quarry. During the inspection, he issued a number of citations including the three citations and one order at issue in these proceedings.

**A. Citation No. 7962491**

This citation alleges a violation of 30 C.F.R. § 56.9300(a), as follows:

A berm was not placed on the outer edge of an approximately 150-foot long by 20- to 40-foot wide section of elevated access road to the mine, where a drop-off exists of sufficient grade or depth to

cause a vehicle to overturn or endanger persons in equipment. The road was widened about two months ago so trucks could exit the scale and make traveling safer for passing. The operator was aware that this condition existed but had not installed the berm.

Inspector Pederson determined that the violation was of a significant and substantial nature ("S&S") and was the result of Good Construction's high negligence. He issued the citation under section 104(d)(1) of the Mine Act and alleged that the violation was the result of Good Construction's unwarrantable failure to comply with the safety standard. Section 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The citation was terminated the following morning after large rocks were placed along the outer edge of the roadway. The Secretary proposes a penalty of \$600 for this alleged violation.

I find that the Secretary established a violation of the safety standard. There is no dispute that a berm was not present along 150 feet of the roadway. In addition, there is no dispute that a drop-off existed along the outer edge of the roadway. Good Construction argues that the roadway was of sufficient width that a berm was not required. It also argues that the standard is so vague that it fails to give mine operators notice of when a berm is required. I reject these arguments. First, I find that the safety standard is clear with respect to its application in this case. A berm is required whenever there is a sufficient drop-off where a vehicle could overturn if it traveled off the edge of the road. The drop-off on the roadway in this instance was of a sufficient grade to cause a vehicle to overturn. Although there may be a point at which a roadway is so wide that berms are unnecessary, the roadway in this instance was 30 to 40 feet wide at its narrowest point and berms were necessary to protect the safety of truck drivers.

I find that the violation was the result of Good Construction's moderate negligence and that the Secretary did not establish that the violation was the result of Good Construction's unwarrantable failure. In making his unwarrantable failure determination, Inspector Pederson relied heavily on the fact that Mr. Good was candid in stating that he was aware that berms were required on elevated roadways. In this instance, however, there are a number of mitigating circumstances that must be taken into consideration. At the time of the inspection, Good Construction was in the process of relocating and widening the access road. Good Construction started rebuilding the road in the late summer of 1997 and the project took a little over three months to complete. (Tr. 88). Good Construction began putting rock on the surface of the road the first week of October. When Inspector Pederson arrived, trucks had been using the new road for about one week. Good Construction had just completed grading the outer edges of the roadway and was set to install the berm. Good Construction planned to use rocks for the berm because an earthen berm could cause silting of the water runoff. (Tr. 90-91). It had gathered the rocks for this purpose and placed them near the scale house. (Tr. 91, 124, 127).

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987).

Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission stated that several “factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

I rely on a number of facts in holding that the violation was not the result of Good Construction’s unwarrantable failure. The access road in question is only about 150 to 200 yards long. The trucks that use this roadway are “highway legal,” so they are no more than eight feet wide. County roads in the area are about 24 feet wide while the access road varied between about 42 and 85 feet wide without berms. (Tr. 92, 130). The trucks using the access road traveled at a low rate of speed. (Tr. 15, 44). As a consequence, the violation was not extensive and the risk of injury very low. The violation had only existed for about a week and the operator was getting ready to install rock berms. (Tr. 89-90). Good Construction had not been put on notice that greater efforts were necessary. Although Good Construction should have installed berms before it permitted trucks to use the roadway, its failure in this regard does not constitute “reckless disregard” of the safety of the truckers, “intentional misconduct,” “indifference” to safety, or a “serious lack of reasonable care.” Good Construction did not believe that it was endangering truck drivers and I find that its conduct constituted no more than ordinary negligence. The citation is modified to a section 104(a) citation.

I also find that the violation was not S&S. An S&S 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 ... mine safety or health hazard.” A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. One must assume “continued normal mining operations” when evaluating whether a violation is S&S. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

In order to establish that a violation is S&S, the Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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.

The Secretary established all parts of this test except part three. I find that it has not been established that it was reasonably likely that the hazard contributed to by the violation would

result in an injury. The access road was wide, the vehicles that used the road were no more than 8 feet wide, the speed of vehicles on the road was 15 miles per hour or less, and the unbermed portion of the road was about 150 feet long. The condition had lasted about a week and, assuming continued normal mining operations, the condition would have been corrected within a few days. An accident was not likely.

Although I do not rely on this fact, it is interesting to note that the inspector first testified that it was unlikely that the cited condition would result in an accident because of the low speeds on the road and the courtesy exhibited by truck drivers on the road. (Tr. 15). After he was shown a copy of the citation, he testified that an accident was reasonably likely. (Tr. 15-16). Thus, the inspector implicitly conceded that the S&S issue is close.

**B. Order No. 7962495**

This order alleges a violation of 30 C.F.R. § 56.9301, as follows:

Both sides of the approach to the feed hopper were not bermed. The ramp was approximately 30 feet long and gradually elevated to about 12 feet high. The plant was recently moved to its present location, ramp to the feeder installed, but berms [were] not placed to prevent the front-end loader from overtraveling, especially with the loaded bucket raised.

Inspector Pederson determined that the violation was not S&S and was the result of Good Construction's high negligence. He issued the order under section 104(d)(1) of the Mine Act and alleged that the violation was the result of Good Construction's unwarrantable failure to comply with the safety standard. Section 56.9301 provides that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning." The citation was terminated ten minutes later after berms were installed on both sides of the ramp. The Secretary proposes a penalty of \$300 for this alleged violation.

I find that the Secretary established a violation. Good Construction does not dispute the fact that there were no berms on the sides of the ramp leading to the feed hopper of the crusher. Good Construction argues that there was no real danger of overtravel or overturning for a number of reasons. The ramp was only 6 feet above the ground at the top and it was only 25 feet long. (Tr. 96-97). Because loaders are about 22 feet long, the rear wheels would only be a few feet above the ground level when the loader operator was dumping material into the feeder. (Tr. 123). The ramp was about 22 feet wide and the loaders were about 8 feet wide. (Tr. 25, 107). The area around the ramp was flat and open so it was not difficult to approach the ramp head on. (Tr. 122). I find that these factors relate to the gravity of the violation rather than the fact of violation. The lack of berms presented a hazard that one of the front wheels of a loader would travel off the edge of the ramp as the operator was approaching the feeder. I find that the gravity was low, however, because such an event was unlikely given the facts discussed above.

I also find that the violation was not the result of Good Construction's unwarrantable failure. Inspector Pederson testified that he based his unwarrantable failure determination on the fact that, when questioned, Mr. Good could not offer any excuse for the lack of berms. (Tr. 25). There is no dispute that the crusher had been recently moved within the quarry and a new ramp was constructed out of earth and rock. That ramp had been in use for about a week. (Tr. 24, 106). Prior to the move, the ramp to the feeder had been provided with berms. (Tr. 106). Good Construction's conduct does not demonstrate "reckless disregard" or "intentional misconduct" with respect to the requirements of the safety standard. It could indicate "indifference" or a "serious lack of reasonable care," however. In this case it appears that the lack of berms was an oversight. A new ramp had to be constructed when the crusher was moved and, due to an oversight, berms were not added. The condition had existed for about a week but the violation did not create a serious safety hazard. I find that the violation was the result of Good Construction's ordinary negligence. The order is modified to a section 104(a) citation.

### **C. Citation No. 7962493**

This citation alleges a violation of 30 C.F.R. § 56.14132(b)(1), as follows:

An automatic reverse signal alarm was not installed on the ... fuel truck that is used to store and dispense fuel for equipment at the mine. The fuel truck is driven in the mine occasionally.

Inspector Pederson determined that the violation was not S&S and was the result of Good Construction's moderate negligence. He issued the citation under section 104(a) of the Mine Act. Section 56.14132(b)(1) provides, in part, that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have" a backup alarm or an "observer to signal when it is safe to back up." The citation was terminated the following day after a wheel bell was installed. The Secretary proposes a penalty of \$50 for this alleged violation.

The fuel truck had an obstructed view to the rear and it was not equipped with a backup alarm. Good Construction contends that it complied with this standard by having an observer to signal the driver of the fuel truck when it is safe to back up the fuel truck. (Tr. 103, 107, 115). It is not disputed that this truck is rarely moved. Other vehicles in the quarry are driven to the fuel truck when refueling is necessary. The fuel truck is not licensed so it never leaves the quarry. Mr. Good stated that the fuel truck is moved from time to time and that it may be required to back up when it is moved. (Tr. 101-03). He stated that an observer is present when the truck is backed up. (Tr. 103, 107, 115). Inspector Pederson did not observe the fuel truck backing up. (Tr. 27). He testified that during his inspection, Mr. Good "didn't mention about having an observer, although [that's] not to say there couldn't have been [one]." (Tr. 28). On the other hand, Inspector Peterson also stated that Mr. Good told him that they normally would not use an observer. *Id.* This testimony is rather ambiguous.

It is not clear from the testimony whether Good Construction has backed up the fuel truck without having an observer present. The truck was not moved on the day of the inspection. The

inspector's testimony is somewhat ambiguous as to the conversation he had with Mr. Good and there is no direct proof that the fuel truck was backed up without an observer being present. Another administrative law judge held that the Secretary had not established a violation when faced with a similar dispute concerning whether an observer had been used in lieu of an alarm. The judge discussed the issue as follows:

I find that in order to have made a *prima facie* case of a violation, the Secretary must have produced some evidence that the respondent was operating the equipment without a reverse signal alarm or an observer at some definite time or at least some date certain. To hold otherwise would force the respondent to prove the negative, *i.e.* that it did not operate the equipment in violation of the standard on *any* day since it was first acquired, which was years before the citation was written.

*River Cement Co.*, 10 FMSHRC 1027, 1029-30 (August 1988)(emphasis in original). I agree with the judge's reasoning. The Secretary contends that there have been occasions in which the fuel truck was backed up without an observer present, but she offered insufficient evidence to support her contention. Since the Secretary bears the burden of proof, I vacate the citation.

**D. Citation No. 7962494**

This citation alleges a violation of 30 C.F.R. § 56.14132(b)(1), as follows:

The Ford utility truck, with an air compressor and welding machine in the back, had an obstructed view to the rear. An automatic reverse signal alarm was not installed to warn people when backing. The truck is used in the plant for maintenance and construction purposes.

Inspector Pederson determined that the violation was not S&S and was the result of Good Construction's moderate negligence. He issued the citation under section 104(a) of the Mine Act. The citation was terminated the following day after a signal alarm was installed. The Secretary proposes a penalty of \$50 for this alleged violation.

The utility truck was not equipped with a backup alarm. Good Construction contends that the view to the rear of this truck was not obstructed. Mr. Good testified that the view to the rear of the utility truck was as clear as the view to the rear in a pick-up truck with the tail gate closed. (Tr. 111). He testified that the welding equipment and the air compressor did not obstruct the driver's view sufficiently to prevent him from seeing a pedestrian behind the truck. Although I agree that the utility truck driver would be able to see most pedestrians, blind spots existed that created a hazard. (Tr. 32; Ex. R-5). I find that the cited utility truck had an obstructed rear view. Accordingly, I find that the Secretary established a violation and I affirm the citation.

Based on the evidence presented at the hearing, I find that an accident was unlikely and that the violation was not serious. I find that Good Construction's negligence was slightly less than that determined by the inspector. First, the view to the rear of the vehicle was only slightly obstructed. Second, this quarry has been inspected by MSHA on many occasions, Good Construction's utility trucks were not equipped with backup alarms, and no citations were previously issued. (Tr. 105-06).

## II. APPROPRIATE CIVIL PENALTIES

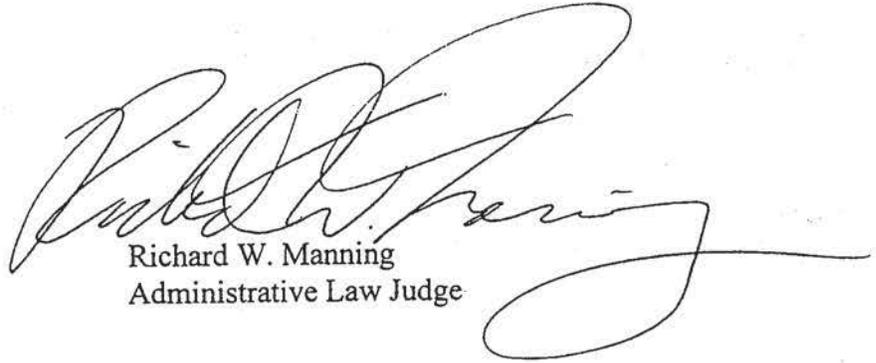
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that no citations were issued at the quarry during the two years prior to this inspection. (Ex. P-1; Sec. Prehearing Submission). The quarry is a relatively small-to medium-sized facility that employed about 10 miners in 1997 and worked 26,339 man-hours in 1996. The record does not reveal that Mr. Good owns any other facilities. The violations were rapidly abated. The penalties assessed in this decision will not have an adverse effect on Good Construction's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

## III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 98-139-M		
7962493	56.14132(b)(1)	Vacated
7962494	56.14132(b)(1)	\$40.00
WEST 98-178-M		
7962491	56.9300(a)	80.00
7962495	56.9301	80.00

Accordingly, the citations listed above are hereby **VACATED, AFFIRMED, or MODIFIED** as set forth above, and Good Construction is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 40 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

Distribution:

William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

James A. Nelson, Esq., P.O. Box 878, Toledo, WA 98591 (Certified Mail)

RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 19, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-69
Petitioner	:	A.C. No. 44-01873-03603 A
v.	:	
	:	
<b>PAUL R. BRYSON</b> , employed by	:	No. 1 Mine
STEDCO MINING, INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-70
Petitioner	:	A.C. No. 44-01873-03605 A
v.	:	
	:	
<b>STEVE HONAKER</b> , employed by	:	No. 1 Mine
STEDCO MINING, INCORPORATED,	:	
Respondent	:	

## DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Secretary of Labor;  
Jimmie L. Hess, Jr., Esq., Morefield, Kendrick, Hess and Largen, P.C., Abingdon, Virginia for Respondents.

Before: Judge Bulluck

These matters concern petitions for assessment of civil penalty against Respondents Paul Bryson and Steve Honaker, pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c), as agents of Stedco Mining, Incorporated. The Secretary seeks to impose a civil penalty of \$1,400.00 on Bryson and \$800.00 on Honaker, for knowingly authorizing, ordering, or carrying out a violation of mandatory safety standards specified in 30 C.F.R. §§ 75.400 and 75.1722 (applicable to Bryson only).

A hearing on the merits was convened on January 26, 1999 in Kingsport, Tennessee. At the hearing, the parties entered into a settlement agreement whereby Petitioner agreed to

withdraw her request for individual civil penalties respecting certain citations/orders, and Respondents agreed to pay reduced penalties respecting the remaining citations/orders. The settlement was accepted at hearing. That determination is hereby confirmed. The initial assessments and the proposed settlement amounts are as follows:

<u>Docket No.</u>	<u>Order No./ Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
VA 98-69	7293475	\$500.00	Penalty withdrawn
	7293477	\$500.00	Penalty withdrawn
	7293478	<u>\$400.00</u>	<u>\$300.00</u>
	Total	\$1,400.00	\$300.00
VA 98-70	7293475	\$400.00	\$300.00
	7293477	<u>\$400.00</u>	<u>\$300.00</u>
	Total	\$800.00	\$600.00

The basis for withdrawal of penalties in Citation/Order Nos. 7293475 and 7293477 against foreman Bryson (loose coal, float coal dust, oil and grease accumulations violations) is evidence that he lacked authority from his employer to conduct clean-up activities on his shift. The reduced penalty in Citation No. 7293478 against Bryson (failure to maintain guard on belt drive) is based on the fact that Bryson no longer operates in the mining industry as a foreman or agent of an operator.

Respecting operator Honaker, the reduction in penalties for Citation Nos. 7293475 and 7293477 is based on evidence that he is no longer working in the mining industry and is currently working at a rate of pay far below that of a miner.

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

### **ORDER**

The settlement is appropriate and is in the public interest. **WHEREFORE**, the approval of settlement is **GRANTED**, and it is ordered that Respondent, Paul R. Bryson, pay a penalty of \$300.00, and that Respondent, Steve Honaker, pay a penalty of \$600.00 within 30 days of this order. Upon receipt of payment, these cases are **DISMISSED**.

  
 Jacqueline R. Bulluck  
 Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

Paul R. Bryson, Rt. 1, Box 278, St. Charles, VA 24282 (Certified Mail)

Jimmie L. Hess, Jr., Esq., Morefield, Kendrick, Hess & Lagen, P.C., 190 E. Main Street, P.O. Box 1327, Abingdon, VA 24212 (Certified Mail)

/nt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 19, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-119
Petitioner	:	A. C. No. 46-01968-04281
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary;  
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

### Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging a violation by Consolidation Coal Company (Consol) of 30 C.F.R. § 75.333(c)(3).<sup>1</sup> In addition to citing Consol for this violation, the Secretary also issued an imminent danger order under section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act). A hearing was held in Pittsburgh, Pennsylvania, on December 2, 1998.

On January 25, 1999, Respondent filed a post-hearing brief. On February 12, 1999, the Secretary filed a post-hearing brief.

### Findings of Fact and Discussion

On March 3, 1998, MSHA Inspectors William L. Sperry and Richard Lee Stefanick inspected the 9 S longwall section at Consol's Blacksville No. 2 underground coal mine. Francis Nickler, Consol's safety supervisor accompanied the inspectors. Upon entering the No. 4 entry through a man-door from the No. 3 track entry, an intake air entry, methane monitors worn by

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<sup>1</sup>/ 30 C.F.R. § 75.333(c)(3) provides as follows: "[w]hen not in use, personnel doors shall be closed."

the inspectors and Nickler emitted an audible alarm indicating the presence of methane. Methane readings taken in the belt entry at various locations between the 93 block and the 111 block indicated methane readings between 0.8 percent and 2.2 percent. Also, in a cavity located in the roof above the 110 block, the methane reading exceeded 5 percent. The explosive range of methane is between 5 and 15 percent. An imminent danger withdrawal order was issued requiring the withdrawal of the miners from the area.

Due to the extensive presence of methane in concentrations above than 2 percent, along with the presence in the cavity of methane in an explosive range, I find that the inspectors did not abuse their discretion in issuing the withdrawal order. Indeed, Nickler acted with alacrity in taking the initiative in ordering withdrawal of all of the miners.

Upon noting the presence of methane, and the absence of air movement, Nickler and the inspectors tried to determine the cause of the methane buildup. They were informed by Mike Cole, a foreman, who appeared angry and visibly upset, that a man-door in a metal stopping between the No. 3 and 4 entries had been propped open, and a man-door at the 67 block was open. There is no dispute that these doors were open in violation of the section 75.333(c)(3), supra, and I find that Consol violated section 75.333 (c)(3), supra.

#### Significant and Substantial

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 U.S.C. § 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).

It is not contested that a violation of section 75.333(c)(3), supra, occurred, and that this violation contributed to the hazard of a fire or explosion, in that it resulted in reduced air flow that led to an accumulation of methane in an explosive range. Hence, I find that the first two elements set forth in Mathies, supra, have been satisfied. At the time the violative condition was cited, the section was not yet producing coal, and the belt entry at issue was deenergized. The area was generally well rock dusted and there was not any equipment present in the belt entry that was in such a physical condition as to constitute an actual ignition source. There is some evidence that rail bonding was to have been performed that day in the adjacent No. 3 entry, but there is no evidence that any torch or welding work was being performed at the time. However, as explained by the inspectors, the presence of high voltage cable, switches, and rectifiers that could generate sparks, constituted potential ignition sources. Also, although welding and the use of torches, clearly ignition sources, was not being performed at the time of the violation, it is clear that a reasonable likelihood of injury existed had normal mining operations continued i.e., the bonding of the tracks (see, Rushton Mining Co., 11 FMSHRC 1432 (August 1989)). It is too speculatively to find, as essentially argued by Consol, that the likelihood of an explosion would have been minimized by the requirement of an examination prior to energizing the belt line.

Within the above framework of evidence, and taking into an account the existence of methane in explosive concentrations, the extent of the area in the entry where methane was found, and the fact that there were no conditions in existence at the time of the violation that would have prevented any further buildup of methane, I find that it has been established that the violation was significant and substantial.

#### Penalty

The inspectors testified that the violation could have resulted in a violent explosion causing fatalities to the miners that were present in the section at issue. This testimony was not contradicted or impeached. I thus find that the level gravity of this violation was relatively high, especially considering the fact that it resulted in an accumulation of methane in an explosive range.

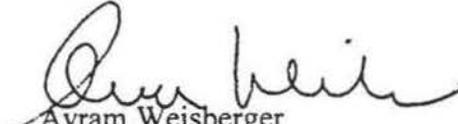
There is no clear evidence as to exactly how long the violative condition had been in existence prior to its being cited. It appears that Consol's management did not have notice or knowledge of the violative condition until approximately 10:00 a.m., on March 3, when the methane detectors detected methane. In this connection, it was Nickler's uncontracted testimony that he reviewed the Weekly Ventilation Examination book and that the preshift and on-shift air readings taken on March 2 and 3, were between 34,950 and 81,200. Also, according to Nickler, the last required weekly examination of the belt prior to March 3, 1998, occurred on February 24, 1998, and the next required examination was to have been performed during the afternoon shift on March 3. Other examinations of the belt on February 25, 26, 27, 28 and March 2 did not contain any notations of either decreased air flow, abnormal methane readings, or open doors. Further, according to Nickler, all miners are provided with 8 hours annual training which includes 45 minutes on ventilation. Also, new employees are provided with a copy of Consol's safety rules which, inter alia, contain the following language: "[d]o not damage, remove, or change any ventilation device" (Respondent's Ex. 1, par. 16). Additionally, Nickler testified that he conducts weekly safety meetings with all miners. A written statement provided to miners at such a meeting on February 23, 1998, contains the following language<sup>2</sup> "[k]eep all mandooors properly closed, . . . ALL EMPLOYEES HAVE A PERSONAL RESPONSIBILITY TO MAKE CERTAIN MANDOORS ARE KEPT CLOSED AS REQUIRED." According to Nickler, once he found out that one of the doors had been propped open, he conducted an investigation and learned that three miners had been working in the area the prior shift. He stated that he interviewed these employees and that no one confessed to having propped the door open. Nickler indicated that there was not any foreman in the area. According to Nickler, had he known who had left the doors open, the person responsible ". . . would have subjected himself to strong disciplinary action up to discharge" (Tr. 243-244). On March 3, after the violitive conditions had been cited, Nickler met with all miners from all shifts and told them that "absolutely no doors, no doors are to be left open, no regulators are to be tampered with, and if anybody is . . . caught tampering with ventilation controls they would be discharged" (Tr. 246). Since none of Nickler's above testimony was rebutted, contradicted, or impeached, I therefore accept it. However, Consol had been cited on three occasions, within a 2 year period prior to March 3, 1998, for having left personnel doors open in violation of section 75.333(c)(3), supra. Thus, I find that Consol should have been put on notice that its training and supervision may not have been adequate to sufficiently redress this very serious problem. Taking all the above into account, I conclude that the violation herein resulted from Consol's moderate negligence. Considering the remaining factor as set forth in section 110(i) of the Act, and especially considering the high level gravity as set forth above, I find that a penalty of \$6,000 is appropriate.

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<sup>2/</sup> Three asterisks are set forth to the left of this language. Nickler explained that these denote areas of specific interest.

**ORDER**

It is **ORDERED** that the section 107(a) withdrawal order be affirmed as written. It is further **ORDERED** that, within 30 days from the date of this Decision, Consol pay a total civil penalty of \$6,000 for the violation found herein.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

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Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

dcp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

February 22, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-61-D
on behalf of PAUL MIDDLETON,	:	
Complainant	:	BARB CD 98-19
v.	:	
	:	Mine No. 1
J & C MINING, L.L.C.,	:	Mine ID 15-17707
Respondent	:	

**DECISION**

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;  
Susan C. Lawson, Esq., Lawson & Lawson, Harlan, Kentucky, for the Respondent.

Before: Judge Weisberger

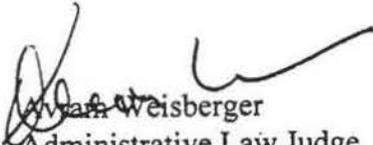
This case is before me based on a Complaint filed by the Secretary of Labor on behalf of Paul Middleton alleging that J & C Mining discriminated against him in violation of section 105 of the Federal Mine Safety and Health Act of 1977. The Secretary seeks personal relief on behalf of Middleton, and a civil penalty. The matter was scheduled for hearing, and was partially heard on January 19, 20, and 21, 1999.

On January 21, 1999, during a recess, the parties advised that they had reached a settlement of this matter, and J & C Mining made a motion to approve the settlement and dismiss the case. The parties presented the terms of the settlement on the record. After due consideration, the motion was granted as follows, with the exception of minor changes not of a substantive nature.

The motion is granted. I have considered carefully the terms of the motion. I find that the settlement agreement entered into the record to be a very fair and just disposition of the issues. This conclusion is based upon my review of the terms of the settlement, along with a consideration of the entire record that has been presented .

**ORDER**

The terms of the settlement are approved, and it is **ORDERED** that (1) the record in this case be sealed; (2) Respondent pay a civil penalty of \$1,000 within 30 days of this decision; (3) the parties shall abide by all of the terms of the settlement agreement; and (4) that this case be **DISMISSED** with prejudice.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 1999

RAWL SALES & PROCESSING CO.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 99-13-R
	:	Citation No. 7175284; 10/1/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Rocky Hollow Mine
ADMINISTRATION (MSHA),	:	
Petitioner	:	

## SUMMARY DECISION

Appearances: William K. Doran, Esq., Heenan, Althen & Roles, Washington, D.C.,  
for the Contestant;  
Douglas N. White, Associate Regional Solicitor, Yoora Kim, Esq.,  
Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia,  
for the Petitioner.

Before: Judge Feldman

Before me for consideration is a notice of contest with respect to Citation No. 7175284 filed by Rawl Sales & Processing Company (the contestant) against the Secretary of Labor (the Secretary) and the Mine Safety and Health Administration (MSHA) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815. The contestant challenges the applicability of the on-shift beltline examination provisions of the mandatory safety standard in section 75.362(b), 30 C.F.R. § 75.362(b), to an unattended underground beltline that is operating when no employees are working underground.<sup>1</sup>

The parties have stipulated to all issues of material fact and have filed motions for summary decision. Oral argument was conducted on January 25, 1999, at the Commission's Office of Administrative Law Judges in Falls Church, Virginia. The parties' briefs that address issues raised during the oral argument have been considered in the disposition of this matter. As discussed below, the Secretary's application of section 75.362(b) to the facts in this case must be rejected because it mandates the exposure of on-shift beltline examiners, who

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<sup>1</sup> For the purposes of this decision, reference to on-shift examination of the "beltline" includes examination of both the belt conveyor and the belt conveyor haulageway.

would otherwise not be required to go underground, to the hazards of underground mining. Accordingly, Citation No. 7175284 shall be vacated.

### **I. Statement of the Case**

The contestant's Rocky Hollow underground mine is an idle mine. The Rocky Hollow beltline is used as a conduit beltline between the beltline of Sycamore Fuels Mine No. 1 (Sycamore Fuels), a separate and distinct adjacent underground coal mine from which coal is extracted, and the beltline of the Sprouse Creek Preparation Plant (Sprouse Creek), the coal's ultimate destination. Specifically, the coal from Sycamore Fuels is brought to the surface by beltline. The coal is then transported approximately  $\frac{3}{4}$  mile on a surface beltline whereupon it enters underground traveling approximately  $5\frac{1}{2}$  miles through the idle Rocky Hollow mine. Upon surfacing from Rocky Hollow, the beltline runs approximately 100 feet to the Sprouse Creek Processing Plant.

Coal is extracted from Sycamore Fuels during two shifts, 7:00 a.m. to 4:00 p.m., and, 4:00 p.m. to midnight. Sycamore Fuels runs a non-production maintenance shift from midnight until 7:00 a.m. Each day from 7:00 a.m. until 11:30 p.m., coal is transported from Sycamore Fuels on the beltline to the processing plant, which includes the beltline through Rocky Hollow. Rocky Hollow's preshift examination begins at 3:30 a.m., and, Rocky Hollow operates one work shift from 7:30 a.m. until 3:30 p.m. There are seven hourly and two salaried supervisory personnel that work underground at Rocky Hollow during this shift. Their job duties consist of performing underground preshift and on-shift examinations, as well as examining, cleaning and maintaining the beltline and related areas of the mine. There are no personnel underground at Rocky Hollow from 3:30 p.m. to 11:30 p.m. when coal is transported on the beltline through Rocky Hollow from Sycamore Fuels.

At issue is the validity of Citation No. 7175284, issued on October 1, 1998, that seeks to apply the on-shift beltline provisions of section 75.362(b) to the Rocky Hollow beltline during the 3:30 p.m. to 11:30 p.m. "shift," a period during which no personnel are assigned to work underground at Rocky Hollow. Citation No. 7175284 states:

Coal is being transported through the [Rocky Hollow] mine, from Sycamore Fuels to the Sprouse Creek Preparation Plant, on the 1530 to 2330 shift, an on-shift examination is not being conducted on this shift. **No one is underground at this time.** (Emphasis added).

Section 75.362(b) provides:

**During each shift that coal is produced,** a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours of the **oncoming shift.** (Emphasis added).

It takes approximately three to four hours to perform an on-shift examination of the Rocky Hollow beltline. For the first eight weeks following the issuance of Citation No. 7175284, in order to abate the citation and continue operating after 3:30 p.m., the contestant extended the work shift of four Rocky Hollow miners for three to four hours to perform the on-shift examination required by MSHA. As of December 2, 1998, the contestant has stopped the belt at 3:30 p.m. to avoid paying overtime.

## **II. Pertinent Stipulated Facts**

### A. Rocky Hollow

1. Contestant operates the Rocky Hollow Mine which is an underground coal mine through which a conveyor beltline carries raw coal from Sycamore Fuels Mine No. 1 to the Sprouse Creek Preparation Plant.
2. Rocky Hollow was an actively producing coal mine from the mid-1970's until November, 1994. Today Rocky Hollow is classified BA "Active-Nonproducing" because it is an underground coal mine in which no coal is being extracted from the earth.
3. Rocky Hollow is inactive and it exists solely as a tunnel mine — the purpose of which is to serve as throughway for the conveyor belt between Sycamore Fuels and the Sprouse Creek Preparation Plant.
4. Rocky Hollow's MSHA Mine Identification Number is 46-05195.
5. Sycamore Fuels, Inc. operates the Sycamore Fuels mine, MSHA Mine Identification Number 46-01756. Coal is currently being produced at Sycamore Fuels.
6. Rawl Sales & Processing Co. Operates the Sprouse Creek preparation plant, MSHA Mine Identification Number 46-05368. Coal from Sycamore Fuels is processed at Sprouse Creek.
7. Sycamore Fuels is located approximately 8 miles by road from the Sprouse Creek Plant.
8. A conveyor beltline carries raw coal from Sycamore Fuels to be processed at Sprouse Creek. The beltline runs approximately .75 mile above the surface at Sycamore Fuels, then runs approximately 5.5 miles underground through the idle Rocky Hollow mine. From Rocky Hollow, the beltline runs approximately 100 feet to Sprouse Creek.
9. Sycamore Fuels mines coal on two production shifts (7:00 a.m.- 4:00 p.m.

and 4:00 p.m.- 12:00 a.m.) and runs a non-production maintenance shift from 12:00 a.m.- 7:00 a.m.

10. Ordinarily, the beltline from Sycamore Fuels to Sprouse Creek operates each day from approximately 7:30 a.m. until 11:30 p.m.

11. Rocky Hollow ordinarily operates one work shift from 7:30 a.m.- 3:30 p.m. A total of 7 hourly miners and 2 salaried supervisory personnel work at Rocky Hollow. Except for one hourly electrician, all personnel are certified to perform underground preshift and on-shift examinations. Their duties consist solely of functions related to examination, cleaning and maintenance of the beltline and related areas of the mine.

12. Each working day, three miners at Rocky Hollow perform a preshift examination beginning at approximately 3:30 a.m. The miners perform an on-shift examination of Rocky Hollow during the 7:30 a.m.- 3:30 p.m. shift.

13. Rocky Hollow is equipped with an automatic fire warning system which is active 24 hours per day. The conveyor belts are flame-resistance as required in MSHA regulations.

14. Methane levels at Rocky Hollow are such that Rocky Hollow is not required under Section 103(i) of the Federal Mine Safety and Health Act to undergo spot checks for methane.

15. The roof at Rocky Hollow is composed predominately of shale.

16. Rocky Hollow has an approved roof control plan and a ventilation plan.

17. There are four portals to Rocky Hollow. All four portals are intake air since there is no coal being produced at the mine. A mine fan operates 24 hours per day and is examined daily.

18. The hourly miners at Rocky Hollow are represented by the United Mine Workers of America and their terms and conditions of work are covered by a collective bargaining agreement.

#### B. Citation Number 7175284

19. On October 1, 1998, a Mine Safety and Health Administration Inspector issued Citation No. 7175284 to Contestant alleging a violation of 30 C.F.R. § 75.362(b) as follows:

Coal is being transported through the mine from Sycamore Fuels to Sprouse Creek Preparation Plant, on the 1530 to 2330 shift, an

on-shift examination is not being conducted on this shift. No one is underground at this time.

This was the first time Contestant had been cited for a violation of this standard.

20. On October 30, 1998, Contestant filed a Notice of Contest of Citation No. 7175284.

21. The approximately 5.5 miles long portion of the beltline which runs underground through Rocky Hollow is the subject of Citation No. 7175284.

22. If Contestant assigns miners to examine the beltline between 3:30 p.m. and 11:30 p.m., Contestant, among other things, would be required to perform preshift examinations of the areas the miners would have to enter to perform the on-shift examination of the beltline.

23. In addition, while miners are underground, the mine will have to assign a person to monitor the main mine fan on the surface, pursuant to 30 C.F.R. § 75.311(e).

#### C. Summary Decision

24. The parties agree that there are no material facts at issue and this case may be resolved on summary decision.

### **III. Discussion and Evaluation**

Ordinarily, when the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to an absurd result. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). However, regulatory provisions that were promulgated in contemplation of, and intended to apply to, routine mining operations such as those at Sycamore Fuels, may become contrary to legislative intent when applied to unusual circumstances such as those that exist at the unstaffed Rocky Hollow mine. In this regard, the Commission has stressed that "a [regulatory] standard must be construed in accordance with the statutory language upon which it is based." *Consolidation Coal Company* 15 FMSHRC 1555, 1557 (August 1993).

The preshift regulatory provisions in section 75.360,<sup>2</sup> and the on-shift regulatory provisions in section 75.362, implement the statutory requirements for preshift and on-shift examinations set forth in sections 303(d)(1) and (e) of the Mine Act, 30 U.S.C. § 863(d)(1) and (e). These statutory provisions require preshift and on-shift examinations in active workings and working sections.

The Mine Act and the Secretary's regulations define "active workings" as "any place in a coal mine where miners are normally required to work or travel." 30 U.S.C. § 878(g)(4); 30 C.F.R. § 75.2. "[W]orking section" is defined in the Mine Act and the regulations as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2.

Section 303(d)(1), in pertinent part, provides:

[1] Within three hours immediately **preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine**, certified persons designated by the operator of the mine **shall examine such workings** and any other underground area of the mine designated by the Secretary or his authorized representative. [2] Each such examiner shall **examine every working section in such workings** and shall make tests **in each such working section** for accumulations of methane with means approved by the Secretary for detecting methane and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions **in such working section**; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandon areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. [3] Belt conveyors on which coal is carried shall be examined **after each coal producing shift has begun**. (Sentence numbers added). (Emphasis added).

Section 303(e) of the Mine Act, in pertinent part, states:

At least once during each coal producing shift, or more often if necessary for safety, each **working section** shall be examined for hazardous conditions by certified persons designated by the operator to do so. (Emphasis added).

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<sup>2</sup> Section 75.360 specifies a preshift examination must be performed "within 3 hours preceding the beginning of any **shift during which any person is scheduled to work or travel underground**." (Emphasis added). 30 C.F.R. § 75.360.

Under the facts of this case, there is a working section and there are active workings at Sprouse Creek during the period 3:30 p.m. through 11:30 p.m. However, the active workings at Sprouse Creek during this period do not provide the statutory predicate for preshift and on-shift inspections at Rocky Hollow.

There are no active workings at Rocky Hollow from 3:30 p.m. to 11:30 p.m. because there is no "oncoming shift" entering Rocky Hollow at 3:30 p.m. Moreover, the Commission has determined, and the Secretary has conceded, that coal carrying belt equipment, alone, as referred to in the third sentence of section 303(d)(1) of the Mine Act, does not constitute an "active working" that requires an on-shift inspection. See *Jones & Laughlin Steel Corporation*, 5 FMSHRC 209, 1212 (July 1983).

However, the Secretary argues the Commission's *Jones & Laughlin* decision is not controlling because it only applies to belt conveyors while section 75.362(b) applies to belt conveyor haulageways. Thus, the Secretary, relying on *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1501 (August 1990), asserts areas or places in a mine are "active workings" even if miners are required to travel in such areas on an irregular basis. In *Southern Ohio* the Commission determined a tailgate entry that is only examined on a weekly basis is an "active working" area.

However, a tailgate is distinguishable from this case because the tailgate is in a mine with working sections and active workings. The tailgate can serve as an escapeway during any working shift. In short, *Southern Ohio's* mine contained the missing link that is required to support the position taken by the Secretary in this case - - people. Consequently, the Secretary's reliance on *Southern Ohio* is misplaced.

In the present case, there are no miners exposed to a dangerous underground mine environment in the Rocky Hollow mine from 3:30 p.m. until 11:30 p.m. Moreover, at oral argument, the Secretary was unable to identify any mine personnel at Sycamore Fuels or the Sprouse Creek Preparation Plant who were, in any way, exposed to a hazard because of the contestant's failure to perform an on-shift inspection of the Rocky Hollow beltline during the hours from 3:30 p.m. to 11:30 p.m. In addition, counsel for the Secretary could not identify any Sycamore Fuels or Sprouse Creek employees who would be at risk even if an explosion occurred in the Rocky Hollow mine. In this regard, it is significant that the alleged violation in this case was designated as nonsignificant and substantial (not reasonably likely to contribute to injury).

Turning to the statutory language of the first sentence in section 303(d)(1) of the Mine Act, while it is true the Secretary may designate any area of a mine, such as a beltline, for special preshift examination, the anticipated presence of miners underground is a prerequisite to such special examination. The plain language of section 303(d)(1) makes clear that preshift examinations are required three hours preceding the beginning of any shift **only** when it is contemplated that a miner in such shift will enter the active workings of the coal mine.

Logic dictates there is no need for a preshift examination if miners are not going underground.<sup>3</sup>

Similarly, if a preshift of Rocky Hollow is not required for the 3:30 p.m. to 11:30 p.m. period because no one is underground, there is no basis for requiring an on-shift examination. An on-shift examination would expose the on-shift examiners to significant mine hazards given the fact that they would be called upon to conduct a four hour examination of a beltline that is 5½ miles long.

Ironically, although beltline examinations may serve the interest of preventing interruptions in production because such examinations may disclose conditions before it is necessary to deenergize the beltline, the Secretary has not articulated why such examinations would enhance safety given the absence of miners who could be exposed to any hazard. Moreover, even the mandatory on-shift examination sought by the Secretary would result in the unattended operation of the beltline after the on-shift examination was completed. Accordingly, it is not clear that the references to “each shift that coal is produced” and “oncoming shift” in section 75.362(b) apply to the unstaffed Rocky Hollow mine during a period when there is no working section and no working place.

Having concluded that the plain meaning of section 75.362(b) does not support the Secretary’s position, the focus shifts to whether deference should be accorded to the Secretary’s statutory and regulatory interpretation. The Secretary asserts she should be accorded “great deference to [her] interpretation of a regulation [she] has promulgated under a statute [she] is entrusted with administering. . . .” (Sec. br. at p.3). While it is within this Commission’s discretion to accord deference to the Secretary’s reasonable statutory and regulatory interpretations when ambiguity exists, deference is particularly appropriate in matters where the regulation involves considerations that “require significant expertise and entail the exercise of judgment grounded in policy concerns.” *Thomas Jefferson Univ. v. Shalala*, 129 L. Ed. 405, 415 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

In essence, the Secretary asserts that it is safer to expose beltline examiners to the hazards of underground mining in an attempt to prevent a belt malfunction and possible fire. However, the Secretary has failed to identify any miners who would be exposed to any hazard if a fire occurred because the beltline was not routinely examined after 3:30 p.m. A fire or other smoke hazard could occur at any time, anywhere along this 5½ mile belt, with or without the presence of belt examiners. In such event, it is more desirable to have personnel on the surface rather than underground.

In apparent recognition of the implicit underground safety hazards associated with on-shift examinations, the Secretary also argues that on-shift examinations during the eight hour period preceding the preshift examination will reduce the hazards faced by preshift examiners. However, the preshift examination begins at 3:30 a.m., four hours after the beltline is shut down.

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<sup>3</sup> At the oral argument, the Secretary’s counsel conceded a preshift examination at Rocky Hollow prior to 3:30 p.m. is not required by section 75.360 because no miners are going underground. (Tr. 55).

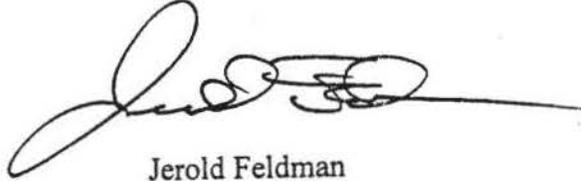
The minimal risk, if any, posed to the preshift examiners does not justify exposing the on-shift examiners to the hazards associated with an operational beltline. Moreover, as noted above, even the Secretary would permit the beltline's unattended operation after the on-shift examination for a substantial part of the eight hour "shift" immediately preceding the 3:30 a.m. preshift examination.

Finally, the Secretary contends the failure to on-shift the beltline may contribute to a fire which would pose a hazard to firefighters. The potential hazard to victims trapped underground in the event of a fire, far outweighs the potential hazard to firefighters who would enter the mine from the surface fully prepared to extinguish a fire.

Admittedly, I am less than comfortable with the concept of an unattended beltline. I have been ready and willing to defer to the Secretary upon a showing of valid policy concerns. However, the Secretary's insistence on an on-shift examination during the period 3:30 p.m. to 11:30 p.m. cannot be reconciled with her conclusion that a preshift examination is not required. Moreover, notwithstanding the Secretary's failure to clearly identify anyone who is exposed to risk, the Secretary's vaguely expressed safety concerns are substantially undermined by the approximate four hour unattended operation of the beltline that would occur after the on-shift examination mandated by the Secretary is completed. Consequently, I am unable to defer to the Secretary because she has failed to advance any consistent, convincing policy concerns that justify interpreting the pertinent statutory and regulatory provisions in a way that prohibits unattended operation of the Rocky Hollow beltline.

**ORDER**

In view of the above, Rawl Sales & Processing Company's Motion for Summary Decision in this contest proceeding **IS GRANTED**. Consequently, Citation No. 7175284 **IS VACATED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal line extending to the right.

Jerold Feldman  
Administrative Law Judge

Distribution:

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/mh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

February 26, 1999

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of <b>MORRIS THOMPSON</b>	:	Docket No. KENT 99-119-D
Complainant	:	
v.	:	PIKE CD 98-13
	:	
LODESTAR ENERGY, INC.,	:	Shop Branch No. 2
Respondent	:	Mine ID 15-17939

**DECISION APPROVING SETTLEMENT**  
**OF APPLICATION FOR TEMPORARY REINSTATEMENT**

Before: Judge Bulluck

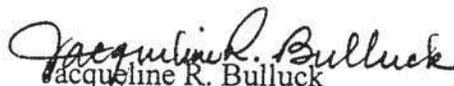
On February 1, 1999, the Secretary of Labor filed an application for an order requiring Lodestar Energy, Inc., ("Lodestar") to reinstate temporarily Morris Thompson to his former position as a bulldozer operator at the Shop Branch No. 2 surface mine, or to a similar position at the same rate of pay, pending a hearing and final disposition of the case.

The application was supported by the declaration of Michael Belcher, Special Investigator for the Secretary's Mine Safety and Health Administration ("MSHA"), and a copy of Thompson's Discrimination Complaint filed with MSHA. In the application, the Secretary alleged that Lodestar suspended Thompson on July 31, 1998, then discharged him on August 3, 1998, because Thompson had filed safety complaints with MSHA.

The parties have filed a joint motion to approve settlement of the application for temporary reinstatement and to dismiss the case. Lodestar has agreed to withdraw its objection to the application for temporary reinstatement, and to temporarily reinstate Thompson to the position of first shift bulldozer operator at the Spradlin Branch surface mine, at the same rate of pay that he formerly received, pending final disposition of the case.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable.

**WHEREFORE**, the settlement agreement is in the public interest and will further the intent and purpose of the Act, the motion for approval of settlement is **GRANTED**, and the complainant, Morris Thompson, having been temporarily reinstated on February 22, 1999, by Lodestar, it is **ORDERED** that this case is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

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/nt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 97-33
Petitioner	:	A.C. No. 44-04946-03603
v.	:	
	:	McClure No. 2 Mine
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-17
Petitioner	:	A. C. No. 44-04946-03608 A
v.	:	
	:	McClure No. 2 Mine
JACK WHITTEN BALL, Employed by	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-18
Petitioner	:	A. C. No. 44-04946-03609 A
v.	:	
	:	McClure No. 2 Mine
ROY NELSON MUSICK, Employed by	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Daniel M. Barish, Esquire, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Petitioner;  
David J. Hardy, Esquire, Jackson & Kelly, Charleston, West Virginia and  
Vaughn R. Groves, Esq. Lebanon, Virginia for the Respondents.

Before: Judge Barbour

These consolidated civil penalty cases arise under sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(d), 820(c)) ("Mine Act" or "Act"). The Secretary of Labor ("Secretary"), on behalf of her Mine Safety and Health Administration ("MSHA"), seeks the assessment of civil penalties against Clinchfield Coal Corporation ("Clinchfield" or the "company") and two of its agents for an alleged violation of section 75.400 (30 C.F.R. §75.400), a mandatory safety standard for underground coal mines. The standard prohibits the accumulation of coal dust, loose coal, and other combustible materials in the active workings of an underground mine.

The Secretary alleges that on January 22, 1997, coal dust and loose coal were allowed to accumulate under the return rollers of a conveyor belt system at Clinchfield's McClure No. 2 Mine, an underground bituminous coal mine located in Dickenson County, Virginia. She also alleges that float coal dust was allowed to accumulate in by the portal of the conveyor belt entry. In addition to being a violation of the standard, the Secretary charges the accumulations were a significant and substantial contribution to a mine safety hazard ("S&S") and the result of Clinchfield's unwarrantable failure to comply with section 75.400. Finally, she alleges that the agents knowingly ordered, authorized, or carried out the violation.

Clinchfield denies it violated section 75.400; and argues alternatively that if a violation is found, the inspector's findings with regard to the gravity of the violation, the violation's S&S nature, and Clinchfield's unwarrantable failure are not valid. The agents also deny the existence of the violation, and argue alternatively that if it existed it was not because of their knowing conduct.

The cases were consolidated for hearing and decision. They were tried in Big Stone Gap, Virginia. Counsels submitted helpful briefs.

### **THE ISSUES**

The principal issues are the existence of the violation, its S&S and unwarrantable nature, whether the agents knowingly violated the standard, and the amounts of any civil penalties that must be assessed, taking into consideration the statutory civil penalty set forth in section 110(i) of the Act (30 U.S.C. §820(i)).

### **STIPULATIONS**

At the commencement of the hearing the parties stipulated that:

1. The Administrative Law Judge and the . . . Commission have jurisdiction to hear and decide th[e] civil penalty proceeding[s].

2. Clinchfield . . . is the owner and operator of the McClure [No. 2] Mine.

3. Clinchfield . . . [has] the overall responsibility of running the . . . [m]ine.

4. The maximum penalty which can be assessed [against Clinchfield] . . . will not affect the ability of . . . Clinchfield to remain in business.

5. The copy of Citation No. 7293555 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

6. MSHA Inspector Lester Watson was acting in his official capacity . . . when he issued Citation No. 7293555.

7. Citation No. 7293555 was properly served to [Clinchfield's] agents.

8. MSHA's Proposed Assessment Data Sheet . . . accurately sets forth . . . the number of assessed violations charged to the . . . [m]ine for the period shown and . . . the number of inspection days per month for the period shown.

9. MSHA's R-17 Assessed Violation History Report may be used in determining appropriate civil penalty assessments for the alleged violations.

10. Clinchfield . . . was a corporation in November of 1996, and has continued to be a corporation up through the present time.

11. Musick was the superintendent of the . . . [m]ine from at least November 1, 1996, through January 23, 1997.

12. Musick was an agent of Clinchfield . . . from at least November 1, 1996, through January 23, 1997[,] within the meaning of [s]ection 3(e) of the Mine Act.

13. Ball was the mine foreman . . . mine from at least

November 1, 1996, through January 23, 1997.<sup>[1]</sup>

14. Ball was an agent of Clinchfield . . . from at least November 1, 1996, through January 23, 1997, within the meaning of [s]ection 3(e) of the Mine Act (Tr. 23-24; See also Joint Exh. 1).

## **THE FACTS**

### **The Mine**

The McClure No. 2 Mine is a bituminous coal mine that extends underground for approximately four and one half miles and contains approximately four and one half miles of conveyor beltlines. Coal is cut by continuous mining machines and is transported out of the mine on the belts. The mine consisted of two active sections — the Main Section and the Three Left Section. The Main Section is the primary section. On the Main Section coal is produced during two shifts each production day (Tr. 885-887). The coal producing shifts are the evening shift and the night or “owl” shift (Tr. 858). Maintenance work is done on the day shift (Tr. 859). The Three Left Section is a “spare unit” that is operated when the Main Section is “down” (Tr. 856).

There are eleven conveyor belts on the Main Section and two on the Three Left Section (Tr. 855). The structures on which the Main Section belts run have top rollers positioned at five foot intervals and bottom rollers positioned at 10 foot intervals. The Mains No. 1 belt is one of the conveyor belts serving the Main Section. From the portal to the tailpiece, the belt extends for 3,000 feet in the Mains No. 1 belt entry. The Mains No. 1 belt structure contains approximately 600 top rollers and 300 bottom rollers (Tr. 865-867).

The belt drive for the Mains No. 1 belt is on the surface in the head house. The head house is located just outside the portal (Tr. 861). From the portal the Mains No. 1 belt runs inby for approximately 450 feet to a point (the “Y”) where the belt entry merges with the track entry (Tr. 867). Air in the Mains No. 1 belt entry travels at a high velocity, especially after the entry merges with the track entry (Tr. 864, 879, 1073). The miners enter the mine in on-track personnel carriers. The track is located approximately 6 feet from the belt (Tr. 868).

Seventy eight miners work at the mine (Tr. 860). Sixty three are wage workers. Eleven of the wage workers are “grademen.” Grademen do maintenance and cleanup work on the belts (Tr. 881). In addition to the grademen, there were four wage employees who work as belt

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<sup>1</sup>At the time of the hearing Ball, who then was 49 years old, no longer was employed by Clinchfield. He had retired due to “nerve . . . and knee problems” (Tr. 1203). He had received Social Security disability payments, and he had applied to Clinchfield for a disability pension. He did not believe he would be able to return to work (Tr. 1202-04).

examiners. The belt examiners also perform maintenance and cleanup work on the belts (Tr. 882). Besides the grademen and the belt examiners, miners who work at the face sometimes are called in to clean belts on their days off (Tr. 958).

### **The January 22 Inspection, The Alleged Violation, and Section 104(d)**

On January 22, 1997, MSHA inspector Lester Watson conducted an inspection at the mine. Watson estimated he spend a total of four hours underground (Tr. 396). He entered the mine sometime around 9:00 a.m. and came out around 1:00 p.m. (Tr. 397-398).

When Watson arrived at the mine he had a miner telephone mine foreman, Jack Ball. The miner told Ball that Watson would inspect and travel along the Mains No. 1 belt (Tr. 42-43). Watson started at the portal and walked approximately 450 feet inby to the Y (Tr. 399). At the Y he turned and walked back to within approximately 100 feet of the portal (Tr. 43-44, 405). He then turned and walked approximately 2900 feet to the tailpiece (Tr. 407). As he proceeded, he examined the belt, the belt structure, and the areas adjacent to the belt (Tr. 399-400). During the inspection he usually was two to three feet away from the belt (Tr. 81-82).

From the belt entry portal to the Y Watson observed dry float coal dust that had accumulated on the belt structure, on the roof, on the floor, and on the ribs (Tr. 60). Most of the dust was on the structure (Tr. 44, 456). He described the dust as a "heavy skim" (Tr. 453). He attempted to measure the float coal dust with his ruler. It was thin, and he could not determine its exact depth, but he guessed that it measured less than 1/16th inch (Tr. 45).

All along the beltline Watson also noticed accumulations beside and under the belt (Tr. 43). These accumulations consisted of loose coal and coal dust and, in some areas, rock dust was mixed with the other materials (Tr. 488-490). In addition to visually inspecting the accumulations, he picked up some to determine their content and squeezed some to determine their consistency (Tr. 408-409).<sup>2</sup> He measured the loose coal and coal dust and found it to be 4 inches to 22 inches deep (Tr. 45, 445). He took between 8 and 12 measurement (Tr. 443).

From the Y inby for approximately 2,250 feet the accumulations were dry (Tr. 63-64, 79). When he squeezed them they didn't "ball up." Rather, they "fell back into dust" when he opened his hand (Tr. 79). For the next 225 to 325 feet inby approximately 75% of the accumulations were damp (Tr. 63-64, 80, 450-451). For the last 75 feet to the tailpiece the accumulations were wet (Tr. 63-64, 80), and the closer he got to the tailpiece the wetter they became (Tr. 451).

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<sup>2</sup>Watson testified he conducted the "squeeze tests" "not [at] every location, but the majority of locations . . . enough to give me a good impression of what exist[ed]" (Tr. 400-401). He squeezed the accumulations in order to "ensure [him]self that the accumulations were either damp, wet or whether they were dry" (Tr. 401).

Watson also saw at least 37 places along the beltline where belt rollers were missing, stuck, or misaligned and where misaligned rollers were causing the belt to rub the belt structure. In addition, there were places where the accumulations reached the rollers and the rollers were turning in them (Tr. 48, 53-54, 460, see also Tr. 446-448)).<sup>3</sup> In these areas too Watson felt the accumulations to gauge whether they were dry, damp, or wet, as well as to determine if they were warm (Tr. 409-410). Further, there were places where the rollers were stuck and the belt was rubbing the belt structure. He also felt the rollers and the structure (Id., 411). The belt was running while he preformed these tests (Tr. 411).

The area from inby the Y to the tailpiece had been freshly rock dusted (Tr. 443-444). However, in Watson's opinion the rock dust did not rendered the accumulations of loose coal and coal dust incombustible (Tr. 483-486).

Watson also noted that approximately 50 feet inby the Y, the waterline that ran along the beltline was broken (Tr. 52, 132). Ball later told Watson water to the line had been turned off because of the break (Tr. 131). Watson believed this was true because water was not coming out of the line at the break (Tr. 131). Because of the break, Watson thought no water was available for fire fighting purposes for 450 feet from the portal to the Y and for 50 feet inby (Tr. 52, 132-134, 359). He acknowledged that there was a small fire extinguisher and a rock duster at the portal. He did not know if other fire fighting equipment was available along the beltline.<sup>4</sup>

Watson did not observe any efforts being made to remove the accumulations or otherwise to render them harmless. (Tr. 366, 485). Because the float coal dust, coal dust, and loose coal existed in active workings of the mine, Watson found the accumulations constituted a violation of section 75.400. Watson told Ball he was going to issue a citation for the violation under section 104(d)(1) of the Act because he believed the accumulations were S&S and the result of Clinchfield's unwarrantable failure.

With regard to the S&S nature of the violation, Watson stated, "It only takes one

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<sup>3</sup>Watson described the 37 rollers as being "in various locations along the entire 3,000 [feet] of the belt," beginning inby the belt portal and extending "all the way to the tailpiece" (Tr. 385).

<sup>4</sup>In fact, the testimony revealed that other fire fighting equipment was available. Five hundred feet of hose was stored at the portal and another 500 was feet stored at the Y (Tr. 972, 1270). The hoses had access to water, and, according to mine superintendent, Musick, it would have taken about 5 minutes to hook the hoses to the water sources (Tr. 972, 1073). Also, the rock duster could have been used to spread rock dust to help smother a fire (Tr. 361). However, it is questionable whether the rock dust would have been very effective (Tr. 362) and whether rock dust released in the portal area would travel all the way to the Y (Tr. 465).

frictional source to ignite coal dust," and an ignition could come from any of the many frictional sources he had seen (Tr. 47, 54, 95-96, 112-113). Further, he believed the air velocity in the entry would have fanned an ignition and helped propagate a fire (Tr. 56-58). Because the belt air was ventilating the working faces, smoke from an explosion or fire would have travel directly to where miners were working. At a minimum, eight miners inby the accumulations would have been affected (Tr. 101-102). Further, because the belt and track were adjacent to one another, miners who traveling along the track also would have been endangered (Tr. 96-97).

With regard to unwarrantable failure, Watson told Ball that given the amount of accumulated coal and coal dust, he believed the accumulations had been present for "some time" (Tr. 51). In addition, Watson had been told about a November, 1996, conversation that his supervisor, James Pointer and an MSHA inspector, Gary Roberts, had with Musick. As Watson understood it, they warned Musick that Clinchfield needed to do a better job in preventing accumulations along the beltlines. In view of the conversation, Watson "felt that . . . Musick showed aggravated conduct by not . . . taking action to correct the condition" (Tr. 108, see also Tr. 113). Further, Watson relied on the mine's belt examination book (Tr. 289-291). He had reviewed the book before the inspection, and he believed the conditions he observed on January 22 had been reported since January 8 (Tr. 142-144, 461-462). Watson had noted that on many shifts between January 8 and January 22, the belt examiners had written of the Mains No. 1 belt, things like "needs some cleaning," "needs a few rollers," "float coal dust inby the head house" (Tr. 142). Usually, the examination book was countersigned by mine management, and he thought that Clinchfield's management "had to be aware there were accumulations on [the] beltline" (Tr. 144).

**Ball's Response To The Conditions, Issuance of the Citation,**  
**and**  
**Musick's Post-Citation Actions**

After completing the inspection, Watson met Ball. Watson told Ball about the conditions he had observed along the beltline (Tr. 51). He stated he had looked at the belt examination book and had seen notations in the book that the beltline needed cleaning. Watson asked Ball if he wanted to travel the entire beltline with him so that Ball could assure himself the accumulations were there. Watson testified Ball replied, "I know what's there . . . I don't need to go back, I don't need to look at it" (Tr. 51, see also Tr. 294).<sup>5</sup> Watson interpreted this as an indication "that ...[Ball] knew there [were] accumulations on the belt" (Tr. 299).

Watson then issued the citation. It states:

Loose coal and coal dust was allowed to accumulate under

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<sup>5</sup>Although Ball first testified he could not recall the exchange with Watson, on cross examination he testified it might have occurred (Tr. 1260, 1294).

the return rollers of the Mains #1 Conveyor Belt System. The accumulations began at the Belt Entry Portal and extended inby to the tailpiece which is a distance of approximately three thousand feet. Depth ranged from four to twenty four inches. Float coal dust was allowed to accumulate in the belt entry from the Belt Entry Portal to . . . where the Belt and Track Entries merge. This is a distance of approximately four hundred fifty feet. These accumulations were one sixteenth of an inch and less in depth. There were at least thirty seven location[s] along the belt where the rollers were either running in the accumulation or the rollers were stuck or misaligned. There were at least eleven locations where the rollers were missing [and] the belt was rubbing the frame of the roller stands. These location[s] were warm to the touch (Gov. Exh. 2).

After the citation was issued Musick looked at the conditions (Tr. 985). Musick road a personnel carrier to the Y. At the Y he left and walked back to the portal. Musick saw miners cleaning the cited areas. He testified that they were using slate bars because the material was frozen (Tr. 905). There were two wipers on the belt outby the portal. Normally, the wipers knock off loose material that was on the belt. However, when the temperature was below freezing, the wipers tended to freeze and the loose material was carried into the mine and fell to the mine floor (Tr. 918-919). Because of this, there were more accumulations along the beltlines during the winter (Tr. 1281). Musick maintained it was this frozen material that he observed the miners cleaning between the portal and the Y. He described the material as "chucks of ice . . . under the return rollers" (Tr. 1051).

Musick also traveled in the personnel carrier to the tailpiece. Approximately 200 feet outby the tailpiece he saw a spillage of coal. The area was "extremely wet" (Tr. 907), so wet, in fact, that he did not think any of the material could burn (Tr. 1049). He saw no other accumulations (Tr. 907, 1042); nor did he notice any missing rollers (Tr. 914).

### **Abatement**

After the citation was issued, Ball assigned three or four miners, including himself to clean the accumulations (Tr. 1287). Further, when the oncoming shift arrived, and members of the crew were told they too were going to help with the clean up (Tr. 699).

Ball described the accumulations as a combination of ice, rock dust, and coal (Tr. 1262). In his opinion, the material was too wet and too frozen to be combustible (Tr. 1264). Ralph O'quinn, a miner who helped with the cleanup just inby the portal, testified the accumulations consisted of coal, rock dust, and chucks of black and white ice (Tr. 1124-25) and that they were "real frozen solid hard stuff" (Tr. 1105). Another miner who helped, Herbert Short, cleaned up further inby the portal. Short testified that some of the accumulations were wet and some were

frozen, but that the frozen accumulations "weren't . . . real solid" (Tr. 1148). In fact, the ice was in the form of paper thin flakes that fell from the belt (Tr. 1159).

When Watson returned to the mine on January 23, he found the accumulations had been cleaned up and rock dusted from the portal of the belt entry to the tailpiece (Tr. 125).

### THE VIOLATION

Of the many safety standards for underground coal mines, section 75.400 is among the most frequently cited and well known. Its parameters were outlined in one of the Commission's first decisions, and the fundamental interpretation the Commission there enunciated has been applied since. In Old Ben Coal Co., 1 FMSHRC 1954, 1956 (December 1979) (Old Ben I), the Commission stated that section 75.400 is violated "when an accumulation of combustible materials exists." The Commission noted that the standard is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated" and that the standard "makes accumulations impermissible" (1 FMSHRC at 1957). The Commission distinguished between "accumulations" and "spillage" and recognized that while some spillage of combustible materials may be inevitable in mining operations, the question of whether spillage is an accumulation depends, at least in part, on its size and amount (1 FMSHRC at 1958).

Shortly after deciding Old Ben I, the Commission revisited section 75.400 and stated that it was the presence of combustible materials that could cause or propagate a fire or an explosion that the standard sought to proscribe. The Commission stressed the importance of the inspector's judgement in determining whether the combustible materials could in fact cause or propagate a fire or explosion if an ignition source were present (Old Ben Coal Co., 2 FMSHRC 2806, 2802 (October 1980) (Old Ben II). The burden was on the Secretary to establish the presence of the alleged accumulation, and the fact that the material could cause or propagate a fire or explosion.

Here, the Secretary met the burden. Watson testified at length about the nature and extent of the accumulations. He described what he saw, what he pick up, and what he measured. His testimony was persuasive and it was clear.

Watson examined the entire beltline. He was usually two to three feet away from the belt (Tr. 81-83, 363-364). This meant he was virtually "on top" of the accumulated material. From the portal to the Y, a distance of approximately 450 feet, he saw float coal dust on the roof, the floor, and on the belt structure, with the majority of the float coal dust being on the structure (Tr. 44, 60, 456). The dust coated the structure like a "heavy skim" (Tr. 453). He tried to measure its depth. He was not successful, but, as I have noted, he estimated that float coal dust was somewhat less than 1/16th of an inch deep (Tr. 45).

He testified that the float coal dust easily could have been ignited by heat or fire produced by friction (Tr.54), and it is common knowledge that once ignited float coal dust can propagate

an explosion. These facts alone are enough to bring the accumulation within the perimeters of Old Ben II and to establish the violation of section 75.400 (see Black Diamond Coal Mining Company 5 FMSHRC 764, 778 (April 1983 (ALJ Koutras) (aff'd 7 FMSHRC 1117 (August 1985))).

Watson's testimony also established the presence of loose coal and coal dust along and under the belt. (Tr. 43). As he walked the beltline, he stopped and looked at these accumulations, he touched them, he picked them up, he squeezed them, and he measured them (Tr. 45, 59, 445). Although the accumulations became wetter as he walked toward the tailpiece, there were points where the accumulations were dry. They crumbled in his hand (Tr. 450-451). The depth of the loose coal and coal dust ranged from 4 inches to 22 inches (Tr. 45, 445). He also observed places where rock dust mixed with the coal and coal dust (Tr.488-490).

I fully credit Watson's observations. He walked the beltline. In so doing he placed himself in the best position to see what lay under and alongside it. Moreover, he verified what he saw by handling and measuring the accumulated material. Clinchfield did not offer testimony that persuasively undermined Watkins's first-hand observations regarding the loose coal and coal dust. For example, Musick testified that although he saw spillage at one point between the Y and the tailpiece, he did not see any other accumulations (Tr. 907, 1042), but Musick viewed the area after Watson decided to issue the citation, and Music did not walk beside much of the belt. Rather, he rode on a mantrip, a mode of travel that placed him further from the beltline than Watson and that required him to pass along the beltline at a great speed (Tr. 1043). Moreover, even Musick agreed there was some coal spillage along the beltline that needed to be cleaned up (Tr. 914).

Finally, those engaged in the clean up efforts consistently testified that although the cited material included rock dust and chunks of ice, it also included loose coal (e.g., Tr. 1124-25 see also Tr. 1172, 1262). Accumulations of loose coal are prohibited by the standard.

Based on the extent of the coal and coal dust, which existed all the way along the beltline -- a distance of approximately 3,000 feet -- and the depth of the accumulations, which ranged from 4 to 22 inches, I find that the coal and coal dust was much more than "spillage," that is, it was more than a mere deposit of combustible materials. Moreover, although the consistency of the material ranged from dry to damp to wet, I find that enough of it could have ignited and caused or propagated a fire to meet the requirements of Old Ben II. In this regard I especially note the dry coal and coal dust, could have served as an originating source for an explosion or fire or could have feed fire originating elsewhere. It is also true that the damp, wet, and frozen accumulated coal and coal dust, could have dried out or defrosted and burned if the coal and coal dust became involved in a fire. Finally, the fact that rock dust was mixed with the coal and coal dust does not negate the violation. As the Commission has stated, "A construction of [section 75.400] that excludes loose coal that is wet or allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from the

mine and permits potentially dangerous conditions to exist" (Black Diamond, 7 FMSHRC at 1121).

### S&S AND GRAVITY

A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (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 the injury in question will be of a reasonable serious nature.

The first requirement is met because there was a violation. The second requirement is met also because that violation contributed to the danger of a mine fire or explosion. As with most instances involving the validity of an S&S finding, the critical question is whether the Secretary established the third element. In other words, did the Secretary prove there was a reasonable likelihood the accumulated material would catch fire or explode and injure a miner?

Watson testified that he saw locations where rollers were turning in the accumulations and places where stuck or misaligned rollers caused the belt to rub against the belt structure (Tr. 48, 53). The rollers that were turning in the accumulations and the belt that was running over the stationary rollers and against the structure were sources of friction and hence of heat, a fact that Watson confirmed by touching some of the rollers, the accumulations, and the areas of the belt structure (Tr. 49, see also Tr. 409-415). Watson's testimony was delivered in an entirely believable manner, and it also has the singular advantage of conforming to an invariable law of physics — rubbing produces friction and friction generates heat.<sup>6</sup>

As I have noted, some of the accumulations of loose coal and coal dust were dry, and the heat could have served as a reasonably likely ignition source for the dry accumulations (Tr. 450). Further, while many of the accumulations ranged from damp to wet, there were places where the belt was rubbing in the damp to wet accumulations, which meant that heat was being produced and therefore the accumulations were drying. This too meant that as mining continued, it was

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<sup>6</sup>Roberts laconic observation that touching the stuck rollers while the belt was moving was "not the best practice in the world" was certainly an understatement, and Watson's actions in this regard may warrant counseling by his supervisors (Tr. 587). However, in my view the fact that his testimony may have been adverse to his own interests enhances rather than lessens his credibility.

reasonable likely that even some of the damp to wet accumulations could have ignited.

Finally, there was the highly explosive float coal dust that lay on the belt structure from the portal to the Y (Tr. 44, 456). As mining continued, the places where the belt was as malfunctioning could have generated heat sufficient to touched off an ignition (Tr. 47). As Watson aptly noted, "It only takes one frictional source to ignite coal dust" (Tr. 54). Once there was an ignition, the float coal dust could have propagated an explosion along the beltline.

Miners were exposed to the hazard. The mantrip moved adjacent to the belt when it took miners to the working section (Tr. 96-97, 868). In the event of an explosion or fire, all of the miners on the mantrip easily could have been affected. Moreover, the air in the belt entry traveled toward the working section, and at a minimum eight miners worked inby the accumulations. They too could have been affected by an explosion or fire (Tr. 101-102).

Injuries which reasonably could have been expected were burns and/or those injuries caused by smoke inhalation. Such injuries are of a reasonably serious nature. For all of these reasons I conclude the violation was S&S.

Also, the violation was serious. The focus of the civil penalty gravity criterion is not necessarily on the reasonable likelihood of serious injury, but rather on the effect of the hazard if it occurs (Consolidation Coal Company 18 FMSHRC 1541, 1550 (September 1996); citing to Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987) ("gravity" penalty criterion and special finding of S&S not identical although frequently based on same or similar factual circumstances)). As a practical matter this means that analysis of the violation's gravity concentrates on what could have happened if a fire or explosion occurred. As I have found, the proximity of the track to the belt entry and the fact that the working section was inby the violation meant that had the accumulations caught fire and/or had the float coal dust propagated an explosion, the effect on the miners traveling in the proximity of the accumulations or working inby the accumulations could have been disastrous (Tr. 465).

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

The Commission has defined unwarrantable failure as aggravated conduct constitution more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

Several factors must be considered in analyzing whether a violation resulted from unwarrantable failure: among these are "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the . . . condition, and whether [the] operator has been placed on notice that greater efforts are necessary for

compliance" (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993)). The burden of proof is on the Secretary.

The question of whether the Secretary met her burden by proving the violative conditions were the result of reckless disregard or indifference requires consideration of whether the violative accumulations resulted from Clinchfield's failing to meet a heightened standard of more than ordinary care, a standard required by the company having been put on notice, directly or indirectly, that such care was needed to prevent the violation. Indices the standard was required might be that the company had an inordinate number of accumulations violations prior to January 22; or, that the company was advised by MSHA that the agency believed greater efforts were necessary to prevent violative accumulations; or, that the company otherwise was warned that an inordinate number of accumulations existed; or, that the conditions themselves were so extensive and dangerous they required the company's immediate attention.

Although the Secretary argues the evidence establishes that in November 1996, and into mid-December, the company had an on-going problem with violative accumulations and that the problem required it to adopt a heightened standard of more than ordinary care, I do not agree. Roberts testified that in mid-November 1996, prior to going to the mine, he reviewed records at the MSHA office and found that "there were several 75.400 violations and citations, about six months prior" (Tr. 566). He guessed the number was between 14 or 15 (Tr. 568). The company argued that to be put on notice, the violations had to involve accumulations along the beltlines, but in my view, a significant number of section 75.400 violations anywhere in the mine would have been sufficient. However, to establish that a certain number of prior violations was a basis for unwarrantable failure, the Secretary had to offer testimony as to what the number was and why the number was meaningful. I cannot find that 14 or 15 accumulations violations over six months should have signaled that the company had a more than an ordinary problem with compliance. There was no testimony by Roberts or by others why such numbers should have alerted the company to greater compliance efforts, and standing alone the numbers do not speak for themselves. Further, I find nothing extraordinary in Roberts testimony that out of the nine citations he issued on November 18, three were for violations of section 75.400 (Tr. 526). Again, the numbers do not speak for themselves.

I recognize Watson testified that on December 16, 1996, he also issued seven citations for violations of section 75.400, and that they involved accumulations of coal and coal dust along seven of the beltlines at the mine (Tr. 159-167; Gov. Exhs. P7-P13). This may or may not be a meaningful number of violations of the same standard. I cannot tell because once again the testimony was presented without a necessary gauge by which to judge the numbers.

Further, there is evidence in the record which suggests (although not conclusively) that whatever Clinchfield's past history with regard to violations of section 75.400, at the end of December 30 and into the first part of January, the company was meeting the standard of care

required of it. Watson testified he was at the mine on December 30 and January 8, 1997. On both occasions he rode in a mantrip along the beltlines, and he saw no violative accumulations (Tr. 229, 239, 243-44, 254, 263). The Secretary argues that Watson's failure to note any accumulations is unimportant because he was there at the mine for purposes other than to inspect the beltlines, and because he was riding not walking alongside the lines. However, as Watson himself agreed, regardless of the purpose of the visit, he would have cited any accumulation violation he observed, and although it was more difficult to see accumulations along the beltlines while riding in the mantrip, it was not impossible.

For these reasons I do not believe the Secretary proved that the company's past violations of section 75.400 put it on notice that a higher standard of care was required. The question then is if he proved that MSHA gave the company actual notice?

The parties dispute whether or not MSHA warned Clinchfield in mid-November that it needed to take a more aggressive approach to guard against accumulations violations. At issue is the discussion between Musick, Pointer, and Roberts. Pointer did not testify. The Secretary's version of the discussion was detailed through what others heard Pointer and Roberts say about the discussion and through Roberts' testimony regarding what Pointer and he said to Musick.

According to Watson, in December, Pointer told him that about a month earlier he (Pointer) and Musick had discussed the "exceptional number of section 75.400 violations and the conditions of the conveyor beltlines" (Tr. 107, 373). The discussion took place at the MSHA office. Roberts, who testified he was present at the November discussion, stated that Pointer told Musick that "more extreme measures" would have to be taken if the situation with regard to the beltlines did not improve (Tr. 548). Roberts also believed that he told Musick essentially the same thing (Tr. 541, 558).

Musick emphatically denied that the statements were made to him (Tr. 965-966, 1027-28). He was sure that nothing was said about MSHA taking "more extreme measures," such as future enforcement actions under section 104(d) of the Act for violations of section 75.400 (Tr. 569). Musick noted that Shelley Branham, the union local president and chairman of the union safety committee, arrived during the meeting with Pointer and Roberts, that Musick introduced Branham to Roberts, and that Musick then left the room. Musick speculated that Roberts might have told Branham that MSHA intended to intensify its enforcement actions at the mine, and that Roberts might have confused Branham for Musick (Tr. 1027). (Prior to the meeting Roberts never had met Musick or Branham).

This conflicting testimony does not support finding that Musick was warned about "more extreme" enforcement measures. As I have noted, Pointer did not testify, and while Roberts "thought" he gave Musick "a kind of verbal warning that perhaps more extreme measures would be forthcoming," in the face of Musick's denial the Secretary needed first-hand confirmation (Tr. 548). She offered Branham's testimony, but Branham's recollection was highly suspect. Branham had met with Roberts and the Secretary's counsel two days prior to the hearing. At the

meeting Roberts "mentioned" what he and Pointer had said to Musick (Tr. 606). Branham had no independent recollection of the conversation until this meeting (Tr. 760-761; 768-769).

Musick's and Roberts' different recollections of what was said at the November meeting do not mean that the witnesses were disingenuous. Not infrequently speakers recall in good faith what they think they should have said, and listeners recall in good faith what they think they should have heard. This is especially so when, as here, the words recalled were uttered more than a year and one half before.

Much of the rest of the Secretary's aggravated conduct allegation is premised on the entries that Clinchfield's belt examiners made in the belt examination book and in Clinchfield's response to those entries. The testimony and the exhibits establish that the belt examiners repeatedly entered notations in the book regarding the presence of accumulations that needed "some cleaning" along the Mains No. 1 belt. An examination of copies of the book that were admitted as evidence indicates that a notation the belt "needs some cleaning" was made over and over during December 1996 and January 1997. Further, the specific entries with regard to possible accumulations for January 11, January 18, January 19, January 20, and January 21 all stated, "Float dust inby the head house" (Tr. 629-634; Gov. Exh. P-5). Many also stated that the beltline needed rollers (See Gov. Exh. P-5).

Musick, in what most charitably can be termed an understatement, agreed the notations were "pretty common" (Tr. 924). However, Clinchfield maintained that a notation stating a belt needed "some cleaning" did not necessarily mean there was a violation of section 75.400, because when a belt examiner usually believed there was a violation, the examiner would leave a note for Musick or for Ball about the condition or tell one or both about the condition. No notes were left and no oral reports were made from January 8 to January 22 (Tr. 925, 927-930, 1207-08).

While I agree with Clinchfield that a notation the belt needed cleaning did not necessarily indicate there was a violation, I believe it should have alerted Clinchfield to the possibility a hazardous condition existed, one that needed to be checked and possibly corrected. This was especially true when the notation was accompanied by an entry signaling the need to replace or repair rollers, since malfunctioning rollers could cause coal and coal dust to fall from the belt and also could serve as an ignition source. Ball seemed to recognize this. He testified, "The purpose of [the belt examination book] is to let us know of any hazard[ous] conditions or anything that we need to look at or address" (Tr. 1277). I credit this assessment of the book's purpose because it corresponds with Ball's practice of looking at the book at the start of the shift to see if any hazardous conditions were reported (Tr. 1207).

To accept Clinchfield's contention that only notes or oral reports from the belt examiners alerted it to hazards significant enough to constitute violations would be to render almost meaningless the notations in the book. Surely the company would not have its examiners make and its mine foreman review meaningless entries.

Thus, although Ball maintained nothing in the belt examination book from January 8 to January 22 gave him any indication there was a violation of section 75.400 along the Mains No. 1 belt, that is not the point (Tr. 1253-54). As Ball himself stated, the purpose of making entries in the book was not to report violations but rather to report conditions that needed attention and correction. Clinchfield was responsible for following up on the reports in the book by examining the reported conditions and correcting them so that hazardous conditions were eliminated and violations did not develop as mining continued. Clinchfield totally failed to meet its responsibilities in this regard.

In almost every entry between January 8 and January 22, notations were made indicating that some part of the Mains No. 1 belt needed cleaning, and relatively few notations were made showing that cleaning was done (Tr. 142; see Gov. Exh. 5). Carson Lowe testified that when he wrote the belt needed cleaning over those several days in January, it was because there were accumulations along part or all of the belt and because based on his examination he did not believe the accumulations had been cleaned (Tr. 635-636). The repeated entries in the belt examination book and the extent of the accumulated materials along the beltline supports a reasonable inference that Lowe was right, and that the accumulations had existed for several days.<sup>7</sup> The inference is buttressed by Watson's testimony that when he told Ball it looked as though the accumulations had existed for "some time" and offered Ball the chance view the beltline with him, Ball declined and stated he knew what was there (Tr. 51, see also Tr. 294). Since Ball also stated that during the course of a day it was his practice to visit every beltline (Tr. 1209), the most reasonable interpretation of his response to Watson is that Ball knew the accumulations existed.

Clinchfield's excuse for allowing the loose coal and coal dust to accumulate along the Mains No. 1 beltline essentially was that the entry was too cold to keep clean when winter temperatures went below freezing. According to Musick, in January miners sometimes were assigned to clean along the Mains No. 1 belt for 30 minutes and then were moved to locations where it was warmer or where it at least felt warmer (Tr. 1062). Ball testified he assigned men to clean the belt on January 17, but that it got so cold he sent the men to shovel another belt (Tr. 1212-16). Because of the cold, Musick guessed it had been two and one half to three weeks since a crew was assigned to clean the belt for an entire shift. Rather, than assign an adequate number of miners to clean along the beltline, Clinchfield seems to have relied on intermittent cleaning by the belt examiners (Tr. 1067-68). The problem with this, as belt examiner O'quinn observed with respect to himself, was that if the belt needed cleaning along its entire length, there was not time to do it (Tr. 1122).

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<sup>7</sup> The same inference cannot be made with regard to the float coal dust that accumulated from the portal to the Y. The testimony established it could have accumulated in a very short time, that Clinchfield recognized this fact, and that Clinchfield made it a practice frequently to rock dust the area (Tr. 931-934, 949).

The testimony and evidence establishes that temperatures had been below freezing the week before the citation was issued but that they had begun to warm by January 22. Given the warming trend, Clinchfield maintains that had mining continued the accumulations would have been cleaned by the end of the January 22 shifts. Musick stated, "We hadn't had no one on the belt because it had been so cold and it was beginning to warm up. We was going to clean on that belt" (Tr. 1065, see also Tr. 1214).

The intention to clean when it was warmer is not an acceptable reason for allowing the accumulation. Ball credibly testified that there tended to be more accumulations along the beltlines in the winter (Tr. 1281). Moreover, the mine was drier in the winter, making the accumulations more readily combustible. Acceptance of the company's excuse would mean that during the winter, when temperatures were below freezing, accumulations would be inevitable and miners would be subject to working under the continual hazard of a mine fire or explosion. Compliance is not dependent upon the weather, and Clinchfield cannot be allowed to wait until the weather changes to give its miners the protection envisioned by section 75.400.

Rather than dance to the temperature's tune, it was the company's responsibility to find a way to keep its beltline free of violative accumulations. How it met its responsibility was for Clinchfield to determine. If it could not operate in the winter without running afoul of section 75.400, it could have applied for a variance (see 30 U.S.C. §811(c)). There is no suggestion in the record that the company considered such a step.

Given the extensiveness of the accumulated loose coal and coal dust, the length of time the accumulations existed, the fact that the belt examiners, through their book notations advised mine management the accumulations needed cleaning, and the lack of any effective action to clean up the accumulations, prior to the issuance of the citation, I conclude the violation was due to more than ordinary negligence on Clinchfield's part and that the company unwarrantably failed to prevent the violation.

This finding is equivalent to a finding of high negligence on Clinchfield's part.

### **KNOWING VIOLATIONS**

Section 110(c) of the Act provides for the assessment of a civil penalty when an agent of a corporation "knowingly [has] authorized, ordered, or carried out" a violation of a mandatory health or safety standard (30 U.S.C. §820(c)). The parties have stipulated that at all times relevant to the cases Clinchfield was a corporation (Stip. 10). In addition, at all times relevant the superintendent (Musick) and the mine foreman (Ball) were agents of the corporation (Strips. 12, 14). Thus, they may be held personally liable if they knowingly violated section 75.400.

The Commission has approved the description of "knowingly" found in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950), wherein the court stated that the word:

“does not have any meaning of bad faith or evil purpose of criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence (92 F. Supp. At 780).

The Commission has found that this interpretation “is consistent with both the statutory language and the remedial intent of the . . . Act” (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981) (aff’d on other grounds, 689 F.2d 623 (6<sup>th</sup> Cir. 1982), cert denied, 461 U.S. 928 (1983)). The Commission has explained:

If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC at 16).

In addition, the Commission has held that to violate section 110(c), the person’s conduct must be “aggravated”, i.e., it must involve more than ordinary negligence (Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992)).

I conclude that the cited accumulation was due to more than ordinary negligence on the part of Musick and of Ball and that they knowingly violated the standard. As Musick stated, he was the person “in charge of the overall . . . health and safety of the employees [and] production” (Tr. 853), and Ball was his principal deputy (Tr. 1049). Moreover, Ball was the management official particularly responsible for keeping the belts clean (Id., 1049, 1080). Both men knew that accumulations of loose coal and coal dust along the beltlines were more common in the winter when the outside wipers froze, the loose material on the belt froze, and the frozen material was carried inside the mine where it tended to fall under and alongside the belt (Tr. 918-919, 1281).

This meant that during the winter Clinchfield’s agents should have exercised heightened care to prevent accumulations along the beltlines. Neither did. As O’quinn testified, no one miner was assigned full time to keep the Mains No. 1 belt clean from the portal to the tailpiece. Rather, Musick and Ball primarily relied on the belt examiners, and O’quinn persuasively testified that if the belt required cleaning along its entire length, he, as a belt examiner, did not have the time to clean it (Tr. 1118, 1112). This was echoed by Lowe who also felt that insufficient personnel were relied upon by the agents to keep the belt clean (Tr. 639, 640).

As importantly, although the agents knew that in the winter they might not be able to

keep miners cleaning the beltline for more than 30 minutes at a time due to the cold, they did nothing otherwise to ensure compliance. Or, if circumstances in the mine made compliance impossible in the winter, they did nothing to initiate steps to provide for a legal alternative to compliance.

Musick explained, "We hadn't had no one on the belt because it had been so cold" (Tr. 1065, see also Tr. 121)," and Musick speculated that because of the cold it had been two and one half to three weeks since he and Ball had assigned a crew to clean the beltline (Tr. 1067-68). Ball too maintained the cold affected his ability to keep the beltline clean in that he had removed miners from cleaning the belt on January 17 and had sent them elsewhere because it had been so cold (Tr. 1212-16). Rather than rotate cleanup crews, or assign enough miners to clean the entire line in a time that avoided the problems caused by the cold, the record permits the inference the agents chose to operate as usual, and, as I have already found, to make compliance contingent upon the weather (Tr. 1065).

In so doing both men fell short of the heightened standard of care required by the circumstances. Their negligence was aggravated, and they are liable for the violation under section 110(c).

## **CIVIL PENALTY ASSESSMENTS**

### **CLINCHFIELD**

The violation while serious was not as serious as the Secretary contended in that much of the accumulated material was damp to wet which meant than an ignition was less likely than if all of the accumulations had been dry. Further, the violation was not as serious as Watson initially believed in that some fire fighting protection was available from the portal to the Y and immediately inby the Y (see n.4 supra ). The violation was due to the company's high negligence. Clinchfield is a large operator with a large history of relevant previous violations. The violation was abated with good faith and in a reasonable time.

The Secretary has proposed a civil penalty of \$3,200 for the violation. Because of the lessened gravity of the violation, I conclude a penalty of \$2,500 is appropriate.

### **MUSICK AND BALL**

For the same reasons as set forth above, I find that the violation while serious, was not as serious as the Secretary contended and as Watson believed, and that the violation was abated in good faith (Sunny Ridge Mining Co., Inc., 19 FMSHRC 254, 272 (February 1997) (findings on gravity and good faith abatement in section 110(c) cases may be made on same record used in assessing operator's penalty)). I also find that Musick and Ball exhibited more than ordinary negligence in failing to make sure the loose coal and coal dust along the Mains No.1 belt was cleaned up and the accumulation prevented. Neither Musick nor Ball offered evidence as to their

income and net worth, and I therefore assume the size of the penalty will have no affect on their ability to meet their financial obligations.

There is no indication in the record that either Musick or Ball previously engaged in knowing violations. Indeed, the record contains statements by rank and file miners regarding the care and concern they usually exhibited toward the safety and the well being of the miners whom they supervised (Tr. 658, 751-752, 1198-99, 1093, 1153). Given the somewhat lessened gravity of violations, the agents' lack of a prior history of knowing violations, and being mindful of the Commission's admonition that "inordinately high penalties should not be assessed against individuals under sections 110(c)" (Sunny Ridge, 19 FMSHRC at 272), I find that significant reductions in the penalties proposed by the Secretary are warranted. In addition, in assessing a penalty against Ball, I note that he is disabled and seems unlikely to return to work as a miner (see n.1 supra).

The Secretary has proposed that Musick and Ball respectively be assessed civil penalties of \$1,400 and \$1,000. For the reasons set forth above, I conclude Musick should be assessed \$800 and Ball should be assessed \$200.

**ORDER**

**DOCKET NO. VA-33**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
7293555	1/22/97	75.400	\$3,200	\$2,500

The citation is **AFFIRMED** and Clinchfield is **ORDERED** to pay a civil penalty of \$2,500 within 30 days of the date of this decision.

**DOCKET NO. VA 98-17**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
7293555	1/22/97	75.400	\$1,000	\$200

Ball is **ORDERED** to pay a civil penalty of \$200 within 30 days of the date of this decision.

**DOCKET NO. VA 98-18**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
7293555	1/22/97	75.400	\$1,400	\$800

Musick is **ORDERED** to pay a civil penalty to \$800 within 30 days of the date of this

decision.

Upon receipt of the payments, Dockets No. VA 97-33, VA 98-17, and VA 98-18 are **DISMISSED**.

*David F. Barbour*  
David F. Barbour  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

February 26, 1999

GREGORY BENNETT,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 98-115-D
	:	WE MD 97-21
NEWMONT GOLD COMPANY,	:	
Respondent	:	Twin Creeks Mine
	:	Mine ID 26-01942

## DECISION

Appearances: Mr. Gregory R. Bennett, Golconda, Nevada, *pro se*;  
David Farbar, Esq., Patton Boggs LLP, Washington, D.C. for Respondent.

Before: Judge Bulluck

This discrimination proceeding is before me on a Complaint of Discrimination brought by Gregory R. Bennett against Newmont Gold Company ("Newmont"), under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (c). The complainant alleges unlawful discharge in retaliation for health and safety complaints that he had raised with Newmont.

Bennett filed his discrimination complaint with the Mine Safety and Health Administration ("MSHA") pursuant to Section 105(c)(2) on July 25, 1997 (See Complaint File).<sup>1</sup> On December 22, 1997, MSHA notified Bennett that, based on its investigation of the allegations, it had concluded that a violation of Section 105(c) had not occurred. Bennett, *pro se*, initiated this proceeding before the Commission on January 16, 1998, under Section 105(c) (3), 30 U.S.C. §815 (c)(3).<sup>2</sup>

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<sup>1</sup>Section 105 (c)(2) provides, in pertinent part, that "Any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

<sup>2</sup>Section 105(c)(3) provides, in pertinent part, that "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of the notice of the Secretary's determination, to file an action in his own behalf before the Commission...."

By motion filed on May 11, 1998, Newmont sought dismissal of Bennett's discrimination complaint, based on Bennett's failure to state a claim upon which relief may be granted. Based on Bennett's opposition to Newmont's motion, Bennett was granted permission to amend his pleadings by filing an 11-page narrative that he had previously submitted to MSHA during the initial investigation of his complaint. Bennett's pleadings, as amended, construed in the light most favorable to him, were deemed to adequately allege protected activity and adverse treatment under 105(c), for which he would be entitled to relief, if proven. Accordingly, Newmont's Motion to Dismiss was denied.

A hearing was held in Reno, Nevada. The parties presented testimony and documentary evidence, and filed post-hearing briefs.<sup>3</sup> For the reasons set forth below, I conclude that Bennett did not prove that he had engaged in protected activity under the Act and that, even if he had, he was not discharged for having engaged in any protected activity.

### I. Stipulations

The parties stipulated to the following facts:

1. Newmont is subject to the jurisdiction of the Mine Act.
2. Mr. Bennett was an employee at Newmont or its predecessor beginning in 1990.

### II. Factual Background

Newmont owns and operates several gold mines in the northern Nevada area, including the Twin Creeks Mine, which was acquired from Santa Fe Pacific Gold in or around June 1997 (Tr. 115). Twin Creeks has two mills, Juniper and Pinion, which are approximately six miles apart (Tr. 413).

Bennett began working at Santa Fe Pacific Gold, Rabbit Creek project, in June 1990 (subsequently became the Pinion Mill at the Twin Creeks Mine, due to the merger of Santa Fe Pacific Gold and Goldfields Company in or around 1995), until June 1996, when he was transferred to the Juniper Mill, and remained at that location until his discharge in June 1997 (Tr. 110-13). As Juniper Mill foreman, Bennett's duties included oversight of operations and maintenance of a safe work environment for his subordinates (Tr. 113). Bennett reported

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<sup>3</sup>By motions dated October 7 and 16, 1998, and November 9, 1998, Bennett sought 1) discipline of Newmont employees Blas Doran, Cindy Jones, Chris Conley, Richard Tucker and David Stacey for perjured testimony in his discrimination hearing, and 2) my withdrawal from his case, based on bias and denial of his right to fully present his case. By Order of November 10, 1998, both motions were denied.

directly to Greg McMillen, general foreman of the Juniper Mill until June of 1996, at which time Cindy Jones replaced McMillen as Bennett's general foreman (Tr. 114-15).

A major component of gold mining, particularly in northern Nevada, is safe control of the mercury that is also extracted from the ore during the gold-extraction process (Tr. 116-17, 183-84, 299). The type of mercury that is a byproduct of mining at Twin Creeks is elemental, as opposed to more hazardous organic and inorganic mercury (Tr. 300). Elemental mercury (silvery substance found inside thermometers) poses a hazard from excessive vapor inhalation, and is not dangerous when handled or ingested (Tr. 299-302). Newmont's ever-evolving mercury control program, specifically in the Juniper Mill, includes the following: Jerome Monitor samplings on every shift to ensure permissible mercury levels (Tr. 129-30, 217);<sup>4</sup> individual fit-tested and air- tested respirators for use in elevated mercury situations (Tr. 131-33, 216-17, 227, 302-04); protective clothing to prevent mercury exposure (Tr. 133-34, 217-18, 233-34); mercury vacuums that pick up visible mercury (Tr. 310-11); and use of chemical additives, such as sodium sulfide, HGX and DTC, which bind with mercury to inhibit vaporizing (Tr. 121-22, 135-36, 234-35, 310-11, 356, 371-73).

Additionally, exceeding MSHA's requirements, Newmont employs an intensive health-monitoring program which includes monthly urine testing of mill employees for elevated mercury levels (refinery employees are tested weekly), whereby testing at a "biological exposure index" for a sustained period results in removal of affected employees to mercury-free areas, until systemic mercury drops to an acceptable level (Tr. 136-37, 235-37, 243, 304-07). There has never been an instance of mercury poisoning at Twin Creeks (Tr. 243, 305, 308).

It is essential in describing the work environment at Newmont to note the emphasis placed on mercury containment by all mill employees, to a degree that daily discussions on the subject are pervasive and suggestions about improving the company's approach to the problem are not only welcomed, but encouraged (Tr. 21, 116-17, 192, 211-12, 233-34, 238, 369).

In March of 1997, Bennett had discussions with Newmont's human resource manager, Chris Conley, concerning Bennett's frustration with being "blown-off" by his supervisor as to how the mercury in the mill should be controlled, his desire to leave the company, whether he should untimely submit an incident report of a back injury to Newmont, and his concern of not being re-employable due to his injured back (Tr. 9-13, 404-06, 408; Bennett Br. at 7, 12).

Several weeks later, on April 22, 1997, a meeting was held between Bennett, his general foreman Cindy Jones, loss control manager (also called safety coordinator) Richard Tucker and other management officials, to discuss the incident report of the March 1996, back re-injury,

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<sup>4</sup>A Jerome Monitor is a hand-held instrument with an air probe at one end that takes an instantaneous reading of mercury vapor in the sample location (Tr. 308).

untimely submitted by Bennett in April 1997 (Tr. 13-20, 253-56, 315-18). At that meeting, characterized by Bennett as "a general complaint forum" for him (Tr. 19), Bennett alluded, without specificity, to safety concerns at the Pinion Mill, which apparently included lifting requirements, and was requested by management to provide a list identifying those items needing correction (Tr. 14-19, 351-52). Additionally, Bennett raised, at least, one generic issue respecting mercury at the Juniper Mill, by stating, according to his testimony, that "we are not addressing the mercury in the Juniper Mill" (Tr. 19; see also 120) or, according to Cindy Jones, by bringing up "sodium sulfide to be added to the sag discharge screen" (Tr. 356). Bennett never provided management with the list of specific safety items (Tr. 353, 366).

Bennett also had informal discussions with Richard Tucker beginning in April 1997, which Bennett described as "general safety philosophy-type. No specifics" (Tr. 36-38). According to Tucker, Bennett expressed his desire to "take care of the mercury problem if we would allow him to, but we would need to give him the opportunity to do that, and we would need to keep his supervisors, management, other people, out of the area and let him handle it, and he could take care of it (Tr. 312-13). Chris Conley, human resources manager, testified to similar conversations with Bennett, in which Bennett expressed his "concerns of mercury contamination in the refinery; that he had a solution to that, but that Cindy Jones wasn't listening to him; that if the company had followed his solution, the problem would not still exist" (Tr. 408).

Against this backdrop, on the morning on May 9, 1997, what was normally a routine meeting between Jones and Bennett, became a confrontation that marked Bennett's last day of reporting to duty at Newmont. Bennett summarized the meeting in the following testimony:

My supervisor, Cindy Jones, walked into the foreman's office. I believe she started to address some of the daily activities. At that point, I had two environmental release reports, set them down on the table, and I said, "you can't have things both ways." I said, "I can't work in this environment anymore. Nobody will take care of nothing." And I think the Court by now can appreciate how I go off on a rant, and this is probably basically what I did, saying, "You can't do this; you can't do that." There came a point when Cindy Jones stood up and said, "I'm going to Phil Walker's office, and as far as I'm concerned, you can go home" (Tr. 40).

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I referenced my back, yes I did. I told her, "I can't quit because I'm not able to get a job somewhere else." I said, "I can't go anywhere. I have to have something, settlement or severance or something." And the rest of the comments ensued

(Tr. 160). Bennett was referencing two reports, prepared for the Nevada Department of Environmental Protection ("NDEP"), in which he had documented environmental spills that had

occurred at the mine site on January 18, 1997, and May 2, 1997, respectively.<sup>5</sup> Cindy Jones had altered those reports in a manner that characterized the spills as more serious than Bennett had reported, and Bennett believed that Jones had, in essence, falsified the information reported (Tr. 42-44, 358).

Cindy Jones' account of that meeting was that it was extremely heated, Bennett complained about the environmental spill reports, and he invited her to go down to the Pinion Mill where, according to him, she would find a lot of safety "items" that had not been corrected, without identifying those items specifically (Tr. 350-51; Ex. C-31).

At some point when the meeting got out of control, Bennett was either directed or given permission by Jones to go home (Tr. 46-47). Sometime that same afternoon, on behalf of Newmont, Jones called Bennett at home, informed him that he was being placed on medical leave, and requested that he get examined by a doctor (Tr. 48, 159-60, 263-64). Bennett was examined by a local physician of his choosing, Dr. McQuillen, who cleared Bennett for return to duty, without restrictions (Tr. 49-50). Over the next month, numerous contacts occurred between Newmont and Bennett, but despite Newmont's assurances to Bennett that he had not been fired, numerous requests that he return to work, and warnings that unexcused absence of three days would result in termination, Bennett refused to return to duty (Tr. 51-56, 138, 174, 412, 416; Ex. R-5). Bennett also refused the options of voluntary resignation or transfer to a comparable foreman position in the Pinion Mill (Tr. 139, 148, 151, 152-54, 170-71, 213, 219-20, 388, 413-14; Ex. R-3). Accordingly, Bennett was terminated on June 10, 1997, for his "repeated refusal to come to work" ( Ex. R-6; Tr. 418, 423).

### III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,<sup>6</sup> a complaining miner bears the burden of establishing that 1) he engaged in protected activity and

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<sup>5</sup>According to Bennett, he met with NDEP officials after his termination and reported the alleged falsified environmental release reports. NDEP's investigation of Bennett's allegations resulted in a finding of no wrongdoing on the part of Newmont (Tr. 70-74, 142).

<sup>6</sup>Section 105(c)1 of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint ... of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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 (4) he has exercised "on behalf of himself or others ... any statutory right afforded by this Act."

2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F. 2d 1211 (3<sup>rd</sup> Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F. 2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F. 2d 639, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F. 2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

A miner's refusal to work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. *Conatser v. Red Flame Coal Co.*, 11 FMSHRC 12, 17 (January 1989) (*citing Pasula*, 2 FMSHRC at 2789-96; *Robinette*, 3 FMSHRC at 807-12; *Secretary v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-31 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469, 472-73 (11<sup>th</sup> Cir. 1985)). Moreover, "where reasonably possible, a miner refusing work should ordinarily communicate ... to some representative of the operator his belief in the safety or health hazard at issue." *Id.* (*citing Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982)). While the miner's communication may be simple and brief, it must effectively put the operator on notice of the perceived hazard, so as "to avoid situations in which an operator at the time of a work refusal is forced to divine the miner's motivations for refusing work." *Id.* (*citing Dillard Smith v. Reco, Inc.*, 9 FMSHRC 992, 995-96 (June 1987)). The Commission has provided a framework in which to analyze the effectiveness of the communication, by subjecting it to an evaluation of the specific words used, the circumstances in which the words are used, and the results, if any, that flow from the communication. *Id.* The Commission has emphasized that the alleged protected activity must not be premised upon a "difference of opinion--not pertaining to safety considerations--over the proper way to perform the task at hand." *Ramsey v. Industrial Contractors Corporation*, 12 FMSHRC 1587, 1589 (August 1990) (*quoting Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398 (June 1984)).

Bennett has failed to establish a *prima facie* case, in that he has not proven that he communicated to Newmont a reasonable, good faith belief that the work in either mill, Juniper or Pinion, involved a hazard. Bennett has only been able to prove that he engaged in unprotected confrontational discussions with management that were production oriented and not descriptive

of any safety complaints. *See id.* at 1593.

Bennett has pinpointed, with specificity, two meetings during which he believes that he engaged in protected activity. Respecting the first, an April 11, 1997, meeting, he offered the following testimony:

The way I began that was, "Jim, did you ever get up in the morning and your back just hurts because you worked hard all day?" That got a big round of laughter. And he says, "Tell me what happened." And I said, "Well, over the years we have had tasks that we had to perform that were well beyond our safety margins for lifting." Well there aren't any safety margins for lifting, and many times I had hurt my back--for most of, I want to say '94, '95 and part of '96 I had had--I was hunched over. I was having a lot of problems with my back, serious pain. Jim Venesky said to me, "Bo, that happened in another administration." He says, "That's when Serat (phonetic) and Wolf was here." And I said--and also I believe he stated, "If we have these tasks and you tell us, we'll mechanize it." I stated, "We have told you about these tasks. They're on the safety sheet. They're logged on the log book. They're ignored" (Tr. 14).

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I asked if they would walk across the hundred yards to go look with me at these tasks I was talking about ....When I stated that to Jim Venesky, who was the one that was questioning me, he said, "What are you talking about?" And I do not think that I specifically talked of the tasks that I was referring to in that meeting (Tr. 18).

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The subject got off, and it was a general complaint forum for me. I made a comment, "We are not addressing the mercury in the Juniper Mill." Roger Johnson got angry. He said, "What are you talking about, Bo?" At that point I had not gone above my supervisor. That's something else that's a very touchy thing to do. I didn't want to make accusations to my supervisor or of my supervisor in the meeting. At the very least, it's bad taste. And also, I felt maybe this would stir something for these issues to get addressed....I looked at my supervisor, Cindy Jones; was waiting for her to respond. She looked up and said, "We add sodium sulfide to the mill." At that point, I didn't say anything because it was untrue. At that point--I think it was at that point I said, "Maybe Cindy and I should get together and see if we can work some of these things out"

(Tr. 19-20).

It is clear from the record that Bennett's comments at the May 11<sup>th</sup> meeting were part of daily routine discussions about mercury as a byproduct of gold-extraction. Moreover, based on Bennett's credible testimony as to his state of mind during this period, I am persuaded that any concerns Bennett may have communicated to Newmont about mercury were discussed from an operational perspective. On this issue of whether Bennett had a reasonable, good faith belief that he was working in a hazardous work environment, Bennett's testimony during cross-examination, that he never formed such belief, is particularly illuminating:

Q. Now, as of the date of the April 11<sup>th</sup> meeting, did you believe that any of the three issues that we've just talked about, the sodium sulfide, the scrubber tank, the fan from the bullion room ever posed a direct health or safety threat to you?

A. In the Juniper Mill?

Q. Yes.

A. I was becoming unclear at that point, so I can't answer that. Prior to that I had always felt comfortable. I took the responsibility to come to work. I don't have any problem accepting that. And prior to that, I thought things were reasonable, so I can't answer "yes" or "no."

Q. Okay. But prior to that you thought things were reasonable, but about that time you began to become unsure, is that correct?

A. Yes.

Q. Now, you just didn't know one way or the other if there was a health or safety threat to you or not?

THE COURT: So becoming unsure was around sometime in April of '97?

THE WITNESS: Probably a bit before that, but...

THE COURT: Well, when, roughly?

THE WITNESS: I'm going to say early February, I'm not sure anymore. I'm not sure anymore. I'm beginning to question.

Q: All right. Before you were formally terminated from your employment at Newmont on June 10<sup>th</sup>, did you ever form a conclusion that this fan issue, the tank issue, or the sodium sulfide issue posed an actual health or safety threat to you, Bo Bennett?

A. You know, I'm worried about it. I'm worried about it. So not drawing a conclusion--I don't know anymore. I'd always felt sure, but I can't answer that.

THE COURT: Always felt what?

THE WITNESS: I always was comfortable prior to that point. I don't know anymore.

THE COURT: The question is, though, at any time before June 10<sup>th</sup> of 1997, did you ever go from unsure to making a conclusion one way or the other?

THE WITNESS: No, ma'am. No.

Q: So you don't believe that you personally were at risk of getting ill from mercury because the mercury exposures, the fan or the sodium sulfide issue or the tank, correct?

A: I don't think that's correct. I didn't know anymore. I didn't form a conclusion, but I didn't know anymore

(Tr. 122-24). In addition to mercury issues, Bennett testified a great deal about having back problems, and suggested that he also complained about the lifting requirements at Newmont. It is clear, however, that any allusion by Bennett to lifting duties in the April 11<sup>th</sup> meeting concerned the Pinion Mill, where Bennett had not worked since June 1996 (Tr. 11-12, 351, 355). Moreover, the record indicates that Bennett had been placed on "light duty" in the Fall of 1996, restricting him permanently to sedentary work (Tr. 118-19). Indeed, Bennett conceded that he had injured his back prior to his employment at Newmont in 1990, and that duties at the Juniper Mill neither included heavy lifting nor contributed to his back problems (Tr. 11, 38-39, 117-19; see also 355, 361, 370, 428; Ex C-30 at 15). In any case, Bennett never complied with Newmont's request that he provide a list of specific safety concerns at the Pinion Mill (Tr. 366).

The second meeting, occurring the morning of May 9, 1997 and resulting in a heated confrontation between Bennett and Jones, included health and safety complaints, according to Bennett. Bennett testified that he referenced the two environmental spill reports when he told Jones, "You can't have things both ways. I can't work in this environment anymore. Nobody will take care of nothing" (Tr. 40). He explained that he was conveying to her that no one was addressing the mercury issues, and that the release reports had been falsified (Tr. 24-31; 42-44). He also testified that he referenced his back problems during that encounter by telling Jones that "I can't quit because I'm not able to get a job somewhere else. I can't go anywhere. I got to have something, settlement or severance or something" (Tr. 160). Cindy Jones testified similarly that the May 11<sup>th</sup> incident involved environmental spill reports and references to unspecified safety concerns at the Pinion Mill, where Bennett neither worked at that time nor had any supervisory responsibility (Tr. 350-51, 365). Jones also testified that she lacked authority to

discharge Bennett, that she felt he did not trust her because she had altered the environmental spill reports and that, in response to suggesting the possibility of transferring Bennett to the Pinion Mill as foreman, Bennett responded that he could not work with the general foreman at that mine because he received zero support from him (Tr. 387-88; see also Ex. C-31).

Bennett's assertions that he believed he had been fired by Newmont on May 9<sup>th</sup> are inconsistent with his own testimony that he is aware that Cindy Jones, alone, did not have the authority to fire him (Tr. 148). Moreover, Bennett admitted that he believed Chris Conley when Conley assured him on May 12<sup>th</sup> that he was still employed (Tr. 56, 138; see 412).

Conley testified that he had had a discussion with Bennett in March of 1997, which he summarized as follows:

As I recall, he was very unhappy with his supervisor, Cindy Jones. He told me that she had changed a spill report that he had completed; that it was just one of many times that she had failed to listen to him enough about what should be done with the process, gold process. And it was obvious to me that Bo was very unhappy with the company and with his current supervisor.

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As I recall, Bo said that his--he had been with the company for sometime; that he was a very experienced process foreman; that Cindy Jones didn't listen to him enough about how to solve problems, and it frustrated him a great deal. I, again, could tell by the emphatic and sincere way he was talking to me that he felt very deeply about the things he was telling me....He felt that he actually was not being respected at all

(Tr. 405-06; see also 408, 445). Bennett corroborated Conley's testimony and admitted that he had been thinking about leaving the company between March and June 1997, when he was terminated (Tr. 146). Moreover, Conley testified that he wanted to keep Bennett on board because Bennett was considered "a very competent, caring, effective supervisor" (Tr. 419; see also 434-35; Exs. R-3, R-4). Accordingly, and especially because Conley appreciated the futility of resolving problems between Bennett and Jones, Conley offered Bennett the comparable Pinion Mill foreman position (Tr. 139, 413, 419; see Ex. R-3). Conley testified that Bennett responded that "the general foreman he'd be reporting to there did not have his confidence either; that there had been some past promises that general foreman--his name is Greg McMillen--had made to him that he did not keep, and he did not want to work for him either" (Tr. 414). Bennett testified similarly that he was not interested in assuming the position at the Pinion Mill, as long as the problem with Greg McMillen existed (Tr. 151-54). According to Conley, he did all that he could to persuade Bennett to return to work, so that he could keep Bennett on the payroll (Tr. 445).

Bennett, despite discussions and written notice that his vacation leave was exhausted and

he would be terminated upon three unexcused absences, Bennett consistently refused to report to work; he communicated to Newmont that he did not wish to return to an environment where his supervisor altered his work product (Tr. 138-39, 149-50, 155, 414; see Exs. C-17, C-18, C-19, C-20, R-5, R-6). Looking to the allegations in Bennett's discrimination complaint and the 11-page narrative, as well as his interview with MSHA on August 14, 1997, Bennett never specifically raised health and safety concerns and as relief, he sought restoration of the environmental release reports to their original text, back pay and severance pay, but did not seek any modification of his work environment (Exs. C-8, C-9, R-1; see also Tr. 26-33).

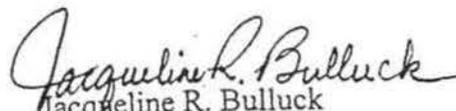
I note, especially in light of Bennett's accusations that all Newmont witnesses gave perjured testimony, that I found all witnesses, including Bennett, highly credible. Although Bennett appeared somewhat confused, sometimes unresponsive, easily frustrated and even hostile at times, he essentially gave a detailed and sincere account of his claim. Unfortunately, he is misinformed as to what constitutes protected activity and what rights are accorded to him by the Act.

Having failed to prove, as a foundation for his refusal to report to duty, that he communicated to Newmont a reasonable, good faith concern that his work involved a safety or health hazard, it must be concluded that Bennett did not engage in protected activity and his work refusal was not protected.

Assuming, *arguendo*, that Bennett had established a *prima facie* case of discrimination under Section 105(c) of the Act, Newmont has clearly rebutted his case by proving that Bennett was terminated for a legitimate business-related reason: that he refused to return to duty at the Juniper Mill, accept a transfer to the Pinion Mill or voluntarily resign, after exhaustion of his vacation leave.

### **ORDER**

Accordingly, inasmuch as Bennett has failed to establish, by a preponderance of the evidence, that he was terminated for engaging in protected activity under the Act, it is **ORDERED** that the complaint of Gregory R. Bennett against Newmont Gold Company, under Section 105(c) of the Act, is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

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