March 1981

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

MARCH

The following cases were Directed for Review during the month of March:

Secretary of Labor, MSHA v. Indian Coal Land Company, WEVA 80-5; (Judge Broderick, Default Dec. February 5, 1981)

Secretary of Labor, MSHA v. White Pine Copper Company v. United Steel Workers of America, LAKE 79-202-M, 80-24-M; (Judge Broderick, February 19, 1981)

Review was Denied in the Following Cases during the month of March:

Ranger Fuel Corporation v. Secretary of Labor, WEVA 79-218-R; (Judge Melick, January 28, 1981)

Magma Copper Company v. Secretary of Labor, MSHA, WEST 79-382-M; (Judge Carlson, February 4, 1981)

Secretary of Labor, MSHA v. Allied Chemical Corporation, HOPE 78-722-P; (Judge Koutras, February 5, 1981)

Secretary of Labor, MSHA and United Steelworkers of America v. Phelps Dodge Corporation, WEST 80-134-M; (Judge Merlin, February 12, 1981)

Richard Neal v. Wayne Boich d/b/a W.B. Coal Company, LAKE 80-105-D; (Judge Laurenson, February 12, 1981)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 11, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 80-5
v.	:	
INDIAN COAL LAND COMPANY, Respondent	:	

DIRECTION FOR REVIEW AND ORDER

The Petition for Review filed by the operator is granted. The Order of Default dated February 5, 1981 is vacated and the case is remanded to the Judge for further proceedings in light of the operator's submission to the Commission dated February 25, 1981.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1981

WAUKESHA LIME AND STONE COMPANY, INC.,	:	Docket No. VINC 79-66-PM
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
HALQUIST STONE COMPANY, INC.,	:	Docket No. VINC 79-118-PM
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

ORDER

Further administrative proceedings in these cases are stayed pending the decision by the Supreme Court in Marshall v. Dewey, 493 F. Supp. 963 (D. Wis. 1980), appeal filed, 49 USLW 3456 (U.S. Dec. 4, 1980)(No. 80-901), prob. juris. noted sub nom. Donovan v. Dewey, 49 USLW 3531 (U.S. Jan. 26, 1981), or further order by the Commission.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Distribution

Francis R. Croak, Esq.
Jan E. Kearnery, Esq.
Cook & Franke, S.C.
600 East Mason Street
Milwaukee, Wisconsin 53202

Waukesha Lime and Stone Co., Inc.
P.O. Box 708
Waukesha, Wisconsin 53187

Paul Binzak, Esq.
Kraemer and Binzak, S.C.
16800 Appleton Avenue
Menomenee Falls, Wisconsin 53051

Michael A. McCord, Esq.
U.S. Dept. of Justice
Office of the Solicitor
4015 Wilson Boulevard
Arlington, Va. 22203

James A. Broderick
Chief Administrative Law Judge
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 24, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	Docket Nos. VINC 75-83-P VINC 75-230-P
v.	:	
OLD BEN COAL COMPANY, Respondent	:	IBMA No. 76-86

DECISION

This penalty proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801-960 (1976) (amended 1977) (the Act). After an evidentiary hearing, the administrative law judge dismissed the petition for assessment with regard to four section 104(c)(2) orders of withdrawal,1/vacated four notices of violation and dismissed their related penalty proceedings.2/ The Mining Enforcement and Safety Administration (MESA) appealed.3/ For the reasons that follow, we affirm in part and reverse and remand in part.4/

Penalty Proceedings Related to Withdrawal Order

Respondent Old Ben Coal Company moved and MESA agreed to continue the penalty proceedings related to four orders of withdrawal because Old Ben's contest of those orders had been heard by another judge in review proceedings and decisions in those cases were expected. The judge reasoned, however, that there could be a considerable time before final decision of the orders on review. Therefore, he dismissed the penalty proceedings without prejudice to MESA's right to refile if ultimately successful in the review proceedings.

1/Order No. 1-HG, dated February 5, 1974.
Order No. 1-HG, dated February 6, 1974.
Order No. 2-HG, dated February 6, 1974.
Order No. 1-HG, dated February 13, 1974.

2/Notice No. 1-HG, dated February 6, 1974.
Notice No. 1-HG, dated February 7, 1974.
Notice No. 1-JWD, dated December 12, 1972.
Notice No. 1-BP, dated December 19, 1972.

3/On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961 (Supp. III 1979). MESA's enforcement responsibilities were transferred to the Department of Labor's Mine Safety and Health Administration (MSHA), and MSHA is substituted as the petitioner in this appeal.

4/Because of common questions of law and fact, the appeals as to the orders of withdrawal are treated jointly. The notices are treated separately.

This Commission has previously considered the advantages and disadvantages of a stay of proceedings rather than a dismissal.5/ We hold that as a matter of policy a stay in the instant circumstances would be more appropriate. A stay would relieve the parties of the task of refiling and would eliminate any potential problems attendent to refiling caused by the passage of time necessary to resolve the appeal of the underlying order. We believe that any benefit gained by the judge in removing the penalty proceedings from his docket does not outweigh these considerations. Accordingly, the judge's decision is reversed. The petition for assessment of penalties related to the four subject orders of withdrawal is reinstated and remanded for further proceedings.

Notice No. 1-HG, 2/6/74

This notice alleged that float coal dust was deposited on rock-dusted surfaces in return air courses for approximately 2,500 feet in violation of 30 CFR 75.400. Respondent defended by contending the cited area was not an "active working" required by 30 CFR 75.400 6/ and defined by section 318(g)(4) of the Act.7/ The judge assumed that no miners worked in the area and vacated the notice because MESA failed to carry the burden of showing that this accumulation occurred in an "active working."

Without determining whether or not the function alone of a particular area in a mine qualifies the area as an active working, the record shows that the cited area was required to be inspected at least once a week, was traveled as an escape route, and was rock-dusted periodically. We find that these uses meet the work and travel requirements of an active working under the standard. Kaiser Steel Corp., 3 IBMA 489, 510 (1974); Mid-Continent Coal & Coke Co., 1 IBMA 250, 257 (1972). Accordingly, the judge's decision is reversed, and remanded for further proceedings.

Notice No. 1-HG, 2/7/74

This notice alleged that eight open top 5-gallon cans of hydraulic fluid were stored in a crosscut off a track entry in violation of 30 CFR 75.1104.8/ This standard requires that lubricating oil and grease be kept in closed metal containers or other no less effective containers. Since no evidence was presented that hydraulic fluid was a lubricating oil, the judge vacated the notice.

5/Eastern Associated Coal Corp., 2 FMSHRC 2774, 2777 (October 9, 1980).
6/30 CFR 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." [Emphasis added].
7/Section 318(g)(4) of the Act provided: "'Active working' means any place in a coal mine where miners are normally required to work or travel."
8/30 CFR 75.1104 provides: "Underground storage places for lubricating oil and grease shall be of fireproof construction. Except for specially prepared materials approved by the Secretary, lubricating oil and grease kept in all underground areas in a coal mine shall be in fireproof closed metal containers or other no less effective containers approved by the Secretary." [Emphasis supplied].

MESA contends the judge should have taken notice that hydraulic fluid was a lubricating oil. However, we find that MESA should have presented such evidence to the judge during trial. To allow MESA's request of judicial notice first made on appeal would deny Respondent an opportunity to rebut whatever probative value such notice afforded. Also at the time of the hearing in this matter, MESA itself was on notice of an unresolved issued as to whether hydraulic fluid falls within the purview of the cited standard. Valley Camp Coal Co., 3 IBMA 176, 183-4 (1974). In finding the vacation of notice proper, we are holding only that, in this case, MESA failed in its burden of proof. The judge's decision is affirmed.

Notice No. 1-JWD, 12/12/72

MESA alleged that Respondent violated 30 CFR 75.316 by failing to comply with its ventilation plan. However, the plan itself was not available as evidence. Finding that the Respondent refused to stipulate the requirements of the plan, the judge vacated this notice.

While the plan was not available and Respondent would not stipulate as to its contents, the MESA inspector, having read and remembered the plan, testified as to what the plan provided in relation to the alleged non-compliance. His testimony was supported by area practice, and was not contradicted by Respondent. Under these defined circumstances, MESA was not obligated to produce the relevant part of the plan to support this notice. Accordingly, the judge's decision as to this notice is reversed, and remanded for further proceedings.

Notice No. 1 BP, 12/19/72

This notice alleged a violation of 30 CFR 75.323 9/ in that neither the mine superintendent nor the assistant superintendent had countersigned the daily reports of the preshift examiner and the assistant mine foreman. The judge, finding that the subject regulation placed no time limit for the countersigning by the superintendent or his assistant, interpreted the regulation to provide a reasonable time for such signing. The judge then found that MESA presented no evidence that the time involved here was unreasonable and vacated the notice.

9/30 CFR 75.323 provides: "The mine foreman shall read and countersign promptly the daily reports of the preshift examiner and assistant mine foreman, and he shall read and countersign promptly the weekly report covering the examinations for hazardous conditions. Where such reports disclose hazardous conditions, they shall be corrected promptly. If such conditions create an imminent danger, the operator shall withdraw all persons from, or prevent any person from entering, as the case may be, the area affected by such conditions, except those person referred to in section 104(d) of the Act, until such danger is abated. The mine superintendent or assistant superintendent of the mine shall also read and countersign the daily and weekly reports of such persons."

On appeal, MESA contends that the countersigning requirement is for the purpose of bringing the reports in question to the superintendent's attention with reasonable dispatch and that a reasonable time for such countersigning would be the superintendent's next working shift following the execution of the reports. While such may be the desire of MESA, the regulation provides no time period for countersigning. In fact, this same regulation does expressly require all other signing to be done promptly.

While neither this regulation nor its supporting statutory provision 10/ provides a time certain for the countersigning required, both provide that all reported hazardous conditions be corrected promptly without reliance upon the mine superintendent's or his assistant's reading or signing. Accordingly, without sacrificing prompt safety and health corrective action, we accept the judge's interpretation allowing a reasonable period for such signing and, in the absence of any evidence that the period involved here was unreasonable, we affirm the judge. In so doing, we are not condoning indifferent or dilatory practices in the reading and signing of these reports.

In summary, the judge's decision is affirmed with respect to Notices No. 1-HG, 2/7/74 and No. 1-BP, 12/19/72. With respect to Notices No. 1-HG, 2/6/74 and No. 1-JWD, 12/12/72, the judge's decision is reversed, the notices reinstated and remanded for further proceedings consistent with this opinion. With respect to the penalty proceedings related to the four withdrawal orders, the judge's decision is reversed, the petition for assessment of penalties is reinstated, and the case is remanded for further proceedings.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

10/30 U.S.C. § 863(v).

Distribution

Thomas A. Mascolino, Esq.
Cynthia L. Attwood, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Edmund J. Moriarity, Esq.
Old Ben Coal Company
125 South Wacker Drive
Chicago, Illinois 60606

Administrative Law Judge Charles C. Moore, Jr.
FMSHRC
5203 Leesburg Pike, 10th Floor
Skyline Center #2
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 24, 1981

JOSEPH MAYNARD	:	
	:	
v.	:	Docket No. PIKE 77-57
	:	
STANDARD SIGN & SIGNAL COMPANY	:	IBMA No. 77-48

DECISION

This proceeding arises under the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §801 et seq. (1976). The issue is whether the administrative law judge erred in dismissing a miner's application for review of discharge for failure to state a claim upon which relief can be granted.

In his application and accompanying affidavit Joseph Maynard, an assistant mine foreman, alleges that a federal mine inspector issued several notices of violation to the company on February 15, 1977. 1/ Maynard also alleges he was told by the night superintendent to correct whatever violations he could and to proceed with the production of coal because the second and third shifts would correct the other violations. Maynard states that he did as he was told, but that on February 16, 1977, the mine inspector returned and, finding violations unabated, issued orders of withdrawal. When asked by a supervisor why he had not corrected the conditions for which the orders were issued Maynard responded that he had corrected what he could and thought the third shift would correct the rest. He alleges he was then fired because he had run coal and had not corrected all of the violations. Maynard asserts the discharge violated section 110 of the 1969 Coal Act. 2/

1/ The notices cited violations of the company's roof control plan, excessive coal dust accumulations, and loose panel board covers on buggies.

2/ Section 110(b)(1) of the 1969 Coal Act provided:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

The company moved to dismiss for failure to state a claim upon which relief could be granted. The judge granted the motion stating:

> Mr. Maynard ... has not brought himself within the purview of section 110 of the Act. By his own admission, [Maynard] was discharged because of his failure to abate violations and the Act cannot be construed to protect an employee for his failure to abate violations, even if that failure is the result of instructions by a supervisor. If the allegations of the affidavit are true, [Maynard] probably has a cause of action somewhere, but it is not in this tribunal.

Following the dismissal Maynard moved for reconsideration arguing, among other things, that his application did state a cause of action. He also argued that the Secretary was required to conduct an investigation of his complaint under the 1969 Coal Act, that he had failed to do so and that it was error to dismiss his complaint prior to such an investigation. Maynard requested the judge to reopen the proceeding and to order a factual investigation by the Secretary of the Interior. 3/ The judge denied the motion. The judge stated that he was still of the opinion that Maynard's complaint did not state a cause of action and that neither the 1969 Coal Act nor the Secretary's regulations required the investigation sought by Maynard.

The decision was appealed to the Board of Mine Operations Appeals. While the matter was pending the Secretary's Deputy Associate Solicitor, Division of Mine Health and Safety, sent the Board a letter on July 25, 1977, expressing the Secretary's willingness to conduct an investigation into the facts underlying Maynard's complaint. The Board did not act upon this offer, and the matter was transferred to our jurisdiction when the Federal Mine Safety and Health Act of 1977 took effect. 30 U.S.C. §961(c)(3)(Supp. III 1979).

We concur in the judge's conclusion that the application for review fails to state a claim under the 1969 Coal Act. We agree with the judge that even when viewed in the light most favorable to Maynard, the allegations in the complaint do not come within the perimeters of the activities protected by section 110(b)(1).

We also agree that under the 1969 Coal Act the Secretary was not required to conduct a prosecutorial-type investigation of discrimination complaints. Rather, the procedure established by the Secretary--adversarial adjudication before an administrative law judge, with administrative and judicial review--satisfied the Secretary's responsibilities under section 110(b).

3/ Until enactment of the Federal Mine Safety and Health Act of 1977, enforcement of the 1969 Coal Act was the responsibility of the Secretary of the Interior. His enforcement functions, except those assigned to him under section 501 of the 1969 Coal Act and those expressly transferred to us, were transferred to the Secretary of Labor when the 1977 Mine Act took effect. 30 U.S.C. §961(a) (Supp. III 1979).

We note, however, that the Secretary's offer to conduct an investigation of Maynard's complaint is yet extant. We are mindful that the Secretary's offer represented a change in policy with respect to the Secretary's participation in unlawful discrimination and discharge cases brought under the 1969 Coal Act, and that Maynard was denied the possible benefit of such an investigation through no fault of his own.

Accordingly, we affirm the judge's dismissal of the application for review for failure to state a claim upon which relief can be granted. 4/ We remand the case, however, to afford Maynard leave to amend his complaint within 60 days to allege, if he is so able, facts which do state a valid claim under section 110(b). In the intervening period, the Secretary may, if he chooses, undertake the factual investigation offered in the July 25, 1977 letter.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

4/ Maynard's claim that he was entitled to, but denied a "public hearing" prior to dismissal of his application is without merit. The adjudicatory hearing contemplated by section 110(b) need not, of course, proceed to an evidentiary hearing if prior pleadings and procedures establish that one party is entitled by law or undisputed facts to prevail on the merits. A "public hearing" in this context is an adjudication on the public record.

Distribution

L. Thomas Galloway, Esq.
Center for Law & Social Policy
1751 N Street, N.W.
Washington, D.C. 20036

Michael T. Heenan, Esq.
David S. Smith, Esq.
Smith, Heenan, Althen & Zanoli
1110 Vermont Ave., N.W.
Washington, D.C. 20005

Cynthia L. Attwood, Esq.
Thomas A. Mascolino, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge Charles C. Moore, Jr.
FMSHRC
5203 Leesburg Pike, 10th Floor
Skyline Center #2
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 26, 1981

CONSOLIDATION COAL COMPANY	:	
	:	
v.	:	
	:	Docket No. WEVA 80-333-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
(UMWA)	:	

DECISION

This proceeding was initiated when Consolidation Coal Company (Consol) contested an order of withdrawal issued for failure to abate a violation of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)(the 1977 Mine Act).

On April 24, 1980, Mine Safety and Health Administration (MSHA) inspectors arrived at Consol's mine to conduct an inspection. The inspection was requested by the safety committee of the UMWA local. The UMWA is the collective bargaining representative of the miners. Also present, at the request of the local union safety committee, were members of the UMWA International Safety Division, who identified themselves to Consol and the MSHA inspectors as representatives of the miners for walkaround purposes under section 103(f). An MSHA inspector advised Consol that he wanted the UMWA International safety representatives to accompany the MSHA inspection team. Consol's mine safety director refused to permit the International representatives to enter the mine, on the ground that Consol was not required to admit them because their names had not been submitted to MSHA and Consol as "representatives of miners" pursuant to the Secretary's regulations in 30 CFR Part 40. 1/

MSHA issued a citation, and subsequently an order for failure to abate, charging a violation of section 103(f) of the 1977 Mine Act. That section provides in part:

1/ Those regulations require, among other things, that certain information pertaining to representatives of miners be filed with the MSHA district manager, with copies to operators of the affected mine. Among information required is "the name of the representative" or his "title or official position" and "[a] statement that the person or position named as the representative of miners is the representative for all purposes of the act; or if the representative's authority is limited, a statement of the limitation." 30 CFR §§40.3(a)(1) and (4).

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a). ... To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives....

Consol contested the citation and order, arguing that a failure of representatives to comply with the Part 40 filing regulations per se entitles an operator to deny such persons walkaround participation under section 103(f). The administrative law judge disagreed, held that a violation occurred, and dismissed the contest. For the reasons that follow, we affirm the judge.

Part 40 took effect on July 7, 1978. Those regulations replaced 30 CFR Part 81 which contained requirements for filing as representatives of miners under the 1969 Coal Act. It is undisputed that between July 7, 1978, and the day it denied entry to the International representatives, Consol received nothing filed pursuant to Part 40 which identified the International personnel as representatives of the miners. 2/

The walkaround provision of section 103(f) begins with the clause "subject to regulations issued by the Secretary." On review Consol again argues that Part 40 contains such regulations and that the failure of the International safety representatives to be identified as "representatives of miners" in a Part 40 filing is a basis, per se, for refusing to afford them walkaround participation under section 103(f) of the Act. We disagree.

We have previously recognized the important role section 103(f) plays in the overall enforcement scheme of the Act, both in assisting inspectors in their inspection tasks and in improving the safety awareness of miners. Magma Copper Co, 1 FMSHRC 1948 (1979), petition for review filed, No. 79-7687 (9th Cir. Dec. 26, 1979). We are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.

2/ The UMWA International had, however, by letter of March 22, 1978, advised Consol that the UMWA, its officers and members of its safety division would exercise the rights of representatives of miners. This letter was filed while Part 81 was still in effect. Because we hold that failure to file under Part 40 does not deprive a representative of miners of walkaround rights under section 103(f), we need not decide whether the Part 81 filing constituted compliance with Part 40. Cf. 43 Fed. Reg. 29509 (July 7, 1978)(paragraph (6) of preamble to Part 40). On September 20, 1979, the UMWA local union safety committee submitted to Consol a document headed "Employees Who Travel With Inspectors While At Mine 20", that listed several mine employees and also stated that "(t)he Safety Committee shall have the right to amend or add to this list when they wish." This document, which does not list any International personnel, does not mention the Part 40 regulations and was not filed with MSHA.

Neither the statute nor the legislative history indicates that prior identification of miners' representatives is a prerequisite to engaging in the section 103(f) walkaround right, and Part 40 on its face is silent as to the intended effects of a failure to file. 3/ The preamble to Part 40 does discuss, however, the intended effect of the filing regulations on walkaround participation. It states:

> [I]t should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part.

43 Fed. Reg. 29508 (July 7, 1978). This statement provides a clear indication of the Secretary's intent in promulgating the filing regulations and is not inconsistent with the language of Part 40.

In light of the above, we hold that failure of a person to file as a representative of miners under Part 40 does not per se entitle an operator to deny that person walkaround participation under section 103(f). This is not to say that there may never be circumstances where an operator can legitimately refuse walkaround participation to a person who failed to comply with Part 40's filing requirements. In a particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners. In this case, however, Consol makes no claim that it lacked a basis for believing that the UMWA International safety division personnel were who they purported to be and were authorized miner representatives. Indeed, Consol was well aware of who these persons were and why they were at its mine. Accordingly, the decision of the judge is affirmed.

Richard V. Backley, Chairman

Frank F. Estrada, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

3/ The Part 40 filing requirements were not promulgated merely to identify miners' representatives for section 103(f) purposes. As the preamble to Part 40 noted, the Act "requires the Secretary of Labor to exercise many of his duties under the Act in cooperation with miners' representatives." 43 Fed. Reg. 29508 (July 7, 1978). Filing under Part 40 serves, among other things, to identify such representatives to the Secretary, and to assure such representatives that they will be included in the processes contemplated by the Act. See, e.g., sections 101(e), 103(c), 103(g), 105(a), 105(b), 105(d), 107(b), 107(e), 109(b), 305(b).

Distribution

Samuel P. Skeen, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Cynthia Attwood, Esq.
Stephen Kramer, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Chief Administrative Law Judge James A. Broderick
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006

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

MAR 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 80-125
	:	A/O No. 18-00652-03024V
v.	:	
	:	Gobblers Knob Mine
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Bldg., 3535 Market Street, Philadelphia, Pennsylvania, for Petitioner, MSHA; Ralph M. Burnett, Esq., Burnett, Eiswert & Crawford, P.A., 500 Thayer Center, Oakland, Maryland, for Respondent, Mettiki Coal Corporation.

Before: Judge Merlin

The above-captioned case was heard as scheduled on February 3, 1981. At the conclusion of the inspector's testimony the Solicitor moved to withdraw her petition for the assessment of a civil penalty for the alleged violation of 30 CFR 75.200. As is set forth in the administrative transcript the Solicitor's motion was well taken. Based upon the inspector's testimony the government failed to make a prima facie showing that a violation existed. Indeed, any determination of the factual circumstances involved could only have been based upon speculation and surmise. Accordingly, the Solicitor's motion was granted from the bench.

Upon receipt of the administrative transcript this matter was again reviewed and the determination from the bench is hereby AFFIRMED.

The Solicitor's motion to withdraw the petition is hereby GRANTED and this matter is hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Bldg., 3535 Market St., Philadelphia PA 19104 (Certified Mail)

Ralph M. Burnett, Esq., Burnett, Eiswert & Crawford, P.A., 500 Thayer Center, Oakland, MD 21550 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 5 1981

MONTEREY COAL COMPANY, Contestant	:	Contests of Citations
	:	Docket Nos. HOPE 78-469
v.	:	HOPE 78-470
	:	HOPE 78-471
SECRETARY OF LABOR,	:	HOPE 78-472
MINE SAFETY AND HEALTH	:	HOPE 78-473
ADMINISTRATION (MSHA),	:	HOPE 78-474
	:	HOPE 78-475
UNITED MINE WORKERS OF	:	HOPE 78-476
AMERICA (UMWA), Respondents	:	Wayne Mine

ORDER GRANTING MOTION TO WITHDRAW AND DISMISS NOTICE OF CONTESTS

Statement of the Proceedings

These consolidated review cases were adjudicated by Judge Franklin P. Michels, and he issued his decisions on February 15, 1979. On November 13, 1979, the Commission reversed and remanded the cases to him for further proceedings. Subsequently, Monterey Coal Company filed a petition under section 106(a)(1) of the Act with the Fourth Circuit Court of Appeals for review of the Commission's decision, and on November 17, 1980, the Court dismissed Monterey's petition as premature without prejudice to its right to seek further review of the issues raised before the Commission.

In view of Judge Michels' retirement, the cases were assigned to me for further adjudication, and in order to insure the timely adjuciation and disposition of the cases, I issued an order on January 13, 1981, directing the parties to inform me as to the the following:

1. The issues that remain to be tried and a time frame for the scheduling of any additional hearings which may be required.

2. Any additional information or dispositions which may be contemplated by the parties so as to enable me to timely dispose of the cases.

On February 18, 1981, in response to my order, contestant filed a motion to withdraw its contests on the ground that while its court litigation was pending the Secretary promulgated new regulations regarding

imposition of liability on independent contractors for violations caused by them or under their control, 30 C.F.R. Part 45. Given the fact that those regulations have resolved the major issue litigated by the contestant before the Commission in these dockets, contestant asserts that it has no further interest in pursuing these § 105(d) Notice of Contest proceedings, and requests that its motion to withdraw these notices of contest be granted.

On February 18, 1981, respondent UMWA filed its response to my order and stated that it does not believe that there are any additional facts which need to be litigated. Further, the UMWA states that it believes that any further adjudication and decision by me in these dockets may be made from the present record made before Judge Michels, and that should I decide that additional hearings are required, it does not intend to put on any additional witnesses or submit any additional documentary evidence, but would be willing to submit briefs if they should be required.

On February 27, 1981, respondent MSHA filed its response to my order and stated that it does not oppose contestant's motion to withdraw its contests. MSHA asserted that considering the fact that the Secretary, Monterey, and the independent contractor, Frontier-Kemper Contractors, Inc., have reached a settlement of the civil penalties assessed for the violations in questions, and that payment has been made for those violations, MSHA does not oppose the contestant's motion to withdraw its contests.

ORDER

In view of the foregoing, and upon consideration of the arguments presented by the parties in response to my order, contestant's motion to withdraw its contests is GRANTED, and they are DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Crowell & Moring, 1100 Connecticut Ave., NW, Washington, DC 20036 (Certified Mail)

Lawrence W. Moon, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., UMWA, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

William H. Howe, Esq., Loomis, Owen, Fellman & Howe, 2020 K St., NW, Washington, DC 20006 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

MAR 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KAISER CEMENT AND GYPSUM CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-50-M DOCKET NO. WEST 79-197-M A/O NOS. 04-04075-05002 and 04-04075-05003 MINE: Permanente Cement Plant

Appearances:

Andrea Robinson, Esq.
Office of the Solicitor
United States Department of Labor

For petitioner

Cora Lewis, Esq.
Kaiser Cement Corporation
800 Lakeside Drive
Oakland, California

For respondent

Before: John A. Carlson
Administrative Law Judge

DECISION

These consolidated cases, tried in San Francisco, California, arose from a December, 1978 inspection of respondent's Permanente Cement Plant. The petitioner Secretary issued twelve citations charging violations of various mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

At the outset of the hearing the parties stipulated to several of the facts relevant to assessment of appropriate penalties. It was agreed that respondent is a large company; that the Permanente operation is large; that its prior history of violation is good; and that assessment of the proposed penalties would not impair the ability of respondent to remain in business. These stipulations were approved and will be considered in assessing penalties where violations are affirmed. The parties further stipulated to the Commission's jurisdiction to decide these cases.

The Secretary then moved to dismiss citations 374869, 374870, 374872 and 374881, representing that further investigation and consultation of counsel with enforcement personnel had shown that petitioner lacked sufficient proof to establish violation. The motion was orally granted at trial, and that action is reaffirmed here. Those citations will be vacated and the attendant proposals for assessment of penalty are dismissed.

Respondent, at the same time, moved under Commission Rule 11 to withdraw its contest of the penalties proposed for citations 374874, 374876, and 374877. Following representations made upon the record concerning the gravity, good faith, and abatement elements of these citations, the motion was granted. The penalties will be assessed in the amounts proposed by the Secretary.

Review and discussion of the evidence presented on the remaining five citations follows.

CITATION 374882 -- Unguarded Wall Opening

On December 19, 1978, inspector Sarja issued a citation for violation of the standard at 30 U.S.C. § 56.11-12 which provides:

> Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

In the third level of respondent's number 6 mill inspector Sarja noted an exterior wall opening, approximately 4 feet wide and 5 feet high. The bottom of the opening was approximately 2 feet above floor level, and according to Sarja, would allow a worker to drop some 30 feet should he fall into the opening. The inspector maintained that anyone servicing the large blower situated on the third level would pass by and work close to the opening. These assertions were nowhere directly disputed.

Respondent limited its defense to testimony that the separator (on which most maintenance would be required) was situated much farther from the opening than the blower; that the blower itself required a filter change only every

other week; and that workers, to get added air, had removed the louvres which were intended to cover the opening.

The evidence establishes violation. The floor in the vicinity of the blower served as a travelway to the blower whenever it required filter replacement or other maintenance. A misstep by any worker near the blower could have resulted in a long fall through the wall opening.

The matters raised by respondent -- duration of worker exposure and lack of direct operator negligence in removal of the louvres -- are relevant to penalty determination, but do not bear upon violation. These factors were presumably considered by the Secretary in proposing a modest penalty of $90.00 where an accident, had one occurred, would have been most likely fatal.

Upon the whole record, including the stipulated penalty elements discussed previously, I am convinced that the proposed $90.00 penalty is appropriate. This is chiefly so because of the brief and infrequent presence of workers near the opening, and the evidence that respondent intended that the opening be covered.

CITATION 374871 - Ball Mill Walkway Guardrail

On December 12, 1978, inspector J. Sarja issued a citation charging that a section of guardrail was missing on an elevated walkway adjacent to the drive end of a ball mill. The mandatory standard allegedly violated, 30 C.F.R. § 56.11-2, provides:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Inspector Sarja testified that he issued the citation because of a gap in a metal guardrail protecting the edges of the elevated walkway leading to the ball mill (Tr. 13-16). As the hearing continued, however, considerable controversy arose concerning the physical facts. A photograph taken by and introduced through Donald Schultz, respondent's regional safety supervisor, contributed substantially to that controversy (respondent's exhibit 1). Schultz testified that he took the photograph at "the time of the citation" (Tr. 47); and that two chains shown hanging at approximate railing height across the walkway were "already in place at the time of the inspection" (Tr. 71).

Sarja, in rebuttal, suggested that a portion of the rail shown in the photograph was missing at the time of inspection, and said he could not "remember those chains exactly." He also acknowleged that the chain "may have

been there before" (Tr. 89). At another point the inspector became confused between photographs of the ball mill and an alleged unguarded armature which was the subject of another citation (Tr.91).

The question then becomes whether any violation occurred if the entrance to the walkway was blocked by chains. I conclude that none did. Careful review of the evidence shows that the permanent guardrails did not extend all the way to the ball mill; a short open space existed on the left-hand side where the walkway meets a small concrete platform. Respondent's witness conceded as much (Tr. 42). (In this regard the photograph [respondent's exhibit 1] can be misleading because a metal portion of the mesh guard over the mill appears to be an extension of the guardrail.)

Respondent's safety supervisor testified without contradiction that the walkway had no function except to allow access to the ball mill for repair. No repair could take place, he said, unless the large mesh guard was removed, and to accomplish this carpenters must build a temporary wooden platform (which presumably would have its own perimeter guarding), beyond the rails on the walkway. (Tr. 48-49).

When all the inspector's testimony is considered together, it becomes clear that he lacked firm independent recollections of the physical facts. His notes on the citation itself were introduced without objection. These, however, provide no greater certainty. As originally issued, the citation itself made no mention of either chains or guardrails; instead it refers to a missing section of "walkway." As amended two days later, it referred to missing "guardrail." The inspector's notes include a drawing showing a removable chain across the entrance to the walkway with this notation: "12-20-78 removable chain provided here."

In view of respondent's evidence that the chains were present at the time of inspection, and the inspector's admitted uncertainty as to that fact, one must conclude that the chains were across the walkway[1/].

1/ Respondent's witness used the phrase "in place." This is not as precise as it might be since it leaves open a possibility that the chains were attached at one end, but not the other. The burden of showing violation is, however, upon the Secretary; and given the lack of any credible evidence that the chains were not actually hung across the walkway's entrance, we are obliged to assume that they were.

Inspector Sarja appears to have ultimately accepted the chains as adequate abatement, noting in his "subsequent action" on the citation that a removable chain was accepted with the "reservation" that when the chain was unfastened violation would occur unless workers on the walkway wore safety lines.

He thus acknowledged, and correctly so, that the chained-off walkway presented no actionable present hazard to employees. He further acknowledged that methods other than fully extended guardrails could provide adequate protection when the chain was down and the walkway was in use. Because there is no affirmative evidence, direct or circumstantial, that such additional precautions were not taken when the chains were down, no violation is established and there can be no penalty.

CITATION 374875 - Guarding of 4B Finish Mill Motor

On December 12, 1978, inspector Sarja issued a citation for violation of the standard at 30 C.F.R. § 56.14-1 which provides, as here pertinent, that

> ... exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded.

Specifically, the evidence shows that a wedge-shaped opening existed in the screen covering the armature of a large drive motor for a finish mill. This opening, at the edge of a walkway paralleling the motor and enclosed driveshaft, was ordinarily barricaded by two chains suspended at the height of standard guardrails (photograph respondent's exhibit 2). Sarja testified, however, that at the time of his visit one chain was missing and the other was on the floor (Tr. 88). Mr. Schultz admitted that this may have been so (Tr. 72-73).

The opening, extending from floor to knee height, did expose employees on the adjacent walkway to injury from the rotating armature when the chains were not in place.[2/] Consequently, the standard was violated.

The chains protected no one when not in place. Respondent chose that means of protection; it was therefore respondent's duty to insure that the chains were up.[3/] Otherwise, as the Secretary contends, a screen or other guard was necessary.

2/ The inspector maintained that the unguarded area posed an electrical hazard as well as a mechanical one. Respondent denied this, contending that the armature was insulated. That issue need not be decided. The armature clearly posed a threat of mechanical injury and therefore required some form of guarding.

3/The inspector seemed unsure whether chains, when in place, constituted an adequate protection, and suggested that only a fixed guardrail would suffice (Tr. 92-93). The implication appeared to be that chains are not enough because they may be removed with ease. That position lacks merit. Under the circumstances here the double chain was a barrier substantially as effective as a rail. Even a mesh screen could have been removed.

We now consider penalty. Significant injury, while possible, was not likely since the unprotected part of the armature was at knee level. It therefore offered little hazard to a passing worker unless he should be unfortunate enough to stumble or fall while traversing one short segment of the walkway. Even then, he would have to fall in but one of several possible directions to strike the armature.

On the other hand, the exposed area of the armature was obvious, and respondent should have known that the barrier chains were not in place.

Considering these factors along with the findings of size, and other statutory matters stipulated at the outset of the decision, I determine that a civil penalty of $114.00 should be assessed.

CITATIONS 374883 and 374884 -- Guarding of Electrical Components

On December 19, 1978, inspector Sarja issued two citations for alleged violations of the mandatory electrical standard published at 30 C.F.R. § 56.12-23. That standard provides:

> Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded unless protection is provided by location.

The inspector was concerned that several direct current generators and a number of bus bar panels in an electrical room were unguarded.

The generators, some located on the floor and some on an elevated platform, had openings in their covers which exposed the armatures and brushes. Inspector Sarja maintained that these were "connections" and could transmit a lethal shock.[4/]

The bus bars, by design uninsulated, carried 480 volts. The inspector testified without contradiction that an inadvertent touching of a bar could be fatal, and I so find.

The principal issue presented is whether, as respondent contends, protection was provided by location.

4/ Respondent's safety director questioned whether these components were "connections" within the meaning of the standard, and insisted that the armature of 240 volt direct current generators did not, in any event, present an electrical hazard. Respondent's electricians, he claimed, routinely replaced brushes on these units without turning them off (Tr. 62). Because of the dispositions ultimately made of these citations, this conflict will not be resolved.

The generators and the bus bar panels were in an enclosure formed by floor-to-ceiling chain link fencing. Entrance to this enclosure, which was inside an electrical workshop, could be gained only through one of two chain link doors. Beside each was a large sign displaying this notice: "Restricted Area, Danger, High Voltage, Qualified Personnel Only." These facts are undisputed. The inspector conceded that the doors were latched, and respondent's safety director agreed that they were not kept locked.

Respondent emphasized, however, that the room is within its electrical workshop and is used only by electricians (its own employees or those of contractors). Its safety director acknowledged that the enclosure is also used for some storage. He maintained, however, that the storage use did not constitute an invitation for workers other than electricians to enter the enclosure since only electrical items were stored there, and no other workers would have occasion to be in the building, let alone the enclosure (Tr. 63).

The evidence makes clear that the bus bars and generators are not the types of electrical components which are customarily covered with insulation. No evidence dealt with possibilities for individual guarding of the devices. On the contrary, the approach taken by witnesses for both parties embodied an apparent sense that a fenced enclosure provides an acceptable way of isolating workers from unintended contact with such equipment. But the inspector insisted that compliance with the standard further requires that the enclosure be locked at all times and that only electricians possess keys. Respondent's safety director was content that the enclosure, latched gates, and warning signs were enough.

I must agree with respondent. The inspector appeared satisfied that electricians, cognizant of the hazards inherent in the uninsulated devices, could be trusted to work safely within the fence. His real concern was that the doors be kept not only closed but also locked to keep out unauthorized and unskilled employees. The evidence persuades me, however, that there was virtually no possibility that anyone other than an electrician would enter the enclosure. The area contained nothing of concern to anyone except electricians, and was clearly marked as a restricted location by fencing and signs.5/

Moreover, and most important, the phrase "protection ... provided by location" as used in the standard would scarcely imply to the most prudent and safety-conscious mine operator that a lock was essential. Perhaps the inspector's insistence on a lock was somehow associated with his understanding of another electrical standard, 30 C.F.R. § 56.12-68, which provides:

> Transformer enclosures shall be locked against unauthorized entry.

That standard lends no support to the Secretary's position. Instead, it shows that the draftsmen of the extensive electrical rules had not overlooked locks as a precautionary measure. It also shows that they were fully capable

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5/ See photograph, respondents exhibit 3.

of articulating a locking requirement where necessary. The enclosure here contained no transformers, so far as we know; and it would be palpably unfair to engraft a specific locking requirement onto the cited standard.

I hold that the phrase "protection ... provided by location," because of its generality, must be construed to require only that degree of protection reasonably calculated to insure against worker injury under all the circumstances. What respondent has done in the present case is sufficient. The proposals for penalty will therefore be vacated for failure to prove violation.

ORDER

Accordingly, it is ORDERED that:

(1) Citations 374871, 374883 and 374884 are vacated;
(2) Citation 374875 is affirmed and a penalty of $114 is assessed therefor; and
(3) Citation 374882 is affirmed and a penalty of $90 is assessed therefor.

It is further ORDERED, pursuant to the motions for withdrawal and dismissal granted at the outset of the hearing, that:

(1) Citations 374869, 374870, 374872 and 374881 and the corresponding notices of proposed penalties are vacated and dismissed;
(2) Respondent's contest of the penalties proposed in connection with citations 374874, 374876 and 374877 are withdrawn and that the proposed penalties are affirmed as follows:

Citation 374874	$ 38.00
Citation 374976	$150.00
Citation 374877	$ 38.00

It is finally ORDERED that respondent shall pay the aggregate of $430.00 of assessed penalties no later than 30 days from the date of this order.

John A. Carlson
Administrative Law Judge

Distribution:

Andrea Robinson, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102

Cora Lewis, Esq., Kaiser Cement Corporation, 300 Lakeside Drive, Oakland, California 94612

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 11, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-139-M
	:	A.C. No. 20-00371-05019H
v.	:	
	:	White Pine Mine
WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, Respondent	:	
LOCAL 5024, UNITED STEELWORKERS OF AMERICA, Representative of Miners	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner;
Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, P.C., Ishpeming, Michigan, for Respondent;
Harry Tuggle, Safety and Health Department, United Steelworkers of America, Pittsburgh, Pennsylvania, for Representative of Miners.

Before: Chief Administrative Law Judge Broderick

Statement of the Case

This is a civil penalty proceeding growing out of the issuance of an imminent danger withdrawal order under section 107(a), and a citation under section 104(a) of the Act, charging a violation of 30 C.F.R. § 57.3-22 because a scoop operator worked under loose rock on June 4, 1979.

A hearing was held on October 23, 1980, in Houghton, Michigan. Witnesses for the Secretary were Bruce Haataja, the Federal inspector who issued the citation and order and Benjamin Berno and Gordon Smith, miners and union members who accompanied Haataja during the inspection. Witnesses called by the company were William Carlson, a supervisory official of the Mine Safety

and Health Administration, Albert Goodreau, the company's safety engineer, Raymond Hicks, foreman of the unit where the violation is alleged to have occurred, and Fred Smith, the operator of the scooptram observed by Inspector Haataja. The Representative of the Miners did not call any witnesses.

The parties have submitted briefs stating their positions and, having considered them and the evidence adduced at the hearing, I make the following decision.

Regulatory Provision

Title 30, Code of Federal Regulations, section 57.3-22, reads:

> Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Issues 1/

1. On June 4, 1979, at approximately 11 a.m., did a scooptram operator work under areas of loose rock in the subject mine as alleged by the inspector?

2. If so, was the condition a violation of 30 C.F.R. § 57.3-22?

3. If a violation occurred, what is the appropriate penalty?

Findings of Fact 2/

1. On June 4, 1979, at approximately 11 a.m., a scooptram operator was working under several areas of loose rock in SW30 heading of Unit 93 in the company's mine.

2. The size and condition of the loose rock was such that it could be reasonably expected to cause death or serious physical harm to miners working in the heading.

1/ The company contends that the 107(a) withdrawal order was improperly issued. This case, however, is not a proceeding to review the order but a civil penalty proceeding and the issue is whether the violation charged in the order/citation occurred.

2/ The parties stipulated that the Commission has both subject matter and personal jurisdiction in this case.

3. The condition was obvious and should have been noticed by miners working in the area.

4. The company demonstrated ordinary good faith in abating the violation.

5. The company is a large mine operator with a moderate history of previous violations. 3/ The civil penalty imposed herein will not affect its ability to remain in business.

Discussion

The White Pine Mine, located in Ontonagon County, Michigan, is an underground mine from which copper is extracted by the room and pillar method. Inspector Haataja testified at the hearing that, as his inspection party approached what he was told was the SW28 heading, he observed a scooptram backing out of the heading. When the tram had cleared the crosscut, he walked toward the face and found three areas of loose rock overhead about 30 feet inby the crosscut. The inspection party spent more than 15 minutes prying down (or "barring") a sizable amount of loose rock. A company representative was not present during this period. In issuing the citation and order, the inspector considered the following: A large amount of rock was barred, the tram was not equipped with overhead protection, and no bar with which loose rock could be trimmed was observed in the vicinity. The inspector's testimony was corroborated by Benjamin Berno and Gordon Smith, who actually removed the loose rock.

The company introduced evidence that no work was being performed in SW28 heading during the morning of June 4, 1979. The company also argued that the tram was not actually observed under the loose rock. However, three witnesses testified to seeing the tram back out of a dead-end heading. When they walked down the heading, they saw tracks at the muck pile and evidence that part of the muck pile had been removed. The evidence clearly shows that the tram was operating under the loose rock. The testimony of Raymond Hicks and Fred Smith strongly suggests that the scooptram was actually working in SW30 heading during the period in question. Hicks, the unit foreman, claims that when he encountered the inspection party at about 11:30 a.m., they were in SW29 heading, which contained a small amount of barred loose rock and an untouched muck pile. No work was performed in SW28 heading until the afternoon, when it was readied for blasting.

The significance of this testimony can be gleaned from a description of the mining cycle. After the face is blasted with explosives, a pile of debris, containing the ore, remains which is called "muck." The next steps, roughly, are to inspect all parts of the heading for loose rock, wet the muck pile, remove the muck with a scooptram, bolt the roof, drill and prime

3/ These conclusions are based on a motion for approval of a settlement which was filed on June 2, 1980.

the face and blast again. Therefore, if there is an untouched pile of muck at the end of a heading, it is probable that the face has just been blasted and the area is about to be checked for loose rock. The company maintains that the inspector encountered loose rock in SW29 heading, for which no citation could be issued until a miner was scheduled to enter the heading and prepare it for mucking out. Cf. MSHA v. Asarco, Inc., 2 FMSHRC 290, 294 (April 15, 1980).

A consideration of all the evidence persuades me that the loose rock observed by the inspector was in SW30 heading, not SW29 or SW28. Haataja identified the heading as best as he could under the circumstances. There was testimony that not all the headings were clearly marked (Tr. 168). Even before the citation and order were reduced to writing, Hicks knew which scooptram operator Haataja had observed and where he was working at the time. Fred Smith spent the entire morning in SW30 heading, according to company records. This was sufficient notice of the location of the alleged violation. The company cannot evade liability because the inspector cited the wrong heading number when it was clearly aware of the location which was intended.

The number of the heading is inconsequential; the important facts are that a scooptram was observed by three witnesses backing out of a heading in which a sizable accumulation of loose, overhead rock was found. This prima facie case was never rebutted by the company. Hicks and Fred Smith both stated that they had checked their working areas for loose rock, but this cannot overcome the eyewitness testimony of Haataja, Berno, and Gordon Smith.

It is unclear how long the loose rock had been present in the back. The condition was obvious and could have been noticed by the tram operator, but there is no evidence that a supervisory employee knew or should have known of it. Abatement of the condition was rapidly achieved. The gravity of the violation was quite serious since it could have resulted in serious injury. The appropriate penalty to be assessed, under all the circumstances, is $2,000.

Conclusion of Law

The condition found by Inspector Haataja on June 4, 1979, at the subject mine, and described by him at the hearing constituted a violation of 30 C.F.R. § 57.3-22.

ORDER

Respondent, White Pine Copper Division, is ORDERED TO PAY the sum of $2,000 within 30 days of the date of this order as a civil penalty for the violation found herein.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Ronald E. Greenlee, Esq., Counsel for White Pine Copper Company, Clancey, Hansen, Chilman, Graybill & Greenlee, P.C., Peninsula Bank Building, Ishpeming, MI 49849

Gerald A. Hudson, Attorney, Office of the Solicitor, U.S. Department of Labor, 231 West Lafayette, Room 657, Detroit, MI 48226

Mr. Harry Tuggle, Safety and Health Department, United Steelworkers of America, 5 Gateway Center, Pittsburgh, PA 15222

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

John Cestkowski, President, Local Union 5024, U.S.W.A., Box 101, Watersmeet, MI 49969

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
Phone (703) 756-6236

MAR 11 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 80-303-M
	:	A/O No. 05-00516-05016
v.	:	
	:	Leadville Unit
ASARCO INCORPORATED, NORTHWESTERN MINING DEPT., Respondent	:	

DECISION APPROVING SETTLEMENT

The proposed assessment for the two alleged violations in this case is $930 and the Secretary proposes to settle for $1. For the reasons set forth hereinafter, I accept the settlement agreement.

The assessment sheet (Exh. A) lists two withdrawal orders with the number 333112, but the first order is followed by an A and the second by B. The only order in the file is numbered 333112 but appears to allege violations of two standards.

The charge is that ice and snow builds up on a stairway during the winter months and that once a week a miner has to climb the stairs with a 5 gallon can of oil. This condition, it is alleged, violates both the standard requiring a safe access to a working place (30 C.F.R. §57.11-1) and the standard requiring that ice and snow be removed or sanded as soon as practicable (30 C.F.R. §57.11-16). Somehow the assessment office came to the conclusion that even though only one condition existed, the violation of section 57.11-16 was more serious than the other and it assessed $190 more for that violation than it did for the violation of section 57.11-1. The Secretary stipulates that this action was erroneous and it agreed to vacate "citation listed as No. 333112A." Actually, 333112A was not a citation but was derived from an imminent danger order. In a sense it was a creation of the assessment office and I'm not sure that imminent danger orders can be properly treated in that manner. Nor am I sure that an imminent danger order without more can form the basis of a civil penalty proceeding. Section 107(a) of the Act, after setting forth the procedures for issuing an imminent danger order, states "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." The implication is that if an inspector thinks that there is a violation of a standard as well as an imminent danger, he should also issue a citation. Section 105(a) of the Act which deals with proposed civil penalties, states that such a proposal should be made if "the Secretary issues a citation or order under section 104, * * *." There is no mention of an order issued under section 107, so I have serious doubts as to the validity of the procedures followed in this case. A decision on that proposition however, should be made only after briefs and arguments rather than in a vacuum; so I will confine myself to expressing the doubt stated above.

The parties stipulated that Respondent has an adequate rule and policy as to cleaning up ice and snow and salting as soon as practicable, and it is obvious from the stipulation that the Secretary does not believe the statement of a former employee that he was not reminded of that policy.

In Secretary of Labor v. CO-OP Mining Company, Docket No. DENV 79-1-P (December 10, 1980), 2 FMSHRC Decisions 3475, the Commission stated that if a settlement motion indicates that no violation occurred, the settlement should not be accepted, but the citation should be vacated and the case dismissed. In one of its earlier decisions, however, Secretary of Labor v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979), in the unpaginated March 1979 issue of FMSHRC Decisions, the Commission agreed with former decisions of the Interior Department's Board of Mine Operations Appeals to the effect that a withdrawal order could not be reviewed in the course of a civil penalty proceeding. I think that the Commission should reexamine that proposition, but again this does not seem like the appropriate case for that. I could and would dismiss the civil penalty suit outright if I was sure that there was no violation, but because of the bare possibility that there might have been a violation, and that it might be proper to assess a civil penalty where no citation or 104 order has been issued, I will accept the $1 settlement.

Respondent is therefore ordered to pay to MSHA, within 30 days, a civil penalty of $1.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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

Earl K. Madsen, Esq., Bradley, Campbell & Carner, P.C., 1717 Washington Avenue, Golden, CO 80401 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 18 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge Discrimination, or Interference
	:	Docket No. KENT 80-145-D
On behalf of: BOBBY GOOSLIN	:	Calloway No. 1 Mine
Complainant	:	
v.	:	
KENTUCKY CARBON CORPORATION, Respondent	:	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Mary Lu Jordan, Esq., United Mine Workers of America, Washington D.C., and Bernard Pafunda, Esq., Pikeville, Kentucky, for Bobby Gooslin;
C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia; Timothy Biddle, Esq., Crowell and Moring, Washington, D.C.; and Timothy Pohl, Esq., Kentucky Carbon Corporation, Charleston, West Virginia, for Kentucky Carbon Corporation.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) on behalf of Bobby Gooslin alleging that Bobby Gooslin was discharged from his employment at Kentucky Carbon Corporation (hereinafter Kentucky Carbon) on October 8, 1979, because of activities protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (hereinafter the Act). Bobby Gooslin filed a complaint with MSHA concerning his discharge. Following an investigation by MSHA, on January 18, 1980, MSHA filed an application for temporary reinstatement of Bobby Gooslin. That application was granted by Chief Administrative Law Judge James A. Broderick on January 22, 1980. Thereafter,

Kentucky Carbon requested a hearing on the application for temporary reinstatement. A hearing on the application was held in Pikeville, Kentucky, on January 30, 1980, before Chief Judge Broderick. Following the hearing, Chief Judge Broderick held that the order of temporary reinstatement should continue in force until further notice. On March 10, 1980, the Federal Mine Safety and Health Review Commission (hereinafter the Commission) granted Kentucky Carbon's petition for review of the order of temporary reinstatement and stated, "[t]he order of temporary reinstatement remains in effect pending Commission review." To date, the Commission has not ruled on that order.

On February 8, 1980, MSHA filed a complaint of discharge on behalf of Bobby Gooslin. Kentucky Carbon's motion to dismiss for failure to state a claim upon which relief could be granted was denied on May 5, 1980. Upon completion of prehearing requirements, a notice of hearing was issued on July 10, 1980, for a hearing on September 15, 1980. On August 18, 1980, Thomas M. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, sole counsel for MSHA and Bobby Gooslin, sent me a letter which stated in pertinent part:

> In preparation for the hearing scheduled September 15, 1980, I recently traveled to Pikeville, Kentucky to interview the complainant as well as other potential witnesses with knowledge of facts which will be in issue at hearing. As a result of that process, I have become firmly convinced that a conflict of interest would exist if this office continues to represent Mr. Gooslin in this matter.
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> * * * * * * *
>
> We do regret that this notification to you, and to the Respondent, has come at a time when we are only one month from hearing, however it was heretofore our belief that a conflict could be avoided. We have concluded, that such a conflict does exist, and does warrant the withdrawal of the Secretary of Labor from the above-styled matter. We therefore respectfully request that the presiding administrative law judge accept this notification as the Secretary's notice of withdrawal from the above-styled matter.

The August 18, 1980, letter from Mr. Piliero also stated that Bobby Gooslin would be represented in this matter by counsel from the United Mine Workers of America (hereinafter UMWA). On August 18, 1980, I conducted a telephone conference call with Mr. Piliero and C. Lynch Christian III, Esq., counsel for Kentucky Carbon. On August 18, 1980, I denied MSHA's motion to withdraw and ordered MSHA to show cause why its complaint of discharge should not be deemed to be withdrawn and why this matter should not be dismissed. MSHA and the UMWA opposed dismissal and Kentucky Carbon favored it. After considering all of the responses to the previous order, on September 8, 1980, I again denied MSHA's motion to withdraw. Additionally, I directed counsel

for the UMWA to file Bobby Gooslin's consent to representation by the UMWA, directed Mr. Piliero to determine whether he could continue to represent MSHA in this matter in light of the alleged conflict of interest, and granted the UMWA's unopposed motion for a continuance of the hearing. On September 10, 1980, Bobby Gooslin consented to representation herein by the UMWA Legal Department. On September 16, 1980, Thomas A. Mascolino, Esq., Counsel, Office of the Solicitor, U.S. Department of Labor, stated that "despite your denial of our motion to withdraw we must respectfully advise you that we will not be representing Mr. Gooslin in this matter." Mr. Mascolino's letter went on to state that thereafter MSHA would be represented by William F. Taylor, Esq.

On September 23, 1980, Kentucky Carbon filed another motion to dismiss. MSHA and Bobby Gooslin opposed the motion. On October 15, 1980, I denied the motion to dismiss. On October 20, 1980, Kentucky Carbon moved for reconsideration of my order of October 15, 1980, denying its motion to dismiss. On November 5, 1980, I denied the motion for reconsideration. On December 4, 1980, Kentucky Carbon petitioned the Commission for interlocutory review of the order denying the last motion to dismiss and the motion for reconsideration of that order. On December 8, 1980, the Commission denied the petition for interlocutory review.

A hearing on the merits of the complaint of discharge was held in Pikeville, Kentucky, on December 8 through December 11, 1980. At the outset of the hearing, Kentucky Carbon objected to MSHA's right to propose a civil penalty herein without following the procedures set forth in 30 C.F.R. §§ 100.5 and 100.6 and 29 C.F.R. § 2700.25. I sustained Kentucky Carbon's objection, severed the civil penalty proposal from the complaint, and remanded the civil penalty proceeding to MSHA to begin the civil penalty assessment process. Counsel for Bobby Gooslin moved for an order requiring Kentucky Carbon to comply with the temporary reinstatement order by permitting Gooslin to return to work at the mine site rather than being permitted to merely receive wages. MSHA and Kentucky Carbon opposed the motion. I denied this motion for the following reasons: (1) since the Commission granted the petition for review of the order of temporary reinstatement and further stated that the order remained in effect pending Commission review, I did not have jurisdiction over the order of temporary reinstatement and (2) the motion was not timely.

At the hearing, MSHA and Kentucky Carbon made opening statements. Thereafter, Bobby Gooslin moved for a summary decision on the basis of admissions contained in Kentucky Carbon's opening statement. The motion, considered to be the equivalent of a motion for directed verdict after the opening statement, was denied. MSHA presented no evidence at the hearing. Kentucky Carbon renewed its motion to dismiss and the motion was denied. The following witnesses testified on behalf of Bobby Gooslin: Bobby Gooslin, Tommy Coleman, Rodney Dale Isom, Jimmy R. Stiltner, Lloyd Johnson, Larry Keith Simpkins, and Ernie Justice. The following witnesses testified on behalf of Kentucky Carbon: James R. Reynolds, Joe S. Dado, Troy Coleman, James Marshall Christian, Aaron H. Hall, Jr., William Meade, Delmar Cook, Fred C. Biliter, Billy Jack Fuller, and James C. Hager.

Upon completion of the testimony at the hearing, MSHA presented a closing argument and, thereafter, submitted its written response to questions I raised at the conclusion of its closing argument. Bobby Gooslin and Kentucky Carbon filed posthearing briefs.

ISSUES

1. Whether the complaint should be dismissed where MSHA requested permission to withdraw from this proceeding because of a conflict of interest between MSHA and Complainant Bobby Gooslin and where MSHA failed to present any evidence in support of the complaint at the hearing.

2. Whether Kentucky Carbon violated section 105(c) of the Act in discharging Complainant Bobby Gooslin and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. § 815(c), provides in pertinent part as follows:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.
>
> (2) Any miner or applicant for employment or representative of miners 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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation

to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

Section 103(g) of the Act, 30 U.S.C. § 813(g), provides in pertinent part:

(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If

the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

STIPULATIONS

The parties stipulated the following:

1. At all times relevant herein, Kentucky Carbon operated the Calloway No. 1 Mine in the production of coal and, accordingly, was an operator as defined in section 3(d) of the Act.

2. Kentucky Carbon's Calloway No. 1 Mine located near Phelps, Kentucky, is a "mine" as defined in section 3(h)(1) of the Act.

3. At all times relevant herein, the Complainant was employed by Kentucky Carbon as a "miner" as defined in section 3(g) of the Act. In addition, the Complainant was president of the UMWA local and safety committeeman at the Calloway No. 1 Mine.

4. On October 8, 1979, Complainant was discharged by Kentucky Carbon.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

Background

1. Kentucky Carbon is the operator of Calloway No. 1 (hereinafter the mine), an underground coal mine in Phelps, Kentucky.

2. Bobby Gooslin began his employment at Kentucky Carbon in 1972 and, at all times relevant herein, worked as a supply motorman. Prior to the time of this dispute, Kentucky Carbon considered Bobby Gooslin to be a good employee and no disciplinary action had been taken against him.

3. At all times relevant herein, Bobby Gooslin was president of UMWA Local 1416 and a member of the UMWA local safety committee at the mine. Although Bobby Gooslin was not chairman of the UMWA local safety committee, it was the practice of UMWA members and Kentucky Carbon management to deal with Bobby Gooslin regarding safety complaints.

4. On March 12, 1979, there was an unauthorized work stoppage or "wildcat" strike at the mine which lasted until March 14, 1979. On March 15, 1979, Billy R. Southerland, Division Manager of Kentucky Carbon, issued a memorandum to the President of Local Union 1416, members of the mine committee and all union employees of Kentucky Carbon stating that unauthorized work stoppages or "wildcat" strikes would not be tolerated and further stating as follows:

> You are hereby placed on notice that, in the event an unauthorized work stoppage occurs in the future, company policy will be as follows: Management will selectively discipline, up to and including discharge, a significant number of employees who participate in future unauthorized work stoppages. Such discipline will be directed first to employees who can be identified as agitating or actively giving leadership or support to the stoppage. They may be determined on a basis as fundamental as those who first "hang up their lights" or those who first leave the work area or the parking lot. If such activists cannot be identified, participating employees whose record of work attendance or job performance is deemed poor will be selected for discipline. It is imperative that you realize you may be disciplined or discharged simply by participating in an unauthorized work stoppage.

The above memorandum was posted on the bulletin board at the mine and all miners were aware of it.

5. On May 7, 1979, Larry K. Simpkins, a shear operator on the longwall at Kentucky Carbon's Calloway No. 2 Mine, exercised his individual rights under the National Bituminous Coal Wage Agreement of 1978 (hereinafter the contract) and withdrew himself from a condition which he believed to be abnormally and immediately dangerous. He was assigned other duties on that date. On May 8, 1979, all five UMWA employees on his crew withdrew themselves for the same reason. Eight UMWA employees on another longwall section of the same mine withdrew themselves pursuant to the contract. All 13 of the UMWA employees involved in this matter were suspended with the intent to discharge them. An arbitrator reinstated all 13 employees but found that each of them should forfeit 4 days' pay because he found that they came out as a group rather than individually.

6. For a period of time prior to the events leading to the discharge of Bobby Gooslin, there was a continuing dispute between Kentucky Carbon and the UMWA concerning the propriety of hauling supplies on mantrips. During the week prior to the discharge of Bobby Gooslin, a group of miners visited the MSHA office to protest Kentucky Carbon's practice of hauling supplies on the mantrips. MSHA Coal Mine Inspector Supervisor Troy Coleman explained MSHA's interpretation of the regulations concerning mantrips and hauling supplies. The UMWA employees were unhappy with MSHA's interpretation of the law. The controversy surrounding the issue of hauling supplies on mantrips continued up to the time of Bobby Gooslin's discharge. Bobby Gooslin did not participate in the foregoing dispute. Subsequent to Gooslin's discharge and the occurrence of the work stoppage, MSHA conducted an inspection pursuant to section 103(g) of the Act concerning this complaint.

7. At the time of this incident involving Bobby Gooslin, Kentucky Carbon contended that the UMWA was required to give 24-hours notice to the operator before making a safety run or spot inspection except in cases where the UMWA

alleged the existence of an immediate or imminent danger. At all times relevant herein, the UMWA contended that it was not required to give 24-hours notice before making any safety run or spot inspection. Prior to this incident, there were instances when Kentucky Carbon had both allowed and denied the UMWA local safety committee the right to make spot safety inspections without the required 24-hours notice.

Events of September 29, 1979

8. After completing work on the 12:01 a.m. to 8 a.m. shift on September 29, 1979, UMWA members Tommy Coleman and Rodney Isom stopped at Bobby Gooslin's residence on their way home from the mine. Shortly thereafter, they were joined by UMWA safety committeeman J. R. Stiltner. The four miners who participated in this discussion contend that Coleman and Isom complained about bad roof along the main haulage track and an escapeway which was blocked by water. None of the miners suggested that this was an immediate or imminent danger. They asked Bobby Gooslin to make a UMWA safety committee run to check these conditions. All four of the miners who participated in this discussion deny that there was any discussion of the issue of hauling supplies on the mantrips.

9. At the conclusion of the meeting, Bobby Gooslin said he would call and make arrangements for the safety run.

10. Bobby Gooslin took no further action on this matter on September 29, 1979.

Events of September 30, 1979

11. During the afternoon, Bobby Gooslin called Lacy Ferrell, chairman of the local UMWA safety committee, to advise him that he wanted to schedule a safety committee spot run or inspection of the mine at the beginning of the 12:01 a.m. shift on October 1, 1979. Lacy Ferrell told Bobby Gooslin to set up the run but that Lacy Ferrell would not be present.

12. Between 3 and 4 p.m., Bobby Gooslin called William Meade, superintendent of the mine, to request postponement of a grievance meeting which had been scheduled for the next day. Bobby Gooslin did not mention any intention to make a safety run.

13. Between 3 and 4 p.m., Bobby Gooslin called Joe Dado, a Coal Mine Inspection Supervisor in MSHA's Phelps, Kentucky office. Bobby Gooslin claims that he requested that Joe Dado send an inspector to the mine at midnight and that Gooslin would have a written request pursuant to section 103(g) of the Act at that time. Joe Dado testified that Bobby Gooslin complained about the fact of hauling supplies on mantrips and other unspecified violations. Joe Dado claimed that Gooslin did not request an inspection pursuant to section 103(g) of the Act but merely wanted to know if MSHA would send an inspector.

In any event, at this time, it was Dado's understanding that he was not permitted to agree to meet Gooslin at the mine at a specific time and that there was no requirement that he send an inspector to the mine until a written request for such an inspection had been received.

14. At approximately 5 p.m., Bobby Gooslin called James Boyd, a UMWA district safety inspector, and asked Boyd to meet him at the mine for a safety run prior to the 12:01 a.m. shift on October 1, 1979. Bobby Gooslin also told James Boyd that Gooslin was unable to get an MSHA inspector from the local MSHA office and that Boyd should arrange for an MSHA inspector at the time of the safety run.

15. Between 6 and 7 p.m., Doug Fleming, Acting District Manager of MSHA, called Joe Dado and Troy Coleman, coal mine inspection supervisors in the Phelps, Kentucky MSHA office. Acting District Manager Fleming advised the inspection supervisors that he had received a request from James Boyd, UMWA district safety inspector, for an inspection of the mine pursuant to section 103(g) of the Act. Joe Dado questioned whether MSHA could agree to such a request in view of the other provisions of the Act which prohibit advance notice of MSHA inspections. Joe Dado suggested that Doug Fleming call Troy Coleman because the mine was under Coleman's jurisdiction. Troy Coleman also discussed the question of advance notice with Doug Fleming and Coleman told Fleming that he was going on vacation the next day. No further action was taken by MSHA that day.

16. At approximately 8:45 p.m., Bobby Gooslin called Superintendent William Meade's home. He learned that Superintendent Meade had gone to the mine because of a roof fall. Thereafter, Bobby Gooslin called Superintendent Meade at the mine. Bobby Gooslin said that he had been unable to reach Superintendent Louis Simpkins and that Gooslin wanted to make a safety run at midnight. Gooslin and Meade also discussed the roof fall which measured 10 feet by 8 feet by 18 inches and was expected to take one shift to clean up. Superintendent Meade said he would contact Safety Director James Hager to make arrangements for the safety run.

17. At approximately 9:15 p.m., Superintendent Meade called Safety Director James Hager at home. Superintendent Meade reported the fact and dimensions of the recent roof fall and also reported Bobby Gooslin's request for a safety run at midnight. James Hager told Meade to call Gooslin back and tell him that he would not be permitted to make the safety run because he had not given 24-hours notice of this request.

18. At approximately 9:20 p.m., James Hager called MSHA Inspection Supervisor Joe Dado to report the roof fall.

19. At approximately 9:30 p.m., Superintendent Meade called Bobby Gooslin to inform him that James Hager had instructed Meade to notify Gooslin that he would not be permitted to make the safety run at midnight because he had failed to give Kentucky Carbon 24-hours notice. Gooslin responded that

he did not give a damn whether the company had someone to accompany him or not and that he was going to the mine anyway. Gooslin also advised Meade that James Boyd, UMWA District Safety Inspector, would be there with Gooslin.

20. Thereafter, Superintendent Meade called James Hager to report Gooslin's response in the above paragraph. Hager instructed Meade to call the shift foreman for the 12:01 a.m. shift and instruct him to deny Gooslin entry to the mine and tell Gooslin to return at 8 a.m. on October 1, 1979, to make the run.

21. At approximately 9:45 p.m., Hager called Fred Fletcher, Personnel Manager of the mine, and reported that Bobby Gooslin was going to go to the mine to make an inspection even though he had been notified that he would not be permitted to make the inspection. James Hager called Fred Fletcher because he thought the matter would develop into a personnel problem.

22. At approximately 10 p.m., Fred Fletcher came to Jame Hager's home to discuss the above events. Thereafter, Fred Fletcher called James R. Reynolds, Manager, Personnel Services, Carbon Fuel Company, the parent company of Kentucky Carbon. Fred Fletcher was concerned about the situation and wanted James Reynolds' reaction to these events.

23. At approximately 10 p.m., Bobby Gooslin called Larry Simpkins, a member of the UMWA local safety committee, and asked him to come to the mine for a safety run.

24. The following events occurred at the mine between 11 and 11:45 p.m. on September 30, 1979:

(a) At approximately 11 p.m., James Christian, shift foreman of the 12:01 a.m., shift, called Superintendent Meade and was informed that Bobby Gooslin would be at the mine with a UMWA safety inspector for an inspection. Christian was instructed to tell Gooslin that he was not allowed to make the inspection because he had not given enough notice and that he was to come back at 8 a.m.

(b) James Boyd and Bobby Gooslin arrived at the parking lot outside the mine office. Several other miners, who were scheduled to work the 12:01 a.m. shift, were already present in the parking lot.

(c) Shift Foreman Christian came out of his office and walked over to Gooslin and Boyd. Christian told them that he had orders from Superintendent Meade not to allow them underground. James Boyd asked Christian his name and then stated that Christian would end up in Federal court. Gooslin stated: "I'm going to show the damn Hagers they don't run this place." Bobby Gooslin then called Tommy Coleman and Rodney Isom over and had Christian repeat his statement denying Gooslin entry to the mine.

(d) Thereafter, Christian returned to the mine office where he called Superintendent Meade to report the preceding conversation. Christian

then remembered that he had neglected to tell Gooslin to return at 8 a.m. He again went out to the parking lot and told Gooslin to come back at 8 a.m. Christian again returned to his office.

(e) Thereafter, Gooslin told the miners who were gathered in the parking lot that he was "going off the mountain," Kentucky Carbon did not want him to make a safety run, and that they should "be very careful."

(f) Thereupon, Gooslin and Boyd left the parking lot in their vehicles.

(g) After Boyd and Gooslin left the parking lot, the miners who were to work the 12:01 a.m. shift assembled and discussed Kentucky Carbon's refusal to allow the safety committee to make a run, the occurrence of the roof fall earlier that night, and their complaints about bad roof and a blocked escapeway. After some discussion, the miners jointly decided not to work. None of the miners voiced a safety complaint to Kentucky Carbon management that night.

25. At some time between 11:45 p.m. and midnight, the miners who were to work the 12:01 a.m. shift at the mine got in their vehicles and left the mine with their headlights flashing and horns blowing. The miners who were about to start work at Calloway No. 2 Mine, on the other side of the valley, upon hearing and seeing these events, also left that mine.

Events Occurring After the Work Stoppage

26. The unauthorized work stoppage or "wildcat" strike which began on the 12:01 a.m. shift on October 1, 1979, continued until the 12:01 a.m. shift on October 8, 1979. During this time, approximately 350 miners were idled. Prior to resuming work on October 8, 1979, the UMWA local safety committee inspected the mine and cited more than 80 safety and health violations.

27. On October 1, 1979, Bobby Gooslin was served with a letter from Superintendent Meade notifying him that he was "suspended pending an investigation of your involvement preceding and culminating in an unauthorized work stoppage on October 1, 1979."

28. On October 2, 1979, Bobby Gooslin was served with a notice which stated as follows:

> The Company has concluded that your actions on September 30, 1979 were the efficient cause of an unauthorized work stoppage and clearly establish you as a primary contributor in the instigation of a work stoppage in violation of the Agreement.
>
> For this offense, you are hereby suspended with intent to discharge effective immediately.

The memorandum was unsigned and the author is not identified.

29. On October 8, 1979, Bobby Gooslin was discharged by Kentucky Carbon.

30. On November 1, 1979, arbitrator David T. Kennedy, heard testimony on behalf of Bobby Gooslin and Kentucky Carbon concerning Bobby Gooslin's grievance under the contract. On November 14, 1979, Arbitrator Kennedy denied Bobby Gooslin's grievance and found that his discharge was sustained. Arbitrator Kennedy stated in pertinent part:

> The Union stressed the fact that no one who testified admitted hearing the Grievant order or suggest a work stoppage. It would be an unusual happening if anyone did. The initiation of a wildcat strike is not usually a public act. The proverbial "wink and nod" are sufficient. In this case, actions speak louder than words. Here, there were a number of men who came to the mine intending to work. After some of them spoke to Gooslin, the homeward movement started and spread throughout the operation with a domino effect. It may be that when the Grievant came to the mine on Sunday night, he did not intend to start a work stoppage, but there can be no question that his words or actions after his arrival did just that.
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> A number of witnesses testified that, although they came to the mine intending to work, upon arrival they were individually and separately seized with a sudden fear which prevented them from entering the mine, so they left. Although not one of them used the individual withdrawal provisions of the Contract, all professed knowledge of it. They would have us believe that their leaving the mine had nothing to do with the concerted homeward movement of the other Employees. I do not know what explanation the Employees of the other operations would give for not working, but it would be interesting to hear.
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> We are not required to believe the incredible. In my opinion, the evidence in this case leaves not one scintilla of doubt in my mind that this Grievant was the efficient catalyst of the work stoppage. Consider: The Employees came to work intending to work; Gooslin arrives on the scene and speaks to a few men, everyone goes home. Strikes do not erupt spontaneously; they are caused. As I have said and attempted to demonstrate, it is not even necessary to consider the Company's evidence to sustain the discharge. The Grievant stands convicted by his own testimony and that of his fellow workers, and by the facts and circumstances. Beyond that, Gooslin was evasive and equivocal in his answers to questions propounded to him, and his testimony exhibited a hostility to his Employer which contradicted his protestations of innocence and his avowals of cooperation.

31. On January 14, 1980, the Arbitration Review Board denied review of Arbitrator Kennedy's award of November 14, 1979.

DISCUSSION

I. Whether the Complaint Should Be Dismissed For Want of Prosecution.

This action was initiated by MSHA upon completion of its investigation of Bobby Gooslin's complaint. Initially, MSHA was successful in obtaining an order of temporary reinstatement for Gooslin. Thereafter, the instant matter was filed to secure permanent relief. Less than a month before the scheduled hearing date for this matter, MSHA requested permission to withdraw from this proceeding due to an unspecified "conflict of interest." I denied MSHA's request. Thereafter, Kentucky Carbon presented numerous motions to dismiss this proceeding for want of prosecution. I denied those motions.

A. May MSHA withdraw from a complaint of discharge, which it initiated pursuant to section 105(c) of the Act, due to a "conflict of interest" with the complaining miner?

The parties are in agreement that there is no precedent for MSHA's request to withdraw from this proceeding. Section 105(c)(2) mandates that MSHA shall prosecute an action where it determines that an operator has discharged a miner in violation of section 105(c)(1) of the Act. At all times, MSHA asserted that Kentucky Carbon violated the above law in its discharge of Bobby Gooslin. The only authorities cited by MSHA in support of its request to withdraw from this proceeding were court decisions holding that an attorney may not represent a party where there is a conflict of interest. These cases do not support the proposition that a party - as distinguished from an attorney - may withdraw from the proceeding. This is especially true in the instant case where, by statute, MSHA is the only party which can institute proceedings pursuant to section 105(c)(2) of the Act.

I reaffirm my decision that in an action brought by MSHA pursuant to section 105(c)(2) of the Act, MSHA will not be permitted to withdraw from the proceeding due to a "conflict of interest" with the complaining miner. My reasons are as follows:

> (1) Section 105(c)(2) clearly mandates MSHA to prosecute a discharge case where it determines that section 105(c)(1) of the Act has been violated; (2) Bobby Gooslin had no right to bring his own action for discharge pursuant to section 105(c)(3) of the Act because MSHA never determined that this section of the Act was not violated; and (3) the law applicable to a conflict of interest specifies instances where an attorney shall be precluded from representing a party but does not authorize the withdrawal of a necessary party from a proceeding.

B. Where MSHA declines to represent a complaining miner or present any evidence on his behalf at hearing, should the complaint be dismissed for want of prosecution?

Pursuant to MSHA's notice that it would not represent Bobby Gooslin and the subsequent representation of Gooslin by the UMWA, Kentucky Carbon moved to dismiss this action for want of prosecution. It also renewed this motion at the hearing after MSHA rested without presenting any evidence. Kentucky Carbon maintains that once MSHA rested without presenting any evidence, section 105(c)(2) of the Act does not permit the introduction of any "additional evidence" by the complaining miner. Section 105(c)(2) of the Act states that "the complaining miner . . . may present additional evidence on his own behalf during any hearing held pursuant to this paragraph." Therefore, Kentucky Carbon asserts that in the absence of any primary evidence, there was nothing to trigger "additional evidence." Since the specific statutory language of section 105(c) of the Act does not resolve this matter, I examined the legislative history of this section of the Act. Its states:

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

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 623.

If Kentucky Carbon's renewed motion to dismiss is granted, it would place Bobby Gooslin's claim in limbo. While he could file his own discharge case with the Commission, Kentucky Carbon could then challenge it on the basis that his claim does not satisfy the statutory language of section 105(c)(3) of the Act which requires that MSHA determine that there was no violation of section 105(c)(1) of the Act. In any event, it would further delay a resolution of this conflict. Moreover, if the complaint of discharge is dismissed, there would be a serious question whether the order of temporary reinstatement should also be dismissed.

I have considered all these factors and conclude that section 105(c)(2) should be broadly construed to allow Bobby Gooslin's case to go forward even though MSHA declined to present any evidence in support of the complaint.

II. Whether Kentucky Carbon Violated Section 105(c) of the Act.

A. Setting

Prior to the occurrence of the incident herein, labor-management relations at the mine were hostile and acrimonious. During the 7 months prior to this incident, there was a history of work stoppages, a written statement

from management threatening to discharge or discipline any miner who was involved in an unauthorized work stoppage, the discharge and subsequent reinstatement of 13 miners who invoked their individual rights under the contract by refusing to work in an allegedly unsafe area, a continuing dispute as to whether the UMWA was required to give management 24-hours notice before making safety committee inspections of the mine, and a UMWA-Kentucky Carbon dispute, involving MSHA, dealing with the propriety of hauling supplies on mantrips.

None of the parties to this proceeding has covered itself with glory. MSHA presented no valid reason for its failure to honor a UMWA request for an inspection pursuant to section 103(g) of the Act. Bobby Gooslin presented no valid reason for only giving Kentucky Carbon 3 hours notice of his intent to make a safety run for a complaint not involving imminent or immediate danger. Kentucky Carbon presented no valid reason for its refusal to allow Bobby Gooslin and the safety committee to inspect the mine as requested as its refusal was based solely upon UMWA's failure to give 24-hours notice of the inspection.

The UMWA and Kentucky Carbon were on a collision course. To put it kindly, MSHA was merely negligent. While these events are not directly relevant to the issues at hand, they set the stage for the events of September 30, 1979, which culminated in the work stoppage and the discharge of Bobby Gooslin.

B. Weight to be Given Arbitrator's Decision.

As noted in paragraphs 30 and 31 of the Findings of Fact, supra, Bobby Gooslin filed a grievance under the contract and that matter was heard and decided by arbitrator David T. Kennedy. Arbitrator Kennedy ruled against Bobby Gooslin and in favor of Kentucky Carbon. The award, upholding Gooslin's discharge, became final when the Arbitration Review Board denied review. Kentucky Carbon asserts that substantial weight should be given to the arbitrator's decision because it "authoritatively resolve[d] the specific factual issue of the reason for Gooslin's discharge." On the other hand, Bobby Gooslin asserts that no weight should be given to the arbitrator's decision because "the issues are totally inapposite," the evidence was different in this proceeding, and the arbitrator failed to consider Bobby Gooslin's protected activity pursuant to section 105(c) of the Act.

Recently in Secretary of Labor o/b/o David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission considered the weight, if any, to be accorded the findings of arbitrators. The Commission discussed the decision of the Supreme Court in Alexander v. Gardner-Denver Co., 414 U.S. 36 (1974) and held as follows:

> We adopt the Gardner-Denver approach to arbitral findings in discrimination proceedings under the Act. We believe that according weight to the findings of arbitrators may aid the

> Commission's judges in finding facts. A judge faced with a credibility problem may find the views of the arbitrator on labor practices in the mines, mine customs, or on the "common law of the shop" helpful.
>
> This does not diminish the role of the Commission's judges. The hearing before the administrative law judge is still de novo and it is the responsibility of the judge to render a decision in accordance with his own view of the facts, not that of the arbitrator. Arbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling upon the judge.
>
> As Gardner-Denver indicates, there are several factors that must be considered in determining the weight to be accorded to arbitral findings: the congruence of the statutory and contractual provisions; the degree of procedural fairness in the arbitral forum; the adequacy of the record; and the special competence of the particular arbitrator. Arbitral findings may be entitled to great weight if the arbitrator gave full consideration to the employee's statutory rights; the issue before the judge is solely one of fact; the issue was specifically addressed by the parties when the case was before the arbitrator; and the issue was decided by the arbitrator on the basis of an adequate record.

Pasula at 2795.

In Pasula, the Commission concluded "that the judge did not err in according little or no weight to the arbitral findings." Ibid.

I conclude that pursuant to the standard announced in Pasula, supra, the findings of the arbitrator are entitled to little or no weight for the following reasons:

1. The arbitrator never considered Bobby Gooslin's statutory rights and protected activity pursuant to section 105(c) of the Act.

2. The evidence before me in this proceeding is substantially different from the evidence presented at the arbitration proceeding in the following particulars: (a) the arbitrator was unaware of Gooslin's efforts to obtain an MSHA inspection of the mine at the same time he arrived to conduct the UMWA safety run. This evidence undermines the arbitrator's adverse finding concerning Gooslin's reasons for going to the mine. If Gooslin had been successful in obtaining the MSHA inspection, there would have been no challenge to the 24-hours notice policy because Kentucky Carbon would have been obligated to allow MSHA to inspect its mine without any advance notice and the UMWA would have been permitted to designate a representative to accompany the MSHA inspector; (b) the testimony of the miners who decided not to work at the time in question was significantly different at the instant

hearing than their testimony at the arbitration hearing. The arbitrator found that their testimony, that each of them decided individually and without consultation with others not to work, was incredible. In the instant proceeding, these miners admitted that they discussed Kentucky Carbon's refusal to allow the safety committee inspection, the roof fall which occurred a few hours earlier, and the alleged problems of bad roof and a blocked escapeway. Thereafter, the miners jointly decided not to work; and (c) the arbitator was unaware of the fact that less than 5 months before this incident, Kentucky Carbon had discharged 13 miners for exercising their individual rights under the contract. This evidence undermines the arbitrator's conclusion that: (1) the testimony of the miners who did not work on the shift in question was incredible; (2) that Bobby Gooslin "was the efficient catalyst of the work stoppage;" and (3) that "the contract gave the (safety) committee full authority to demand that no employee work in that area, as provided in Article III (d)(3)."

Although there are other differences in the records of the arbitration proceeding and the instant matter, suffice it to say that based upon the test adopted by the Commission in Pasula, I conclude that the findings of the arbitrator are entitled to little or no weight in the instant case.

C. Applicable Case Law and Definition of the Issue

In Pasula, the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

Pasula at 2799-2800.

MSHA and Gooslin assert that Gooslin was discharged by Kentucky Carbon in violation of section 105(c) of the Act due to the protected activities in connection with a safety complaint. Kentucky Carbon asserts that Gooslin was discharged solely for unprotected activity in instigating an unauthorized work stoppage and, hence, there is no violation of section 105(c) of the Act.

In a nutshell, Kentucky Carbon contends that Gooslin instigated the unauthorized work stoppage by his presence at the mine and his actions and words at that time. While there has been much discussion, some of which was initiated by me, concerning the question of whether the instigation of an unauthorized work stoppage can ever be protected activity pursuant to section 105(c) of the Act, I conclude that there is no reason to reach that issue in this proceeding. Similarly, I agree with Kentucky Carbon's contention that "the issue whether Gooslin actually did instigate the strike (although relevant in the Wage Agreement arbitration to the question whether Gooslin was fired for good cause) is not relevant under section 105(c) which focuses simply upon Kentucky Carbon's motivation for the discharge." Posthearing Brief of Kentucky Carbon at 20. Kentucky Carbon's conclusion that Gooslin was discharged for instigating an unauthorized work stoppage must be analyzed by examining the specific, relevant activities of Bobby Gooslin on the night of September 30, 1979. Thereafter, a determination must be made whether such activity constitutes protected or unprotected activity under section 105(c) of the Act.

D. Did Bobby Gooslin Engage in Protected Activity?

Bobby Gooslin contends that he engaged in protected activities pursuant to section 105(c) of the Act on September 30, 1979, when he called Superintendent William Meade and notified him that he intended to make a safety inspection of the mine prior to the commencement of the midnight shift and, also, when he went to the mine after 11 p.m. for the purposes of conducting the safety inspection. Section 105(c)(1) of the Act sets forth certain types of protected activity including, inter alia, filing or making

> a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, representative of miners . . . on behalf of himself or others of any statutory right afforded by this Act.

At all relevant times herein, Bobby Gooslin was acting in the dual capacities of a miner and a representative of miners. Neither the Act nor its legislative history specifies the manner in which complaints to the operator are to be made.

The first issue here is whether Gooslin's call to Superintendent Meade falls within the scope of protected activity. Gooslin's call to Meade notified him of the intent to make a safety run or inspection. Gooslin also notified Meade that he would be accompanied by the UMWA District Safety Inspector. Kentucky Carbon emphasizes that at no time did Bobby Gooslin ever

specify the nature of his complaint. While this is true, at no time did any of Kentucky Carbon's management personnel ever ask Gooslin about the nature of his complaint. I conclude that Gooslin's call to Superintendent Meade notified him of the UMWA's intent to conduct a safety run or inspection and that such call amounts to "a complaint notifying the operator . . . of an alleged danger or safety or health violation." Hence, under section 105(c) of the Act, I conclude that Gooslin engaged in protected activity in connection with his telephone call to Superintendent Meade.

The next issue is whether Gooslin's presence at the mine on the night in question is also protected activity. Gooslin asserts that as a representative of miners (safety committeeman) he had the "right to enter the property to investigate the conditions complained of." Brief of UMWA at 18-19. Kentucky Carbon does not challenge Gooslin's right to be present on the mine property and concedes that "neither Hager nor Meade gave instructions that Gooslin be prohibited from entering the mine site . . . ." Reply Brief of Kentucky Carbon at 7. I find that Superintendent Meade's instruction to Gooslin not to come to the mine that night is irrelevant in determining the scope of protected activity. A mine operator cannot narrow the scope of section 105(c) of the Act by instructing the miner or representative of miners not to come to the mine. Gooslin arrived at the mine prior to the midnight shift to make a complaint to Kentucky Carbon about an alleged danger or safety violation. Kentucky Carbon does not contend that it was unaware of the fact that Gooslin's presence at the mine was related to his claim concerning a safety problem. Rather, Kentucky Carbon contends that the purported safety problem dealt with hauling supplies on mantrips, a complaint already resolved against the UMWA by MSHA, and that any such safety problem was merely a pretext on the part of the UMWA to challenge Kentucky Carbon's 24-hours notice policy. As to the first contention, it makes no difference, under section 105(c), whether Gooslin was concerned about the issue of hauling supplies on mantrips or bad roof conditions. Both areas are the subject of MSHA safety regulations and a complaint concerning either one is a protected activity under section 105(c) of the Act. Kentucky Carbon's contention that this purported safety committee inspection was merely a pretext to challenge its 24-hours notice policy is rejected. The preponderance of the evidence - in particular the concurrent request to MSHA for an inspection pursuant to section 103(g) of the Act - establishes that Gooslin was making a bona fide safety complaint.

In this case it is unnecessary to determine whether Gooslin had the right to investigate the conditions underlying the safety complaint. I find that the language of section 105(c) authorized Gooslin to complain to Kentucky Carbon about any alleged danger or safety violation. To that end, Gooslin was authorized to go to the mine site. Thus, I find that his presence at the mine site on the night of September 30, 1979, also constituted protected activity pursuant to section 105(c) of the Act.

E. Was Gooslin's Discharge Motivated in Any Part by the Protected Activity?

In order to determine which evidence is relevant to this issue, it is appropriate to begin with the reasons given by Kentucky Carbon for Gooslin's

discharge. James R. Reynolds, Manager, Personnel Services, for Carbon Fuel Co., Kentucky Carbon's parent company, testified that he made the decision to discharge Gooslin. Mr. Reynolds testified on direct examination as follows:

> Q. As a result of Mr. Fletcher's report what did you do?
>
> A. On the basis of the facts as they were presented to me, there was no question in my mind that Mr. Gooslin was the sole, the sole reason - his presence on the hill was the sole reason for the illegal work stoppage occurring.
>
> Q. As a result of Mr. Fletcher's report what action was then taken?
>
> A. I instructed Mr. Fletcher to prepare a suspension with intent to discharge slip . . . .

(R. 333).

On cross-examination Mr. Reynolds testified as follows:

> Q. In your conclusion Mr. Gooslin's presence on the hill was the sole reason for the work stoppage?
>
> A. That's right.
>
> Q. In other words, there's no particular action that you are relying on by Mr. Gooslin to support your determination that he instigated a work stoppage?
>
> A. No, I'm relying on the complete set of circumstances. That if we had a mine ready to go go work with no labor dispute or unrest Mr. Gooslin's appearance on the hill and whatever his actions and words were at that time resulted in the "wildcat" strike following Mr. Goosin off the hill.
>
> Q. In other words, the mere fact that Mr. Gooslin appeared on the hill would have been sufficient?
>
> A. I believe Mr. Gooslin's presence on the hill was the catalyst for the work stoppage, yes, without question.

(R. 360-361).

Kentucky Carbon's superintendent, William Meade, participated in the discussions which led to Gooslin's suspension and discharge. Although he stated that he did not make the decision to discharge Gooslin, he signed the initial suspension of Gooslin on October 1, 1979. Superintendent Meade testified on cross-examination as follows:

Q. Mr. Meade, isn't the sole reason that Mr. Gooslin was terminated by Kentucky Carbon was because he came out to Calloway number 1 on the night of September 29, 1979 in an attempt to make a safety inspection?

A. That and I think his presence on the hill did instigate the unauthorized work stoppage.

(R. 526).

The above testimony by Kentucky Carbon management personnel establishes clearly that Kentucky Carbon believed that Gooslin's presence at the mine on the night in question caused the work stoppage and, thus, motivated Kentucky Carbon to discharge him.

Hence, it is clear that Kentucky Carbon's determination - that Gooslin instigated the unauthorized work stoppage - is based, at least in part, upon the fact of Gooslin's presence at the mine on the night in question. Since I conclude that Gooslin's presence at the mine on the night in question was protected activity pursuant to section 105(c) of the Act, it follows that Gooslin has established that his discharge, for instigating an unauthorized work stoppage, was motivated at least in part by his protected activity. Therefore, pursuant to the test set forth in Pasula, supra, I conclude that Gooslin has established a prima facie case of a violation of section 105(c)(1) of the Act.

F. Was Gooslin's Discharge Also Motivated By His Unprotected Activities?

James R. Reynolds, who made the decision to discharge Bobby Gooslin, stated that, in addition to Gooslin's presence at the mine on the night in question, he also based his decision on Gooslin's "actions and words at that time." (R. 361). Kentucky Carbon refers to only one statement made by Gooslin that night. After being informed by Shift Foreman James Christian that he would not be allowed to make a safety inspection of the mine, Gooslin said, "I'm going to show these damned Hagers that they don't run this place." (R. 415, 588). Although Gooslin denies making this statement, I find that the preponderance of the credible evidence establishes that he made the statement. Clearly, this statement does not amount to any form of protected activity and must be classified as unprotected activity.

Kentucky Carbon is unable to identify any specific actions of Gooslin, apart from the above statement, on the night in question. It refers, however, to "Gooslin's defiant, confrontation-oriented mood . . . ." Posthearing Brief of Kentucky Carbon at 21. Such an allegation is insufficient to establish any basis for discharge independent of the spoken words. Kentucky Carbon then asserts that "the circumstantial evidence in this case demonstrates that Gooslin instigated the wildcat strike." Posthearing Brief of Kentucky Carbon

at 22. In support of this contention, Kentucky Carbon relies upon the arbitrator's findings. While the arbitrator seemed to infer that Gooslin somehow signaled the commencement of the work stoppage with a "wink and nod," the evidence before me does not support such an inference. It is just as plausible that the work stoppage occurred in the manner described by the miners who refused to work on the night in question. They testified that after Kentucky Carbon refused to allow the safety inspection, they met and discussed this fact, the roof fall earlier that night, complaints concerning bad roof generally, and a blocked escapeway. Thereupon, they jointly decided not to work. I conclude that the evidence of record fails to establish that Gooslin committed any act, apart from his spoken words as reviewed supra, which constitute unprotected activity motivating his discharge. In light of the hostile and accrimonious relations between the UMWA and Kentucky Carbon at this time, I conclude that Gooslin's spoken words as unprotected activity, also motivated Kentucky Carbon's decision to discharge him.

G. Would Kentucky Carbon Have Discharged Gooslin For the Unprotected Activity Alone?

The dispute here is analogous to the dispute in Pasula, where the Commission found "that the miner's refusal to work was protected under the 1977 Mine Act." Pasula at 2793. The Commission went on to state, "we will assume that Pasula was fired also in part for engaging in the presumably unprotected activity of . . . refusing to permit anyone else to operate the machine. There is insufficient evidence to find that Pasula would have been fired for engaging only in the unprotected activity." Id. at 2796. The Commission concluded that

> The record fails to support Consol's claim that the evidence shows that Pasula's "misdeeds are so obvious that the employee would have in any event been disciplined." Indeed, part of the misconduct that Consol claims would have caused Pasula to be fired in any event . . . is conduct that we have concluded is protected by the 1977 Mine Act - Pasula's refusal to work." Id. at 2801.

In the instant case, I conclude that Gooslin's presence at the mine on the night in question was protected under section 105(c) of the Act. I also conclude that Gooslin was fired because of his protected activity and, in part, for his unprotected activity in stating that "I'm going to show these damned Hagers that they don't run this place." Kentucky Carbon contends that Gooslin was discharged for instigating an unauthorized work stoppage. However, the previously quoted testimony of James R. Reynolds and Superintendent Meade clearly establishes that Kentucky Carbon concluded that the unauthorized work stoppage was instigated by Gooslin's presence at the mine which was protected activity under section 105(c)(1) of the Act. Kentucky Carbon has failed to establish that Gooslin would have been discharged for his unprotected activity alone. Kentucky Carbon has failed to meet its burden of persuasion on this affirmative defense. Bobby Gooslin has sustained his complaint of discharge in violation of section 105(c) of the Act.

H. Award to Complainant.

Section 105(c)(2) of the Act provides in pertinent part as follows:

> The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

Accordingly, based upon my conclusion that Bobby Gooslin was discharged in violation of section 105(c) of the Act, Kentucky Carbon is ordered to rehire and reinstate him to his former position with full seniority rights. It should be noted that Kentucky Carbon was previously ordered to reinstate him on January 22, 1980. While the complaint herein requested an award of back pay and other monetary employment benefits, no evidence was presented on this matter and, hence, I find that Bobby Gooslin has abandoned this claim.

Pursuant to the legislative history of the Act, Kentucky Carbon also shall expunge all references to Gooslin's discharge from his employment records, post a copy of this decision and order on all bulletin boards at the mine for a consecutive period of 60 days, and shall cease and desist from discriminating against or interfering with Bobby Gooslin because of activities protected under section 105(c) of the Act.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant Bobby Gooslin and Kentucky Carbon were subject to the provisions of the Act.

2. This administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

3. Where MSHA initiates an action on behalf of a miner or representative of a miners pursuant to section 105(c)(2) of the Act, MSHA may not withdraw from such action because of a "conflict of interest" with the miner or representative of miners.

4. Where, in an action initiated by MSHA on behalf of a miner or representative of miners pursuant to section 105(c)(2) of the Act, MSHA fails to present any evidence at hearing but the miner or representative of miners stands ready to present evidence, the action will not be dismissed for want of prosecution.

5. On September 30, 1979, Complainant Bobby Gooslin engaged in the following activities which are protected under section 105(c) of the Act:

(a) Telephone call to Superintendent William Meade notifying him that Gooslin, in his capacity as UMWA safety committeeman, intended to make a safety committee inspection of the mine at midnight; and

(b) Gooslin's presence at the mine for the purpose of making a safety committee inspection.

6. Complainant Bobby Gooslin has established that he was discharged by Kentucky Carbon on October 8, 1979, because of his protected activities, supra, and he would not have been discharged but for such protected activity.

7. On September 30, 1979, Complainant Bobby Gooslin engaged in the following activity which does not constitute protected activity under section 105(c) of the Act: After being refused the right to enter and inspect the mine by Shift Foreman James Christian, Gooslin said, "I'm going to show these damned Hagers that they don't run this place."

8. Kentucky Carbon has established that its determination to discharge Complainant Bobby Gooslin was also motivated by Complainant's unprotected activity as set forth in the preceding conclusion of law, but has failed to establish any other unprotected activity of Complainant Bobby Gooslin which motivated its determination to discharge him.

9. Kentucky Carbon has failed to establish that it would have taken adverse action against Complainant Bobby Gooslin for the unprotected activity alone.

10. Complainant Bobby Gooslin was discharged by Kentucky Carbon in violation of section 105(c) of the Act.

11. Complainant Bobby Gooslin shall be rehired and reinstated to his former position at Kentucky Carbon with full seniority rights.

12. Complainant Bobby Gooslin has failed to establish any claim for back pay, interest, or other monetary employment benefits.

13. Complainant Bobby Gooslin has established his claims requiring that this incident be expunged from his employment records, requiring a copy of this decision and order be posted on Kentucky Carbon's bulletin boards at the mine, and entitling him to an order that Kentucky Carbon cease and desist from discriminating against or interfering with him because of activities protected under secton 105(c) of the Act.

14. MSHA failed to follow the procedure concerning proposed assessment of a civil penalty as set forth in Commission Rule of Procedure 25, 29 C.F.R. §2700.25 and, therefore, the proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings.

ORDER

WHEREFORE, IT IS ORDERED that Kentucky Carbon's motion to dismiss for want of prosecution is DENIED.

IT IS FURTHER ORDERED that Complainant's complaint of discharge is SUSTAINED and Complainant shall be rehired and reinstated to his prior position at Kentucky Carbon with full seniority rights.

IT IS FURTHER ORDERED that Kentucky Carbon shall:

1. Expunge all references to Complainant's discharge from his employment records;

2. Post a copy of this decision and order on all bulletin boards at the mine where notices to miners are normally placed and shall keep it posted there, unobstructed, for a consecutive period of 60 days;

3. Cease and desist from discriminating against or interfering with Complainant because of activities protected under section 105(c) of the Act.

IT IS FURTHER ORDERED that the proposal for assessment of a civil penalty is SEVERED from this proceeding and REMANDED to MSHA for further administrative proceedings.

James A. Laurenson, Judge

Distribution Certified Mail:

William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Room 280 U.S. Courthouse, Nashville, TN 37203

Mary Lu Jordan, Esq., 900 15th St., NW, Washington, DC 20005

Bernard Pafunda, Esq., P.O. Box 668, Pikeville, KY 41501

C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, P.O. Box 553, Charleston, WV 25322

Timothy Biddle, Esq., Crowell and Moring, 1100 Connecticut Ave., NW, Washington, DC 20036

W. Timothy Pohl, Esq., Carbon Industries, Inc., Suite 1300, One Valley Square, Charleston, WV 25301

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 18 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 80-49-M A.O. No. 09-00518-05001
v.	:	Sweet City Quarry & Mill
SWEET CITY QUARRIES, Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., U.S. Department of Labor, Atlanta, Georgia, for the petitioner; Willie Simmons, pro se, Elberton, Georgia, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing a civil penalty of $40 for one alleged violation of mandatory safety standard 30 CFR 56.19-128(a). Respondent contested the citation and a hearing was held on November 25, 1980, in Athens, Georgia.

The citation in this case was issued by MSHA Inspector Wayne Hubbard on October 23, 1979, and the condition or practice described on the face of the citation is as follows:

> There were more than six broken crown wires per lay in several lay of the main fall rope on the shift leg hoist.

The cited mandatory safety standard, section 56.19-128(a), requires that "[R]opes shall not be used for hoisting when they have: (a) more than six broken wires in any lay;".

Discussion

In support of the alleged violation, petitioner presented the testimony of Mr. Hubbard, and the respondent presented the testiomny of its quarry foreman James Bell. At the conclusion of all of the testimony, I advised

the parties that based on all of the evidence and testimony, it was my initial preliminary finding that petitioner had failed to establish that there were in fact six broken wires in any one lay as charged in the citation. That finding was reduced in writing on January 29, 1981, as a Preliminary Finding and Order, and served on the parties. The parties were afforded an opportunity to file exceptions or further arguments concerning my finding on the fact of violation, but they declined to do so. The basis for my finding that the petitioner had failed to establish the fact of violation is detailed in my January 29, 1981, Order, copy of which attached hereto, and those findings and conclusions are herein incorporated by reference.

Conclusion and Order

In view of the foregoing, I find that petitioner has failed to prove a violation of section 56.19-128(a), as charged in Citation No. 099070, issued on October 23, 1979. Accordingly, the citation is VACATED and this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Willie M. Simmons, Sweet City Quarries, Inc., Box 727, Elberton, GA 30635 (Certified Mail)

Ken S. Welsch, Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree St., NE, Rm. 330, Atlanta, GA 30309 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 80-49-M A.O. No. 09-00518-05001
v.	:	Sweet City Quarry & Mill
SWEET CITY QUARRIES, Respondent	:	

PRELIMINARY FINDING AND ORDER

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing a civil penalty of $40 for one alleged violation of mandatory safety standard 30 CFR 56.19-128(a). Respondent contested the citation and a hearing was held on November 25, 1980, in Athens, Georgia. At the conclusion of the hearing the parties were afforded an opportunity to state whether they desired to file any post-hearing proposed findings, conclusions, or briefs. Of particular concern to the court was whether or not petitioner has established a violation of the cited standard by a preponderance of the evidence. Petitioner's counsel stated that he did not believe it necessary to file a brief, but stated that he "would like to also do a little research and if I do come across something, I would like to have the opportunity to offer something" (Tr. 88). Respondent, acting pro se, took the position that petitioner had not established that there were more than six broken wires in any lay as stated in the cited section 30 CFR 56.19-128(a), (Tr. 89).

I previously advised the parties that I would issue a preliminary finding regarding the fact of violation and would then afford them an opportunity to take issue with that finding by filing additional arguments. The critical issue concerns the interpretation to be placed on the regulatory language more than six broken wires in any lay as found in the cited section. Although MSHA Inspector Hubbard testified that he observed eight broken wires in one of the rope lays and 10 in another, the breaks were on the outer visible (crown) areas, and he did not determine whether the breaks he observed were in fact the same wire broken more than once, and the damaged portion of the cable was not cut out and

examined to make this determination. Although Mr. Hubbard permitted the respondent to abate the citation by repositioning the rope on the reel so that the damaged portion was not at the "working end", respondent nonetheless purchased and installed a new rope, at a cost of $2100 (Tr. 52).

Discussion

The section 104(a) citation, No. 099070, served on the respondent on October 23, 1979, by MSHA Inspector Ellis Hubbard, describes the condition or practice which the inspector believed violated section 56.19-128(a) as follows:

> There were more than six broken crown wires per lay in several lay of the main fall rope on the shift leg hoist.

The pertinent requirements of section 56.19-128(a) states as follows: "Ropes shall not be used for hoisting when they have: (a) more than six broken wires in any lay;".

The parties are in agreement that the rope in question is a 3/4 inch steel core cable, approximately 1000 to 1200 feet long, and the alleged defective area encompassed an area of some 10 inches long. As for the meaning of the term "lay", The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, 1968 Ed., defines the term "lay" in pertinent part as follows:

> The direction, or length, of twist of the wires and strands in a rope. The length of lay of wire rope is the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope. The length of lay of the strand, similarly, is the distance in which a wire makes one complete turn about the axis of the strand. The pitch or angle of helix of the aires or strands of a rope, usually expressed by ratio of the diameter of the strand or rope to the length required for one complete twist.

The term "wire rope" is defined at pg. 1241 of the Dictionary in pertinent part as follows:

> A rope made of twisted strands of wire. A steel wire rope used for winding in shafts and underground haulages. Various constructions of wire rope are designated by the number of strands in the rope and the number of wires in each strand.

During the course of the hearing, respondent conceded that its mining operation was subject to the Act, and the parties stipulated that respondent is a small operator with no prior history of violations (Tr. 4). Petitioner conceded that respondent abated the citation in good faith (Tr. 81), and based on the testimony of record I made tentative findings that assuming the violation were established, I would find that it resulted from ordinary negligence and that on the basis of the circumstances surrounding the condition of the rope in question, I would likely ultimately find that the citation was nonserious (Tr. 83-85). As for the effect of the initially assessed penalty of $40 on respondent's business, assuming it were affirmed as my penalty in this matter, I cannot conclude that it will adversely affect respondent's ability to remain in business.

Fact of Violation

The critical remaining question in this case is whether the record supports the petitioner's assertion that a violation of the cited standard in fact occurred. Based on my review of the testimony of Inspector Hubbard, my preliminary finding is that petitioner has not established a violation, and I invite counsel's attention to the following testimony as set forth at pgs. 68-71 and 79-81 of the trial transcript:

BY MR. SIMMONS:

Q. You say that there were six broken wires in a crown?

A. In a lay.

Q. How did you determine that there were six broken wires? There could have been two wires that was broken three wires. There could have been one wire broken six times. How do you know that there were six of those wires broken in a crown? How can you prove that there were six wires broken in a crown?

A. I'm telling you that I counted eight breaks in one lay and ten breaks in one lay. Okay? You're asking me how do I know that we might not be talking about two or three breaks in the same wire. We could be.

But generally speaking, when wire goes, it'll go in lines. Where you find one broken wire and another beside of it, you know that's not the same wire.

Q. We know that's not the same wire. Common sense will tell you that it's not the same wire. But the thing being wrapped around, how do you know it's not the same wire that's broke six times instead of six wires broken in a wrap?

THE WITNESS: There's no way I can definitely say that one of these breaks isn't the same wire broke twice without cutting the rope out and actually taking it apart.

JUDGE KOUTRAS: What if it were six breaks in the same wire?

THE WITNESS: I don't -- I don't know.

BY JUDGE KOUTRAS:

Q. Would that be a violation?

A. That's the way we've interpreted the standard.

Q. Well, if there's six breaks in one wire, more than six breaks in one wire? See, the standard says, "more than six broken wires in any lay." So that means six individual wires. It doesn't say six breaks in one wire.

Mr. Welch, how do you interpret that?

Not only that, I was wondering how the standard writers arrived at six broken wires. Why is that such a magical figure? Why not five?

MR. WELCH: That I can't answer, but it does say "more than six broken wires in any lay" and I think I would have to say my interpretation would be different wires.

JUDGE KOUTRAS: More than six broken wires in any lay, to me, means individual wires.

MR. WELCH: Yes.

JUDGE KOUTRAS: Mr. Hubbard, did you take any notes at the time of the event at all on this thing?

Did you make any sketches or anything? I assume nobody took a picture.

THE WITNESS: I don't have a thing. The only thing I've got in my notes -- the only thing I put in my notes at this time was more or less the same thing the citation says.

JUDGE KOUTRAS: There were more than six broken crown wires per lay in several --

THE WITNESS: Lay of the main rope.

MR. SIMMONS: This is what you say. Do you have any proof that there were six or eight wires broken in that crown?

THE WITNESS: No, but I do nowadays. I take pictures.

JUDGE KOUTRAS: It says "More than six broken wires in any one lay." So that's the troublesome part.

Do you disagree or agree or what? What would be your -- if I were to call for briefs in this case, would you try to convince me that you've preponderated here and that you've established the case by preponderance of the evidence?

MR. WELCH: Yes, sir, I'd try to convince you that we'd done that. I think strictly speaking it's a factual view as to whether or not there were six broken wires in any one lay.

The inspector, according to my understanding of his testimony, did count more than six broken wires in any one lay.

The question as to whether or not they were the same wire is something that the inspector cannot answer.

JUDGE KOUTRAS: The $64 question is: is it a question that he's called upon to answer before I can affirm the citation? Is that part of the burden of proof?

MR. WELCH: Yes, sir, I --

JUDGE KOUTRAS: I think the answer would probably have to be in the affirmative.

MR. WELCH: Without researching any cases, I'd have to agree with you.

BY MR. WELCH:

Q. When you counted them, where were the broken wires?

A. The broken wires weren't all in the same strand, but still, I can't -- I can't substantiate -- there's only two ways without dissecting the rope that you could determine if it had six broken wires in one spread. One is that the wires were side by side in the same strand or, two, that each one was in a different strand. This could be done without taking the rope apart; otherwise, there'd be no way.

Q. Do you recall in your counting any broken wires of this particular rope that we're talking about on October 23rd, '79, in Sweet City Quarries when you counted them where the broken wires were?

A. They were in different strands but I can't definitely say that there were six broken wires.

MR. SIMMONS: Sir, I think you ought to dismiss this thing here.

ORDER

In view of the foregoing, the parties are afforded an opportunity, within thirty (30) days from the date of this order, to file any further arguments concerning my preliminary finding in this matter, and upon expiration of this time period, I will proceed to finalize and render a final decision in this matter.

George A. Koutras
Administrative Law Judge

Distribution:

Willie M. Simmons, Sweet City Quarries, Inc., Box 727, Elberton, GA 30635 (Certified Mail)

Ken S. Welsch, Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree St., NE, Rm. 339, Atlanta, GA 30309 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket Nos. DENV 79-139-PM
	:	A/O No. 41-00046-05001
v.	:	
	:	Docket No. DENV 79-176-PM
EL PASO ROCK QUARRIES, Inc., Respondent	:	A/O No. 41-00046-05003
	:	
	:	El Paso Quarry & Plant

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Ralph W. Scoggins, Esq., El Paso, Texas, for Respondent.

Before: Judge Charles C. Moore, Jr.

On January 28, 1981, the Commission remanded the above cases to me for further proceedings as to six of the citations which I had vacated and which the Commission has reinstated. I have already made findings as to all the necessary criteria except negligence and gravity, and in my opinion the Commission has already decided that the violations did occur. I have given the parties an opportunity to state whether they wanted to present any additional evidence and the Secretary has stated that he did not. Respondent did not reply to the order.

Citation No. 159658

I was of the opinion that the elevated roadway involved in this citation was not used for loading, hauling and dumping, and vacated the citation. The Commission disagreed because explosives were hauled to a blasting site. The lack of berms could be hazardous but there is a very low degree of negligence because the operator thought, as I did, that the standard did not require berms on this type of road. A penalty of $100 is assessed.

Citation No. 159665

In my original decision in this case, I made the following statement concerning this citation:

Citation No. 159665. The allegation is that 30 CFR 56.9-87 was violated in that the automatic reverse alarm was inoperative on one of the company trucks. This was a 35-ton haulage truck and naturally could do serious damage if it were to back over another piece of equipment or a miner. But the evidence indicates that all such equipment is checked every morning and every night, and whenever the vehicle is backed up. The drivers are instructed to take any truck to the shop to be fixed by mechanics when a failure occurs. In the circumstances, I do not believe that the Act requires a mine operator to guarantee that a piece of equipment will not break down. His obligation is to check it often and repair it when it does break down and there is no proof in this case that the operator did not do just that. If the inspector had been able to determine when the horn became inoperative and that the mine operator should have known of it, a violation would be established. In the present circumstances, however, the citation is VACATED.

A civil penalty is supposed to be a deterrent to future violations. In a case such as this, where I believe the Respondent was doing all that could be reasonably expected in order to keep the trucks in safe operating condition, I cannot reasonably assess a penalty high enough to be a deterrent. But even if I assessed a $10,000 penalty, it would not prevent horns from becoming inoperative, headlights from burning out, windshields from becoming cracked, etc. I am assessing a penalty of $10.00 for this "no fault" violation.

Citation Nos. 159669, 159673, and 159695

These three citations were issued because toeboards were not attached to certain elevated platforms creating a danger to miners below of falling tools or equipment. The standard in question (30 C.F.R. 56.11-2) states that "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

I interpreted the words "where necessary" in the standard to apply to situations where there was a danger of falling from the elevated ramps or elevated walkways but the Commission has decided that the standard is also intended to protect persons under the platforms. Inasmuch as there was equipment or the platforms, and there were no toeboards, a violation was established. There was negligence in allowing the condition to exist and I think the hazard involved justifies a civil penalty of $100 for each of these three citations, and I accordingly assess $300 for these citations.

Citation No. 195691

The allegation in this citation was that the gate in the fence surrounding an electrical transformer was not locked. The fence had a hole in it big

enough for someone to walk through (a penalty was assessed for this hole), and like Commissioner Backley I fail to see the point in requiring that a gate be locked when there is a big hole in the fence. Having the transformer inadequately fenced is hazardous, but I can see no additional hazard caused by the fact that the gate was not locked. Nor do I find any negligence in the circumstances. A penalty of $5 is assessed.

ORDER

It is therefore ordered that Respondent pay to MSHA, within 30 days, a civil penalty of $415. 1/

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Ralph W. Scoggins, Esq., Suite 342, 5959 Gateway West, El Paso, TX 79925 (Certified Mail)

1/ These assessments are in addition to those contained in my earlier decision.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 20 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 80-19-M A.O. No. 24-01431-05001 F
v.	:	Bosal No. 1 Claim
CYPRUS INDUSTRIAL MINERAL CORP., Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

This is a civil penalty proceeding initiated by the petitioner against the respondent through the filing of a proposal for assessment of a civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for one alleged violation of mandatory safety standard 30 C.F.R. § 57.3-22.

Respondent filed a timely answer but this proceeding was subsequently stayed by order issued May 27, 1980, pending a decision by the 9th Circuit concerning the review of a notice of contest filed by the respondent contesting the issuance of the underlying imminent danger order of withdrawal issued in this case. By order issued September 3, 1980, the 9th Circuit remanded the contest of the withdrawal order to the Commission for its review. The Commission issued a final order on January 1, 1981 upholding the validity of the § 107(a) imminent danger order, and on January 21, 1981, I issued an order to show cause why this civil penalty matter should not be scheduled for hearing. Respondent complied by submitting a copy of its petition for review filed with the 9th Circuit on February 4, 1981. The parties on February 12, 1981 also submitted a stipulation and motion to approve a proposed settlement agreement. I rejected, without prejudice, this proposed settlement by an order issued February 13, 1981 because inter alia, I disagreed with respondent's asserted right to a refund based on any favorable outcome for respondent with regard to the litigation pending in the 9th Circuit. On March 4, 1981, the parties filed an amended stipulation and motion to approve settlement agreement, whereby they limited the right to a refund to a decision by the 9th Circuit that respondent was inappropriately cited or that the Commission had no jurisdiction over the mine in issue. The order, initial assessment, and the proposed settlement amount is as follows:

Order No.	Date	30 CFR Standard	Assessment	Settlement
342065	8/3/78	57.3-22	$1,000	$ 500

In support of the proposed settlement the parties have submitted arguments and information concerning the six statutory factors found in section 110(i) of the Act. The parties have stipulated that respondent operates a noncoal mine and the total hours worked at the controlling company are 2,585 and the hours worked at the mine are 160 per year. Payment of the proposed penalty will not impair the respondent's ability to continue in business.

In support of a reduced penalty, the parties state prior stipulated facts which lessen the degree of negligence on the part of respondent. These facts indicate that an independent contractor performed the work for which the order was issued, that this man furnished all the manpower, equipment and supplies needed to perform the work, and that he exercised complete control over the area in which he was working.

Conclusion

After careful review and consideration of the pleadings, arguments and information of record in support of the motion to approve the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the motion is GRANTED and the settlement is APPROVED.

Order

Respondent IS ORDERED to pay a civil penalty in the settlement amount listed above in satisfaction of the order in question, within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed. In the event that respondent prevails on the issue of jurisdiction or in the event that the 9th Circuit determines that respondent was inappropriately cited, petitioner will refund the $500 penalty to respondent.

George A. Koutras
Administrative Law Judge

Distribution:

Katherine Vigil, Esq., U.S. Department of Labor, Office of the Solicitor, 1585 Federal Bldg., 1961 Stout St., Denver, CO 80294 (Certified Mail)

Scott H. Dunham, Esq., O'Melveny & Myers, 611 W. Sixth St., Los Angeles, CA 90017 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 20 1981

CONSOLIDATION COAL COMPANY, Contestant	:	Notice of Contest
v.	:	Docket No. WEVA 80-160-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 633821; November 26, 1979
	:	Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-379
	:	A/O No. 46-01436-03083
v.	:	
	:	Shoemaker Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Mine Safety and Health Administration;
Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Cook

I. Procedural Background

On December 26, 1979, Consolidation Coal Company (Consol) filed a notice of contest in Docket No. WEVA 80-160-R pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act) to contest Citation No. 633821. The citation was issued on November 26, 1979, pursuant to section 104(a) of the 1977 Mine Act citing Consol for an alleged violation of mandatory safety standard 30 C.F.R. § 75.301. The citation contains the additional allegation that the cited violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Consol's notice

of contest alleged, inter alia, (1) that the citation failed to cite a condition or practice which constituted a violation of mandatory safety standard 30 C.F.R. § 75.301; and (2) that no conditions or practices existed in the mine which could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

An answer was filed by the Mine Safety and Health Administration (MSHA) on or around January 7, 1980. In its answer, MSHA (1) admitted the issuance of the citation and stated that it was properly issued pursuant to section 104(a) of the 1977 Mine Act; (2) stated that a violation of a mandatory standard occurred; and (3) denied all other allegations contained in the notice of contest. Additionally, MSHA requested a continuance pending the filing of the associated civil penalty case. The requested continuance was granted by an order issued on February 5, 1980.

On June 23, 1980, MSHA filed a proposal for a penalty in Docket No. WEVA 80-379 pursuant to section 110(a) of the 1977 Mine Act alleging violations of two provisions of the Code of Federal Regulations. The proposal for a penalty encompasses Citation No. 633821. Consol's answer was filed on July 9, 1980.

The hearing was held on July 22, 1980, in Washington, Pennsylvania, at which time evidence was presented in a consolidated proceeding addressing Citation No. 633821. 1/ Representatives of both parties were present and participated. Exhibit No. M-3 was reserved for the posthearing filing by MSHA of a computer printout setting forth Consol's history of previous violations at the Shoemaker Mine for which assessments have been paid during the 24 months preceding November 26, 1979. Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, the briefing schedule was subsequently revised at MSHA's request.

On August 21, 1980, Petitioner filed a computer printout in Docket No. WEVA 80-379 setting forth Consol's history of previous violations at the Shoemaker Mine for which assessments have been paid, beginning November 19, 1977, and ending November 18, 1979. The following stipulation was filed in conjunction therewith:

> The parties * * * stipulate that, for the purposes of this proceeding, the relevant portion of the attached

1/ The proposal for a penalty filed in Docket No. WEVA 80-379 also encompassed Citation No. 633657, November 19, 1979, 30 C.F.R. § 75.303. Citation No. 633657 was also the subject matter of the notice of contest proceeding in Docket No. WEVA 80-158-R. All matters relating to Citation No. 633657 were disposed of on July 22, 1980, by the granting of various motions in the two cases resulting in the vacation of Citation No. 633657 and the dismissal of the proposal for a penalty insofar as it related to such citation. This disposition was affirmed by an order issued on September 18, 1980.

computer printout, program ID: AS45904, is that portion pertaining to [Consol's] history of violations at the Shoemaker mine during the period November 19, 1977 to November 18, 1979. [MSHA] offers the attached printout in evidence as Exhibit M-3. [Consol] has no objection to reciept [sic] of the printout in evidence for the limited purpose set forth above.

Exhibit M-3 was received in evidence by an order issued on September 23, 1980.

Consol and MSHA filed posthearing briefs on September 26, 1980, and September 29, 1980, respectively. Consol filed a reply brief on October 10, 1980.

II. Violations Charged in Docket No. WEVA 80-379

Citation No.	Date	30 C.F.R. Standard
633657	11/19/79	75.303 2/
633821	11/26/79	75.301

III. Witnesses and Exhibits

A. Witnesses

MSHA called as its witness Federal mine inspector Charles Coffield.

Consol called as its witness Kit Phares, the regional inspector for the Moundsville Operations of Consol's Eastern Division.

B. Exhibits

1. MSHA introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 633821, November 26, 1979, 30 C.F.R. § 75.301, and a copy of the termination thereof.

M-2 is a copy of the Shoemaker Mine's approved ventilation system and methane and dust control plan in effect on November 26, 1979, and submitted for revision on May 9, 1980.

M-3 is a computer printout setting forth Consol's history of previous violations at the Shoemaker Mine for which assessments have been paid, beginning November 19, 1977, and ending November 18, 1979.

2. Consol introduced the following exhibits in evidence:

2/ See n. 1, supra.

O-1 is a map of the 5 North Face section of the Shoemaker Mine.

O-2 is a copy of Inspector Coffield's "inspector's statement," MSHA Form 7000-4, pertaining to M-1.

IV. Issues

A. The following issues are presented in the above-captioned notice of contest proceeding:

1. Whether the condition or practice cited in Citation No. 633821 constitutes a violation of mandatory safety standard 30 C.F.R. § 75.301.

2. If the condition or practice cited in Citation No. 633821 constitutes a violation of mandatory safety standard 30 C.F.R. § 75.301, then whether such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of the Code of Federal Regulations occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Administrative Law Judge has jurisdiction in the above-captioned proceedings (Tr. 5-7).

2. Consol operates in interstate commerce, and the Shoemaker Mine is covered under the 1977 Mine Act (Tr. 6-7).

3. Consol is a large operator, and the Shoemaker Mine is a large mine (Tr. 6-7). Specifically, the size of Consol is rated at 44,855,465 tons of coal per year, and the size of the Shoemaker Mine is rated at 1,791,721 tons of coal per year (Tr. 11).

4. Consol abated the violation within the time set by the inspector and it acted in good faith in doing so (Tr. 5-6).

B. Occurrence of Violation

Federal mine inspector Charles Coffield issued Citation No. 633821 at Consol's Shoemaker Mine during the course of his November 26, 1979, inspection

(Tr. 15-16). The citation alleges a violation of mandatory safety standard 30 C.F.R. § 75.301 in that only approximately 4,600 cubic feet of air per minute (cfm) was reaching the last open crosscut between the No. 2 and No. 3 entries of the Five North Face left side section (047) (Exh. M-1). The citation alleges a violation of that portion of mandatory safety standard 30 C.F.R. § 75.301 which requires that "[t]he minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of developing rooms shall be 9,000 cubic feet a minute." (See Tr. 61.)

The briefs filed by the parties present two questions for resolution in determining whether a violation occurred. The first question relates to the accuracy of the 4,600 cfm air volume measurement obtained by the inspector, and to the methods used by the inspector to obtain that air volume measurement. The second question relates to whether the air volume measurement, as stated, constituted a violation of the law at the time and location involved.

The resolution of the first question turns upon Consol's challenge to the accuracy of the air velocity measurement used by the inspector in his computations to determine that only approximately 4,600 cfm of air was reaching the last open crosscut between the No. 2 and No. 3 entries of the Five North Face left side section. An anemometer was used to make the air velocity measurement. It appears from the record that an accurate air quantity computation, based upon an air velocity reading taken with an anemometer, requires the following: An approved, calibrated anemometer is used to obtain an air reading. An anemometer correction chart is then used to convert this reading into an accurate air velocity measurement. The width and the height of the crosscut are determined, and the three figures are multiplied together to obtain an air quantity measurement in terms of cfm.

Consol's challenge to the accuracy of the 4,600 cfm reading rests solely upon the assertion that Inspector Coffield could not state for certain whether he had or had not used the anemometer correction chart (Consol's Posthearing Brief, pp. 18-19; Consol's Reply Brief, p. 8). Inspector Coffield testified on direct examination during MSHA's case-in-chief: (1) that he used an approved, calibrated anemometer to take an air velocity reading; (2) that, to the best of his recollection, he obtained a reading of 38 feet per minute; (3) that he had already taken a width and a height measurement; and (4) that he multiplied the three figures together and obtained an air quantity figure of slightly less than 4,600 cfm (Tr. 16). Consol's position as to whether the inspector did or did not use the correction chart is based upon the following testimony elicited from Inspector Coffield on cross-examination during MSHA's rebuttal case:

> Q. Mr. Coffield, your anemometer that you used to take the readings, is it equipped with a correction chart?
>
> A. Yes, sir.
>
> Q. Did you use the correction chart for taking the readings on the date in question?

A. The correction chart, I think --

Q. The answer would be yes or no, I think, to that question.

A. I don't know if I can answer it yes or no.

I will say I looked at -- yes, I looked at the correction chart.

Q. You looked at it?

A. Uh-huh.

(Tr. 96-97).

I find that the evidence is sufficient to support a finding that the inspector made use of the correction chart. The fact that he looked at the chart renders it more probable than not that he made use of the chart in computing air velocity. The record also contains sufficient independent evidence to corroborate the accuracy of the 4,600 cfm figure. Mr. Phares testified that Inspector Coffield performed a series of computations prior to stating that there was only 4,600 cfm reaching the last open crosscut between No. 2 and No. 3 entries (Tr. 73). Mr. Phares' position on the date of the inspection does not appear to have included any disagreement with the accuracy of the inspector's 4,600 cfm reading. It appears that the disagreement was confined to the location where the air velocity measurement was obtained, with Mr. Phares contending at the time that the reading should have been taken in the last open crosscut between No. 1 and No. 2 entries (Tr. 69-70). Mr. Phares made computations based on an air velocity reading taken in the last open crosscut between No. 1 and No. 2 entries and obtained a 26,000 cfm figure (Tr. 69-70). Considering the arrangement of the ventilation system, Mr. Phares did not consider the difference between his reading and Inspector Coffield's reading to be unusual (Tr. 75). Accordingly, I find that only approximately 4,600 cfm of air was reaching the last open crosscut between No. 2 and No. 3 entries.

Consol's challenge to the method of measurement centers around the smoke tube test performed by Inspector Coffield (Consol's Posthearing Brief, p. 19). Consol challenges the test on various grounds. However, the evidence establishes that the results of the smoke tube test did not form a basis for the inspector's determination that only approximately 4,600 cfm of air per minute was reaching the last open crosscut between No. 2 and No. 3 entries. The evidence clearly shows that the smoke tube test was performed after the inspector informed Mr. Phares that he had obtained a 4,600 cfm figure using the air velocity figure derived from the anemometer reading (Tr. 93-94). Accordingly, it is unnecessary to address Consol's challenge to the smoke tube test in order to resolve the issues presented herein.

The second question raised by the parties is whether an air volume measurement of 4,600 cfm at the location involved constituted a violation of 30 C.F.R. § 75.301. The record establishes the following:

The Five North Face section of the Shoemaker Mine was a two miner section consisting of 10 entries numbered in sequence from left to right (Exh. O-1, Tr. 68-69). Each entry contained a "working face." The type of ventilation system in use was described as a split system of ventilation (Tr. 58-59). On November 26, 1979, the working face where coal was being extracted, on the left side of the Five North Face section, was located in the No. 1 entry (Tr. 68-69, Point A on Exh. O-1). The mining plan on the day shift was to advance the No. 1 entry a distance of approximately 100 to 120 feet (Tr. 68). None of the other entries on the left side of the Five North Face section were to be mined during the shift (Tr. 84). 3/ Ventilation was accomplished through the use of permanent stoppings, check curtains, regulators and a system of fans (Exh. O-1, Tr. 79, 87).

The ventilation system on the left side of the section was set up as follows: Permanent stoppings had been installed in the crosscuts between No. 2 and No. 3 entries, up to and including the second crosscut outby the last open crosscut (Exh. O-1). A check curtain (check curtain No. 1) had been installed in a crosscut between the No. 1 and No. 2 entries. The crosscut containing check curtain No. 1 was located one crosscut outby the last open crosscut (Exh. O-1). An additional check curtain (check curtain No. 2) had been installed in the No. 2 entry at a point approximately midway between the first crosscut outby the last open crosscut and the second crosscut outby the last open crosscut (Exh. O-1). Under this setup, the left side of the section was being ventilated with Nos. 3, 4 and 5 entries, and part of No. 2 entry, on intake air. The No. 1 entry and the remainder of No. 2 entry were on return air (Exh. O-1, Tr. 69). An auxiliary exhaust fan was located in the No. 1 entry just outby the point where it intersected with the last open crosscut (Exh. O-1, Tr. 79). According to Mr. Phares, the return air course began in the No. 1 entry at the last open crosscut (Tr. 69).

Check curtain No. 1 was loose in a few places around the edges, but it was basically up and basically sound (Tr. 29, 33-34). Check curtain No. 2 was almost completely torn down; specifically, approximately two-thirds of it had been torn down and approximately one-third of it remained up (Tr. 29, 31-33). 4/

3/ The five North Face section was a two-miner section. The other miner was mining in one of the entries on the right side of the Five North Face section (Tr. 89).

4/ Inspector Coffield and Mr. Phares demonstrated considerable disagreement as relates to the condition of the two check curtains. Inspector Coffield testified that check curtain No. 1 was loose in a few places around the edges, but that it was basically up and basically sound (Tr. 29, 33-34). He further testified that check curtain No. 2 was almost completely torn down, with approximately two-thirds of it down and the remaining one-third of it

As noted above, Inspector Coffield measured the volume of air in the last open crosscut between No. 2 and No. 3 entries and obtained a measurement of 4,600 cfm. Mr. Phares promptly measured the volume of air in the last open crosscut between No. 1 and No. 2 entries and obtained a measurement of 26,000 cfm.

MSHA contends that Inspector Coffield took his measurements in the proper location, i.e., in the last open crosscut between No. 2 and No. 3 entries. MSHA points to the provisions of the approved ventilation system and methane and dust control plan in effect on November 26, 1979 (Exh. M-2), as designating the line of pillars between No. 2 and No. 3 entries as the line of pillars separating the intake and return air courses. Consol disagrees, contending that the measurements were required to be taken in the last open crosscut between No. 1 and No. 2 entries because, under the ventilation set up in use on November 26, 1979, the line of pillars between the No. 1 and No. 2 entries was the line of pillars separating the intake and return air courses. Consol maintains that the point at which intake air becomes return air is of significance in making this determination, and contends that intake air becomes return air only after it has passed over the last active working face. Accordingly, Consol argues that the return air course did not begin until the air had passed over the last active working face, in this case the face of the No. 1 entry where work was actually in progress.

Consol's position is not sustainable from two different standpoints.

First, its position can be maintained only if it relies upon the provisions of 30 C.F.R. § 75.301-3(a). This section of the regulations was promulgated by the administrators of the 1969 Coal Act to set forth a place they considered adequate to measure the quantity of air which Congress determined was required to reach the last open crosscut. In enacting section 303(b) of the 1969 Coal Act, Congress decreed that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries shall be 9,000 cfm. Therefore, Congress determined that this quantity of air must reach the last open crosscut where it intersects each developing entry.

The regulation as to the place to measure the quantity of air states, in part, that "the volume of air shall be measured in the last open crosscut

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fn. 4 (continued)
up (Tr. 29, 31-33). Mr. Phares testified at one point that Inspector Coffield and he came through curtain No. 2, and that he did not recall it being down (Tr. 72). Similarly, Mr. Phares testified at another point that he did not recall any problem with check curtain No. 1 or check curtain No. 2 (Tr. 83-84).

I accept the inspector's testimony on this point because he affirmatively testified as to the condition of the two check curtains. Mr. Phares testimony that he did not recall check curtain No. 2 being down is not an affirmative statement that the curtain was up. Similarly, his testimony that he did not recall any problem with either curtain is not an affirmative statement that no problems existed.

through the line of pillars that separates the intake and return air courses of each split." 30 C.F.R. § 75.301-3(a).

Consol argues that such place of measurement is the place where intake air becomes return air and that that place varies such that it occurs at that particular working face where mining is actually being done.

Consol, however, submitted a ventilation plan that was approved by the Government wherein it set forth a specific provision that permanent stoppings will be maintained to separate intake and return air courses up to and including the third connecting crosscut outby the faces. Exhibit O-1 shows the places where Consol installed its permanent stoppings. Consol itself then designated that line of stoppings as the separation between the intake air course and the return air course.

Consol can hardly now claim that it did not affirmatively determine, under its own ventilation plan, the separation between the intake and return air courses. This, of course, is between the No. 2 and No. 3 entries. Therefore, as a minimum, the air reading must be 9,000 cfm in the crosscut between No. 2 and No. 3 entries. 5/

There is another reason why Consol's position is not well founded. As stated above, the statute in question requires that 9,000 cfm of air reach the last open crosscut where it intersects each developing entry.

We know that the quantity of air in the last open crosscut between the No. 2 and No. 3 entries was only 4,600 cfm. We also know that the witness for Consol stated that in his opinion the quantity of air in the last open crosscut between the No. 5 and No. 4 entries and the No. 4 and No. 3 entries was possibly less than 4,600 cfm (Tr. 88-89).

Therefore, Consol's position results in a situation wherein the air reaching the last open crosscut in No. 5, No. 4, and No. 3 entries could be less than 9,000 cfm and Consol would maintain that this was not a violation of law.

However, this condition would violate the basic intent of the statute since 9,000 cfm of air would not be reaching the last open crosscut where it intersects the No. 3, No. 4, and No. 5 entries. Each of these entries contains a working face. The term "working face" is defined as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 C.F.R. § 75.2(g)(1).

5/ The foundation for Consol's argument that a location in the last open crosscut between the No. 1 and No. 2 entries constitued a valid place for measurement is further without foundation because Consol has not shown any provisions in the ventilation plan which would have authorized any part of the No. 2 entry as an intake air course. The only portions of the ventilation plan which apply to this situation would indicate that there is no foundation for the use of No. 2 entry for intake air.

Methane is released from all of the working faces in the mining cycle even though coal is being extracted from only one of those faces at a given time (Tr. 34-37, 91-92). 6/ Therefore, air of that quantity is needed to maintain safe conditions in the entire mining cycle. This is why Congress requires that such quantity of air reach the last open crosscut where it intersects each of these developing entries.

The case of Zeigler Coal Company, 3 IBMA 78, 81 I.D. 173, 1973-1974 CCH OSHD par. 17,615 (1974), has been cited. In that case, the Interior Board of Mine Operations Appeals (Board) cited 30 C.F.R. § 75.301-3 and indicated that the location at which the air volume measurement is to be made, which is through the line of pillars separating the intake and return air courses, must be determined with reference to the point at which intake air becomes return air. 3 IBMA 78 at 83-84. As stated above, in view of the definition of "working face", the faces in each entry were working faces. We know that intake air was proceeding up to the faces in the No. 5, No. 4, No. 3, and No. 2 entries.

When the intake air in No. 5 entry reached the No. 5 working face that air became return air since it would be carrying methane away from the face area (Tr. 34-39, 91-92) whether or not mining was being done at that moment in that particular working face in the mining cycle. That return air would then be drawn to the left of the section through the last open crosscut by the auxiliary fan in the No. 1 entry. Intake air was also coming up the No. 4 and No. 3 and No. 2 entries as shown on Exhibit O-1. We know that that air was intake air at least until it reached the last open crosscut and that it was return air as it proceeded to the left of each entry through the last open crosscut.

Consequently, the provisions of 30 C.F.R. § 75.301-3 as to the place of air measurement can be applied in the last open crosscut between each entry since the air is continuously changing from intake to return air.

No matter what kinds of arguments are developed as to locations of measurements, 7/ it is patently clear that the finding of only 4,600 cfm as the measurement of quantity of air obtained in the last open crosscut between the No. 2 and No. 3 entries, is clear evidence of a violation of 30 C.F.R. § 75.301 in that 9,000 cfm of air was not reaching the last open crosscut in this set of developing entries.

Accordingly, it is found that a violation of 30 C.F.R. § 75.301 has been established by a preponderance of the evidence.

6/ Inspector Coffield testified that he had taken methane readings on different occasions and had obtained readings of .8 percent, .9 percent and possibly 1.2 percent. He further testified that methane has been found in excessive quantities even back on the belt lines (Tr. 35).

7/ The most logical and effective method would be to set forth definitions for the terms "intake air course," "return air course," "intake air," and "return air" in Part 75 of Title 30 of the Code of Federal Regulations.

C. Negligence of the Operator

The placement and condition of the check curtains was responsible for the low air reading obtained by the inspector (Tr. 25, 29, 71, 77-78, 89). The parties demonstrated substantial disagreement as to whether the placement of the curtains complied with the applicable portions of the approved ventilation system and methane and dust control plan. The drawings on page 12 of the plan depict a typical ventilation system applicable to a mining cycle utilizing 8 entries and one or two continuous miners. The portion of the mine in which the violation occurred had 10 entries. Paragraph 7 on page 9 of the plan states that the "section and face ventilation system (typical for each system of advance and retreat mining) shown will vary in the number of entries, entry and crosscut centers, and crosscut angles."

It appears that the placement of the check curtains did not comply with the provisions of the approved ventilation system and methane and dust control plan. Furthermore, the flexibility afforded by paragraph 7 on page 9 of the plan does not extend so far as to permit the operator to place himself in violation of 30 C.F.R. § 75.301.

The inspector did not know whether Consol knew that the check curtain in the No. 2 entry was down (Tr. 37). However, the testimony of Mr. Phares indicates that the placement of the curtains was the responsibility of a section foreman (Tr. 79). It can therefore be concluded that Consol knew or should have known of the existence of one of the conditions principally responsible for the low air reading. Accordingly, it is found that Consol demonstrated ordinary negligence.

D. Gravity of the Violation

Inspector Coffield testified that the violation was serious because methane could accumulate on the left side of the section as a result of the reduced ventilation (Tr. 34-35). An accumulation of methane could figure prominently in a mine explosion (Tr. 37). Mr. Phares testified that the section liberates methane (Tr. 72). According to Inspector Coffield, the mine liberates such quantities of methane that excessive quantities have been detected on the belt lines (Tr. 35). However, it does not appear that Inspector Coffield issued any citations at the time based upon excessive quantities of methane (Tr. 54). The section was basically dry (Tr. 35).

Mr. Phares testified that it was possible that less than 4,600 cfm of ventilation was present in the crosscut between No. 3 and No. 4 entries, and that it was possible that such ventilation was even progressively lower in the crosscut between No. 4 and No. 5 entries (Tr. 88). According to Inspector Coffield, the progressively lower air velocity readings in the last open crosscut between No. 3 and No. 4 entries, and No. 4 and No. 5 entries, would affect the accumulation of methane. The lower the air readings, the more methane would or could accumulate (Tr. 91-92).

In view of the foregoing, it is found that the violation was serious.

E. Significant and Substantial Criterion

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In Alabama By-Products Corporation, 7 IBMA 85, 94, 83 I.D. 574, 1976-1977 CCH OSHD par. 21,298 (1976), the Board held that the significant and substantial criterion bars the issuance of citations in "two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." A corollary to this proposition is that a violation of a mandatory standard may be significant and substantial "without regard to the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone death." 7 IBMA at 94.

As noted above, the violation was serious. It was not a purely technical violation. Considering the low air volume reading computed by the inspector, the mine's level of methane liberation, the potential for methane to accumulate, and the well-recognized explosive properties of methane, it cannot be said that the source of injury had only a remote or speculative chance of coming to fruition. Accordingly, it is found that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

F. Good Faith in Attempting Rapid Abatement

The parties stipulated that Consol abated the violation within the time set by Inspector Coffield and that Consol acted in good faith in doing so (Tr. 5). Accordingly, it is found that Consol demonstrated good faith in attempting rapid abatement.

G. History of Previous Violations

Respondent's history of previous violations at the Shoemaker Mine for which assessments have been paid, beginning November 19, 1977, and ending November 18, 1979, is summarized as follows:

30 C.F.R. Standard	Number of Paid Assessments	Total Amount Paid
All sections	962	$180,851
75.301	1	$122

H. Size of the Operator's Business

The parties stipulated that Consol is a large operator, and that the Shoemaker Mine is a large mine (Tr. 6-7). Specifically, the parties stipulated that size of Consol is rated at 44,855,465 tons of coal per year, and

the size of the Shoemaker Mine is rated at 1,791,721 tons of coal per year (Tr. 11).

I. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

No evidence was presented to establish that the assessment of a civil penalty will affect Consol's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSHD par. 15,380 (1972), the Board held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Therefore, I find that a penalty otherwise properly assessed in Docket No. WEVA 80-379 will not impair Consol's ability to continue in business.

VI. Conclusions of Law

1. Consolidation Coal Company and its Shoemaker Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. Federal mine inspector Charles Coffield was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 633821, November 26, 1979, 30 C.F.R. § 75.301.

4. The violation charged in Citation No. 633821, November 26, 1979, 30 C.F.R. § 75.301, is found to have occurred as alleged.

5. The violation charged in Citation No. 633821, November 26, 1979, 30 C.F.R. § 75.301, was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

MSHA and Consol filed posthearing briefs. Consol filed a reply brief. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty in Docket No. WEVA 80-379 is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
633821	11/26/79	75.301	$600

ORDER

Accordingly, IT IS ORDERED that the determination of September 18, 1980, affirming the dismissal of the proposal for a penalty in Docket No. WEVA 80-379 as relates to Citation No. 633657, November 19, 1979, 30 C.F.R. § 75.303 be, and hereby is, REAFFIRMED.

IT IS FURTHER ORDERED that the notice of contest in Docket No. WEVA 80-160-R be, and hereby is, DENIED; and that Citation No. 633821, November 26, 1979, 30 C.F.R. § 75.301 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that Respondent pay a civil penalty in Docket No. WEVA 80-379 in the amount of $600 within the next 30 days.

John F. Cook
Administrative Law Judge

Distribution:

David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, 900 Oliver Building, Pittsburgh, PA 15222 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

24 MAR 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge
	:	Docket Nos. LAKE 80-292-D
	:	VINC CD-80-10
On behalf of:	:	
GENE F. HAND,	:	Zeigler No. 11 Mine
Complainant	:	
v.	:	
	:	
ZEIGLER COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
D. Michael Miller, Esq., Alexander, Ebinger, Fisher, McAlister & Lawrence, Columbus, Ohio, and J. Halbert Woods, Esq., Zeigler Coal Company, Des Plaines, Illinois, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) on behalf of Gene F. Hand alleging that Gene F. Hand was discharged from his employment at Zeigler Coal Company (hereinafter Zeigler) on December 21, 1979, because of activities protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (hereinafter the Act). Gene F. Hand filed a complaint with MSHA concerning his discharge. On May 19, 1980, following its investigation, MSHA filed an application for temporary reinstatement of Gene F. Hand. That application was granted by Chief Administrative Law Judge James A. Broderick on May 20, 1980. Thereafter, Zeigler requested a hearing on the application, which was subsequently held in St. Louis, Missouri, on June 9, 1980, before Chief Judge Broderick. Following the hearing, Chief Judge Broderick held on June 17, 1980, that the order of temporary reinstatement should continue in force until further notice. On July 23, 1980, the Federal Mine Safety and

Health Review Commission (hereinafter Commission) denied Zeigler's petition for review of the order of temporary reinstatement. Thereafter, Zeigler brought an action seeking injunctive relief in the U.S. District Court for the Southern District of Illinois. Zeigler asserted that the foregoing proceedings denied it due process of law. Chief Judge Foreman denied Zeigler's motion for injunctive relief. Zeigler Coal Company v. Marshall, 502 F. Supp. 1326, (S.D. Ill. 1980).

On June 18, 1980, Complainant filed a complaint of discharge on behalf of Gene F. Hand. Upon completion of prehearing requirements, a hearing was held in St. Louis, Missouri, on January 13 and 14, 1981. The following witnesses testified on behalf of Gene F. Hand: Charles H. Morgan, Wendell Davis, Gene F. Hand, Shan W. Thomas, and Paul Tisdale. The following witnesses testified on behalf of Zeigler: Raphael C. Colombo, Daniel R. Spinnie, Jack R. Thornton, B. Carl Reidelberger, and Robert H. Wallace.

Upon completion of the testimony at the hearing, Zeigler moved for a directed verdict and for temporary relief. The motion for directed verdict was denied from the bench. After consideration of the contentions of the parties, I denied Zeigler's request for temporary relief on January 29, 1981, because I did "not find that the complaint was frivolously brought or that MSHA's finding was arbitrary or capricious." Thereafter, the parties submitted briefs and proposed findings of fact and conclusions of law.

ISSUES

Whether Complainant Gene F. Hand, a section foreman, is a "miner" entitled to the protection of section 105(c) of the Act; and, if so;

Whether Zeigler violated section 105(c) of the Act in discharging Complainant Gene F. Hand, and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. § 815(c), provides in pertinent part as follows:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant

for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners 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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation, shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner, to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

STIPULATIONS

The parties stipulated the following:

1. At all relevant times, Zeigler Coal Company operated the No. 11 Mine, and is an operator as defined in section 3(b) of the Federal Mine Safety and Health Act of 1977 (the Act).

2. The No. 11 Mine, located in Randolph County, Illinois, is a mine defined in section 3(h)(1) of the Act, the products of which enter or affect commerce.

3. Complainant was employed as an underground section foreman by Respondent at its No. 11 Mine in December of 1979.

4. Complainant was discharged by Respondent, Zeigler Coal Company, on December 21, 1979.

5. Complainant was hired by Respondent on July 9, 1973, and employed in its Spartan Mine until its closure in 1979.

6. Complainant, originally hired as a section foreman, was promoted to assistant mine manager on January 13, 1975, and a mine manager on March 24, 1975.

7. Complainant was transferred at his request to the No. 11 Mine on April 23, 1979, after a short tenure at Respondent's No. 4 Mine.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. Zeigler, at all times relevant to this proceeding, operated the No. 11 Mine, and Zeigler is an "operator" as defined in section 3(b) of the Act.

2. Zeigler's No. 11 Mine is located in Randolph County, Illinois, and is a "mine" as defined in section 3(h)(1) of the Act. The products of Zeigler No. 11 Mine enter and affect commerce.

3. Gene F. Hand was hired as an underground section foreman by Zeigler at its Spartan Mine on July 9, 1973, and was promoted to assistant mine manager on January 13, 1975, and mine manager on March 24, 1975. He worked at the Spartan No. 2 Mine until it closed on March 17, 1979.

4. After a short period of work at Zeigler No. 4 Mine, Gene F. Hand was transferred, at his request, to Zeigler No. 11 Mine on April 23, 1979.

5. Gene F. Hand was employed as an underground section foreman at the No. 11 Mine in December 1979.

6. On December 21, 1979, Gene F. Hand was discharged by Zeigler.

7. Between June 1979, and December 21, 1979, the date of Hand's discharge, he was the subject of disciplinary action as follows:

(a) In June 1979, Hand was reprimanded for violating Zeigler's policy requiring that accidents be reported on the day they occur.

(b) During the summer of 1979, Hand was reprimanded after he allegedly threatened a member of the United Mine Workers of America (hereinafter UMWA) and a formal complaint was lodged against him by the UMWA safety committee.

(c) In August 1979, Hand was reprimanded for failure to adequately supervise the extension of a steel air line.

(d) In August 1979, Hand was suspended for 5 days after he ordered the mine manager off his section. Upon Hand's reinstatement, Mine Superintendent Robert Wallace warned him not to engage in such conduct again.

(e) In early December 1979, Hand was reprimanded by Superintendent Wallace following a dispute between Hand and Chief Electrician Walter Dotson. Hand's dispute with Dotson was terminated when General Mine Manager, Carl Reidelberger, stepped between them. After the incident with Dotson, Superintendent Wallace told Hand that he was "not going to put up with it much longer."

(f) In mid-December 1979, a UMWA safety committeeman complained to Superintendent Wallace about Hand's conduct, which included losing his temper with the miners. Thereafter, Superintendent Wallace again reprimanded Hand.

8. In the weeks prior to December 21, 1979, there had been two major roof falls in the No. 3 section or unit of the mine. Following these occurrences, Zeigler adopted a revised roof-control plan.

9. On December 20, 1979, at Hand's request, Superintendent Wallace assigned additional roof bolters to Hand's unit to catch up on the roof bolting.

10. On the morning of December 21, 1979, a coal drill operator took some torque readings on roof bolts in the No. 3 section and reported the results to the UMWA safety committee.

11. At this time, Hand also noticed some 4-foot roof bolts which had just been installed and Hand believed that these roof bolts did not conform to the revised roof-control plan adopted by Zeigler.

12. Thereafter, Hand checked some roof bolts and found some in compliance and others out of compliance. By 11 a.m., he had not checked the required number of roof bolts for torque when Superintendent Wallace and Zeigler's Chief Mining Engineer, Ray Colombo, arrived on Hand's section. Hand informed Superintendent Wallace of the problem concerning the torque

of the roof bolts; Hand and Wallace thereupon torqued roof bolts together. Again, some of the bolts were in compliance and others were not. Wallace thereupon criticized Hand for the manner in which he had handled this problem and told him to assign a miner to torquing the roof bolts. Hand did not believe that the person suggested by Wallace was qualified to torque roof bolts. Hand became excited and argued with Wallace. Hand told Wallace to get off his section and that he, Hand, would straighten it out.

13. When Hand completed his shift on December 21, 1979, he was summoned to Wallace's office and thereupon discharged for insubordination.

14. Although Hand contends that there was a violation of federal law concerning roof bolting on his unit on December 21, 1979, he did not report any such violation in his daily report and the information in his report on the torque of roof bolts in his section showed no violation of law.

DISCUSSION

I. Whether Gene Hand, a Section Foreman, is a "Miner" Entitled to the Protection of Section 105(c) of the Act

Zeigler contends that "the Review Commission is without jurisdiction to consider Hand's claim of discrimination because Hand is not a 'miner' within the meaning of section 105(c) of the Act." Zeigler cites no specific authority for this contention but argues that in other sections of the Act, Congress "drew a distinction between supervisory personnel, such as a section foreman, and the 'miners' who work in a mine."

MSHA, on behalf of Hand, contends that the definition of "miner" in section 3(g) of the Act "is clear, unambiguous, and no reasonable basis for a restrictive interpretation exists." MSHA also relies upon a 1975 decision of the Interior Board of Mine Operations Appeals holding that an owner of a mine is a miner. Charles T. Sink, 5 IBMA 217, 225, aff'd, 538 F.2d 325 (4th Cir. 1976).

Section 3(g) of the Act, 30 U.S.C. § 802(g), defines the term "miner" as "any individual working in a coal or other mine." The definition of "miner" in the Coal Mine Health and Safety Act of 1969 was as follows: "Any individual working in a coal mine." Public Law 91-173, section 3(g) December 30, 1969. Thus, for purposes of this matter, the definition of "miner" was not changed in the 1977 Act. Under the definition, it is clear that a section foreman in a coal mine is a "miner" for purposes of the Act.

Zeigler's contention, that section foremen, constituting supervisory personnel, are excluded from the definition of "miner" for purposes of section 105(c) of the Act, is erroneous. Under the 1969 Act, the Interior Board of Mine Operations Appeals held that the owner of a mine was also a miner for purposes of section 3(g) of that Act. Charles T. Sink, supra at 225. More recently, the Third Circuit Court of Appeals held that four brothers who owned a mine were also "miners" under the Act. Marshall v. Kraynak, 604 F.2d 231

(3d Cir. 1979). I also agree with the Third Circuit that the definition of "miner" in section 3(g) of the Act "is free from ambiguity."

I conclude that, at all times relevant herein, Gene F. Hand, a section foreman employed by Zeigler, was a "miner" for purposes of section 105(c) of the Act. Therefore, I have jurisdiction to decide this matter.

II. Whether Zeigler Violated Section 105(c) of the Act

Recently, in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other federal statutes. The Commission held as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800.

Hand contends that he was discharged by Zeigler because of his complaints to Superintendent Wallace that the roof in his section "was unsafe and violative of the law" and that he resisted an order from the superintendent to assign an unqualified miner to torque roof bolts. Complainant's Posthearing Brief at 17. Zeigler asserts the following: (1) Hand failed to establish that he engaged in any protected activity at the time of his discharge; (2) Hand failed to establish that a safety complaint was a motivating reason for his discharge; (3) Hand was discharged for insubordination - conduct which is not protected under the Act; and (4) Zeigler would have discharged Hand for his unprotected activity alone.

A. Did Gene F. Hand Engage in Protected Activity?

Gene F. Hand contends that he engaged in protected activity when he complained to Superintendent Wallace about short roof bolts, inadequate torque of roof bolts, and the superintendent's order that an unqualified miner be assigned to check the torque of roof bolts. Superintendent Wallace testified that, on the day in question, Hand had never told him that any part of the section was unsafe. Superintendent Wallace also denied giving an order that any particular miner should torque the roof bolts.

Section 105(c)(1) of the Act sets forth certain types of protected activity including, inter alia, filing or making:

> [a] complaint under or related to this Act, including a complaint notifying the operator * * * of an alleged danger or safety or health violation in a coal or other mine * * * or because of the exercise by such miner, representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c) does not prescribe the manner in which such complaint shall be made to the operator.

The evidence establishes that, in the month prior to this incident, there had been serious problems with the roof on Hand's section. Two major roof falls had occurred. MSHA reevaluated the roof-control plan and a revised roof-control plan had been adopted by Zeigler. According to Hand, production of coal in this section had been reduced because of too little roof bolting. At Hand's request, Superintendent Wallace assigned additional miners to roof bolt this section on the day before this incident. On the day in question, unbeknownst to Hand, a coal drill operator on his crew checked the torque of roof bolts and apparently reported a violation to the UMWA safety committee. Other miners apparently saw 4-foot roof bolts which had just been installed in violation of the revised roof-control plan. It is unnecessary to examine the merits of these complaints. Suffice it to say that the miners on Hand's shift on the day in question notified him of a safety complaint. When he subsequently relayed these complaints to Superintendent Wallace, he was making a "complaint notifying the operator * * * of an alleged danger or health violation * * *." Such action on Hand's part constitutes protected activity.

The evidence is less clear concerning Superintendent Wallace's purported order to assign, in Hand's opinion, an unqualified person to check the torque of roof bolts. However, I find that Superintendent Wallace did discuss with Hand the manner in which the torque of roof bolts should be checked. Hand disagreed with Wallace's suggestion or order. Under the broad language of section 105(c) of the Act, I also conclude that Hand's disagreement concerning the manner of checking the torque of roof bolts constitutes a safety complaint and, hence, protected activity under section 105(c) of the Act.

B. Was Hand's Discharge Motivated in Any Part by the Protected Activity?

An analysis of Zeigler's motivation for discharging Hand on December 21, 1979, must include an examination of the relevant events that preceded the discharge. During the 6 months prior to the discharge, Hand was the subject of five reprimands and a 5-day suspension. Of particular importance, is the fact that Hand was suspended for 5 days in August 1979, for ordering the mine manager off his section. Upon his reinstatement, Hand was warned that this conduct would not be tolerated.

On December 21, 1979, Hand notified Superintendent Wallace of his concern about the torque of roof bolts on his section. Thereafter, Hand and Wallace proceeded to check the torque of the bolts. Hand does not allege that the roof bolts torqued by him that day were in violation of the law. His daily report makes no mention of any problem with roof bolts. Thereafter, Hand left Wallace to attend to other problems. When he returned to Wallace, a discussion enused about the manner in which roof bolts should be torqued. Although the substance of this discussion is disputed, it is clear that Hand concluded that Wallace had ordered him to assign an unqualified miner to check the torque of the roof bolts. Hand testified as follows:

> At this time I was confused, and I got a little hot. And I asked Mr. Wallace, after looking at them four-foot bolts--the more I thought of those four-foot bolts after we had had this meeting with the federals and everything, and the crew was trying to get the run straightened up--after this, I got a little nervous and excited over him not getting us to proceed with the proper procedure the way the federals wanted us to comply with, and I asked him to leave my section. And to let me, the man that signed the books, that was responsible for that, try to get it straightened up to where we could run coal.

(Tr. 91).

The testimony of Superintendent Wallace concerning this confrontation was as follows:

> So I started back over and here came Gene up to the face, and Gene and I and Columbo went to the face out of earshot of anybody, anybody else as far as hearing, at which point I told Gene, I said, "Gene, it was your responsibility in the first place to designate the man to take the torques and report back to you, not just anybody, it is up to you to designate a man." But I said, "If you quit your bellyaching and start doing your job and telling the men what they are supposed to do and see that it is being done, either that or quit and get your ass out of the mine." Excuse the language. At which point that is when Mr. Hand blew up.

He said that he was hired there or sent there by higher ups, it was higher ups than me that would have to get rid of him. He said, "You can't run a section. That's the reason the mine is in the shape it is," and he said, "Just get your ass off my section and stay off my section." At which point I told him, I said, "Gene, as long as I'm superintendent that is my job to come to this mine and see that the jobs are being done proper."

About this time Mike Blair, the shooter, came to the mouth of the entrance. He hollered in there and he said that the shells were not going off and he was going to have to go out to the bench. I told Gene, I said, "Gene, I want you to go out there and help the shooters get the shells lined out and so we can get some shooting done." He continued to want to argue. I said, "Gene, I'm giving you a direct order. Go help the shooters get lined out." And that ended our conversation.

(Tr. 288-289).

Superintendent Wallace's reason for discharging Hand was as follows:

Well, let's say that it popped into my head right when he told me to get the hell out of his section, but I did not say anything at that time, possibly I done wrong, but as I was leaving the section I told Columbo, I said, "I'm going to discharge Gene Hand when he gets out of the mine tonight at 4:00 o'clock." I said, "I suspended him for running the mine manager off the section" and I said, "I'm not going to take it any longer. This is the last straw." Mr. Columbo said, "You done different than me. I would have fired him on the spot."

(Tr. 291).

Thus, Hand contends that he was discharged for complaining about safety both in connection with the length and torque of roof bolts and the assignment of an unqualified miner to check the torque. Zeigler asserts that Hand was discharged solely for insubordination in ordering the superintendent off the section after a prior suspension for ordering the mine manager off the section.

I conclude that while Hand engaged in protected activity by complaining about safety matters, he failed to establish that his discharge was motivated in any part by the protected activity. There is no evidence, by way of admission or otherwise, that Hand's discharge was motivated by his protected activity. Moreover, the circumstances surrounding Hand's discharge do not give rise to an inference of unlawful discrimination. Hand was suspended for 5 days in August 1979, for insubordination in ordering the mine manager off

his section. He was warned that such conduct would not be tolerated. I conclude that Zeigler has established the fact that when, on December 21, 1979, Hand ordered Superintendent Wallace off the section, it was "the last straw." Clearly, Hand's order to Wallace to leave the section was activity which is not protected under section 105(c) of the Act. Since Hand's action in ordering Superintendent Wallace off the section, in conjunction with Hand's prior disciplinary problems at Zeigler, was the motivation for Hand's discharge, Hand failed to carry his burden of persuasion that his discharge was motivated in any part by his protected activity.

Assuming, arguendo, that Hand could establish that his discharge was in part motivated by his protected activity, he would, nevertheless, fail to prevail in this matter because Zeigler has established that it would have discharged him for his unprotected activity alone, that is, his insubordination in ordering the superintendent off the section. I believe that the Commission contemplated a situation such as this when it stated:

> On the other hand, the Commission recognizes that it would hardly further the statutory purpose to order the reinstatement of a miner who would have been discharged for lawful reasons alone. It would put a miner who has engaged in both protected and unprotected activities in a better position than he would have occupied had he done nothing. It would require reinstatement even though the record shows that the employer would have lawfully assessed the miner as unfit for further employment.

Pasula, supra at 2800.

I conclude that Hand failed to prove that his discharge was motivated in any part by his protected activity and that Zeigler would have discharged him for his unprotected activities alone. Therefore, the Complaint of Discharge is denied and the Order of Temporary Reinstatement is dissolved.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant Gene F. Hand was a miner as defined in the Act and entitled to the protection afforded in section 105(c) of the Act.

2. Zeigler Coal Company is subject to the provisions of the Act.

3. This administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

4. On December 21, 1979, Complainant Gene Hand engaged in the following activity which is protected under section 105(c) of the Act: Complaints to Superintendent Robert Wallace concerning the length and torque of the roof bolts on his section and the qualification of a miner assigned to check the torque of roof bolts.

5. Complainant Gene F. Hand failed to establish that the protected activities, supra, motivated, in any part, the decision of Zeigler Coal Company to discharge him on December 21, 1979.

6. Hand's action on December 21, 1979, ordering the mine superintendent off his section, constitutes activity which is not protected under section 105(c) of the Act.

7. Zeigler Coal Company discharged Gene F. Hand on December 21, 1979, following a 6-month history of disciplinary action consisting of five reprimands and a 5-day suspension for insubordination, because, despite a prior warning, he ordered the mine superintendent off of his section.

8. Zeigler established that it considered Hand to be deserving of discharge for insubordination in ordering the mine superintendent off his section on December 21, 1979, since in August 1979, Hand received a 5-day suspension for ordering the mine manager off his section and since Zeigler would have discharged Hand for his unprotected activities alone.

9. Zeigler's discharge of Gene F. Hand on December 21, 1979, did not violate section 105(c) of the Act.

10. Complainant Gene F. Hand's complaint of discharge is denied.

11. The Order of Temporary Reinstatement entered in favor of Gene F. Hand on May 20, 1980, is hereby dissolved.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's Complaint of Discharge is DENIED.

IT IS FURTHER ORDERED that the Order of Temporary Reinstatement of Gene F. Hand is DISSOLVED.

James A. Laurenson, Judge

Distribution:

Frederick W. Moncrief, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

D. Michael Miller, Esq, Alexander, Ebinger, Fisher, McAlister & Lawrence, 17 South High Street, Columbus, OH 43215 (Certified Mail)

J. Halbert Woods, Esq., Zeigler Coal Company, 2700 River Road, Des Plains, IL 60018 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-82-M
	:	A.O. No. 12-01389-05003
v.	:	
	:	Rockport Plant
EVANSVILLE MATERIALS, INC., Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Philip E. Balcomb, for Respondent.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Evansville, Indiana. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Evansville Materials, Inc., operated a plant known as the Rockport Plant in Spencer County, Indiana, which produced sand, gravel, and limestone for sales in or substantially affecting interstate commerce.

2. Respondent was engaged in dredging material from the Ohio River and transporting it to its Rockport Plant alongside the river on barges. Conveyor belts carried the material from the shoreline of the river to the plant, where the material was classified, washed, and stockpiled for sales. There were about six belts at the plant, which varied in length from 20 feet to several hundred feet and traveled at a walking pace. The belts were waist-high; however, at the belt direction change points, the belts passed overhead.

The Citation Concerning Safety Glasses

3. A belt operator traveled the walkways beside the conveyor belts to check the flow of material. Dust, sand and gravel particles could be blown off the belt by a gust of wind and enter the operator's eyes. However, the material was dredged from the river and was usually wet, so that it was not easily blown off the belts. At times, particles of sand and gravel fell from the belts that passed overhead or around the tail pulley and, if caught by the wind, these could irritate or injure the eyes. Eye injuries were a potential risk, but not actually realized by experience. The preponderance of the evidence established that the employees' hardhats with a brim protected them from falling sand and gravel particles so that the potential risk was wind-blown particles that might enter an employee's eyes. This risk does not appear to have been more severe than the risk of eye injury on an ocean beach that could result from sand being blown into someone's eyes by a sudden gust of wind.

4. In and around the plant, Respondent required its employees to wear hardhats and impact-resistant glasses. As mentioned, the hardhats came with a brim that would protect against injuries to the head, eyes and face from falling objects. The required safety glasses were constructed of impact-resistant lenses to prevent eye injuries from direct impact but they were not equipped with shields to prevent eye injuries from particles entering around the lenses (although some employees wore glasses with side shields).

5. Respondent had difficulty enforcing its safety eyeglass requirement because employees often complained that foreign particles collected on the front of the lenses and became trapped behind the lenses, interfering with vision.

6. On August 7, 1979, federal inspector Jerry Spruell, accompanied by Arnold Mulzer, Jr., one of Respondent's superintendents, inspected the Rockport Plant. The inspector was wearing impact-resistant glasses without peripheral shields. The inspector observed the plant operator, Steve Davis, leaving and entering the control room and traveling underneath belts, on walkways across belts, and past tail pulleys. The belts were transporting sand. The operator was not wearing glasses and Respondent did not have a pair of glasses for him to wear. Other employees were wearing glasses, which Inspector Spruell believed to be impact-resistant glasses, but he was not sure of this. The glasses worn by the inspector and most employees looked very much like ordinary framed eyeglasses, and could not readily be distinguished as having impact-resistant lenses.

7. During the inspection, there was a slight breeze and some loose material was falling or blowing from the belts. On several occasions, the inspector had to wipe sand from his eyes. This caused a slight eye irritation, but not an eye injury.

8. On August 7, 1979, Inspector Spruell issued Citation No. 367445 to Respondent, reading in part: "The plant operator was observed working around

the tail pulley of the direction switching station without safety glasses. He had to pass under other conveyors during his work shift. Sand being conveyed was noted falling from these areas." The cited condition was deemed to be abated on August 21, 1979, by providing impact-resistant glasses to all employees; the glasses did not have peripheral shields.

9. At the hearing, the inspector testified that there was an additional danger of frayed belt pieces striking the eyes, but such a danger was not proved by a preponderance of the evidence.

The Citation Concerning Brakes

10. Sized stone, sand, and gravel from the stockpiled areas were dumped into customers' trucks with 980-B front-end loaders. The brakes on the loaders consisted of (1) an air-activated service (regular) braking system that operated by depressing either of two brake pedals and (2) a spring-activated emergency braking system that activated automatically when air pressure dropped below 70 p.s.i. or when a dash-mounted emergency parking brake control valve was manually pushed. There were two brake pedals that activated the service brakes. The left brake pedal would also neutralize the transmission.

11. When the engine was running, an air compressor attached to the engine distributed a continuous supply of compressed air to six brake chambers. There were four chambers on the front of the loader and two slightly larger chambers on the rear of the loader. More braking power was required for the front of the loader because it carried more weight when the bucket was loaded.

12. Each brake chamber contained a service brake cylinder and an emergency brake cylinder. The service brake cylinder contained a rod assembly, a diaphragm and a diaphragm return spring. When either brake pedal was depressed, compressed air entered the service brake chamber and forced the diaphragm and rod assembly outward to apply the brakes. About 75 p.s.i. was required to compress the diaphragm return spring. The emergency brake cylinder contained a piston and a spring. When air pressure fell below 70 p.s.i., a buzzer would sound and a light would flash in the operator's compartment and the brakes would automatically lock by the springs releasing to push the pistons against the brakes. When the emergency system was activated, the machine would stop in 2 to 3 seconds.

13. When either the service brakes or the emergency brakes were applied, the push rod in the air chamber extended and forced the slack adjustor to rotate a camshaft, which forced two brake shoes outward against the brake drum.

14. The manufacturer established a safe range of air pressure (the green area on the air pressure gauge) of 77 to 122 p.s.i. and an unsafe range (the red range on the air pressure gauge) of air pressure below 70 p.s.i. When air pressure was in the safe range, the pistons in the brake chambers were

retracted and the emergency springs remained compressed. When air pressure entered the unsafe range or when the parking brake was activated, the springs would force the pistons to activate the emergency brakes.

15. The service and emergency braking systems operated independently so that a problem affecting one of the braking systems would not prevent the other from operating. In normal operation, when the service brakes were released, adequate air pressure was maintained in the emergency braking system so that the springs remained compressed. When the engine was turned on, the air compressor charged the air reservoir and air pressure would gradually build. If either brake pedal was depressed before the parking brakes were released, a double check valve would prevent simultaneous application of both braking systems. Once the emergency brakes were released, compressed air would enter the brake chambers to keep the emergency brakes released and to operate the service brake portion of the system.

16. The air pressure on the diaphragms varied according to how far the brake pedal was pushed down. The farther down the pedal was pushed, the farther the air valve would open and the more pressure would be applied. Normally, the brake pedal was pressed only far enough to activate the brakes.

17. The emergency system could be tested by pressing the brakes repeatedly to bleed the system of air. The pressure gauge would then fall into the red range and the emergency springs would force the brakes to apply, if the emergency system operated properly.

18. On August 7, 1979, at about 3 p.m., Inspector Spruell approached the loader while it was dumping material into a truck. When he was about 20 feet from the loader, the operator applied the brakes and the inspector heard a hissing noise, which he believed to be the sound of escaping air. Normally, when the brakes were applied there would be a rush of air that lasted about 1 second, accompanied by an air pressure loss of between 5 and 10 p.s.i. as air was distributed to the activators. When the service brakes were applied with the engine off, the drop in air pressure would be greater because the air compressor would not be resupplying the air reservoir. The inspector noticed that the sound of escaping air continued as long as the brakes were applied.

19. The inspector climbed on the loader and asked the operator to apply the service brakes again so that he could observe the air pressure gauge. When the operator applied the brakes, the inspector observed a drop in air pressure. The gauge decreased slightly, but it did not enter the unsafe range. The inspector then told the operator to turn off the motor and apply the brakes. When the brakes were applied, the inspector heard the sound of continuously escaping air and the gauge continued to drop without stopping. With the engine turned off, the mechanic, Stanley Dickinson, and the inspector crawled under the loader and the inspector observed loose connections at the hoses leading to the left rear activator and at the directional valve at the front of the loader, and he observed what he believed to be a leak near the slack adjuster on the left rear brake. He made these observations with the

engine off, by having the operator apply the brakes. The mechanic was able to tighten the loose connections with a wrench; however, the left rear brake cylinder, which the inspector thought to be defective, could not be replaced until the following morning.

20. The loader normally traveled over smooth terrain and a few small inclines. It had a maximum speed of 15 mph; however, it rarely traveled that fast. The surface at the plant site consisted of loose gravel. The inspector did not require the operator to check the capability of the brakes on an incline because he believed that it would be unsafe to do so. Instead, the machine was tested on level ground. The operator traveled 5 to 7 mph, applied the brakes, and the brakes worked. The inspector observed no erratic motion and heard no squeaks; however, he did hear the sound of escaping air.

21. On the morning of August 7, before the loader was placed in operation, the mechanic had told the operator that there was a leak on the loader.

22. On August 7, 1979, Inspector Spruell issued Citation No. 367447 to Respondent, reading in part: "The left rear brake on the Cat. 980 loader had an air leak. The air seemed to be coming past the slack adjuster rod." On August 21, 1979, the cited condition was found to have been abated.

23. The inspector believed that the brakes had an air leak that created a possibility of the machine jerking back and forth and acting erratically if the brakes were applied suddenly. The inspector believed that an accident could occur if the operator had to stop suddenly in an emergency or if the brakes were applied while the loader was on an incline. He also believed that the reliability of the emergency braking system was affected by the air leak.

24. The inspector concluded that Respondent knew or should have known of the leak because the mechanic told the loader operator that morning that there was an air leak and the inspector heard the sound of hissing air.

25. Respondent's employees were provided with a copy of rules for the safe operation of front-end loaders. Safety meetings were also held. The rules required that the machines not be operated unless all safety devices were fully operable and all parts were in safe condition. Before moving a loader at the start of a shift, the operator was supposed to check the air pressure by starting the engine and applying the brakes.

26. Regular inspections of the loaders were conducted before they were placed in operation and extra checks would be made of parts that needed frequent replacement. The loaders were not taken into the shop unless a part needed repair or replacement; parts that required frequent replacement were watched closely. A company safety procedure required that the operator fill out a check-list before the loader was used. The check-list included starting the engine, testing the brakes, observing the air pressure gauge and listening for air leaks.

27. Diaphragms usually required replacement about once every 9 months. If a diaphragm was damaged, a hissing sound would be noticed and it would gradually grow worse. A small hole in the diaphragm might not be apparent to the operator until it became larger and the hissing noise grew louder. With a substantial leak, the hissing sound could be heard above the noise of the loader when the brakes were applied. Normally, the only way to detect a small air leak was to listen; however, if the leak was large, the air pressure gauge would bleed down. The operating manual required that all leaks, even if small, be sealed immediately.

28. James Rhodes, a superintendent at the Rockport Plant, was not at the plant when the citation was issued on August 7. On his return to the plant the following day, he picked up a new brake chamber to install on the loader. On August 8, 1979, he operated the loader and applied the brakes; however, he did not hear any leaks and the brakes operated satisfactorily. With the help of William Goffinet, a master mechanic, he removed the brake chamber on the left rear wheel, installed the new chamber and disassembled the old chamber at the shop. He tested the old chamber in the shop by applying air; however, he was unable to find a leak in the cylinder. Rhodes then reassembled the cylinder and replaced the new cylinder with the old one and ran the loader again for about 2 hours. He observed no leaks and he experienced no problems with the brakes.

DISCUSSION WITH FURTHER FINDINGS

The Citation Concerning Safety Glasses

Based on the citation issued on August 7, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. § 56.15-4, which provides: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

The Secretary argues that persons around the belt conveyors were subject to a hazard of eye injury from falling or blowing sand and gravel and from frayed pieces of belt.

The Secretary proposes a penalty of $28.

Respondent's first defense is that the citation issued by Inspector Spruell is defective because it fails to list with particularity all the potential hazards of not wearing protective eye glasses. Respondent contends that the citation refers only to the hazard of falling sand; however, at the hearing, the inspector testified that the plant operator was also in danger of eye injuries from frayed pieces of conveyor belt. Respondent contends that it was prejudiced at the hearing because, had this hazard been alleged in the citation, "respondent would have been prepared to conclusively show by very substantial and provable evidence that there was no potential for any kind of injury from such sources, much less to eyes."

This defense is rejected. The Act requires only that the nature of the violation be described with particularity. Section 104(a) of the Act requires that each citation "shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." The Act does not require that the inspector list every possible hazard that the standard was designed to prevent. I find that the Secretary was not estopped from trying to show at the hearing the hazards and their potential for occurrence, even though they were not included in the citation. Furthermore, Respondent could have found through discovery procedures the hazards that the Secretary was going to try to prove at the hearing.

Respondent next argues that the Secretary failed to prove by a preponderance of the evidence that pieces of torn conveyor belts created a hazard of striking the eyes of employees. Respondent contends that a belt has never torn or snapped as alleged by the Secretary and that no employee has ever been injured by the whipping action of a piece of torn belt. I find that the Secretary failed to prove by a preponderance of the evidence that a hazard of eye injury from a torn belt existed so as to require protective glasses.

Respondent also argues that no hazard relevant to the safety glasses required by the inspector existed at the Rockport Plant. Respondent contends that a preponderance of the evidence established that the purpose of wearing impact-resistant glasses was to prevent injuries from direct or frontal impact and that small particles of sand and gravel blowing or falling from the conveyor belts did not present such a hazard as to require impact-resistant glasses. Respondent argues that its employees were protected from falling objects, including sand, by wearing hardhats with a brim.

A mandatory safety standard must be clearly worded and fairly administered so that a reasonably prudent operator can understand and follow it. The operator should not be subjected to varying and inconsistent interpretations based on the subjective understanding of different inspectors. Clear wording and consistent application of the standard are required to avoid unfairness to the mine operator. The Supreme Court has held that the rule-making procedures in the Administrative Procedure Act were designed to insure fairness and should not be supplanted by ad hoc adjudicatory proceedings. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969).

In Connally v. General Construction Co., 269 U.S. 385, 391 (1925), the Supreme Court said: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." This fundamental principle also applies to industrial and commercial safety standards that can result in the imposition of civil penalties for their violation. See also: Brennan v. OSHRC, 505 F.2d 869, 872 (10th Cir. 1974); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-1336 (6th Cir. 1978); Longview Refining Co. v. Shore, 554 F.2d 1006, 1114 (Temp. Emer. Ct. App. 1977), cert. denied, 434 U.S. 836 (1977). In Diebold, Inc., the court said:

> Among the myriad applications of the due process clause is the fundamental principle that statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid. In our jurisprudence, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). The principle applies with special force to statutes which regulate in the area of First Amendment rights, but the due process requirement of fundamental fairness is hardly limited to that context. Even a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed.

585 F.2d at 1335-1336.

In determining whether a safety standard satisfies the principles of due process, the regulation must be examined "in light of the conduct to which it is applied" (Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980); United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963)) and must meet the test of "delineat[ing] its reach in words of common understanding" (Cameron v. Johnson, 390 U.S. 611, 616 (1968)).

The cited standard requires that "safety glasses, goggles or face shields or other suitable devices" be worn by employees in an area of a plant "where a hazard exists which could cause injury to unprotected eyes."

Neither this Commission nor the courts have decided whether this standard meets the notice requirements of due process. 1/ However, the courts have

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1/ The cited standard, which was promulgated by MSHA under its rulemaking authority, can be contrasted with a similar rule, which was promulgated by the Occupational Safety and Health Administration (OSHA) to prevent eye injuries. Section 1910.133(a)(1) of OSHA's regulations, Title 29, Code of Federal Regulations, provides that protective eye and face equipment shall be required "where there is a reasonable probability of injury that can be prevented by such equipment." Section 1910.133(a)(1) specifically requires that eye protection be provided "where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards." Subsection (a)(2) requires that eye protectors provide adequate protection against the particular hazards for which they were designed. Subsection (a)(b) further requires that "design, construction, testing, and use of devices for eye and face protection" meet the standards of the American National Standard for Occupational and Educational Eye and Face Protection, Z87-1 1968 (ANSI).

considered several OSHA safety standards that are similar in language, scope, and purpose to the cited standard by requiring the use of personal protective equipment "wherever it is necessary" or "where there is an exposure to hazardous conditions * * *." 2/ In considering these general personal protection standards, a majority of the circuit courts have applied an objective "reasonableness" test of whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard. Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38, 41 (2nd Cir. 1978); Voegele Co. v. OSHRC, 625 F.2d 1075, 1079 (3rd Cir. 1980); Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 723 (4th Cir. 1979); Ray Evers Welding Co. v. OSHRC, supra, 625 F.2d at 731-732; Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 655 (8th Cir. 1976); Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976). The First Circuit explained that "knowledge of the existence of a hazardous situation must be determined in light of the common experience of an industry, but that the extent of precautions to take against a known hazard is that which a conscientious safety expert would take." General Dynamics v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979).

The Fifth Circuit, by contrast, has linked the reasonableness standard to the custom and practice of the industry. In Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974), the court said that the general industry safety standard was not unconstitutionally vague as long as it "affords a reasonable warning of the proscribed conduct in light of common understanding and practices." 497 F.2d at 233; United States v. Petrillo, 332 U.S. 1, 4 (1947).

In B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1372 (5th Cir. 1978), which involved a citation for failure of an employee to wear a safety belt, the Fifth Circuit held that a reasonable insulation industry employer would not have required the use of safety belts under the circumstances and that the company did all that was required of it. The court found that only one of 11 witnesses, the OSHA compliance officer, testified that safety belts would have been appropriate under the circumstances and the Secretary of Labor introduced no evidence of industry custom. Ibid. The court said that the Occupational Safety and Health Review Commission's conclusion that industry custom required the use of safety belts under the circumstances was inaccurate because it was based entirely upon the opinion of people employed by the Government without considering the evidence of the people in the industry.

2/ Section 1910.132(a) of OSHA's regulations, Title 29, Code of Federal Regulations, is a general industry standard that requires the use of personal protective equipment "wherever it is necessary by reason of hazards or processes or environment * * * encountered in a manner capable of causing injury * * * through physical contact." Section 1926.28(a) is a general standard that requires "the wearing of appropriate protective equipment in all operations where there is an exposure to hazardous conditions * * *."

583 F.2d at 1370. See also, Cotter & Company v. OSHRC, 598 F.2d 911 (5th Cir. 1979); Power Plant Division, Brown & Root, Inc. v. OSHRC, 590 F.2d 1363 (5th Cir. 1979).

The other circuits have not followed the Fifth Circuit in limiting the reasonableness standard to the custom and practice of the industry because, as the First Circuit explained, an industry practice standard "would allow an entire industry to avoid liability by maintaining inadequate safety training." General Dynamics, supra, 599 F.2d at 464, accord, Voegele Co., supra, 625 F.2d at 1078. The Sixth Circuit said that industry standards and customs should not be determinative of reasonableness "because there may be instances where a whole industry has been negligent in providing safety equipment for its employees." Ray Evers Welding, supra, 625 F.2d at 732.

In MSHA v. Atlantic Cement Co., YORK 79-10-M, 2 FMSHRC Decs. 2910 (October 10, 1980), Commission Judge Melick considered a vagueness charge in a civil penalty proceeding involving an alleged violation of a mandatory safety standard. He found that the safety standard (30 C.F.R. § 56-9.2) was similar to the personal protective equipment standards considered by the Fourth Circuit in McLean Trucking Company v. OSHRC, 503 F.2d 8 (4th Cir. 1974), and the Fifth Circuit in Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974). Judge Melick said:

> The regulatory standard cited herein is similar * * * in that "the regulation appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury." Also just as in the case of those standards, inherent in the standard at bar "is an external and objective test, namely, whether or not a reasonable person would recognized [the cited hazard]." McLean, supra at p. 10. The "reasonable person" has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

I conclude that the wording of the cited standard meets the notice requirements of due process as prescribed in the above cases. However, I conclude that the inspector's application of the standard was arbitrary and unreasonable in this case, and that it would be a denial of due process to hold this operator liable for failing to provide the safety glasses required by the inspector.

Neither the wording of the standard nor the facts of this case would cause a reasonably prudent operator to conclude that the law required unshielded impact-resistant lenses to protect the eyes from falling or wind-blown sand or gravel particles. The glasses worn by the inspector, and accepted by him as compliance with the standard, would not prevent falling and wind-blown sand and gravel from entering the eyes from around the top, bottom, and sides of the glasses. Wrap-around goggles, safety glasses with

peripheral shields, or face shields would have offered better protection from the dangers of falling and wind-blown sand and gravel particles, but none of these was put in issue either by the inspector's discussion with the operator or by the citation he issued. The inspector believed that wearing safety glasses without peripheral shields would protect a person's eyes from wind-blown sand and gravel particles. However, even though the inspector was wearing such glasses, he had to wipe particles of sand from his eyes on several occasions.

The evidence shows that the inspector construed "safety glasses" to include the kind he was wearing, i.e., impact-resistant lenses without peripheral shields. However, such glasses have not been shown to be "suitable" to protect against the hazard assumed by the inspector and Respondent is not charged with failing to provide other types of protective devices. The citation alleges a failure to provide "safety glasses" and does not say "goggles, or face shields or other suitable protective devices." Respondent cannot be held liable for failing to provide unsuitable devices even though an inspector may find them to be suitable.

In summary, I conclude that, under the wording of the standard and the facts of this case, it is arbitrary and unreasonable for the Government to charge a safety violation for failing to provide impact-resistant safety glasses such as those worn by the inspector. Whether a different kind of protection, such as safety glasses with peripheral shields, wrap-around goggles, or face shields could and should be required to protect against sand and gravel particles at Respondent's plant has not been put in issue by the Government and is not decided here.

The Citation Concerning Brakes

Based on the citation issued on August 7, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. § 56.9-2, which provides: "Equipment defects affecting safety shall be corrected before the equipment is used." The basic issue as to this charge is whether there was a leak in the braking system that affected the safe operation of the front-end loader.

The Secretary argues that a preponderance of the evidence shows there were leaks in the braking system of the front-end loader; that these leaks affected the safe operation of the loader; and that Respondent knew or should have known of the leaks before placing the machine in operation. The inspector testified that he could hear the sound of escaping air, that he observed loose hose fittings on the loader, and that the mechanic had told the operator on the morning of the inspection that there was an air leak. The inspector also observed what he assumed to be a leak near the slack adjuster on the left rear brake.

The Secretary proposes a penalty of $64.

Respondent argues that the Secretary failed to prove, by a preponderance of the evidence, that there was any air leak that affected the safety of the

loader. Respondent contends that the sound of escaping air heard by Inspector Spruell did not amount to a defect. Respondent argues that the air pressure gauge did not drop into the unsafe range and that the operation of the loader's brakes was not affected by the air leak. Superintendent Rhodes testified that after the citation he tested the brakes and found them to operate satisfactorily. He removed the brake cylinder and examined it at the shop and discovered no holes or other defects. He also testified that the loader was examined by the operator before being placed in operation, as required by the company's rules, and that no brake problems were discovered.

Respondent also contends that the alleged hazards of the loader jerking and swerving were unsupported by the record. The master mechanic, Mr. Goffinet, testified that the level of air pressure was distributed evenly to all six chambers and that, if pressure dropped below 70 p.s.i., the emergency system would activate evenly on all the wheels. He said that the two braking systems operated independently of each other and that a defect in one would not affect the reliability of the other. He said that a hole in one of the brake chambers might slow the operation of the service brakes; however, it would not affect the emergency system and would not cause the machine to jerk or swerve if the brakes were applied suddenly in an emergency.

To prove a violation of the cited standard, the Secretary must show the presence of a defect that affected the safety of the machine. I find that an audible hissing lasting more than one or two seconds when the brakes were applied indicated an abnormal condition in the loader's braking system so as to require further investigation before placing the machine in operation.

The manufacturer's service manual required that all leaks, even small ones, be sealed immediately to avoid rupturing a diaphragm. A damaged diaphragm would produce a hissing noise during operation and, if left unattended, it could gradually grow worse or rupture and cause the emergency braking system to activate. If the emergency braking system activated unexpectedly, its stopping of the vehicle in 2 to 3 seconds could cause the operator to lurch forward and injure himself on the dash or steering wheel, cause a whiplash injury, or distract the operator so as to cause an accident involving another person, vehicle, or object.

On the morning of the inspection, the mechanic warned the operator of a leak in one of the brake cylinders. Inspector Spruell testified that a hissing sound, which he could hear about 20 feet from the loader while it was in operation, caused him to suspect the presence of an air leak in the braking system. He testified that the air pressure gauge dropped slightly when the brakes were applied and that he found two loose hose connections under the loader, which were repaired immediately, and that the audible hissing continued even after the loose fittings were tightened. I credit this testimony as to what he observed and heard.

I conclude that it was a violation to operate the vehicle with the hissing sound found by the inspector, and that under the mandatory safety standard

Respondent had a duty to detect, examine, and correct the source of the hissing sound before allowing the machine to be put in service. However, considering the evidence that the brakes were effectively stopping the vehicle at the time of the inspection and that the emergency braking system provided independent protection, I find that the violation involved a low gravity of risk to the vehicle operator.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Petitioner did not meet his burden of proving a violation as alleged in Citation No. 367445.

3. Respondent violated 30 C.F.R. § 56.9-2 by failing to repair an air leak on the left rear brake of the front-end loader as alleged in Citation No. 367447. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $64.00 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Evansville Materials, Inc. shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $64.00, within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

Rafael Alvarez, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, 8 Floor, Chicago, IL 60604 (Certified Mail)

Philip E. Balcomb, Esq., Manager, Evansville Materials, Inc., P.O. Box 248, Tell City, IN 47586 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. T & W SAND AND GRAVEL COMPANY, Respondent.	MAR 26 1981 CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-110-M MSHA CASE NO. 05-02331-05002 Mine: Chatfield Pit

DECISION

APPEARANCES:

Robert J. Lesnick, Esq.
Office of the Solicitor
United States Department of Labor
911 Walnut Street - Suite 2106
Kansas City, Missouri 64106
For the Petitioner

Gerald M. Madsen, Esq.
5601 South Broadway - Suite 200
Littleton, Colorado 80121
For the Respondent

Before: Judge John A. Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. [hereinafter the "Act"], arose out of an inspection at respondent's mine near Chatfield, Colorado. After receiving a complaint about a loading machine, two representatives of petitioner inspected the machine on July 17, 1979, pursuant to § 103(g) of the Act. Four citations were issued; only three were actually tried.1/

A hearing on the merits was held on December 9, 1980, in Denver, Colorado. Neither party submitted briefs, electing instead to rest on closing arguments.

1/ During the hearing, petitioner moved to withdraw one of the citations, number 333028. The citation alleged that the absence of lights on the loading machine constituted a violation of 30 C.F.R. 56.17-1. That standard requires:

> "illumination sufficient to provide safe working conditions ... in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

To support his motion, petitioner indicated that there was no evidence that the vehicle was used under conditions requiring lights. The motion was unopposed by respondent and subsequently granted by this Judge (Tr. 36).

1. Jurisdiction:

Before reaching the merits, the jurisdiction of this Commission under the Commerce Clause of the United States Constitution must be addressed. Respondent, by its answer, contends that its "products and operations do not enter and/or affect commerce", and that it is therefore not subject to the Act. At the hearing, respondent adduced testimony that none of its products leave Colorado; that no sales are made outside Colorado; that 99% of respondent's customers are located in South Denver; and that in most cases the products are picked up by customers rather than delivered (Tr. 71). There was testimony, however, that the machinery used at respondent's mine, including the machinery cited, was manufactured in Illinois (Tr. 13).

At the hearing, this Judge, without formally ruling on the question, suggested that, in his view, respondent's operation did affect interstate commerce (Tr. 91). The weight of judicial authority supports the position that virtually any effect on inter-state commerce is sufficient to bring a mining operation within the Commission's jurisdiction. Even where a mine operator sells all of its products intra-state, inter-state commerce is affected by the disruption of mining activities caused by unsafe or unhealthy working conditions. Marshall v. Bosack, 463 F.Supp. 800, 801 (E.D. Pa. 1978); Marshall v. Kilgore, 478 F. Supp. 4 (E. D. Tenn. 1979). Specifically, the purchase of equipment produced out of state provides a sufficient basis for a finding that the mining operation affects interstate commerce. Secretary of the Interior, United States Department of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976). Respondent's argument contesting jurisdiction is therefore rejected.

2. Citation 566091 - - Fume Leaks

a. Violation

This citation alleges that respondent, by allowing a front end loader[2/] to be used while its fumes leaked into the cab, violated 30 C.F.R. § 56.9-2. That standard provides:

> Mandatory. Equipment defects affecting safety shall be corrected before the machinery is used.

Respondent admits the existence of both an equipment defect and the hazards it created[3/] (Tr. 17, 22). It argues, however, that the machine was not used after the defect was discovered (Tr. 61).[4/]

2/ Respondent maintained two front end loaders on its mine premises: a Hough 90-E loader (manufactured by International Harvester) and a Caterpillar 966 loader. The citations in this case concern the Hough loader.

3/ The testimony of Mr. Lyle Marti, one of the inspectors, indicates that the "defects" were leakage of diesel fuel (from the left-bank injector cylinder onto the manifold) and exhaust (caused by cracks in the first elbow of the left exhaust manifold).

4/ Respondent's argument confuses the issue by implying that the standard requires only that machines, known by the operator to be defective, not be used. Indeed counsel asserted in closing argument that T & W could not have done more than correct the defect once it was brought to its attention. The real issue under 30 C.F.R. § 56-9-2 is whether the machine was in fact defective while being used; the evidence has been evaluated with reference to this issue.

The testimony concerning the issue of use was contradictory. All that is clear is that the loader had been taken out of service prior to the inspection on July 17, 1979 (Tr. 79). No evidence directly shows that the loader was used while in a defective condition; there is substantial evidence, however, which strongly suggests that the Hough loader was used before its defects were corrected. Respondent's foreman, Willie Stoops, testified that the Hough loader had not been used before an employee complained of the fumes; at the same time, however, Stoops stated that the employee refused to use the machine because the fumes gave him headaches (Tr. 83). Obviously, the employee would have had no basis for such a complaint if he had not operated the vehicle on a prior occasion. This inference is supported further by testimony of Inspector Marti that the complainant had been asked by Stoops to use the 90-E loader, and refused, claiming it gave him headaches (Tr. 23).

Further, there is evidence that Mr. Stoops told Inspector Marti during a post-inspection conference that the Hough 90-E loader had been used as a back-up for the Cat 966 loader; that when the Cat machine needed repair, Stoops had asked people (other than the complainant) to use the Hough loader (Tr. 85). This testimony is consistent with Mr. Marti's earlier statements that the Hough loader was easily accessible, could be started with just an ignition key, and had not been tagged out of service (Tr. 25-26).

The preponderance of the evidence does indicate that a defect affecting the safety of the Hough loader remained uncorrected while the loader was in use. Citation 566091 is therefore affirmed.

b. Penalty:

The parties stipulated that respondent is a relatively small operator, has an average prior history of violations, and demonstrated good faith in abating the violations promptly (Tr. 4, 5).[5/]

The evidence shows that the fume leaks created a moderate hazard. Inspector Marti testified that the fumes could cause the driver to become dizzy and operate the loader unsafely. As a practical matter, however, the operator would probably be able to stop the machine and step down from the cab if he felt dizzy. The fumes did increase the risk of an engine fire. The potential employee exposure to a fire hazard was moderate. The loader operator himself, of course, would be exposed to a risk of fire; possibly a truck driver would also have been exposed (Tr. 17, 18). If a fire were to break out, the probability of injury to the operator would be significant. The evidence also suggests some negligence since respondent's foreman acknowledged that the loader was in need of repair (Tr. 17, 22). Considering all these factors together, I find that the proposed penalty amount of $180.00 is appropriate.

5/ These factors were taken into account in determining an appropriate penalty in connection with citation 333026, where violation was also established.

3. Citation 333026 -- Back-up Alarm:

This citation charges that respondent violated 30 C.F.R. § 56.9-87 because the Hough loader used at its mine lacked a back-up alarm.[6]/ That standard provides:

> Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The undisputed evidence indicates that the Hough loader did not have a back-up alarm, that the operator had an obstructed view to the rear, and that observers were not used when the machine was backed up (Tr. 31).

Respondent argues that the loader was not "heavy equipment" and thus was not subject to the standard. Respondent's evidence, however, shows only that the loader was small compared to other machines of its type. In determining the hazard presented by the absence of a back-up alarm on this machine, the relative size of the machine is unimportant. The loader was estimated to weigh between fifteen and twenty tons and thus presented a significant safety hazard when moving in reverse without an alarm (Tr. 32).

6/ The citation itself actually alleged a violation of 30 C.F.R. § 56.9-5, which concerns operator conduct rather than the condition of a vehicle. Petitioner's proposal for penalty, however, incorporates a computerized penalty assessment sheet which indicates an alleged violation of 30 C.F.R. § 56.9-87. The pleading does not expressly modify the citation.

The issue raised by respondent's counsel is whether the computerized assessment sheet, incorporated by the proposal for penalty, operates as a proper modification of the original citation. Section 104(h) of the Act implicitly gives the Secretary power to modify a citation. However, neither the Act nor Commission rules set out procedures for modification. The interim procedural rule at 29 C.F.R. § 2700.22 (published March 10, 1978) only requires that a modified citation or order be challenged within 15 days of receipt.

The reference to 30 C.F.R. § 56.9-87 on the computerized sheet is not accurately described as an amendment to a pleading since it accompanies the initial pleading. Federal Rule of Civil Procedure 15(a) is therefore inapposite; however, 15(b) would allow this Judge, on his own motion, to amend the pleadings to conform to the facts pleaded in petitioner's proposal and proved at the hearing. The facts alleged in the citation in essence charge a violation of 30 C.F.R. § 56.9-87; the computerized assessment sheet provided additional notice of that charge; respondent's pleadings and proof at hearing reflect no prejudice resulting from the discrepancy. The proposal for penalty is therefore amended to charge a violation of 30 C.F.R. § 56.9-87.

Although few employees were potentially exposed to the hazard, the gravity of the hazard was severe (Tr. 33). Accordingly, the proposed penalty of $180.00 should be affirmed.

4. Citation 333027 -- Fire Extinguisher:

This citation charges respondent with a violation of 30 C.F.R. § 56.4-23, which provides:

> Firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. Records shall be kept of such inspections.

The citation was issued because there was no fire extinguisher on the Hough loader; since an engine fire could have broken out, an extinguisher, to be "strategically located", must have been placed on the vehicle according to the inspector (Tr. 52).

The fact that the Hough loader lacked a fire extinguisher is undisputed. Respondent argues, however, that the standard at § 56.4-23 applies to mine premises generally, and does not impose a specific requirement that vehicles be equipped with fire extinguishers.

In view of a recently promulgated mandatory standard, which does specifically require vehicles to be equipped with fire extinguishers, respondent's interpretation of § 56.4-23 is, in my opinion, correct. On August 17, 1979, the advisory standard at 30 C.F.R. 56.4-39 was revised, renumbered and made mandatory as follows:

> 56.4-27 Mandatory. Whenever self-propelled mobile equipment is used, such equipment shall be provided with a suitable fire extinguisher readily accessible to the equipment operator.

That the standard specifically addresses mobile equipment and was made mandatory indicates that it was intended to fill a gap left by the standard at § 56.4-23. Both the language and history of § 56.4-27 support respondent's interpretation of § 56. 4-23. The citation is therefore vacated.

CONCLUSIONS OF LAW

The following conclusions of law are based upon findings of fact discussed in the body of the decision.

1. Respondent's mining activities affect commerce and are therefore subject to regulation under the Act.

2. Respondent violated 30 C.F.R. § 56.9-2 as alleged in citation 566091, and the proposed penalty of $180.00 is appropriate.

3. Respondent violated 30 C.F.R. § 56.9-87 as alleged by petitioner's proposal for penalty, which incorporated citation 333026 by reference and which was amended pursuant to Federal Rule of Civil Procedure 15(b). The penalty proposed by petitioner, $180.00, is appropriate.

4. Respondent did not violate 30 C.F.R. § 56.4-23 as charged in citation 333027.

ORDER

Pursuant to the foregoing, it is ORDERED that the penalty proposals made in connection with citations 566091 and 333026 are affirmed, and that the penalty proposals made in connection with citations 333027 and 333028 are vacated. It is further ORDERED that respondent pay the sum of $360.00 within 30 days of this order.

John A. Carlson
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq.
Office of the Solicitor
United States Department of Labor
911 Walnut Street - Suite 2106
Kansas City, Missouri 64106

Gerald M. Madsen, Esq.
5601 South Broadway - Suite 200
Littleton, Colorado 80121

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 27 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-349-M A.O. No. 11-02666-05002
v.	:	
	:	Mine: North American Pit
NORTH AMERICAN SAND & GRAVEL COMPANY, A Corporation, Respondent	:	

DECISION

Appearances: Steven A. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Charles W. Barenfanger, Jr., Sandalia, Illinois, for Respondent.

Before: Judge Melick

A hearing was conducted in this case on February 18, 1981, in St. Louis, Missouri, following which I issued a bench decision. That decision, which appears below with only nonsubstantive changes, is affirmed at this time.

> This case is before me upon the proposal for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration, under the provisions of section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The proposal was directed against the North American Sand & Gravel Company for allegedly excessive noise levels under the health standard at 30 C.F.R. § 56.5-50. The issue before me is whether North American violated the cited regulation and, if so, the appropriate penalty to be assessed for that violation.
>
> The only citation before me in this case, No. 363033, charged North American as follows:
>
> The noise level around the operator of the 966-C Caterpillar front-end loader, Serial

No. 766J1926, was exposed to [sic] 177 per cent of the permissible limit for noise on April 17, 1980, the day shift, for an 80-minute exposure. Feasible engineering or administrative controls were not being used to reduce the front-end loader operator's noise exposure to within those of the table in Section 56.5-50(a) in order to eliminate the need for hearing protection.

The essential evidence is basically undisputed in this case and I find the testimony of Inspector Aubuchon to be completely credible. On April 17, 1980, in the course of a regular inspection at the North American Sand & Gravel mine, the inspector, following customary procedures in conducting a noise inspection, checked the batteries, calibrated, and cleared the Dupont dosimeter used in this case. I find that the dosimeter in fact calibrated to within accepted norms and, indeed, was registering slightly low so that the readings obtained therefrom were on the conservative side.

The inspector thereafter pinned the dosimeter to the collar of the front-end loader operator and told the operator to follow his normal work procedures. The results of the test are undisputed, that is, that the dosimeter read-out at the end of the 8-hour period was 177 percent of the permissible noise exposure. That is in excess of "unity" in the cited regulation and a prima facie case was therefore established.

The evidence shows that the front-end loader at issue had a history of noise problems and sound-suppressant material had therefore previously been installed. On the date of this test, however, a piece of that material, consisting of rubber matting, was missing from over the transmission. One of the loader operators apparently failed to replace the matting following maintenance. The loader operator here was wearing personal protection equipment in the form of ear muffs or plugs and it was the customary practice of the operator to always wear that equipment. I also note that there is no medical evidence in this case to indicate that any harm would come to an employee as a result of the noise exposure under these circumstances, or for that matter even over a long period of time when considering that the rubber matting was ordinarily in place and when it was in place, the noise exposure was within permissible limits.

I also find a very low level of negligence in this case. It appears that the violation was the direct result of an employee neglecting to replace a piece of noise-suppressing rubber matting after maintenance. Since the mine operator

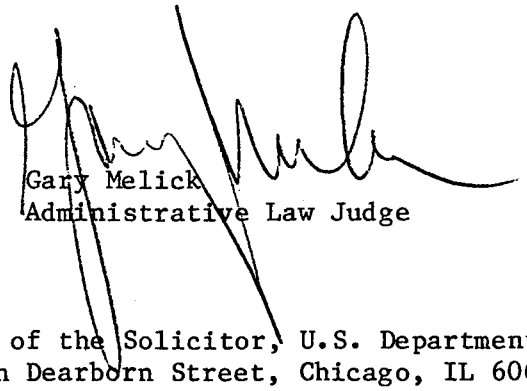
does have an obligation to see that excessive noise is suppressed I do consider this violation to have been partly due to its negligence.

The condition was certainly abated within a reasonable time. The rubber matting was installed the same day as the citation. It was of course always available, it was just not installed. I have certainly also considered, in reaching the amount of penalty, that this operator had only a nominal history of violations, that the business size is certainly very small, and that the penalty would certainly not affect the operator's ability to stay in business.

Under the circumstances, I consider this violation to be only a technical one and I would not assess more than a nominal penalty of $5.

ORDER

The North American Sand & Gravel Company is hereby ORDERED to pay a penalty of $5 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Eighth Floor, 230 South Dearborn Street, Chicago, IL 60604 (Certified Mail)

Charles W. Barenfanger, Jr., President, North American Sand & Gravel Company, Barenfanger, Inc., P.O. Box 190, 1313 North Sunset Drive, Sandalia, IL 62471 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 27 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. WEST 80-101-M A/O No. 02-01510-05003
v.		
MADISON GRANITE COMPANY,	Respondent	Docket No. WEST 80-426-M A/O No. 02-01510-05005 Docket No. WEST 80-485-M A/O No. 02-01510-05006 Docket No. WEST 80-484-M A/O No. 02-01510-05007V Crushed Granite Operations

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA;
W. T. Elsing, Esq., Phoenix, Arizona, for Respondent, Madison Granite Company.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Government against Madison Granite Company. Pursuant to the agreement of counsel, these cases were consolidated for hearing and decision. A hearing was held on March 3, 1981.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 4-5):

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Act, and I have jurisdiction of these cases, subject, however, to the filing of briefs by the parties on the issue of whether coverage actually exists pursuant to the Commerce Clause of the Constitution. I, therefore, reserved

ruling on this question, and in accordance with the request of the parties, afforded them 20 days from the date of the close of the hearing to submit briefs on this issue.

(3) The inspector who issued the subject citations was a duly authorized representative of the Secretary, and the operator's witnesses are accepted as experts, generally, in mine health and safety.

(4) True and correct copies of the subject citations and order were properly served upon the operator.

(5) The imposition of any penalty herein will not affect the operator's ability to continue in business.

(6) All alleged violations were abated in good faith except for the one violation where a withdrawal order was issued.

(7) The operator's history of prior violations is moderate.

(8) The operator's size is small.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 6-148). Decisions were rendered from the bench setting forth findings, conclusions and determinations with respect to each alleged violation. At the close of the hearing, I stated that these decisions would not be affirmed until I had considered the parties' briefs concerning the issue of whether or not this mine was covered by the Act pursuant to the Commerce Clause of the Constitution. The parties have, however, failed to file briefs concerning this issue and have not given any explanation for their failure to do so.

Despite the parties' failure to submit briefs, I have considered the coverage issue and have determined that the operator is properly subject to the Act. As the Chief Judge of this Commission has stated, Congress intended to exercise its full authority under the Commerce Clause when it enacted this statute. Secretary of Labor v. Cash & Carry Gravel, Inc., LAKE 80-48-M (November 13, 1980). In the request for admissions which respondent answered and which were made a part of the record by agreement of the parties, respondent stated that the products excavated from the subject facility are sold commercially within the State of Arizona. In Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), the court held that the fact that the defendant's coal was sold only intrastate did not insulate it from affecting commerce since its mere presence in the intrastate market would affect the supply and price of coal in the interstate market. See the decision of Judge Bernstein of this Commission in Secretary of Labor v. Rockite Gravel Company, LAKE 80-130-M (December 4, 1980) and all the decisions cited therein. Moreover, the respondent has admitted that in the performance of excavation, its employees handle, use, or otherwise work with machinery and equipment which is manufactured or produced outside the State of Arizona. I believe the purchase and utilization of this equipment further supports the determination that the

operator is covered under the Act. Judge Bernstein specifically considered this issue and I adopt his rationale. Therefore, the bench decisions which appear hereinafter are hereby affirmed. The bench decisions are as follows:

Docket No. WEST 80-101-M

Citation No. 380220 was issued when the inspector found no one at the mine trained to give first aid in case of an accident, a violation of 30 C.F.R. 55.18-10. After hearing testimony from the inspector and the operator's assistant to the president, I found that a violation existed. I held that the violation was of moderate gravity, accepting the testimony of the operator's witness with regard to the proximity of the nearest hospital (Tr. 12). Finally, I found the operator negligent, but held that the operator's negligence was mitigated by the fact that this citation had been issued during only the second inspection of this operator under the Act. In light of the foregoing and particularly bearing in mind the operator's small size, I assessed a penalty of $40 (Tr. 13-14).

Citation No. 379242 was issued when the inspector found that records of the continuity and resistance readings of the electrical grounding system were not available at the plant, a violation of 30 C.F.R. 55.12-28. After hearing testimony from the inspector, I found that a violation did exist for the failure to keep records. I found that this was not a serious violation because the witness testified that the citation was issued for a failure to have the required records, and not for a failure to perform the required tests (Tr. 16). I further found the operator to be guilty of ordinary negligence. In light of the foregoing and bearing in mind the operator's small size, I assessed a penalty of $10 (Tr. 16).

Docket No. WEST 80-426-M

Citation No. 383582 was issued when the inspector observed that the employee operating the D-8 Caterpillar dozer was being exposed to 764 percent of the permissible limit for noise during his work shift and that feasible engineering or administrative controls were not being used to reduce the noise level in order to eliminate the need for the use of hearing protection, a violation of 30 C.F.R. 56.5-50(b). After two extensions of the termination due date, 104(b) Withdrawal Order No. 382390 was issued because of the operator's failure to abate this violation. The inspector who issued the citation testified that he conducted a full-shift noise survey of this dozer and determined that the operator of the dozer was being exposed to 764 percent of the permissible noise level (Tr. 20). He testified that most of the noise seemed to be coming from the floorboard near the firewall of the dozer, and that the operator of the dozer was wearing an earplug-type of hearing protection (Tr. 22-23). MSHA's Western District Health Specialist testified that an engineering package was available to the operator at a cost of less than $1,000 that would result in quite a significant reduction in noise exposure to the operator of the dozer, such that the piece of equipment would almost be in compliance with the regulation (Tr. 35-36). He testified that excessive noise exposure of this type would ultimately result in hearing loss (Tr. 40), and that the

danger of hearing loss existed even though the dozer operator was wearing ear protection (Tr. 40). The supervisory mine inspector of MSHA's Phoenix field office testified that he issued the withdrawal order concerning this piece of equipment because the plant foreman told him the operator had refused to install the necessary controls (Tr. 47). The assistant to the president of the operator testified that measures were taken to control the noise problems on the dozer (Tr. 49). On cross-examination, he stated that it was "very possible" that these measures were implemented after the withdrawal order for failure to abate had been issued (Tr. 51). The testimony from MSHA regarding the feasibility of noise controls was uncontradicted. After considering the testimony concerning this citation, I found that a violation existed (Tr. 54). I found this violation to be serious because of the danger of permanent hearing loss to the operator of the equipment, but that the seriousness of this violation was somewhat mitigated by the wearing of ear protection (Tr. 55). I further concluded that the operator had failed to abate this violation in good faith. The statement by the foreman that he was not using the bulldozer does not support the inference that it had been taken out of service. There is a substantial difference between a piece of equipment not being used at the moment and that same piece of equipment being taken out of service (Tr. 55). After again taking into account the operator's small size and moderate history of previous violations, I assessed a penalty of $350 (Tr. 56).

Citation No. 383583 was issued when the inspector observed that the operator of the 619C Caterpillar scraper was exposed to 277 percent of the permissible limit for noise during his work shift and that feasible engineering or administrative controls were not being used to reduce the noise level, a violation of 30 C.F.R. 56.5-50(b). This violation was terminated without the issuance of a withdrawal order when this piece of equipment was permanently removed from service. Most of the testimony taken for Citation No. 383582 concerned this citation as well. In addition, the inspector testified that the operator of this piece of equipment was subject to 277 percent of the permissible noise level (Tr. 25). MSHA's health specialist testified that an engineering package similar to that for the dozer was available for the scraper as well, which testimony was uncontradicted (Tr. 38-39). MSHA's supervisory inspector testified that he observed this scraper after the plant foreman told him it had been removed from service and it appeared to him that various parts, including tires, had been removed from the scraper and it had been retired from service (Tr. 48). For the same reasons set forth concerning Citation No. 383582, I found that a violation also existed with regard to the scraper. I found this violation to be of moderate gravity because the level of noise the equipment operator was exposed to was not as great as it was for Citation No. 383582 and because the operator was wearing ear protection. Again, taking into account the operator's small size and moderate history of violations, I assessed a penalty of $60 (Tr. 56).

Citation No. 371208 was issued when the inspector observed that a tail pulley of a conveyor was not guarded, a violation of 30 C.F.R. 56.14-1. The inspector testified that there was a walkway right next to the conveyor which allowed people to come in close proximity to the conveyor (Tr. 59). He stated that six or seven people worked in the area at a variety of jobs (Tr. 60). He further testified that this lack of guarding was in plain view (Tr. 61), and

stated that on each previous inspection of this plant, the operator had received citations for guarding violations (Tr. 64). Based upon this testimony, I found a violation existed. I found the violation was serious and the operator negligent. Considering all of the criteria, including the operator's small size, I assessed a penalty of $100 (Tr. 66).

Citation No. 371217 was issued when the inspector observed another unguarded tail pulley, a violation of 30 C.F.R. 56.14-1. The inspector testified that there was guarding along the sides of this pulley but not behind the pulley, and that what guarding did exist was inadequate in that a person could reach around the sides of the guards (Tr. 66-67). He also testified that the pulley was located in an area where persons could come in contact with it and that it would be very easy to guard these tail pulleys (Tr. 67-68). Based upon the testimony, I found a violation existed. I found that negligence and gravity were mitigated somewhat by the fact that there was some guarding around the sides of the tail pulley. Accordingly, I assessed a penalty of $75 (Tr. 73).

Citation No. 371213 was issued when the inspector observed another unguarded tail pulley, a violation of 30 C.F.R. 56.14-1. The inspector testified that this pulley was unguarded and was easily accessible to persons (Tr. 74). Based upon this testimony, I found a violation existed. I found the violation was serious, the operator negligent, and assessed a penalty of $100 (Tr. 75).

Citation No. 382392 was issued when the inspector observed that a guard was not provided for a portion of the V-belt drive of the sand return conveyor, a violation of 30 C.F.R. 56.14-1. The inspector testified that this drive was unguarded and that there was a platform located 6 feet below the drive on which people could walk which made the drive accessible to persons (Tr. 76). He also testified that because the drive is 6 feet above the platform, a person would have to reach up to contact the belt drive and become entangled in it (Tr. 76). Based upon this testimony, I found a violation existed. I found the operator negligent, the violation serious, although the gravity was mitigated by the belt drive being located 6 feet above the platform, and assessed a penalty of $75 (Tr. 79).

Citation No. 371219 was issued when the inspector observed that oxygen bottles were not secured, a violation of 30 C.F.R. 56.16-5. The inspector testified that two full oxygen bottles were not secured since they were not chained up (Tr. 84). He stated that the bottles could be tipped over rather easily and the caps could be knocked off, which would release the oxygen (Tr. 84). He testified that the operator should have known about this and secured these bottles (Tr. 85). The assistant to the president of the operator testified that the caps were screwed on the bottles, and it would be very difficult for the caps to come off the bottles (Tr. 86). He further testified that since the bottles were full they must have just been delivered and the operator simply had not got around to placing them in the rack (Tr. 87). Based upon the testimony, I found that a violation had occurred. I found that the violation was potentially serious but that the gravity was substantially

mitigated because the cylinders would have to fall over and the tops come off before the cylinders would be "set off." Finally, I accepted the operator's testimony that the two bottles had not been there very long, which substantially mitigated the factor of negligence. I assessed a penalty of $30 (Tr. 89).

Citation No. 371220 was issued when the inspector observed a front-end loader to be without an operable backup alarm, a violation of 30 C.F.R. 56.9-2. The inspector testified that a backup alarm was present but was inoperable (Tr. 89). The Solicitor stated that the Government had no evidence with regard to how long this had been inoperable and therefore could not sustain a charge of a high degree of negligence (Tr. 91). Based upon this testimony, I found a violation existed. I found the violation was serious, and accepted the Solicitor's representation concerning the degree of negligence. Accordingly, I assessed a penalty of $60 (Tr. 91).

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Order No. 371216 was issued when the inspector observed that a tail pulley guard was not provided for the conveyor leading from the shaker screen, a violation of 30 C.F.R. 56.14-1. The inspector testified that this unguarded tail pulley was located on ground level where persons could easily contact the moving parts (Tr. 80). The inspector stated that the foreman knew this condition existed but he had not had the time to correct it (Tr. 81). Based upon this testimony, I found a violation occurred. I found that the operator was negligent and the violation was serious, and I assessed a penalty of $125 (Tr. 82).

Citation No. 371210 was issued when the inspector observed that various roadways were without berms, a violation of 30 C.F.R. 56.9-22. This citation concerned three different locations that were alleged to have been without berms. Both the inspector and the operator's assistant to the president testified with regard to this citation. The first location was the roadway leading to where equipment is refueled. Based upon the inspector's undisputed testimony that there was no berm at this location (Tr. 93), I found a violation existed. I found this violation was serious. Based upon the testimony of the operator's assistant to the president that there had previously been a berm but that a new road had recently been cut and a new berm had not yet been installed (Tr. 105), I found the negligence of the operator mitigated. At the other two locations, the feed hopper area and the roadway leading to the feed hopper, I accepted the testimony of the inspector who was present at the time the citation was issued, to the effect that the area in question was not an intersection (Tr. 115), and rejected the contrary testimony of the operator's witness, who was not present at the time the citation was issued (Tr. 110). Based upon that testimony, I found a violation existed. I found the condition to be serious and the operator negligent. Based upon the foregoing, I assessed a penalty of $250 (Tr. 120).

Order No. 382391 was issued when the inspector observed a conveyor without emergency stop guards along the rollers of the conveyor, a violation of

30 C.F.R. 56.9-7. The inspector testified that a travelway existed where a person could come in close proximity to the moving conveyor rollers (Tr. 122). He stated that emergency stops or a handrail had once been in place here, but they had deteriorated (Tr. 123). All plant personnel would be exposed to this hazard (Tr. 124), since they regularly walked along this travelway (Tr. 127-128). Based upon this testimony, I found that a walkway existed within the meaning of the standard and that a violation did exist. I further found that the operator was negligent and that the violation was serious. Based upon the foregoing and the operator's small size and moderate history, I assessed a penalty of $100 (Tr. 129).

Docket No. WEST 80-485-M

Citation No. 371211 was issued when the inspector observed that strain relief clamps had not been provided for wiring at two locations, a violation of 30 C.F.R. 56.12-8. The inspector testified that the wires leading into the motor of the short hopper conveyor were not properly insulated to protect the equipment from being energized (Tr. 130). He further testified that this condition was visible (Tr. 123). Based upon this uncontradicted testimony, I found that a violation existed at both locations. I found that the violation was serious and the operator negligent. I assessed a penalty of $150 (Tr. 142).

Citation No. 382393 was issued when the inspector observed that records were not kept of daily inspections for conditions which could adversely affect safety and health, a violation of 30 C.F.R. 56.18-2(b). Based upon the testimony of the inspector, I found a violation existed. I further found the operator negligent and this violation to be nonserious. Based upon the foregoing and the operator's small size, I assessed a penalty of $20 (Tr. 144).

Citation No. 383368 was issued for a failure to maintain a record of tests measuring the continuity and resistance of the grounding system, a violation of 30 C.F.R. 56.12-28. The inspector testified that the foreman had told him that these records should be kept at the main office, but that the last safety director had quit and had lost the records (Tr. 144). Based upon the inspector's testimony, I found that a violation existed. I found the violation was nonserious and that the operator was negligent. I assessed a penalty of $20 (Tr. 148).

ORDER

The foregoing bench decisions are hereby AFFIRMED. The operator is ORDERED to pay $1,565 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, CA 94102 (Certified Mail)

W. T. Elsing, Esq., 34 West Monroe Street, Suite 202, Phoenix, AZ 85003 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. BARB 79-312-PM
v.	:	A/O No. 09-00265-05001
BROWN BROTHERS SAND COMPANY,	:	Docket No. SE 79-90-M
Respondent	:	A/O No. 09-00265-05002
	:	Docket No. SE 80-58-M
	:	A/O No. 09-00265-05003
	:	Junction City Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Frank J. Jordan, Jr., Esq., Talbotton, Georgia, for Respondent.

Before: Judge Cook

I. Procedural Background

Petitions for assessment of civil penalty were filed by the Mine Safety and Health Administration (Petitioner) in the above-captioned cases pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The three cases allege a total of three violations of various provisions of the Code of Federal Regulations. Answers were filed by Brown Brothers Sand Company (Respondent).

On November 3, 1980, a notice of hearing was issued scheduling the above-captioned cases for hearing on the merits beginning at 9:30 a.m., on December 16, 1980, in Columbus, Georgia. The hearing was held as scheduled with representatives of both parties present and participating. After the presentation of the evidence, both parties were accorded the opportunity to file posthearing briefs and proposed findings of fact and conclusions of law. Counsel for Respondent specifically reserved the right to file a posthearing brief. Accordingly, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law.

On February 9, 1981, counsel for Respondent filed a written communication indicating that neither party wished to file posthearing briefs because the issues involved in these cases are factual rather than legal. No briefs were filed by either party.

II. Violations Charged

A. Docket No. BARB 79-312-PM

Citation/Order No. 97094, November 20, 1978, 30 C.F.R § 56.12-16.

B. Docket No. SE 79-90-M

Citation No. 98528, May 1, 1979, 30 C.F.R. § 56.4-2.

C. Docket No. SE 80-58-M

Citation No. 98541, November 27, 1979, 30 C.F.R. § 56.12-32.

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witnesses Federal mine inspectors Gartsel G. Hanrick, and Ronald J. Grabner.

Respondent called as its witnesses Steve Brown, a partner and manager; Jerry Mathis, the sand pump operator; and Carl Brown, a partner and manager.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Directorate of Assessments setting forth Respondent's history of previous violations for which assessments have been paid, beginning June 28, 1977, and ending June 27, 1979.

M-2 is a computer printout compiled by the Directorate of Assessments setting forth Respondent's history of previous violations for which assessments have been paid, beginning January 19, 1978, and ending January 18, 1980.

M-3 contains three photographs pertaining to Citation/Order No. 97094, November 20, 1978, 30 C.F.R. § 56.12-16.

M-4 is the sworn statement of Mr. Steve Brown, dated February 5, 1979, pertaining to Citation/Order No. 97094, November 20, 1978, 30 C.F.R. § 56.12-16.

M-5 is a two-page document containing a copy of Citation No. 98528, May 1, 1979, 30 C.F.R. § 56.4-2, and a copy of the inspector's statement pertaining thereto.

M-6 is a two-page document containing a copy of Citation No. 98541, November 27, 1979, 30 C.F.R. § 56.12-32, and a copy of the inspector's statement pertaining thereto.

M-7 is a drawing prepared by Federal mine inspector Ronald J. Grabner pertaining to Citation No. 98541, November 27, 1979, 30 C.F.R § 56.12-32.

2. Respondent introduced the following exhibits in evidence:

O-1 is a two-page document containing a copy of Citation/Order No. 97094, November 20, 1978, 30 C.F.R. § 56.12-16, and a copy of the inspector's statement pertaining thereto.

O-2 and O-3 are photographs pertaining to Citation No. 98528, May 1, 1979, 30 C.F.R. § 56.4-2.

O-4 is a drawing.

O-5 is a drawing.

IV. Issues

Two basic issues are involved in these civil penalty proceedings: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Respondent's activities affect commerce within the meaning of the 1977 Mine Act (Tr. 3, 5-6).

2. Respondent employs nine employees for one 8- to 10-hour shift, 5 days a week (Tr. 3, 5-6).

3. The Junction City Mine is the only mine owned by Respondent. Respondent is not a subsidiary of any other corporation (Tr. 3, 5-6).

4. Respondent has no history of previous violations cognizable in Docket No. BARB 79-312-PM (Tr. 3, 5-6).

B. Citation/Order No. 97094, November 20, 1978, 30 C.F.R. § 56.12-16

1. Occurrence of Violation

Federal mine inspector Gartsel G. Hanrick conducted an inspection of Respondent's Junction City Mine on November 20, 1978. At approximately 2 p.m., he issued Citation/Order No. 97094, a combination 104(a) citation/107(a) withdrawal order, citing Respondent for a violation of mandatory safety standard 30 C.F.R. § 56.12-16. The citation/order alleges, in pertinent part, that "men were working on the main dredge sand pump replacing the packing without the electric power being locked out" (Exh. O-1). The cited mandatory safety standard provides, in part, that "[p]ower switches shall be locked out or other measures taken which shall prevent the [electrically powered] equipment from being energized without the knowledge of the individuals working on it."

The evidence presented during the hearing establishes that at least one employee was actively engaged in replacing the packing on the main dredge sand pump, a piece of electrically powered equipment, when the citation/order was issued. The power switch, a knife switch, was located approximately 5 to 18 feet from the area where the work was being performed. The equipment had been deenergized by opening the knife switch, thereby breaking the electrical circuit. However, the switch was not locked out and no other measures had been taken to prevent the equipment from being energized without the knowledge of the individual or individuals working on it. If the knife switch had been thrown upward into the "on" position, the pump would have started. The switch was located approximately 36 inches above the floor of the dredge (Exh. O-1, see also Exh. M-4).

Accordingly it is found that a violation of mandatory safety standard 30 C.F.R. § 56.12-16 has been established by a preponderance of the evidence.

2. Negligence of the Operator

It appears that the repacking operation had to be performed on a weekly or monthly basis. However, no lock-out procedure existed at the mine. Pulling three fuse jacks was the only means available for complying with the requirements of the mandatory safety standard. The fuse jacks were located on a telephone pole located approximately 20 to 30 feet from the dredge. The fuse jacks were approximately 15 feet above the ground. Pulling the fuse jacks removed all electrical power from the dredge. It can therefore be inferred that Respondent had no established procedure for complying with the requirements of 30 C.F.R. § 56.12-16. Accordingly, it is found that Respondent demonstrated a high degree of ordinary negligence.

3. Gravity of the Violation

The packing gland is a retaining ring that holds the packing in place. The four bolts holding the gland in place had been removed, and the packing gland had been moved back on the shaft a short distance to a point between

the pump housing and the pillar support bearing. Two employees were present in the work area when the inspection party arrived. One employee was actively involved in the repacking job. His left hand was resting on the shaft and was holding the packing. A tool, such as a screwdriver or punch, was being used to insert the packing material into the opening. The other employee was either observing the repacking operation or rendering assistance. The latter possibility is considered the more probable. There were no other employees on the dredge.

Had the shaft started to rotate, the packing gland would have rotated at a slower rate than the shaft. By holding the packing gland, an employee could have prevented the gland from rotating.

The shaft rotates at a maximum speed of 540 RPMs. In order to reach this speed, two switches must be engaged. Engaging the knife switch causes the shaft to reach a 300-RPM rate of rotation in 5 seconds. Then, a second switch must be engaged to increase rotation to 540 RPMs (Exh. M-4). Injuries could have been sustained as a result of hands, clothing or tools contacting rotating machine parts.

The knife switch had been pulled down to the "off" position and was parallel to the floor of the dredge. In this position, it projected into the walkway which could be used by persons walking on the dredge. Accordingly, it can be inferred that it could have been moved upward accidentally into an "on" position by a passing employee, provided sufficient force was applied.

All factors considered, I find that the occurrence of the event against which the cited standard is directed was improbable. If the event had occurred, one employee would have been exposed to a potentially disabling injury. Accordingly, I conclude that the violation was moderately serious.

4. Good Faith in Attempting Rapid Abatement

The violation was abated immediately by pulling the three power jacks on the nearby telephone pole. Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

C. Citation No. 98528, May 1, 1979, 30 C.F.R. § 56.4-2

1. Occurrence of Violation

Federal mine inspector Ronald J. Grabner conducted an inspection at Respondent's Junction City Mine on May 1, 1979. At approximately 11:45 a.m., Inspector Grabner issued Citation No. 98528 citing Respondent for a violation of mandatory safety standard 30 C.F.R. § 56.4-2 in that "[t]he no smoking sign for the gasoline storage area could not be readily seen as the post it was on had been [knocked] down" (Exh. M-5). The mandatory safety standard requires that "[s]igns warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist."

The gasoline storage area referred to in the citation was a refueling area located outdoors, and consisted of a 1,000-gallon underground fuel tank surmounted by an electrically powered gasoline pump. The post to which the "No smoking" sign was attached was laying on the ground with the sign face down. The sign could not be seen in this position and was therefore not readily visible.

Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. § 56.4-2 has been established by a preponderance of the evidence.

2. Negligence of the Operator

When the inspection party reached the fuel storage area and discovered the violaton, Mr. Jack Spanks, a foreman employed by Respondent, informed Inspector Grabner that the sign had been knocked down by a truck on April 30, 1979.

Mr. Steve Brown stated that to the best of his knowledge the pole with the no smoking sign was up on the day prior to the citation. He stated that he had no knowledge of the violation until after the citation was issued and that he and Mr. Spanks looked at the site and found big truck tracks near the downed pole. They believed that it had been knocked down on the evening of April 30, 1979, or in the morning of May 1, 1979, the date of the citation. The gas pump was not used every day but could be seen from a road passing through the property on the way to the pit. In view of the short time during which the operators or some of their employees could have seen the violation, the negligence is of a minor nature.

3. Gravity of the Violation

The outdoor fuel storage area was used by a small number of people to refuel vehicles with gasoline. Respondent's customers did not use the refueling facility. No one was using the facility when the inspection was conducted.

It is important to bear in mind that the sign was in place and readily visible until it was knocked down by a truck on April 30 or May 1, 1979. It can therefore be inferred that the men who used the refueling area knew that smoking in such area was prohibited, especially considering the small number of people employed at the mine. Additionally, there is no indication that open flames would have been carried into, or used in, the area. Accordingly, I conclude that an occurrence of the event against which the cited standard is directed was improbable. However, in the event of an occurrence, an explosion resulting in fatal injuries could have occurred.

Accordingly, it is found that the violation was accompanied by moderate gravity.

4. Good Faith in Attempting Rapid Abatement

The violation was abated within the time allotted for abatement (Exh. M-5). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

D. Citation No. 98541, November 27, 1979, 30 C.F.R. § 56.12-32

1. Occurrence of Violation

Federal mine inspector Ronald J. Grabner conducted an inspection at Respondent's Junction City Mine on November 27, 1979. At approximately 1:30 p.m., he issued Citation No. 98541 charging Respondent with a violation of mandatory safety standard 30 C.F.R. § 56.12-32 in that "[t]he junction box cover for the 220 volt electrical motor for the shaker screen was missing" (Exh. M-6). The cited mandatory safety standard requires that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs."

The evidence presented during the hearing is in accord with the statements contained in the citation. Additionally, the evidence establishes that no testing or repair work was being performed.

Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. § 56.12-32 has been established by a preponderance of the evidence.

2. Negligence of the Operator

The record contains no evidence as to precisely how long the violation had been in existence. However, the missing junction box cover was not in the area. It can therefore be inferred that the condition had existed for a sufficient period of time for Respondent to have discovered it. Accordingly, it is found that Respondent demonstrated ordinary negligence.

3. Gravity of the Violation

The leads from the motor and the power leads were exposed. It appears that the opening was somewhat less than 6 inches long by 4 inches wide. However, due to the location of the junction box, it would have been improbable for anyone to achieve contact with the electrical leads (Exh. M-6). The occurrence of the event against which the cited standard is directed was improbable (Exh. M-6). However, if an individual had achieved contact with the exposed 220-volt electrical leads while such leads were energized, a fatal injury could have been sustained (Exh. M-6). No employees were in the area.

Accordingly, it is found that the violation was accompanied by moderate gravity.

4. Good Faith in Attempting Rapid Abatement

The violation was abated within the time period allotted for abatement (Exh. M-6). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

E. Size of the Operator's Business

The parties stipulated that the Junction City Mine is the only mine owned by Respondent, and that Respondent is not a subsidary of any other corporation. The parties also stipulated that Respondent employs nine employees for one shift of 8 to 10 hours, 5 days a week (Tr. 3, 5-6).

Accordingly, it is found that Respondent is a small operator.

F. History of Previous Violations

The parties stipulated that Respondent has no history of previous violations cognizable in Docket No. BARB 79-312-M (Tr. 3, 5-6).

As relates to Docket No. SE 79-90-M, Respondent had five violations for which assessments have been paid prior to May 1, 1979. None were violations of 30 C.F.R. § 56.4-2 (Exh. M-1).

As relates to Docket No. SE 80-58-M, Respondent had seven violations for which assessments have been paid prior to November 27, 1979. Four were for violations of 30 C.F.R. § 56.12-32 (Exh. M-2).

G. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of civil penalties in these cases will adversely affect Respondent's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. I find, therefore, that penalties otherwise properly assessed in these proceedings will not impair Respondent's ability to continue in business.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

2. Brown Brothers Sand Company and its Junction City Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

3. Federal mine inspectors Gartsel G. Hanrick and Ronald J. Grabner were duly authorized representatives of the Secretary of Labor at all times relevant to the issuance of the citations at issue in these proceedings.

4. The three violations charged are found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Penalties Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

A. Docket No. BARB 79-312-PM

Citation/Order No.	Date	30 C.F.R. Standard	Penalty
97094	11/20/78	56.12-16	$60.00

B. Docket No. SE 79-90-M

Citation No.	Date	30 C.F.R. Standard	Penalty
98528	05/01/79	56.4-2	$35.00

C. Docket No. SE 80-58-M

Citation No.	Date	30 C.F.R. Standard	Penalty
98541	11/27/79	56.12-32	$45.00

ORDER

Respondent is ORDERED to pay civil penalties totaling $140.00 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, 1371 Peachtree Street, NE., Room 339, Atlanta, GA 30309 (Certified Mail)

Frank J. Jordan, Jr., Esq., P.O. Box 456, Talbotton, GA 31827 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 30, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 78-168-P
	:	A.C. No. 40-00524-02016 F
v.	:	
	:	No. 21 Mine
GRUNDY MINING COMPANY, INC., Respondent	:	

ORDER APPROVING SETTLEMENT AND DIRECTING PAYMENT

On March 20, 1981, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $10,000 and the parties propose to settle for $1,500.

The case arises out of an accident in which a foreman at Respondent's mine was fatally injured when his head was pinned between an overhanging rib and a tractor he was operating. Respondent is a medium-sized operator with an average history of prior violations. Prompt corrective action was taken to abate the cited condition.

The parties seem to concede that 30 C.F.R. § 75.202 was violated, since there was an overhanging rib involved in the accident. They both urge, however, that any causal connection between the violation and the accident is tenuous at best. The record shows that the overhanging rib in question was neither loose nor in danger of falling. The Secretary, in fact, claims that even if the overhanging rib was properly scaled, the accident probably would have occurred anyway.

Any assessment of negligence must take into account the foreseeability of harm. Based on this, the negligence involved in this case was slight, since the accident which occurred was not an easily foreseeable consequence of the violation.

Finally, the history of the case cannot be overlooked. In remanding it, the Sixth Circuit Court of Appeals characterized the violation as "technical." The Secretary apparently does not dispute this and therefore feels that prosecution should not continue. In this posture, the difficulties of re-trying the case before a new administrative law judge surely outweigh the benefits it might provide. I find that the negotiated settlement is fully supported by the record and thus will approve it.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $1,500 within 30 days of the date of this order.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Thomas S. Kale, Esq., Attorney for Grundy Mining Company, Inc., Spears, Moore, Rebman & Williams, 8th Floor, Blue Cross Building, Chattanooga, TN 37402

Paul D. Kelly, Jr., Esq., Attorney for Grundy Mining Company, Inc., Kelly, Leiderman, Cameron, Kelly & Graham, Box 488, Jasper, TN 37347

Robert Cohen, Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Thomas A. Mascolino, Esq., Counsel for Trial Litigation, Office of the Solicitor, Division of Mine Safety, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 31 1981

ELIAS MOSES,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. KENT 79-366-D
WHITLEY DEVELOPMENT CORPORATION,	:	
Respondent	:	Becks Creek Surface Mine

DECISION

Appearances: William E. Hensley, Esq., Corbin, Kentucky, for Complainant;
David Patrick, Esq., Harrodsburg, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 5, 1980, as amended by an order issued September 24, 1980, a hearing in the above-entitled proceeding was held on November 18, 1980, in Barbourville, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

Completion of the Record

At the conclusion of the hearing, I requested that counsel for the parties provide me with supplemental information. It was agreed that the supplemental data would be marked as exhibits and would be received in evidence at the time I prepared my decision in this proceeding. The requested materials were submitted by counsel and are marked for identification as follows:

There is marked for identification as Exhibit A a 35-page compilation of repair bills pertaining to Caterpillar Tractor Serial No. 66A7485 for the year 1976.

There is marked for identification as Exhibit B a seven-page compilation of repair bills for Caterpillar Tractor Serial No. 66A11561 for the year 1977.

There is marked for identification as Exhibit C a repair bill for Caterpillar Tractor Serial No. 90V2938 for the year 1977.

There is marked for identification as Exhibit D a 10-page compilation of repair bills for Caterpillar Tractor Serial No. 66A7485 for the year 1977.

There is marked for identification as Exhibit E a 21-page compilation of repair bills for Caterpillar Tractor Serial Nos. 90V2938 and 66A7485 for the year 1978.

There is marked for identification as Exhibit F a 34-page compilation of repair bills for Caterpillar Tractor Serial Nos. 66A11561, 66A7485, and 90V2938 for the year 1979.

There is marked for identification as Exhibit G a one-page accident report regarding the turning over of a D-6 Caterpillar on June 19, 1979, at Whitley Development Corporation's Becks Creek Mine.

There is marked for identification as Exhibit H a one-page copy of payroll data regarding Elias Moses for the period from May 9, 1979, to June 28, 1979.

Pursuant to stipulation of counsel, Exhibits A through H are received in evidence (Tr. 284).

Issues

The evidence in this case raises some novel issues concerning what constitutes violations of section 105(c)(1) of the Act. Those issues are listed below:

(1) Was complainant actually discharged on July 3, 1979?

(2) Assuming complainant was discharged on July 3, 1979, and assuming further that complainant was not engaged in an activity protected under section 105(c)(1) of the Act, can respondent, nevertheless, be found to have violated section 105(c)(1) if the evidence supports a conclusion that respondent discharged complainant because respondent thought complainant had performed an act which is protected by section 105(c)(1) of the Act?

(3) Is it a violation of section 105(c)(1) of the Act for respondent to harass an employee and upset his peace of mind because respondent suspects that the employee has performed an act which the employee had a right to perform under the Act but did not perform?

(4) Assuming that respondent did not discharge complainant as alleged in his Complaint, is it a violation of section 105(c)(1) for respondent to refuse to allow complainant to continue working when the sole reason for the refusal is the fact that complainant filed a complaint under section 105(c) of the Act?

Counsel for both parties waived the filing of briefs (Tr. 285).

Findings of Fact

My decision in this proceeding will be based on the findings of fact set forth below:

1. Whitley Development Corporation, the respondent in this proceeding, operates two strip mines which are about three-fourths of a mile apart. At the present time, the corporation produces about 107,000 tons of coal annually and employs a total of approximately 37 persons at both job sites and at its tipple (Tr. 280-281). The corporation is owned by Pascual White and his wife (Tr. 242).

2. The complainant in this proceeding, Elias Moses, worked for about 20 years in a steel mill in Ohio. Moses had some time off from the steel mill in 1970 and came to Kentucky where he obtained a job working as a laborer for Pascual White. When it came time for Moses to return to the steel mill in Ohio, he tried to obtain an extension of his leave, but it was refused, so he returned to work in the mill for the remainder of the year. The following summer, he returned to Kentucky and eventually worked a total of about 6 years, or from about 1973 to 1979, as an operator of bulldozers (Tr. 14; 19).

3. Moses applied with Pascual White, or Whitley Development Corporation, for a job as a dozer operator. After Moses had asked for the job, Ben Bunch, an MSHA inspector who is Moses' brother-in-law, asked White to hire Moses. Inasmuch as Bunch was the inspector who was assigned by MSHA to inspect White's mines, White said that it was expedient to hire Moses (Tr. 27; 243).

4. White instructed Moses to report for work to Richard McClure who was White's mine foreman and mechanic at two strip mines, known as the Red Bird job and the Becks Creek job (Tr. 40-41; 184). Moses reported for work on Wednesday, May 9, 1979, as instructed, and McClure assigned Moses the job of operating a D-9 Caterpillar Tractor at the Becks Creek job. Moses was told to prepare a bench for Bob Durham, the shot firer, and to grade the roads which were being used by trucks for hauling coal. McClure then left the Becks Creek job and traveled to the Red Bird job (Tr. 185). After Moses had operated the dozer for about 2 hours, two Kentucky mine inspectors appeared at the Becks Creek job. They inspected the Caterpillar dozer Moses was operating and found that it had a hole in the fuel tank, that oil was dripping onto a hot engine, that the dozer had no brakes, and that the dozer was not equipped with a fire extinguisher. The Kentucky inspectors told Moses to stop operating the dozer until it had been repaired (Tr. 42-43; 216-217). After the Kentucky inspectors stopped Moses from operating the dozer, Moses was assigned to assist McClure in doing some mechanical work (Tr. 219).

5. On June 19, 1979, after Moses had worked at the Becks Creek job for about 6 weeks, Moses heard that a D-6 Caterpillar Tractor had been overturned by its operator, Andy Raines, who was not injured in the accident (Tr. 8; 56; 185-186). On June 20, 1979, the day after the D-6 had turned over, Moses was operating a dozer and observed a helicopter land at the mine. From his location, Moses could not see what the people in the helicopter did, but he saw the helicopter leave (Tr. 9; 59). Afterwards, Moses learned that the helicopter had brought MSHA inspectors to the mine site to investigate the overturning of the D-6 Caterpillar (Tr. 59-60). After the inspectors had left, McClure asked Moses if he was the person who reported the D-6 accident to

MSHA (Tr. 60; 187). Moses replied that he had not reported it. Although McClure testified that he believed Moses when Moses stated that he had not reported the accident (Tr. 187), Moses claims that McClure mentioned the reporting of the accident to MSHA on at least two additional occasions (Tr. 62). Moses claims that McClure accused him of calling his brother-in-law, Ben Bunch, who is an MSHA inspector (Tr. 10; 63-64). Moses was incensed about being accused of calling the inspectors and stated that he would make McClure prove the allegation that Moses had reported the accident to MSHA (Tr. 64).

6. At the end of June 1979, all three of respondent's D-9 Caterpillars were out of order and one of the D-9 Caterpillars was sent to Whayne Supply Company for extensive repairs. The other two D-9's were being repaired also and Moses was told that he could remain at home for a few days and that he would be called back to work when the dozers had been repaired (Tr. 64; 192).

7. On July 2, 1979, before the repairs on the D-9's had been completed, Moses went to respondent's repair shop and office in Williamsburg, Kentucky, to pick up his pay check. Moses went into the repair shop, where respondent's owner, Pascual White, was working, and asked White if he had accused Moses of reporting the D-6 accident to MSHA. White stated that he believed Moses had reported the accident and exclaimed, "and by God, you did call them" (Tr. 68). Moses then told White that he would make White prove that allegation. White told Moses that if he did get his brother-in-law, Ben Bunch, the MSHA inspector, White would see to it that Moses did not work around there any more (Tr. 69).

8. McClure, White's foreman, was also in the shop at the time. Moses felt that White had come so close to firing him, that he believed it necessary to ask McClure if he (Moses) still had a job. McClure told Moses that his job was still available when the D-9 had been returned from the supply shop (Tr. 188-189).

9. Dorothy Moses, complainant's wife, was sitting in Moses' truck when her husband went to get his check. She became aware of loud voices coming from the repair shop, and decided that she should go to the shop and ask her husband to come home so as to stop the heated argument which was in progress. She testified that when she reached the door of the shop, she heard White say to her husband, "You don't work for them damn inspectors; I write your checks" (Tr. 170). She heard her husband say that he would make White prove his claim that Moses had reported the accident. She further stated that White told Moses to "Go ahead and get that damn Ben Bunch" (Tr. 171). Her husband retorted that he would go higher than Ben Bunch. In reply to her husband's statement, White said, "You'll not work around here no more. I'll see to that" (Tr. 117).

10. White's version of his encounter with Moses on July 2 is different from Moses' version. White claims that Moses came into the shop and stated that he had heard that White had accused him of reporting the D-6 accident to MSHA. White claims that he told Moses that he did not care what Moses had heard (Tr. 250). White also claims that he told Moses, "Look, if I was you,

I'd run my own business, because you're not even working here today" (Tr. 251). White denies that he told Moses he would see to it that Moses did not work around there any more. White claims that he did tell Moses "If you want to stay around here, run your own damn business" (Tr. 251). McClure, White's foreman, who was present in the shop, denies that White said any of the things attributed to White by Moses and his wife (Tr. 189; 233).

11. Although Moses had been told by McClure on July 2, at the time of Moses' argument with White in the repair shop, that Moses still had a job when the D-9 Caterpillar had been returned to the job site, Moses reported to the Becks Creek job for work on July 3 because he still had the feeling that White had actually discharged him during the heated conversation in the repair shop on July 2 and Moses wanted to find out for certain on July 3 whether he still had a job. An employee named Bob Durham was in charge of drilling holes and setting off explosives on the morning of July 3. Durham asked McClure to assign someone to fill holes with explosives. McClure knew that Moses had performed that kind of work before and claims that he said to Durham that Moses was available and ought to make a good man for filling holes. Moses claims that McClure looked at him and said that Moses could help Durham fill holes because he was not good for anything else. Moses thereupon claims to have stated, in effect, that he might not be good for anything else, but that he was not a rat who would report accidents to MSHA (Tr. 12; 70).

12. Both McClure and Moses agree that some profane or other objectionable language was used. Both men also agree that McClure said something to the effect that if Moses was not going to work, it would be better for Moses to get in his truck and return home. Moses claims that McClure told him to get off the hill and Moses also contends that when he stopped to talk to Andy Raines and Bob Durham for the purpose of trying to convince them that he had not reported the D-6 accident to MSHA, McClure told him twice more to get off the hill. Both men agree that the entire conversation took place in the neighborhood of 7 a.m. (Tr. 12; 75-76; 190-191).

13. The primary difference between Moses' and McClure's interpretation of the comments made on the morning of July 3 is that Moses claims that McClure used words which, in Moses' mind, clearly meant that McClure had fired him (Tr. 103-104). On the other hand, McClure claims that he did not use a term which meant that he had discharged Moses and that, in fact, it was not his intention to discharge Moses (Tr. 194). McClure claims that if Moses had gone ahead and filled holes, Moses would have been allowed to work on July 3 (Tr. 194), but that since Moses declined to do the only work available, McClure had no choice but to tell Moses to go to the house because there was no work for Moses to do until the D-9 had been returned from the repair shop (Tr. 206; 236).

14. McClure testified that the D-9 was returned from the repair shop about Wednesday of the week following Moses' claimed discharge, that is, July 11, and Moses was not called to come back to work because by then respondent's management had received a letter stating that Moses had filed a complaint alleging that he had been discharged in violation of the Act. McClure says that they did not call Moses back to work after learning that

the complaint had been filed because they just did not follow the "right procedures." In fact, McClure stated, "I think we could work something out--if he hadn't filed the complaint" (Tr. 241).

15. After Moses' heated conversation with White on July 2, 1979, about the allegations that Moses had reported the D-6 accident to MSHA, Moses went to the home of Kenneth T. Howard, an MSHA supervisor of inspectors, and told Howard about his concern over having been charged with reporting the D-6 accident to MSHA (Tr. 61). Moses asked Howard to "clear" his name and Howard agreed to make a trip to discuss the matter with White and advise White that the D-6 accident was reported to MSHA by a woman whose name would have to be kept confidential (Tr. 69; 116).

16. On the morning of July 3, Howard went to the Becks Creek job to report to respondent that Moses was not the person who had reported the D-6 accident to MSHA. White was out of town and Howard talked to McClure. Howard told McClure that Moses had been to his home the night before and had asked Howard to "clear" his name about the identity of the person who had reported the D-6 accident. Howard told McClure that Moses had not reported the accident and Moses feared that he would be discharged that morning when he came to work. McClure told Howard that he had already fired Moses. Howard then explained to McClure that he might want to discuss the matter with White so that they could reconsider Moses' discharge in light of the discrimination provisions in the Act because Howard was of the opinion that Moses would file a discrimination complaint if he should be discharged (Tr. 116-118).

17. Howard also testified at the hearing that it is contrary to MSHA's policy for inspectors to examine mines where the inspector's relatives are working and that Inspector Ben Bunch, Moses' brother-in-law, would not have been sent to investigate the D-6 accident with two other inspectors if MSHA had known that Bunch's brother-in-law was working at the Becks Creek Mine (Tr. 124).

18. White claims that he soon realized after hiring Moses that Moses was not a proficient dozer operator. White then belatedly checked with management at the K-Nab Company, where Moses had previously operated a dozer, and learned that Moses was considered to be a "cowboy" on the equipment, that is, handled the equipment in a rough manner (Tr. 244). White felt obligated, however, to keep Moses on his payroll, even though Moses allegedly damaged the dozers by rough treatment, because White wanted to keep in the good graces of Moses' brother-in-law, Ben Bunch, who was an MSHA inspector (Tr. 252; 255). Also, White said that he kept Moses as an employee because he hoped to be able to switch Moses back to doing manual labor, such as loading holes with explosives, even though he knew he would have to pay Moses the same salary he was paying Moses as a dozer operator (Tr. 252; 258; 280). White inconsistently stated that it takes 2 or 3 years to learn to operate a dozer properly and that although he himself has been operating dozers for 21 years, good dozer operators still show him how to do new things with a dozer (Tr. 258).

19. James Davis appeared as a witness at the hearing in response to a subpoena. He now works for Sterling-Garrett Coal Company as a back-dump

operator, but in May, June, and July 1979, he worked for Pascual White as a serviceman on all of the equipment used at all of White's jobs (Tr. 128-129; 140). Davis said that he saw Moses at least once every day and did not see Moses abusing or misusing the equipment (Tr. 131; 145). In Davis' opinion, the dozers were old and could be expected to give mechanical problems. Davis saw nothing about the equipment malfunctioning which could be attributed to Moses' operation of the equipment (Tr. 134; 138). Davis said that about 2 days after the D-6 accident had occurred, McClure, the foreman, stated that he believed that either Davis or Moses had reported the accident to MSHA. Davis denied that he had called the inspectors and stated that if he were going to call them, he would do so to report the defective brakes on the truck which he was driving (Tr. 133). Davis said that sometimes minor problems would occur on the dozers, but the mechanic would not be able to repair them right away. They would continue to be used and the minor problems would result in major breakdowns from lack of attention (Tr. 146).

20. Bobby G. Durham, at the time of the hearing in November 1980, was working for J. L. White who is Pascual White's brother. Durham appeared as a witness in response to a subpoena (Tr. 158). Durham said that he would not lie to favor either Moses or Pascual White (Tr. 164). Durham was working for Pascual White as a shot firer before and after the time that Moses worked for White (Tr. 150; 158). Durham worked with Moses and showed Moses where he wanted a bench made just as he does for other operators (Tr. 151). In Durham's opinion, Moses was an average dozer operator and Durham did not think that Moses was a "cowboy" on the equipment (Tr. 154). Durham said that McClure asked him, after the D-6 accident, if Durham thought Moses was telling the truth when Moses denied having called the inspectors. Durham told McClure that he believed Moses would tell the truth about the matter and that Durham believed Moses when he said that he had not reported the accident to MSHA. Durham testified that McClure replied to him that he also felt Moses had told the truth (Tr. 155).

21. Durham was present on the morning that McClure told Moses to get off the hill and Durham said that he heard McClure tell Moses that once, if not twice (Tr. 167). Durham thinks that McClure would have allowed Moses to work on July 3 if Moses had been willing to fill holes (Tr. 168). Durham did not hear all that was said between Moses and McClure on July 3 and stated that there may have been more to their conversation than he was aware of. Although Durham did not hear McClure tell Moses not to return, Durham said that McClure might have done so (Tr. 160-161). Durham stopped working for Pascual White because he was not given the help that he needed. Durham said that men were at the mine site who could have helped him fill holes, but they were not allowed to do so (Tr. 159).

The Question of Whether a Discharge Occurred

Before a determination can be made in this proceeding with respect to whether respondent violated section 105(c)(1) of the Act, a decision must first be made as to whether Moses was actually discharged by respondent. I conclude from the preponderance of the evidence that Moses was discharged. Several aspects of the testimony support that finding.

As indicated in Finding Nos. 2 and 3 above, Moses had worked for Pascual White in 1970 as a laborer. Moses thereafter worked for other companies and became a bulldozer operator. In 1979, Moses was unemployed and asked White for a job as a dozer operator. After Moses had asked for the job, White received a request from Moses' brother-in-law, Ben Bunch, who was, and still is, an MSHA inspector, to the effect that Bunch would appreciate it if White could find a job for Moses. White said that he hired Moses as a dozer operator, without first checking into his ability to operate a dozer, because Bunch's duties at that time included inspection of White's mines.

White's testimony shows that he is generally sensitive to pressures brought by MSHA upon the way he conducts his business (Tr. 242; 252; 255; 260; 270). In such circumstances, there is reason to believe that White would have resented the reporting of an accident at his job site to MSHA. McClure, White's foreman, admits that he tried to find out the identity of the person who reported the D-6 accident to MSHA and that, at least once, he asked Moses if he was the person who reported the accident (Finding No. 5, supra). McClure also admits having discussed the reporting of the accident with another employee named Durham and that he discussed the reporting of the accident with White (Tr. 231-232). There can be no doubt, therefore, but that White and McClure were very interested in determining the identity of the person who reported the accident. The fact that Moses had been hired because of subtle pressure placed upon White by Moses' brother-in-law, who was an MSHA inspector, would have been likely to cause White and McClure to suspect Moses as the one who had reported the accident although the testimony of Howard, an MSHA supervisory inspector, shows beyond all doubt that Moses did not report the D-6 accident to MSHA (Finding Nos. 15 and 16, supra).

Moses' sensitivity about being accused of reporting the D-6 accident can be explained on two bases. In the first place, Moses seems to have had a very strong desire to be liked by his fellow employees because he went to great lengths to convince them that he was not the one who reported the accident to MSHA. Moses continually referred in his testimony to his dislike for being considered a traitor who would report his employer and fellow employees to MSHA (Finding Nos. 5, 11, and 12, supra). Secondly, even if McClure did not actually say to Moses that Moses had reported the accident to his brother-in-law, Moses seems to have been acutely conscious of the relationship and overreacted to the suggestion that he had reported the accident to MSHA.

White's testimony shows that he was displeased with Moses in a number of ways. As indicated above, White said that he had hired Moses because of pressure from an MSHA inspector; White found that Moses was, at best, an average dozer operator; White suspected Moses as being a person who might report violations of safety standards to MSHA; White was disappointed when Moses did not follow through with a threat to resign on one occasion (Tr. 248); and White classified Moses as having the worst attitude toward his employer of any person he had hired in his 21 years of experience (Tr. 260). In such circumstances, there is no reason to doubt but that White had made it clear to his foreman, McClure, that McClure was free to discharge Moses any time that an opportunity presented itself.

McClure recalls his final words to Moses on July 3, 1979, the date of Moses' claimed discharge, to be, "If you're going to work, let's go to work. But if not, you'd just as well get in your truck, and go to the house" (Tr. 236). Moses claims that McClure stated, "Get off the hill; I've got nothing for you" (Tr. 12). The MSHA supervisory inspector unequivocally stated that McClure told him on the morning of July 3 that he had already fired Moses (Tr. 117). McClure stated at the hearing that he told Howard that he had sent Moses "to the house" and that Howard might have interpreted that statement to be equivalent to a statement that he had discharged or fired Moses, but that he did not intend for Howard to interpret his statement in that manner (Tr. 206).

Despite McClure's denial of an intention to discharge Moses, it is a fact that the phrase "send to the house" is frequently used in the coal fields as being equivalent to firing or discharging a person. For example, when Pascual White was testifying, he stated that one of his dozer operators once admitted to White that he had negligently failed to notice that the dozer was running low on oil and, as a result of that negligence, the engine was burned out. The dozer operator was aware of the fact that new engines cost a lot of money, so he stated to White, "I just forgot to check the oil, Pat. I don't blame you if you send me to the house" (Tr. 265). White claims that he told the man that he could make whatever decision he wanted to about quitting and the man "never did show back up to work" (Tr. 265).

Howard, the supervisory inspector, who testified that McClure told him on July 3, 1979, that he had fired Moses, is not the type of person who jumps to unwarranted conclusions. Howard testified that he explained to McClure the provisions in the Act regarding the filing of discrimination complaints and Howard stated that McClure said he did not care what Moses filed. It is highly unlikely that McClure would have listened to a detailed discussion about the filing of discrimination complaints pertaining to unlawful discharges without explaining to Howard that Howard had misunderstood him if, in fact, McClure had not intended for his remarks to Moses on July 3 to be interpreted as words of discharge (Tr. 118).

I believe that the discussion above shows that the preponderance of the evidence supports a finding that Moses was discharged on July 3, 1979, as alleged in Moses' Complaint filed in this proceeding.

The Question of Whether a Violation of Section 105(c)(1) Occurred

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

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the

> operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The language of section 105(c)(1) shows that an operator may violate that section by discharging, discriminating against, or otherwise interfering with the exercise of a miner of his rights under the Act. Section 103(g)(1) of the Act provides that a miner may report unsafe conditions to the Secretary (or MSHA). Section 103(g)(1) also provides that an immediate inspection of a mine may be obtained if a miner believes that a hazard exists at the mine. The section further provides that the name of the miner reporting the hazard is not to be made available to the operator of the mine.

The findings of fact in this proceeding, particularly Nos. 15 and 16, show that the complainant in this proceeding did not report to MSHA the accident which occurred at respondent's mine on June 19, 1979, but the accident was reported to MSHA, and three inspectors came to respondent's mine on June 20 to investigate the accident. Complainant in this proceeding not only abstained from reporting the accident to MSHA but, in addition to not reporting the accident, complainant went to the extreme length of asking a supervisory inspector to "clear" his name of the allegation that he was the person who reported the accident. Therefore, on first impression, it appears that respondent cannot be found to have violated section 105(c)(1) by having discharged a complainant who was engaged in the protected activity of making a safety-related complaint to MSHA.

If the Complaint in this proceeding could be brushed aside on the basis stated above, I would have no difficulty in finding that a violation of section 105(c)(1) was not proven in this proceeding. That sort of easy disposition, however, fails to consider other aspects of section 105(c)(1). As noted above, section 103(g)(1) provides that the name of the person who reports a safety hazard to MSHA is not to be revealed to the operator. That provision means that all miners should be free from harassment by their employers as to whether they did or did not report hazards to MSHA. Therefore, it was improper for respondent or its agent to ask the complainant if he had reported the accident of June 19 to MSHA. Senate Report No. 85-181, 95th Cong., 1st Sess. May 16, 1977, states at page 35:

> * * * The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and

> intends it to include not only the filing of complaints seeking inspection under Section [103(g)] or the participation in mine inspections under Section [103(f)] but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

Complainant's foreman agreed in his testimony that he had asked complainant if he had reported the accident to MSHA. Although the foreman claimed to have mentioned the report of the accident only once, complainant contends that his foreman referred to the reporting of the accident at least three different times. Complainant alleges that his foreman made such remarks as, "Oh, he's happy now. He called his brother-in-law" (Tr. 10). If reporting of the accident had been mentioned only once, I do not believe that the matter would have become as much of an obsession to complainant as it turned out to be. Additionally, two of respondent's other employees testified that respondent's foreman asked them if they thought complainant had reported the accident to MSHA (Finding Nos. 19 and 20, supra). Therefore, I consider complainant's testimony to be more credible than that of the foreman when it comes to the number of times that the reporting of the accident was mentioned in complainant's presence (Finding No. 5, supra).

While it was improper for complainant's brother-in-law, who was an MSHA inspector, to ask respondent's owner to hire complainant, it was thereafter just as improper for respondent's management to make unwarranted claims about complainant's alleged role in the reporting of the accident.

For the reasons given above, I find that respondent violated section 105(c)(1) of the Act when it interfered with complainant's right to anonymity under the Act with respect to whether he reported the accident of June 19, 1979, to MSHA.

Discharge on Suspicion of Reporting Accident

Other questions with respect to section 105(c)(1) are raised by the facts in this case. One of them is whether respondent violated section 105(c)(1) when it discharged complainant because it suspected that he had reported the accident to MSHA even though, in fact, he had not. Inasmuch as complainant lost his job because of arguments pertaining to respondent's persistent attempt to implicate him with reporting the accident to MSHA, complainant was discriminated against under section 105(c)(1) by being suspected of reporting the accident just as much as he would have been adversely affected if he had actually reported the accident.

While respondent's owner, Pascual White, disavows that he accused complainant of reporting the accident when complainant asked him that question on July 2, the evidence, in general, supports Moses' description of the argument which developed on that day. If White had said no more than that he did not

care what complainant had heard about White's allegations concerning the reporting of the accident, it is not likely that the conversation would have become as heated as it did. While Dorothy Moses was certainly motivated by self-interest in testifying on behalf of her husband, the complainant in this proceeding, there is reason to believe that she heard White say to complainant, "You don't work for them damn inspectors. I write your checks" (Tr. 170). I conclude that White would make such a remark because of his sensitivity about MSHA's attempts to influence his freedom to hire employees and carry on his business without MSHA's interference (Tr. 242; 252; 255; 260; 270). For the same reason, I believe that Dorothy Moses correctly quoted White when she claims that White told complainant to "Go ahead and get that damn Ben Bunch." Otherwise, there is no reason for complainant to have claimed that he told White he would go higher than Ben Bunch in getting proof that he had not been the person who reported the accident to MSHA.

Finally, there is little reason to doubt both complainant's and his wife's testimony to the effect that White said that he would see to it that complainant did not work around there any more. If White had not made a remark to that effect, there is no reason for complainant to have come away from the argument with the feeling that he had been fired, or would be, after he reported to work the next morning. White claims that he said to complainant that "If you want to stay around here, run your own damn business" (Tr. 251). That remark does not fit into the subject matter of the argument. There would have been no reason for White to make a remark about complainant's running his own business when complainant had discussed only complainant's business with White, namely, an effort to convince White that complainant was not the person who reported the accident.

The references by respondent's foreman to the reporting of the accident had begun to prey on complainant's mind to such an extent, that complainant believed it was absolutely essential that he convince his employer that he was innocent of the charge that he had reported the accident. An employer who was interested in maintaining a harmonious relationship with his employee would have wanted to assure his employee that the question of who reported the accident had been improperly raised in the first instance and that the employer no longer was giving the matter any attention. If White had simply told complainant that White believed him when he stated that he had nothing to do with reporting the accident, the whole matter would doubtless have been laid to rest on July 2.

I believe that the discussion above shows that respondent improperly discharged complainant in violation of section 105(c)(1) because its management believed that complainant had reported the accident to MSHA.

Failure To Retain Complainant After Complaint Was Filed

The fourth question that is raised by the facts in this proceeding is whether respondent's management violated section 105(c)(1) when it refused to retain complainant as an employee after management became aware of the fact that complainant had filed a complaint under section 105(c)(1) of the Act.

Section 105(c)(1) prohibits an employer from discharging an employee because the employee has "* * * instituted any proceeding under or related to this Act."

Although I have found in the first instance that respondent's foreman, McClure, discharged complainant on July 3, 1979, when he told complainant to go to the house, I believe, in the alternative, that if respondent had not discharged complainant on July 3, 1979, because of respondent's suspicion that complainant had reported an accident to MSHA, respondent's management was obligated when it learned of the filing of the complaint on or about July 9, 1979, to call complainant back to work and explain that he had mistakenly filed a complaint of discharge under an erroneous impression that McClure had discharged him on July 3 when McClure told him to go to the house. McClure had no explanation for his failure to retain complainant as an employee except that he had become aware of the filing of the complaint before the D-9 Caterpillar operated by complainant had been returned from the repair shop. In fact, respondent's foreman specifically stated, "I think we could work something out--if he hadn't filed the complaint" (Tr. 241; Finding No. 14, supra).

Even if all of the evidence in this proceeding is interpreted in accordance with respondent's version of the events which occurred before, during, and after complainant's period of employment at respondent's mine, the evidence shows unequivocally that complainant was allowed to pass into the category of an unemployed person solely because respondent's management had been advised that complainant had filed a discrimination complaint against respondent under section 105(c) of the Act. If respondent's management, as it claims, had not actually discharged complainant on July 3, then he was entitled to be called back to work on July 11, 1979, when the D-9 Catepillar he had been operating was returned to the mine site. Respondent's failure to retain complainant as an employee was, therefore, a direct violation of the prohibition in section 105(c)(1) that an employer may not discharge an employee because he has instituted a proceeding under the Act.

Reasons Given by Respondent for Discharging Complainant

Unskilled Operator. Respondent was forced to take alternative positions in this proceeding. Respondent's first defense to the Complaint is that it did not discharge complainant. Respondent's foreman admitted that complainant had not voluntarily quit or resigned when complainant left the Becks Creek job on July 3, 1979 (Tr. 191). It is a fact, however, that respondent had not had a job from the time he left the job site on July 3, 1979, up to the time of the hearing which was held on November 18, 1980 (Tr. 77). Respondent is able to account for complainant's lack of a job only by saying that it just failed to call him back after the D-9 he had been operating was returned to the job site after being repaired (Tr. 241).

Respondent had apparently reached the conclusion before the hearing that its claim of not having discharged complainant would be rejected. Therefore, it gave several reasons for discharging complainant if it were held that

respondent did discharge complainant. The first and primary reason for discharging complainant was that he was an unskilled operator of a dozer. Respondent's co-owner, Pascual White, said that he would describe complainant as a dozer driver rather than a dozer operator. White described a dozer driver as a person who could move a dozer around on level ground from one place to another, whereas a dozer operator knows what to do and how to do it and knows what makes a dozer "tick" (Tr. 245). White said that he should have investigated complainant's ability to operate a dozer before hiring him, but he had hired complainant under pressure from complainant's brother-in-law (an MSHA inspector) and that he just did not check into complainant's abilities until after he had hired complainant and had realized that complainant was not a proficient dozer operator (Tr. 243-244).

Respondent not only categorized complainant as a poor operator of a dozer, but also claimed that complainant was a "cowboy" who was unnecessarily rough on the equipment (Tr. 244; 262). Respondent contended that complainant operated all three of respondent's D-9 Caterpillar tractors and that he tore all of them up so badly that all of them were sometimes in the repair shop simultaneously (Tr. 199-202). Respondent claimed that the repairs on its equipment increased dramatically during the period that complainant worked for respondent (Tr. 200; 246).

In order to check the accuracy of respondent's claims about its repair bills, I asked respondent to send me copies of its repair bills on its three D-9 Caterpillar tractors for the period of 1976 through 1979 (Tr. 284). Respondent's counsel submitted the repair bills as requested and they have been identified and received in evidence in the first part of this decision.

Close examination and tabulation of the data show the following results:

Cost of Repairs

Caterpillar Serial Nos.	1976	1977	1978	1979	Total by Serial Numbers
66A7485	$15,808	$5,174	$5,075	$ 7,562	$33,619
66A11561	Not Supplied	4,289	8,161	15,691	28,141
90V2938	Not Supplied	9	2,288	34,383	36,680
Total by Years	$15,808	$9,472	$15,524	$57,636 1/	$98,440

When one examines the data set forth above, it should be borne in mind that complainant only worked for respondent from May 9 through June 28, 1979.

1/ The cover letter submitted on December 16, 1980, by respondent's counsel with the repair bill states that respondent's counsel added the repair costs for 1979 and arrived at a total amount of $80,157.67. I can account for the disparity between my figures and those of respondent's attorney only by noting that several amounts were shown on the repair bills as credits. I subtracted the credits, whereas respondent's attorney may have added the credits.

Although complainant was discharged on July 3, he did not work between the dates of June 28 and July 3 because the dozer he was operating was in the repair shop from June 28 to July 11.

It was respondent's contention at the hearing that complainant was so rough on the dozers that he kept all three of them torn up all the time. It was alleged that in the 8-week period that complainant worked for respondent, he caused all three dozers to have to be rebuilt and caused respondent to have to spend $54,000 for the repair of the newest Caterpillar with Serial No. 90V2938. The repair bills supplied by respondent show that during the entire year of 1979, a total of $34,383 was spent in repairing Caterpillar No. 90V2938. Since the newest Caterpillar was being used the most, it was reasonable for it to require extensive repairs after incurring the small amount in repair costs of $9 and $2,288 which had been spent on it in the years 1977 and 1978, respectively.

Another significant aspect of the repairs on the dozers may be seen if one examines the total cost of repairs on each dozer for the 3-year period involved in the comparative analysis. The repairs on each of the Caterpillars totaled very much the same for all the years involved in the study, as may be seen by looking at the totals shown in the last column of the tabulation above.

Respondent's foreman, Richard McClure, testified that a Caterpillar engine has to be overhauled every 3,000 to 4,000 hours. There are 2,000 working hours in a year, assuming the dozers are used 50 weeks each year for 40 hours per week. Therefore, the new Caterpillar would have needed to have its engine overhauled in 1979 if it had been used rather constantly during the years 1977 and 1978. McClure also claimed that the engines on two of the dozers had been recently rebuilt and should have lasted another 3,000 hours (Tr. 223). Respondent's owner said that the cost of a new engine is $37,000 and the cost of rebuilding an engine in respondent's own shop is about $17,000 (Tr. 266). The repair bills submitted by respondent fail to show that enough was spent on the dozers in 1977 or 1978 or in 1979, prior to the time that complainant began working for respondent, to support a claim that the engines on two dozers had been rebuilt or replaced shortly before complainant began working for respondent.

The witnesses who were called by complainant's counsel in support of complainant's case both testified that complainant was neither the poorest nor best dozer operator they had ever seen. Both of them considered complainant to be an average kind of operator and both of them stated that complainant was not a "cowboy" on the equipment and that they did not see him abuse the equipment (Finding Nos. 19 and 20, supra).

I conclude that the preponderance of the evidence supports a finding that complainant is not so poor an operator of equipment as to justify his discharge if that were the only consideration being used to warrant the discharge.

Abusive Language and Bad Attitude Toward Supervisors. Respondent's owner, Pascual White, testified that complainant has the worst attitude toward his

employer of any employee he has ever had work for him during his 21 years of experience (Tr. 260). Respondent's foreman, Richard McClure, also made it clear that complainant does not take well to constructive criticism (Tr. 220). On the day that complainant was discharged, McClure stated that complainant called both him and White names which McClure did not wish to state on the record (Tr. 190; 206; 236). During his testimony, complainant found it necessary to refer to "what you sit on" in lieu of the actual word which he used in talking to his foreman (Tr. 12; 70).

The record, therefore, supports respondent's claim that complainant does use rough language in talking with his supervisors. On the other hand, White had employed complainant back in 1970 as a laborer and must have known what sort of person he was hiring when he reemployed complainant in 1979 (Finding No. 2, supra). While the record shows that one of the reasons respondent gave for hiring complainant was that complainant's brother-in-law, who is an MSHA inspector, asked him to hire complainant, I am unwilling to accept that excuse as the sole reason for respondent's hiring complainant a second time.

One reason for my rejection of the MSHA pressure argument as the reason for respondent's hiring of complainant is that White stated that he knew he could have a different inspector assigned to inspect his mines if he asked MSHA to assign a different inspector because of any bias or prejudice which Ben Bunch might display if respondent declined to hire complainant (Tr. 260). Additionally, Howard, the MSHA inspector supervisor who testified in this proceeding, stated that MSHA did not assign inspectors to examine mines where the inspectors' relatives were working if MSHA had knowledge that that was occurring (Finding No. 17, supra). Respondent's owner showed a considerable expertise about regulatory agencies and would know how to deal with prejudicial inspections if he had declined to hire complainant and had felt that complainant's brother-in-law was thereafter deliberately trying to find violations at respondent's mine which would not normally be written apart from retaliation for an employer's refusal to hire an inspector's brother-in-law (Tr. 270).

In view of the fact that complainant had previously worked for respondent in 1970, I believe that the record fails to support a finding that complainant would have been discharged on account of his use of rough language and his attitude toward his employer if the rough language and bad attitude had been the only considerations leading up to the discharge. Moreover, much of the bad language and poor attitude resulted from respondent's improper attempt to find out whether complainant had reported the D-6 accident to MSHA.

Relief Sought

The relief requested in the Complaint is that complainant be reinstated to his former job and that he be awarded all back benefits. Exhibit H in this proceeding is a copy of the payroll data showing the amount that complainant was paid for all hours worked from May 9, 1979, through June 28, 1979. That exhibit shows that respondent worked more than 40 hours during some weeks and less than 40 hours during other weeks. Since it is not possible to estimate the exact number of hours which complainant would have worked had he remained

on respondent's payroll from June 29, 1979, to the present time, I find that payment for 40 hours each week is a reasonable accommodatioin for computing back pay. Exhibit H also shows that complainant was paid $7.50 per hour, or $60 per day. Deductions were made from his check for tax and other purposes in a total amount of $76.80 for a 40-hour week, leaving an amount of $223.20 as complainant's net pay for a 40-hour week.

Interest in the amount of 10 percent should be added to the amount to be paid. In order to avoid the difficulty of computing the interest as it accumulates each week, respondent may, if it wishes, elect to assume that the full amount of back pay was generated halfway between July 3, 1979, and the date of payment and the interest of 10 percent on the total amount may be computed for half of the period involved.

Respondent will also be ordered to reimburse complainant for any medical costs he has incurred since July 3, 1979, if those costs would have been covered by any hospitalization which would have been applicable to him during his employment if he had not been discharged on July 3, 1979. Additionally, complainant should be paid any increase in hourly rate to which complainant would have been entitled if he had not been discharged. Finally, respondent will be instructed to expunge from its files all references to complainant's discharge on July 3, 1979.

Section 105(c)(3) of the Act provides for complainant to be reimbursed for attorneys' fees. According to the letter submitted on December 24, 1980, by complainant's attorney, no charges would have been made if the Complaint had been denied. Complainant's attorney states that he spent between 25 and 30 hours on this case, including time spent in drafting correspondence, in conferences with complainant, his wife, and other persons, in procurement of witnesses, and in representing complainant at the hearing. Complainant's attorney asks that he be paid $100 per hour in view of the fact that he would have received no payment if complainant had not prevailed.

The courts normally discount the time spent in conferences by from 20 to 35 percent (Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), and Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976)). Since complainant's counsel did not provide an exact breakdown of time spent in conferences, as opposed to difficult work, such as representing complainant at the hearing, I find that he should be paid for 25 hours of work instead of 30 hours. The courts have also allowed a higher hourly amount than might otherwise be appropriate when an attorney has agreed to represent a client for nothing if the client does not prevail, on the theory that lawyers will thereby be given an incentive to represent persons with little or no income (Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976)). For the foregoing reasons, I find that complainant's attorney should be paid $100 per hour for 25 hours of work in representing complainant in this proceeding. Inasmuch as complainant has not paid any attorneys' fees and was not obligated to pay any if he lost his case, my order will require respondent to pay the attorneys' fees directly to complainant's counsel.

WHEREFORE, it is ordered:

(A) The Complaint of Discharge, Discrimination, or Interference filed on September 24, 1979, is granted for the reasons hereinbefore given.

(B) Respondent shall, within 30 days from the date of this decision, carry out the following types of relief:

(1) Reinstate complainant to his former or equivalent position at respondent's mine.

(2) Pay complainant back wages on the basis of a 40-hour week for the period from July 3, 1979, to and including the date of payment at the rate of $7.50 per hour (or at a higher hourly rate if complainant would have received an increase in salary but for his discharge on July 3), less deductions for tax, etc., as shown in Exhibit H in this proceeding.

(3) Reimburse complainant for any medical or hospital bills which complainant may have incurred after July 3, 1979, if such bills would have been covered by hospitalization insurance if he had not been discharged.

(4) Expunge from complainant's personnel records all references to his discharge on July 3, 1979.

(5) Pay to William E. Hensley, Esq., First National Bank & Trust Building, Corbin, Kentucky 40701, attorney's fees in the amount of $2,500.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

William E. Hensley, Esq., Attorney for Elias Moses, First National Bank & Trust Buildng, Corbin, KY 40701 (Certified Mail)

David Patrick, P.S.C., Attorney for Whitley Development Corporation, 117 Short Street, P.O. Box 9, Harrodsburg, KY 40330 (Certified Mail)

Assistant Solicitor, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Special Investigation, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 31 1981

MARK SEGEDI,	:	Application for Review of Discrimination
On Behalf of:	:	
	:	Docket No. PENN 80-273-D
S. J. EZARIK, E. P. AVERY, A. ANTANOVICH, E. H. ROSEMIER, JR., M. ZOLDAK, J. OLESKY, C. AVERY, W. E. CLARK, L. CASPER, F. PAULISH, A. R. BARKER, A. RUSILKO, B. G. MILLER, R. FILBY, C. L. PHILLIPS, A. J. SEYKOSKI, JR., D. W. CLARK, C. J. ZUKAUCKAS, S. A. JESTAT, T. L. PYSH, J. M. JIBLETS, W. L. BROWN, S. T. FORTE, G. J. EVANS, K. R. WATKINS, J. J. KURUCZ, M. L. HOYT, T. J. SMITH, D. WYTOVICH, R. D. STAUFFER, R. T. HARRIS, D. PHILLIPS, F. PABIAN, G. R. WHEELER, C. J. ROCCO, T. M. BURGER, C. ZUKAUCKAS, R. MULAC, T. P. GRIMES, S. CLARK, S. DURKO, JR., L. T. PRUSKI, F. PERRI, J. VIARA, W. WHITE, N. GURIEL, J. C. FIEM, S. ROBERTSON, C. J. WASHLACK, R. B. TAYLOR, J. FIDAZZO, R. L. EMERY, R. A. CHANEY, L. T. BIZET, T. TAYLOR, F. DI BASILIO, J. ANTANOVICH, J. FIDAZZO, S. KOTCHMAN, C. E. MONTGOMERY, J. E. CARNATHAM, J. G. ZERAMBO, R. S. MARTOS, A. J. MARTOS, C. M. VILCESK, K. E. WILEY, J. J. STEPKO, F. V. FEMIA, S. W. PERCHINSKY, S. EZARIK, J. S. GLEMBA, T. E. ZGORLISKI, A. R. FIEM, R. L. SCICCHITANO, J. STEPKO, R. HOPKINS, P. A. SKIRCHAK, L. N. HRUTKAY, G. C. DENNY, G. BOSTICH, D. L. TIBERIE, J. H. ZAMISKA, J. F. PIASECKI, R. GATLING, B. F. VISCHIO, J. L. ANTANOVICH, J. S. KUBOVCIK, N. BOSIC,	:	Somerset No. 60 Mine

M. J. REBICH, L. HUEY, J. MOTICHAK, E. J. LACOCK, M. POYE, JR., E. AMBROSEY, J. R. KENNEDY, J.E. PUSKARICH, R. T. RADOS, J. E. KARPOFF, K. G. THOMPSON, L. ROSSERO, J. LINNEN, L. DI BASILIO, A. KISKI, E. DERESH, M. TOTH, J. J. DI BASILIO, R. E. MAIN, J. L. JOHNSON, J. E. TIMLIN, H. W. AMBROSY, G. A. DEAN, and G. G. MC KETA,
Complainants

v.

BETHLEHEM MINES CORPORATION,
Respondent

DECISION

Appearances: Kenneth J. Yablonski, Esq., Yablonski, King, Costello & Leckie, Washington, Pennsylvania, for the Complainants; Thomas W. Ehrke, Esq., Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for the Respondent.

Before: Judge Cook

I. Procedural Background

On June 30, 1980, Mark Segedi, filed a discrimination complaint in the above-captioned proceeding on behalf of 148 miners (Complainants) alleging that Bethlehem Mines Corporation (Respondent) committed acts of discrimination in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The complaint was filed with the Federal Mine Safety and Health Review Commission (Commission) pursuant to section 105(c)(3) of the 1977 Mine Act following a determination by the Department of Labor's Mine Safety and Health Administration that no violation of section 105(c)(1) had occurred. The discrimination complaint states, in part, as follows:

> 1. The Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over the subject matter of this case.
>
> 2. Mark Segedi, (Complainant) is a miner defined in Section 3(g) of the Act and is an elected Safety Committeeman of UMWA Local Union 1197.
>
> 3. Exhibit A, attached hereto and made a part hereof, contains the names of the complainant miners as defined in Section 3(g) of the Act who were present and prepared to work on the 7:00 a.m. shift on January 30, 1980.

4. Somerset Mine #60 is owned by the Bethlehem Mines Corporation, Box 143, Eight Four, Pennsylvania.

5. Somerset Mine #60 is an underground mine operating three shifts a day, employing 580 men.

6. Charles McGlothin [sic] is the superintendent of Somerset Mine #60.

7. Mark Segedi has been delegated by the members of UMWA Local Union 1197 aforesaid to act on their behalf in filing a Complaint with MSHA.

8. On January 30, 1980, the aforesaid miners scheduled to work the 7:00 a.m. to 4:00 p.m. shift at Somerset Mine #60 refused to enter the mine because the automatic guard door on the Otis elevator failed to close properly and operate in a safe manner.

9. Angelo Giacomantonio, cleaning plant foreman, attempted to close the elevator doors manually and thereafter use it to lower the miners into the mine but the men refused.

10. The miners were then told by mine management personnel to ride the elevator, walk into the mine by use of the slope or go home.

11. The men refused to walk into the mine by using the slope because it was unsafe in that the handrails were broken and there were ice accumulations in the foot paths.

12. Federal Inspector Cantini arrived at the mine at 7:20 a.m. and he was informed by UMWA Local President Lloyd Hrutkay of the problem but he refused to make an investigation of the problem and sometime thereafter left the mine premises.

13. At 8:10 a.m. on January 30, 1980, a representative of Otis Elevator Company made some repairs to the automatic doors and determined that the elevator was safe to use.

14. At 8:30 a.m. on January 30, 1980, the mine management representatives told the men to enter the mine but also advised them that their pay would be docked until 8:30 a.m.

15. The Safety Committeemen then met with mine management in an effort to resolve the dispute and at 10:00 a.m. the men entered the mine.

16. On January 31, 1980, a written complaint was filed by the UMWA Safety Committee at the Washington, Pennsylvania Field Office of MSHA.

17. On February 1, 1980, Inspector John Poyle made an investigation and issued a citation under Part 75.1725(A), 30 C.F.R. because the mine operator failed to take unsafe equipment out of service.

18. On February 5, 1980, the Federal Subdistrict office personnel concluded that if the shaft guard doors could be closed manually there was no violation and the citation was vacated.

19. On March 3, 1980, the district manager received a legal opinion from Joseph O. Cook, Administrator for Coal Mine Safety and Health concerning 75.1725 which stated that to operate the automatic doors manually was a violation.

20. In February, 1980, Mark Segedi filed a Complaint with the Mine Safety and Health Administration on behalf of the aforesaid miners scheduled to work on the 7:00 a.m. shift on January 30, 1980 against the Bethlehem Mines Corporation alleging that the Company had violated Section 105(c) of the Act.

21. On May 30, 1980, the Mine Safety and Health Administration determined that no violation had occurred and in a letter dated May 30, 1980, and received June 4, 1980, Mark Segedi was advised of the Administration's decision.

22. The aforesaid miners were discriminated against by Bethlehem Mines Corporation because of their refusal to work in unsafe and unhealthy conditions. Prior to and at the time the Complainants were discriminated against they were engaged in protected activity under Section 105(c) of the Act.

The Complainants' prayer for relief requested: (1) a finding that the Complainants were unlawfully discriminated against by the Respondent for engaging in activity protected under section 105(c) of the 1977 Mine Act; (2) the entry of an order directing the Respondent to pay the Complainants full back pay and employment benefits which were lost due to the alleged acts of discrimination; (3) an award of interest to be added to all back pay until the date such back pay is tendered; (4) the entry of an order requiring that the Complainants' employment records be cleared of all unfavorable references concerning the activities that occurred on January 30, 1980; (5) the entry of an order requiring the Respondent to cease and desist all harassment of the Complainants because said harassment has a chilling effect upon the Complainants' contractual and legal right to refuse to work where there are safety and health hazards; and (6) the assessment of an appropriate civil penalty

for the Respondent's unlawful interference with the Complainants' exercise of rights protected by section 105(c) of the 1977 Mine Act.

On July 18, 1980, the Respondent filed an answer which states, in part, as follows:

> 1. Respondent denies that it committed any acts of discrimination involving the complainants.
>
> 2. Respondent specifically denies that it committed any acts of discrimination concerning activities protected under the provisions of 105(c)(1) of the Act.
>
> 3. Respondent denies that any "unfavorable references" concerning this incident of January 30, 1980 are part of the employment records of the listed complainants.
>
> 4. Respondent further denies that any harassment of the Complainants by Respondent regarding this incident has ever occurred or is occurring.
>
> 5. Respondent states that an investigation of this complaint has been made by a special investigator of the Mine Safety and Health Administration and upon a review of the facts surrounding this incident, MSHA properly determined that a violation of Section 105(c) had not occurred.
>
> 6. Respondent denies that all circumstances related to this issue entitle the Complainants to any of the relief requested by Complainants.
>
> Respondent, therefore, respectfully requests that all requests for relief contained in Complainant's [sic] Application for Review be denied because they are without merit.

On August 18, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on September 15, 1980, in Washington, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating.

Various discussions were held on the record between counsel for the parties and the undersigned concerning the precise number of Complainants and their names, the number of hours that each Complainant was scheduled to work on January 30, 1980, and the precise number of hours of back pay claimed by each Complainant. The parties agreed to address these matters by the filing of an appropriate stipulation. The stipulation was filed on November 26, 1980. The requisite information is set forth in an attached document styled "complainant status summary," a copy of which is attached to this decision as Appendix A.

Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, difficulties experienced by counsel necessitated a revision thereof. Briefs and proposed findings of fact and conclusions of law were filed by the Respondent and the Complainants on November 3, 1980, and November 13, 1980, respectively. The Respondent and the Complainants filed reply briefs on November 26, 1980, and December 1, 1980, respectively.

II. Witnesses and Exhibits

A. Witnesses

The Complainants called as their witnesses Lloyd Hrutkay, a mine mechanic at the Somerset No. 60 Mine, and president of Local Union No. 1197, District 5, United Mine Workers of America; Gary Bostich, a maintenance repairman, or mechanic, at the Somerset No. 60 Mine, and a mine committeeman for Local Union No. 1197; Harry L. Nicklow, special assistant to the safety director of the United Mine Workers of America; and Mark Segedi, a continuous miner operator at the Somerset No. 60 Mine, and a safety committeeman for Local Union No. 1197.

The Respondent called as its witnesses Paul Vancura, an electrical engineer employed by the Respondent; Neal Merrifield, the assistant mine superintendent at the Somerset No. 60 Mine; and Herbert Sutter, a maintenance mechanic employed by the Otis Elevator Company.

B. Exhibits

1. The parties introduced the following joint exhibits into evidence:

J-1 is a copy of a BCOA-UMWA Standard Health and Safety Grievance Form filed under Article III, Section (i) of the National Bituminous Coal Wage Agreement of 1978.

J-2 is a copy of the National Bituminous Coal Wage Agreement of 1978.

J-3 is a copy of a BCOA-UMWA Standard Grievance Form.

J-4 is a copy of Citation No. 626046, February 1, 1980, 30 C.F.R. § 75.1725(a), issued by Federal mine inspector John N. Poyle.

J-5 is a copy of a February 6, 1980, determination vacating J-4, issued by Federal mine inspector Alvin Shade.

2. The Complainants introduced the following exhibits into evidence:

U-1 is a copy of a letter dated February 11, 1980, from Mr. Harry Nicklow to Mr. William Dupree, coal mine inspection supervisor.

U-2 is a copy of a letter dated April 14, 1980, from Mr. Donald W. Huntley, District Manager, Coal Mine Safety and Health District 2, to Mr. Harry Nicklow, in reply to U-1.

U-3 is a copy of a memorandum dated March 3, 1980, for Mr. Donald W. Huntley, from Mr. Joseph O. Cook, Administrator for Coal Mine Safety and Health, setting forth a legal opinion concerning mandatory safety standard 30 C.F.R. § 75.1725.

U-4 is a drawing prepared by Mark Segedi during the course of his testimony.

3. The Respondent did not introduce any exhibits into evidence.

III. Issues

1. Whether any or all of the Complainants refused to use the Otis automatic elevator at Respondent's Somerset No. 60 Mine on January 30, 1980.

2. If any or all of the Complainants refused to use the Otis automatic elevator at Respondent's Somerset No. 60 Mine on January 30, 1980, then whether such refusal was activity protected by section 105(c)(1) of the 1977 Mine Act.

3. If any or all of the Complainants refused to use the Otis automatic elevator at Respondent's Somerset No. 60 Mine on January 30, 1980, and such refusal was activity protected by section 105(c)(1) of the 1977 Mine Act, then whether the Respondent discriminated against or otherwise interfered with the exercise of the statutory rights of such Complainants in retaliation for engaging in such protected activity.

4. If the Respondent discriminated against or otherwise interfered with the exercise of the statutory rights of any or all of the Complainants in retaliation for engaging in activity protected by section 105(c)(1) of the 1977 Mine Act, then what is the appropriate remedy.

IV. Opinion and Findings of Fact

A. Stipulations

1. The parties entered into the following stipulations on September 15, 1980:

a. The Administrative Law Judge has jurisdiction in the above-captioned proceeding (Tr. 12-14).

b. Two written grievances related to this section 105(c) complaint have been filed by appropriate United Mine Workers of America representatives and are currently pending resolution in the grievance procedure (Tr. 13-14).

c. The Somerset No. 60 Mine employed 606 employees as of January 30, 1980, and produced 920,575 tons of clean coal in 1979 (Tr. 13-14).

d. Bethlehem Mines Corporation produced 12,499,402 clean tons of coal in 1979 (Tr. 13-14).

e. The Somerset No. 60 Mine had 158 employees scheduled to work the January 30, 1980, day shift (Tr. 13-14).

f. Mark Segedi properly filed the discrimination complaint in the instant case on behalf of all affected miners (Tr. 13-14).

2. On November 26, 1980, the parties filed the following stipulations with respect to the Complainants whose names appear on Exhibit A of the discrimination complaint filed on June 30, 1980:

a. The attached Complainant Status Summary 1/ accurately reflects the regularly scheduled hours and starting times of the complainants on the day in question. (The regularly scheduled starting times of ineligible complainants have not been included.)

b. The attached Complainant Status Summary accurately reflects the number of hours the complainants worked and were paid for on the day in question.

c. The attached Complainant Status Summary accurately reflects the number of hours for which each of the eligible complainants is seeking pay.

d. Thirty-six of the complainants are not considered eligible for pay in this proceeding, for the reasons listed on the attached Complainant Status Summary. Certain of these ineligible complainants who did not work as scheduled still received pay from other sources, such as the Personal and Sick Leave and Floating Vacation provisions of the collective bargaining agreement. Others who did not work received workmen's compensation payments.

e. The Judge should utilize the Complainant Status Summary and the transcript as bases for determining the number of hours, if any, for which an eligible complainant is entitled to be paid.

f. If it is determined that Respondent is liable for any hours' pay to any complainant listed as an eligible complainant in the Complainant Status Summary, Respondent will determine the permanent job classification held by the complainant on January 30, 1980. Respondent will then multiply the standard hourly wage rate for that classification, as set forth in Appendix A-Part I of the collective bargaining agreement, by the number of hours to which the complainant is entitled, in order to determine the full amount of pay due the complainant.

1/ A copy of the document styled "complainant status summary" is appended to this decision as Appendix A.

B. Discussion

The activities giving rise to the instant claim of discrimination occurred on January 30, 1980, at the Respondent's Somerset No. 60 Mine. The affected miner-complainants were employees at the mine who were scheduled to work the day shift. Their regularly scheduled starting times ranged from 7 a.m. to 8:15 a.m. The facts and surrounding circumstances are set forth in the paragraphs below.

1. Activities Occurring Prior to 7 a.m.

Mr. Lloyd Hrutkay, a day shift mine mechanic and president of Local Union No. 1197, District 5, United Mine Workers of America, arrived at the Respondent's Somerset No. 60 Mine at approximately 5:40 a.m. on January 30, 1980 (Tr. 16-18). Thereafter, he was informed by Mr. Thomas Huddock, the midnight shift lampman, that the Otis automatic elevator had "gone down," or malfunctioned, at approximately 3:20 a.m. (Tr. 18, 51). This elevator is used to transport the miners to the coal seam (Tr. 17-18). Although Mr. Huddock did not explain the nature of the problem (Tr. 38), he did inform Mr. Hrutkay that the Otis Elevator Company had been contacted but that the elevator repairman had not yet arrived (Tr. 18).

At approximately 6 a.m., Mr. Paul Vancura, an electrical engineer employed by the Respondent, received a telephone call at his home from mine management pertaining to an unrelated problem. Mr. Vancura was informed that the rotary dump equipment located underground had encountered problems, or gone down, several hours earlier. Mr. Vancura was advised to go to the mine and investigate the problem (Tr. 134, 136-137).

Mr. Vancura arrived at the mine at approximately 6:40 a.m. At that time, mine management advised Mr. Vancura that he would not be able to go underground because the elevator was not functioning. Specifically, Mr. Vancura was informed by mine management that they were having trouble with the outer doors at the top level. Mr. Vancura was asked to determine the cause of the problem (Tr. 136-137).

Mr. Vancura proceeded to the elevator and noted that the outer doors were open approximately 8 to 10 inches, a condition that would prevent the elevator from performing. Certain individuals were instructed to prevent people from entering the elevator. Mr. Vancura then proceeded to the elevator machinery control room located atop the elevator. There, he found Mr. Joe Forte, the chief electrical foreman, and one of the Wilson Shop electricians. The three men proceeded to perform a rather thorough examination of the elevator (Tr. 137-138, 141-143).

According to Mr. Vancura, the test results indicated that the elevator was electrically sound (Tr. 138, 142-143). Following the test, he apprised Mr. Neal Merrifield, the assistant mine superintendent, that the sole problem with the elevator was a sticky door switch on the outer doors at the top level (Tr. 139). The switch, a sill trip switch, is activated when a mechanical

bar located inside the outer doors falls down to lock the outer doors in a closed position (Tr. 143-144). The switch functions as a safety device by insuring that the outer doors are completely closed before allowing the elevator car to descend, and thus prevents individuals on the top level from falling down the elevator shaft (Tr. 85, 145). However, once the doors close and the mechanical bar locks the doors, the elevator will operate. Once the car leaves the landing, the inside doors will not open unless one bends or breaks something (Tr. 257-258). On the day in question, the only problem was getting the doors to close. Closing the doors manually enabled the switch to operate in a normal fashion (Tr. 145).

Mr. Vancura and Mr. Forte informed Mr. Merrifield that the elevator was not in an unsafe condition (Tr. 156-157). Then, it appears that Mr. Vancura proceeded to the change room to prepare to go underground. By the time he returned to the elevator, Mr. Forte and the Wilson Shop electrician had already proceeded underground by way of the elevator. At approximately 7:10 a.m., Mr. Vancura boarded the elevator for the trip underground. Several attempts were made to close the outer doors manually before such doors would remain closed. Once they closed, the elevator transported Mr. Vancura to the bottom of the shaft (Tr. 139, 146, 156-157).

2. Activities Occurring Between 7 a.m. and 9:40 a.m.

Messrs. Hrutkay, Bostich, and Merrifield were intimately involved in the activities occurring between 7 a.m. and 9:40 a.m. The testimony of each of these witnesses reflects general agreement as to certain matters. There is some disagreement as to certain details which is significant enough to warrant summarizing the testimony of each witness separately. The findings of fact based on this testimony are set forth in Part IV(B)(2)(d) of this decision.

The testimony of Mr. Herbert Sutter, the elevator mechanic from the Otis Elevator Company who performed the January 30, 1980, elevator repairs, has not been summarized separately because most of the matters addressed by Mr. Sutter are reflected in, and in harmony with, the testimony of Mr. Merrifield. Findings of fact based on Mr. Sutter's testimony appear in Part IV(B)(2)(d) of this decision.

a. Mr. Hrutkay's Version

Mr. Hrutkay and his fellow mine mechanics were scheduled to begin work at 7 a.m. Mr. Hrutkay apprised his colleagues that the elevator was down (Tr. 18, 20). Mr. Hrutkay testified that when he first observed the elevator, Mr. Jack Price, the outside foreman, and Mr. Richard Matthews, a shop mechanic, were attempting to close the outer doors by banging them together (Tr. 23, 48). The inner doors were closing, but the outer doors were springing open approximately 1 foot each time such outer doors were forced together manually (Tr. 23). Mr. Hrutkay observed them perform this operation approximately five or six times, and deduced that the same problem had existed at 3:20 a.m. (Tr. 24, 37-38). To the best of Mr. Hrutkay's recollection, the elevator operated on those occasions when the men succeeded in manually closing the outer doors (Tr. 43).

Then, according to Mr. Hrutkay, at approximately 7:15 a.m., Mr. Merrifield approached and informed the men that the elevator was safe. According to Mr. Hrutkay, Mr. Merrifield accorded the men three options at that time: (1) either use the elevator to enter the mine, or (2) use the slope to walk into the mine, or (3) go home (Tr. 18, 24, 39). Mr. Hrutkay and the other men promptly boarded the elevator and the inner doors closed (Tr. 24-25, 39).

Mr. Hrutkay testified that the mine mechanics remained aboard the elevator for approximately 15 minutes while the men on the outside attempted to manually close the outer doors. He testified that he heard the outer doors bang together approximately five or six times. During this time, the elevator never began its descent to the bottom of the shaft. Finally, Mr. Gary Bostich, a mine committeeman, expressed both a strong desire to get off of the elevator and strong reservations about whether the elevator was safe to operate (Tr. 24-26, 39-41). The statement was made loud enough for all aboard the elevator to hear. The men promptly got off of the elevator (Tr. 26-27).

Mr. Hrutkay testified that he and Mr. Bostich then went to see Mr. Charles McGlothlin, the mine superintendent (Tr. 27, 47). Mr. Hrutkay testified that he wanted to tell Mr. McGlothlin certain things, but that Mr. McGlothlin abruptly cut him off, stating: "Lloyd, I want you to understand one thing. You're not going to run this mine." (Tr. 27-29). According to Mr. Hrutkay, Mr. McGlothlin accorded the miners the same three options mentioned by Mr. Merrifield, i.e., either use the elevator, or walk the slope or go home (Tr. 31). He testified that Mr. Bostich inquired as to whether the slope was safe, and that Mr. McGlothlin responded in the affirmative. He further testified that Mr. Bostich raised the issue of ice on the slope, and that Mr. McGlothlin responded by suggesting that the men carry some sand to deal with the problem (Tr. 27-28). At that point, Messrs. Hrutkay and Bostich left the mine superintendent's office (Tr. 27-28).

Mr. Hrutkay testified that he then talked to Federal mine inspector Guido Cantini. Inspector Cantini was at the Somerset No. 60 Mine at the time. Mr. Hrutkay testified that he informed the inspector that the elevator was not operating automatically, and that he requested an inspection. Inspector Cantini gave a noncommittal reply and left the mine without inspecting the elevator (Tr. 32, Exh. U-2).

Mr. Hrutkay testified that following his conversation with Inspector Cantini, he returned to the elevator and observed Mr. Sutter performing some type of work on it (Tr. 33). However, it appears that Mr. Hrutkay never spoke to Mr. Sutter (Tr. 49).

According to Mr. Hrutkay, at approximately 8:15 a.m., mine management stated that the elevator was safe to operate. At the miners' request, Mr. Hrutkay took a test ride to determine whether the elevator was safe. Everything functioned properly and, upon returning to the surface, he pronounced the elevator safe at approximately 8:15 a.m. or 8:20 a.m. Mr. Hrutkay testified that he did not know what Mr. Sutter did to repair the elevator (Tr. 33-34, 45-46).

Then, according to Mr. Hrutkay, he approached Mr. Merrifield and raised the pay issue. The gist of Mr. Hrutkay's inquiry was whether the men's time, for purposes of pay, would commence at their regularly scheduled starting time, i.e., whether the men would be paid for the time period encompassed by the safety dispute. Mr. Merrifield replied that the men would be paid "portal-to-portal" (Tr. 35). The term "portal-to-portal" refers to Article IV, Section b, Paragraph 1, of the National Bituminous Coal Wage Agreement of 1978, which provides, in part, that for "all inside Employees a work day of eight (8) hours from portal-to-portal * * * is established * * *" (Tr. 46, Exh. J-2). The message conveyed was that the men's starting time, for pay purposes, would commence when they boarded the elevator to go underground, and that the men would not be paid for the time period encompassed by the safety dispute (Tr. 35-36).

According to Mr. Hrutkay, an uproar ensued when the men learned of Mr. Merrifield's determination. Mr. Bostich, acting on instructions from Mr. Hrutkay, persuaded the men to go to work and to file a grievance over the pay issue. According to Mr. Hrutkay, the union persuaded the men to enter the mine at approximately 9:40 a.m. (Tr. 35-36). Mr. Hrutkay testified that the pay issue was the only issue that prevented the men from entering the mine after he pronounced the elevator safe at approximately 8:15 a.m. (Tr. 46). Mr. Hrutkay did not recall any further meetings with mine management aimed at resolving the dispute (Tr. 36).

b. Mr. Bostich's Version

Mr. Bostich's version of what occurred that day is generally in accord with Mr. Hrutkay's version. The two versions differ as to certain details. Mr. Bostich's version is set forth as follows:

Mr. Bostich testified that he arrived at the elevator at approximately 7 a.m. on January 30, 1980. The elevator's outer doors were not closing completely in that they remained approximately 8 to 12 inches apart. For approximately 10 or 15 minutes, the outside foreman and a mechanic attempted to manually close the outer doors. Then, the assistant supervisor arrived and tinkered with it for awhile in an attempt to close the doors. According to Mr. Bostich, Mr. Sutter arrived at approximately 7:30 a.m. (Tr. 55-57).

Mr. Bostich testified that before Mr. Sutter's arrival, mine management told the assembled mine mechanics to board the elevator. It appears from Mr. Bostich's testimony that the mine mechanics objected, stating that the doors were not closing (Tr. 57). At some point in the exchange, Mr. Merrifield accorded the men three options, i.e., either ride the elevator, or walk the slope or go home (Tr. 63).

According to Mr. Bostich, he and the other mine mechanics boarded the elevator after Mr. Sutter's arrival. Mr. Bostich testified that this occurred between 7:25 a.m. and 7:45 a.m. Once the men boarded, the inner doors closed. They could not see what happened to the outer doors. The elevator did not move, and the men heard those on the outside bang the outer doors together at

least six times. The men remained aboard the elevator for approximately 3 or 4 minutes, at which point Mr. Bostich expressed a rather strong desire to get off of the elevator, stating that he did not believe that the elevator was safe. The mine mechanics thereupon got off of the elevator (Tr. 58-59).

In response to a question from Mr. Merrifield, Mr. Bostich expressed the opinion that the elevator was unsafe, and indicated that he would not ride the elevator while it was in such condition. At that point, work resumed on the elevator (Tr. 59).

Mr. Bostich testified that after getting off of the elevator, he and Mr. Hrutkay went to Mr. McGlothlin and expressed their concerns about the elevator. He further testified that they informed Mr. McGlothlin that they did not want to ride the elevator until it was fixed properly. According to Mr. Bostich, Mr. McGlothlin started to get "a little bit smart-mouthed." Mr. Bostich testified that Mr. McGlothlin told them that if they were not going to ride the elevator, then to either walk the slope or go home. At that point, Mr. Bostich inquired as to the condition of the slope, and specifically asked whether it was safe to use. Mr. Bostich's testimony characterizes Mr. McGlothlin's response to the question as angry and somewhat sarcastic. According to Mr. Bostich, Mr. McGlothlin suggested, through the use of vulgar language, that he take a bag of sand with him. At that point, the meeting adjourned (Tr. 63-64). At approximately 10 a.m., Mr. Bostich checked the mine examiner's book and found entries recording ice on the slope and a broken handrail (Tr. 65-67).

Thereafter, at approximately 8:10 a.m., mine management apprised the men that the elevator problem had been corrected. Mr. Hrutkay completed his test ride at approximately 8:20 a.m. and pronounced the elevator safe to ride. Then, either Mr. Dickson or Mr. Error stood on a bench and addressed the men, stating they were going to perform mostly "dead work" underground because the rotary dump had gone down on the midnight shift. It appears from the tenor of Mr. Bostich's testimony that the speaker ended his presentation on a hand-clapping high note by stating: "How about let's go down and do our work." According to Mr. Bostich, the consensus amongst the miners was to go to work because the elevator was safe to ride (Tr. 67-69).

The next thing Mr. Bostich heard was Mr. Merrifield's statement that the men would not be paid for the time they had already spent at the mine, that their time would start when they boarded the elevator to go underground. The miners were angered by the decision, and Messrs. Bostich and Hrutkay returned to Mr. McGlothlin's office to discuss the matter. They apprised Mr. McGlothlin of Mr. Merrifield's decision, and notified him of a provision in the collective bargaining agreement which they interpreted as entitling the men to reporting pay for the time already spent at the mine. Mr. McGlothlin affirmed Mr. Merrifield's determination, and stated that the decision was final (Tr. 69-70). According to Mr. Bostich, the issue as to ice on the slope was not discussed during this meeting (Tr. 92). Messrs. Hrutkay and Bostich left the office, and it was decided that Mr. Bostich would apprise the men of the decision regarding pay.

The miners greeted the news with a chorus of boos and hisses. Mr. Bostich informed the men that the collective bargaining agreement required them to work under protest and to file a grievance over the pay issue. Mr. Bostich testified that it required "some time" to explain things to the men. Finally, the men boarded the elevator at approximately 9:40 a.m. to enter the mine (Tr. 70).

c. Mr. Merrifield's Version

Mr. Merrifield's version of the events is set forth as follows:

Mr. Merrifield testified that shortly after 7 a.m., he observed that the mine mechanics were still on the surface. He inquired of them as to why they had not gone to work. He testified that in response to the question, the mine mechanics stated that there was a problem with the elevator, that they felt it was unsafe, and that they were not going to use the elevator (Tr. 157). Mr. Merrifield further testified that he thereupon informed the mine mechanics that Messrs. Vancura and Forte had inspected the elevator and had concluded that a problem with a relay switch was preventing the outer doors from making contact; that the outer doors were a safety feature; that the elevator would not operate unless the outer doors made contact; that it was necessary to close the outer doors manually in order to make the elevator operate; and that once the outer doors were closed, the elevator would operate normally (Tr. 157-158, 210). It is significant to note, however, that notwithstanding this statement, mine management was not entirely certain at that point in time as to the precise nature or extent of the problem. Mr. Merrifield testified at a later point in his testimony that although a determination had been made that the switch was the cause of the problem, mine management did not really know what the problem was (Tr. 171-172).

Following the explanation, Mr. Merrifield requested the mine mechanics to go to work but they refused (Tr. 158).

Approximately 15 minutes later, the mine dispatcher and the slope motorman presented themselves at the elevator, and Mr. Merrifield requested them to go to work. Both men complied by boarding the elevator. The doors were closed manually and the elevator transported the two men underground (Tr. 158).

Thereafter, the motormen scheduled to begin work at 7:45 a.m. refused to enter the elevator. Mr. Merrifield testified that he explained the situation to them, that he requested them to go to work, and that they refused. Subsequent thereto, he addressed the men who were scheduled to begin work at 8 a.m., explained the problem to them and requested them to go to work (Tr. 159).

Mr. Merrifield testified that Mr. Sutter arrived at approximately 7:30 a.m. or 7:45 a.m. Mr. Merrifield explained the problem to Mr. Sutter, and requested that he examine the elevator, diagnose the difficulty, and determine whether the elevator was safe to operate (Tr. 159).

According to Mr. Merrifield, some of the mine mechanics entered the elevator at approximately 7:45 a.m. Two unsuccessful attempts were made to close the doors manually. Then, the men got off of the elevator and claimed that it was unsafe to operate. They refused to ride it (Tr. 161).

When Mr. Sutter completed his inspection, he informed Mr. Merrifield that the problem was in the sill trip switch and that the elevator was safe to use. However, Mr. Sutter was unsure as to how much time would be required to determine precisely what was wrong with the switch. Mr. Merrifield inquired as to whether he could use the elevator to transport the men underground and then turn the elevator over to him for repairs. Mr. Sutter responded in the affirmative (Tr. 159-160).

Then, at approximately 8:15 a.m., Mr. Merrifield addressed the miners, telling them that Messrs. Vancura, Forte and Sutter had inspected the elevator, that the problem was in the sill trip switch, and that the three men had determined that the elevator was safe to operate. The men still refused to ride the elevator. Mr. Merrifield thereupon instructed the men that only underground work was available, and accorded them three options, i.e., either ride the elevator, or walk the slope or go home. Then, Mr. Mike Error, the mine foreman, addressed the men, telling them that the elevator was safe to ride, and that the rotary dump was down. He requested the men to go to work, and the miners began to move toward the elevator. As some of the miners started to enter the elevator, someone asked Mr. Merrifield about pay. Mr. Merrifield responded that in accordance with both the collective bargaining agreement and company policy, the men would be paid "portal-to-portal." The miners thereupon decided against entering the elevator, and began arguing and talking amongst themselves (Tr. 160-162).

Mr. Merrifield testified that at that point he reached the conclusion that the miners were refusing to work, because none of them were going to enter the elevator, and because none of them wanted to walk the slope. He thereupon took the elevator out of service and turned it over to Mr. Sutter for repairs (Tr. 162).

Mr. Merrifield testified that he proceeded to Mr. McGlothlin's office, and explained the matter to him. Shortly thereafter, Messrs. Hrutkay and Bostich entered the office accompanied by other members of the local union. They asked Mr. McGlothlin whether he was going to pay them from the time their shift started. Mr. McGlothlin apprised them of company policy and affirmed Mr. Merrifield's determination. Later, during the same meeting, the issue was raised as to whether the slope was safe. Messrs. Merrifield and McGlothlin responded that the area had been examined during the preshift examination and that no unsafe conditions had been reported. Based on that report, the men were told that the slope was safe to enter. Mr. Merrifield testified that the subject of possible ice on the slope was raised, that the fireboss book indicated that the slope was safe, and that it was suggested that the men take sand with them (Tr. 163-164).

The employees used the elevator to enter the mine at approximately 9:40 a.m. (Tr. 164).

d. Findings Based on the Three Versions

Messrs. Hrutkay and Bostich and their fellow mine mechanics arrived at the elevator at approximately 7 a.m. on January 30, 1980. They observed Mr. Jack Price, the outside foreman, and Mr. Richard Matthews, a shop mechanic, attempting to manually close the outer doors by banging them together. With each attempt, the doors would spring open approximately 8 to 12 inches. There was no problem with the inside doors. Mr. Hrutkay appears to have inferred that this was the same problem that had existed at 3:20 a.m. Additionally, Mr. Hrutkay knew that the elevator repairman had not yet arrived to correct the problem.

Mr. Merrifield, after observing that the mine mechanics had not gone underground, approached them and inquired as to why they were still on the surface. The mine mechanics stated that there was a problem with the elevator, that they felt it was unsafe, and that they were not going to use the elevator. Mr. Merrifield thereupon explained that Messrs. Vancura and Forte had inspected the elevator and had concluded that a problem with a relay switch was preventing the outer doors from making contact; that the outer doors were a safety feature; that the elevator would not operate unless the outer doors made contact; that it was necessary to close the outer doors manually; and that once the outer doors were closed, the elevator would operate normally. He thereupon requested the men to board the elevator and go to work. However, it is significant to note that at that point in time mine management was not entirely certain as to the precise nature and extent of the problem. Mr. Merrifield accorded the mine mechanics three options, i.e., either ride the elevator, or walk the slope or go home. The mine mechanics boarded the elevator, and the inside doors closed. They heard the men on the outside make several attempts to close the outer doors by banging such doors together. After approximately 3 or 4 minutes, Mr. Bostich expressed a rather strong desire to get off of the elevator, stating that he did not believe the elevator was safe. The statement was made loud enough for all aboard the elevator to hear. The men got off of the elevator. Then, in response to a question, Mr. Bostich told Mr. Merrifield that, in his opinion, the elevator was unsafe, and stated that he would not ride the elevator while it was in such condition.

Messrs. Hrutkay and Bostich thereupon proceeded to Mr. McGlothlin's office and explained the problem. Mr. McGlothlin took the same approach as Mr. Merrifield and told them to either use the elevator, or walk the slope or go home. Mr. Bostich thereupon asked Mr. McGlothlin whether the slope was safe to use and specifically raised the issue of ice on the slope. Mr. McGlothlin, through the use of a rather explicit vulgarity, advised Mr. Bostich to carry a bag of sand. The entries in the mine examiner's book recorded the presence of ice on the slope and a broken handrail. Messrs. Hrutkay and Bostich thereupon left Mr. McGlothlin's office.

Then, Mr. Hrutkay approached Inspector Cantini, advised him that the elevator was not operating, and requested an inspection. Inspector Cantini gave a rather noncommittal reply, and left the property without inspecting the elevator.

At various times between approximately 7:30 a.m. and 8 a.m., Mr. Merrifield addressed other groups of miners as they reported to the elevator to begin work. It appears that Mr. Merrifield informed all of these groups of the determination made by Messrs. Forte and Vancura. All refused to board the elevator, except the mine dispatcher and the slope motorman.

At some point in time between 7:15 (Tr. 261) and 7:30 a.m., Mr. Sutter arrived at the mine to attend to the elevator problem. Mr. Merrifield explained the problem and the findings of Messrs. Forte and Vancura, and requested an examination of the elevator, a diagnosis of the problem, and a determination as to whether the elevator was safe to operate. Upon completing the examination, Mr. Sutter informed Mr. Merrifield that the problem was in the sill trip switch and that it would be safe to use the elevator. However, Mr. Sutter was uncertain as to the amount of time that would be required to determine precisely what was wrong with the switch. Mr. Merrifield inquired as to whether he could use the elevator to transport the men underground and then turn the elevator over to him for repairs. Mr. Sutter responded in the affirmative. It should be noted that the elevator was an important part of the escapeway system for the three sections on the left side of the mine (Tr. 220-224).

At approximately 8:10 or 8:15, mine management apprised the miners that the elevator was safe to operate. Mr. Hrutkay, acting pursuant to the request of the miners, took a test ride to determine whether the elevator was safe. Everything functioned properly during the test ride, and, upon returning to the surface, Mr. Hrutkay pronounced the elevator safe. At approximately 8:15 a.m., the miners headed toward the elevator for the trip underground. At that point, Mr. Hrutkay raised the pay issue with Mr. Merrifield. Mr. Merrifield stated that the men would not be paid for the time they had already spent at the mine. The miners were angered by the decision and all movement in the direction of the elevator ceased. Mr. Merrifield reached the conclusion that the miners were refusing to work and that they were not going to use the elevator. Accordingly, he removed it from service and turned it over to Mr. Sutter for repairs.

Mr. Merrifield went to the mine superintendent's office and explained the matter to Mr. McGlothlin. Shortly thereafter, Messrs. Hrutkay and Bostich, accompanied by other members of the local union, entered Mr. McGlothlin's office to discuss the matter with him. They told Mr. McGlothlin about Mr. Merrifield's decision, and notified him of a provision in the collective bargaining agreement which they interpreted as entitling the men to reporting pay for the time already spent at the mine. Mr. McGlothlin then apprised the men of company policy, affirmed Mr. Merrifield's determination, and stated that the decision was final. It is possible, although unlikely, that the issue of ice on the slope was raised again during this meeting.

After Messrs. Hrutkay and Bostich left the superintendent's office, they decided that Mr. Bostich would inform the miners of the decision regarding pay.

The miners greeted the news with a chorus of boos and hisses. The miners were told that the provisions of the collective bargaining agreement required them to work under protest and to file a grievance over the pay issue. It required "some time" to explain things to the men. Finally, the men boarded the elevator at approximately 9:40 a.m. to enter the mine. The elevator repairs had been completed at approximately 8:45 a.m. (Tr. 262-263). 2/

The pay issue was the sole issue that prevented the men from entering the mine at 8:15 a.m.

3. Safety Concerns

Mr. Hrutkay was a mine mechanic with 12 years of experience in repairing the electrical components of mechanical equipment, such as locomotives (Tr. 16, 50-51). It appears that he had no experience as relates to performing repair work on the elevator (Tr. 29).

Mr. Hrutkay was concerned that banging the doors together manually would have an adverse effect on the automatic switches. His experience gained from

2/ On January 31, 1980, the Mine Safety and Health Administration's Washington, Pennsylvania, field office received a written complaint from the mine safety committee regarding the elevator (Exh. U-2). During the ensuing MSHA investigation on February 1, 1980, Federal mine inspector John Poyle issued Citation No. 626046 alleging a violation of mandatory safety standard 30 C.F.R. § 75.1725(a) in that "the outside doors on the Anderson shaft elevator were not working properly for the 8 a.m. shift on January 30, 1980, in that the outside doors had to be closed manually. This elevator is used as portal for men entering and exiting the mine" (Exh. J-4). On February 6, 1980, the citation was vacated by Federal mine inspector Alvin Shade, acting on instructions from the subdistrict manager, based upon MSHA's determination that the condition did not violate mandatory safety standard 30 C.F.R. § 75.1725(a) (Exhs. J-5, U-2). A March 3, 1980, memorandum from Joseph O. Cook, Administrator for Coal Mine Safety and Health, to Donald W. Huntley, District Manager, sets forth a subsequent legal opinion concerning 30 C.F.R. § 75.1725 (Exh. U-3). MSHA's opinion on the matter is set forth in Exhibit U-3 as follows:

"Section 75.1725 states in part that:

"a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

"In our view, the elevator doors in question were designed and installed to operate automatically. If the operator wishes to manually operate landing doors, the elevator should be refitted with this type of door. However, if they order automatic doors, they should be maintained in that condition. The failure to do so, and to not remove from service until a knowledgeable person had determined the exact cause of the malfunction and corrected it, or determined that the malfunction would not detract from the safe operation of the elevator, would constitute a violation of Section 75.1725."

working with other types of equipment indicated that the banging could knock the arc chutes, wires and coils off the contactors. He was also concerned about the possibility of the elevator descending uncontrolled to the bottom of the shaft (Tr. 30-31). However, it is significant to note that Mr. Hrutkay did not express any of these concerns to Inspector Cantini when making the inspection request (Tr. 44-45, 47-48).

Mr. Bostich's duties as a mine mechanic required him to perform mechanical work on electrical equipment. At least some of this equipment was designed to operate automatically, as opposed to manually. Mr. Bostich had been trained to remove automatic equipment from service when it failed to operate properly. When an electrical component malfunctions, it can prevent equipment designed to operate automatically from operating automatically. When the components burn out, the equipment is ordinarily "down" (Tr. 60-62).

Mr. Bostich was not concerned about an uncontrolled descent. Rather, he feared that the malfunction in the circuitry might cause the elevator to become stuck in the shaft and trap those aboard it (Tr. 60, 87). Additionally, he feared the possibility of a fire generated by an electrical arc (Tr. 100-101).

In the past, manual operation of the elevator had been accomplished through a procedure different than the one used on the morning of January 30, 1980. On January 30, 1980, the inner doors were closed first and then the outer doors were closed. The procedure used in the past was exactly the opposite. In the past, the elevator operator closed the outer doors manually from inside the elevator and then closed the inner doors (Tr. 99-100). Mr. Sutter, a trained elevator mechanic, used a similar technique on January 30, 1980 (Tr. 256).

4. Condition of the Slope

A joint union/company inspection party examined the slope after 9:40 a.m. Mr. Mark Segedi, a continuous miner operator and a member of the mine safety committee, and Messrs. Bostich and Merrifield were members of the inspection party (Tr. 71, 124, 164-166).

The slope was angled at 17 degrees, and was approximately 1,200 to 1,500 feet in length (Tr. 74, 91, 166). A conveyor belt, hoist equipment and a staircase were located in the slope.

The conveyor belt was located on the lefthand side of the slope and was used to transport coal out of the mine (Tr. 72). The hoist was located on the righthand side of the slope and was used to transport supplies into the mine. An engine-powered, surface-mounted cable hoist caused the hoist cars to ascend or descend through the slope on a railroad track (Tr. 72, 75-76).

The concrete staircase was located between the conveyor belt and the hoist equipment. The steps were approximately 14 to 15 inches wide and had 6- to 8-inch risers (Tr. 73, 232). Steel girders, or "I" beams, were located

to the right of the staircase. The girders were spaced approximately 3 to 5 feet apart and were numbered for identification. A handrail was located on the righthand side of the steps. The handrail was bolted to the girders (Tr. 72, 74-76, 91).

The inspection party encountered a patch of ice on the steps which extended from approximately 141 girder to 152 girder. This location was at the approximate midpoint of the slope. The patch of ice was approximately 15 feet in length. The thickness of the ice varied from approximately 1 inch to approximately 4 inches. The handrail was broken at that location and, accordingly, it was necessary to negotiate the patch of ice without the assistance of a handrail. It required a substantial degree of caution to successfully negotiate the patch of ice (Tr. 78-79, 91, 102-103, 125-127, 164-165, 233).

The combination of ice and a broken handrail indicates that the danger of falling was great. The slope did not afford a safe means of access to the mine for a large contingent of men. If one man had fallen on the ice, he could have caused some or all of the men in front of him to fall in domino sequence.

5. Governing Legal Standard and Application of the Law to the Facts

The question presented in this case is whether the Complainants were deprived of earnings in retaliation for engaging in activity protected by section 105(c)(1) of the 1977 Mine Act. The protected activity alleged is a refusal to work under unsafe or unhealthful conditions.

Section 105(c)(1) of the 1977 Mine Act provides that:

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

In Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001, 1980 CCH OSHD par. 24,878 (1980), the Federal Mine Safety and Health Review Commission (Commission) held that section 105(c)(1) of the 1977 Mine Act accords a miner the right to refuse to work under conditions which he believes, in good faith, to be unsafe or unhealthful. The Commission's Pasula decision has not "definitely set all the contours of the right to refuse to work." 2 FMSHRC at 2793. However, it appears that some objective evidence supporting a conclusion that a threat to health or safety existed is necessary before it can be determined that the miner has proved a condition believed, in good faith, to be unsafe or unhealthful, and thus be able to rely upon such reason as a foundation for the refusal to work. 2 FMSHRC at 2793-2794.

As relates to the burden of proof, the Commission held in Pasula that:

> [T]he complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

2 FMSHRC at 2799-2800.

At the outset, one critical point should be noted. The testimony of Messrs. Sutter and Vancura proves that the elevator was safe to operate. Neither the defect existing on January 30, 1980, nor closing the outside doors manually constituted an unsafe condition. However, the fact that the elevator was actually safe to use does not mean that the miners engaged in unprotected activity when they refused to use it. The right to refuse to work accorded by section 105(c)(1) of the 1977 Mine Act is not geared to whether the condition is in fact unsafe, but to whether the miner believes, in good faith, that the condition is unsafe.

A preponderance of the evidence establishes that the Complainants who were scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m., engaged in protected activity on the morning of January 30, 1980, but that such protected activity ceased at approximately 8:15 a.m. Various arguments have been raised as to the existence of the slope as an alternate means of access to the mine. These arguments are rejected because the slope did not afford safe access to the mine for a large body of men.

The discrimination complaint will be dismissed as relates to those Complainants whose regularly scheduled starting time was 8:15 a.m. because the record fails to show that such Complainants engaged in activity on January 30, 1980, protected by section 105(c)(1) of the 1977 Mine Act. Therefore, the discussion set forth in the following paragraphs will be confined to those Complainants whose regularly scheduled starting times were 7 a.m., 7:45 a.m. and 8 a.m.

As relates to the time period between 7 a.m. and 8:15 a.m., the record discloses that the Complainants scheduled to begin work between 7 a.m. and 8 a.m. refused to use the elevator for safety reasons. This activity was protected activity within the meaning of section 105(c)(1) because some objective evidence existed to support a good faith belief on their part that the elevator was unsafe. The objective evidence consisted of: (1) the failure of the elevator's outer doors to function normally; (2) the violent manner in which company personnel were attempting to manually close the outer doors; (3) the repeated, violent efforts needed to successfully close the outer doors manually; and (4) the Respondent's unexplained departure from the method used in the past when it had been necessary to close the outer doors manually.

The Respondent concedes that protected activity occurred in the form of Messrs. Hrutkay and Bostich notifying Mr. Merrifield of their concern about the elevator. However, Respondent appears to argue that the subsequent refusal to work was not protected activity because mine management had discovered and investigated the problem prior to 7 a.m. and, as a result, had determined that the elevator was safe. According to Respondent, Mr. Merrifield gave a reasonable response to Messrs. Hrutkay's and Bostich's protected activity by relaying to them the results of Mr. Vancura's investigation. According to the Respondent, the activities occurring subsequent thereto were unprotected (Respondent's Posthearing Brief, pp. 10-12; Respondent's Reply Brief, pp. 6-7).

I disagree with the Respondent's position because, in effect, it penalizes the miners for refusing to accept management's evaluation of the safety hazard. A miner is not required to accept his supervisor's evaluation of the danger. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974). In fact, the record reveals that the so-called "reasonable response" from mine management was anything but reasonable. Mr. Merrifield was attempting to persuade the miners to use the elevator and attempting to persuade them that it was safe to do so at a point in time

when, by his own admission, mine management did not know the precise nature and extent of the problem. The miners acted prudently by not substituting Mr. Merrifield's judgment for their own judgement.

The Respondent argues, in the alternative, that if protected activity did not cease when Mr. Merrifield explained the results of Mr. Vancura's investigation to Messrs. Hrutkay and Bostich, then it definitely ceased when Mr. Hrutkay apprised Inspector Cantini of the problem and Inspector Cantini took no action. 3/ According to the Respondent, Inspector Cantini's failure to investigate the complaint constituted, in effect, his determination that the elevator's condition neither violated a mandatory safety standard nor constituted an imminent danger. Therefore, according to the Respondent, there was no need for the statutory protection regarding Mr. Hrutkay's complaint to continue (Respondent's Posthearing Brief, pp. 11-12; Respondent's Reply Brief, p. 7).

The Respondent's interpretation of the legal consequences of the inspector's inaction falls squarely within the realm of the ludicrous. Accordingly, the Respondent's interpretation is rejected.

Additionally, the Respondent contends that the miners' safety concerns were unreasonable. In support of its position, the Respondent points to the fact that the slope motorman and the dispatcher used the elevator despite the door problem, and to the fact that all of the miners were ready to use the elevator at 8:15 a.m. in spite of the fact that no repairs had yet been made (Respondent's Posthearing Brief, p. 12). However, these considerations do not establish that the miners' belief was unreasonable as relates to whether the elevator was safe. The fact that the dispatcher and the slope motorman used the elevator to enter the mine, standing alone, raises an ambiguity. Although it could be interpreted as tending to support the Respondent's position, it could also be interpreted as either poor judgment or as

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3/ The Complainants characterize Inspector Cantini's actions as improper. However, Exhibit U-2, a copy of a letter from Mr. Donald W. Huntley, District Manager, Coal Mine Safety and Health District 2, to Mr. Harry W. Nicklow, offers the following explanation for Inspector Cantini's actions:

"Inspector Cantini arrived at the mine about 7:20 a.m. He was informed by mine management that the shaft guard door was being closed manually by an assigned person. Cantini went into the lamp house and observed the door being closed manually and persons being transported in and out of the mine. While dressing and preparing for the inspection, he was informed of the same condition by Lloyd Hrutkay, President, U.M.W.A. Local Union 1197. Cantini told him he had observed the shaft guard door being closed manually, but did not give a conclusive response. While proceeding through the lamp house toward the shaft entrance to start his inspection, he heard mine management inform the workmen that they were to ride the elevator, walk the slope, or go home. At that point, Cantini called his supervisor, informed him a labor dispute had occurred, and was instructed to leave the property in accordance with instructions in the Coal Mine Inspectors Manual."

a decision to simply remain silent in order to avoid a confrontation with management. Similarly, the fact that the miners were willing to use the elevator at 8:15 a.m. is not dispositive. It had been pronounced safe by Mr. Hrutkay after his test ride and it appears that the miners thought it had been repaired.

As relates to the second element of the Complainants' prima facie case, the evidence clearly shows that the determination to deny pay for the time period prior to 8:15 a.m. was motivated by the Complainants' protected activity. Mine management clearly knew, as demonstrated by Mr. Merrifield's testimony, that the miners had refused to use the elevator for safety reasons. The decision with respect to pay was motivated by the safety dispute, and, to an extent, was apparently intended to penalize the miners for refusing to accept management's appraisal of the danger. Under the circumstances, it is immaterial that the Respondent elected to justify its actions by reliance on the "portal-to-portal" pay provisions of the collective bargaining agreement and on company policy.

In view of the foregoing, Pasula requires the mine operator to affirmatively defend by showing that he was motivated by the miners' unprotected activities, and that he would have taken adverse action against the miners in any event for the unprotected activities alone. The Respondent has not shown that unprotected activities were involved in its decision to deny pay. In fact, no unprotected activities occurred between 7 a.m. and 8:15 a.m. The decision to deny pay was motivated solely by protected activity.

The activities occurring after 8:15 a.m. were not protected by section 105(c)(1) of the 1977 Mine Act. The refusal to work under conditions believed, in good faith, to be unsafe ended at 8:15 a.m. when Mr. Hrutkay pronounced the elevator safe and the men began to move toward the elevator with the intent to use it. When the pay issue was raised, all movement toward the elevator ceased. Even Mr. Hrutkay testified that the pay issue was the only thing that prevented the men from entering the mine at 8:15 a.m.

The Complainants who were scheduled to begin work at 7 a.m, 7:45 a.m. and 8 a.m., however, seek a remedy for the time period between 8:15 a.m. and 9:40 a.m. by claiming that such time was lost as a result of the Respondent's retaliatory or discriminatory action. The Complainants contend that the delay was caused by the Respondent's pay announcement and that such delay could have been avoided if the Respondent had used reasonable restraint. Additionally, the Complainants contend that the elevator was out of service until 9:40 a.m. (Complainants' Posthearing Brief, p. 14; Complainants' Reply Brief, pp. 8-9).

I disagree with the contention that such considerations entitle the Complainants to a remedy covering the time period from 8:15 a.m. to 9:40 a.m. Section 105(c)(1) authorizes a refusal to work under conditions believed, in good faith, to be unsafe or unhealthful. It does not authorize a refusal to work over a pay dispute. Therefore, according the Complainants a remedy for

the time period encompassed by the pay dispute would do violence to the provision set forth in the statute for securing redress for violations of section 105(c)(1). Such self-help remedies are not encompassed by the statute. If a miner suffers discrimination, then section 105(c) accords him a remedy and a lawful means to secure it.

Furthermore, one additional consideration is noteworthy. The work stoppage over the pay issue occurred immediately following the refusal to work under conditions believed, in good faith, to be unsafe. The timing of these two events is attributable entirely to chance. The pay dispute would not have arisen at 8:15 a.m. had Mr. Hrutkay not posed, and Mr. Merrifield not answered, the question concerning pay at that precise point in time. Under other circumstances, the miners might not have learned of the company's decision until they received their pay checks several days later. Their rights should be the same in both instances. Section 105(c)(1) would not authorize a work stoppage in the latter case, and therefore should not be construed to authorize it in the former.

In view of the foregoing, I conclude that the Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. engaged in activity protected by section 105(c)(1) between their regularly scheduled starting times and 8:15 a.m. on January 30, 1980. I further conclude that the Respondent discriminated against such Complainants in violation of section 105(c)(1) by denying them pay for the time period between their regularly scheduled starting times and 8:15 a.m. 4/

V. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. Bethlehem Mines Corporation and its Somerset No. 60 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

4/ The Complainants prayed for the assessment of an appropriate civil penalty for the Respondent's violation of section 105(c) of the 1977 Mine Act. This request will be denied for two reasons.

First, the proceeding was filed solely pursuant to section 105(c)(3) of the 1977 Mine Act. Civil penalty proceedings before the Commission must be filed pursuant to section 110 of the 1977 Mine Act. Accordingly, it must be concluded that the Commission's authority to assess civil penalties has not been properly invoked.

Second, the provisions of sections 105(a), 105(c)(3), 105(d), 110(a), and 110(k), collectively indicate that the 1977 Mine Act requires civil penalties to be proposed by the Secretary of Labor. Commission jurisdiction attaches in penalty matters when the operator has notified the Secretary of Labor that it intends to contest the Secretary's penalty assessment. Since these steps have not been followed in this case, the assessment of a civil penalty by the Commission would be premature at this stage.

3. The Mine Safety and Health Administration conducted an investigation of the dispute which is the subject matter of this case and concluded that a violation of section 105(c) of the 1977 Mine Act had not occurred.

4. Mark Segedi properly filed the discrimination complaint in this case with the Federal Mine Safety and Health Review Commission on behalf of all affected miners.

5. The Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. engaged in activity protected by section 105(c)(1) of the 1977 Mine Act on January 30, 1980, commencing at their regularly scheduled starting times and ending at 8:15 a.m.

6. The Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. engaged in activity unprotected by section 105(c)(1) of the 1977 Mine Act on January 30, 1980, from 8:15 a.m. to 9:40 a.m.

7. The Respondent discriminated against the Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. by denying them pay from their regularly scheduled starting times to 8:15 a.m.

8. The Complainants scheduled to begin work at 8:15 a.m. did not engage in activity protected by section 105(c)(1) of the 1977 Mine Act on January 30, 1980.

9. All of the conclusions of law set forth in Part IV, supra, are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

The parties filed the posthearing submissions identified in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

A. IT IS ORDERED that the above-captioned proceeding be, and hereby is, DISMISSED as to those Complainants who were scheduled to begin work at 8:15 a.m. on January 30, 1980. Such Complainants are identified as B. G. Miller; R. Filby; D. W. Clark; C. J. Zukauckas; S. A. Jestat; T. L. Pysh; R. T. Harris; D. Phillips; G. R. Wheeler; C. J . Rocco; S. Durko, Jr.; L. T. Pruski; J. R. Kennedy; R. T. Rados; J. E. Karpoff; M. Toth; J. E. Timlin; H. W. Ambrosy; G. A. Dean; and G. S. McKeta.

B. IT IS FURTHER ORDERED that Respondent (1) immediately determine the permanent job classification held by the following Complainants on January 30,

1980, and (2) multiply the standard hourly wage rate for that classification, as set forth in Appendix A, Part I, of the collective bargaining agreement, by the number of hours of back pay to which each respective Complainant is entitled:

Complainant	Regularly Scheduled Starting Time; January 30, 1980	Hours of Back Pay Due
S. J. Ezarik	8:00 a.m.	.25
E. P. Avery	8:00 a.m.	.25
A. Antanovich	8:00 a.m.	.25
E. H. Rosemier, Jr.	8:00 a.m.	.25
M. Zoldak	8:00 a.m.	.25
J. Olesky	8:00 a.m.	.25
C. Avery	8:00 a.m.	.25
W. E. Clark	8:00 a.m.	.25
L. Casper	8:00 a.m.	.25
F. Paulish	8:00 a.m.	.25
A. R. Barker	8:00 a.m.	.25
A. Rusilko	8:00 a.m.	.25
C. L. Phillips	8:00 a.m.	.25
A. J. Seykoski, Jr.	8:00 a.m.	.25
J. M. Jiblets	8:00 a.m.	.25
W. L. Brown	8:00 a.m.	.25
S. T. Forte	8:00 a.m.	.25
G. J. Evans	8:00 a.m.	.25
K. R. Watkins	7:45 a.m.	.50
J. J. Kurucz	8:00 a.m.	.25
M. L. Hoyt	8:00 a.m.	.25
T. J . Smith	8:00 a.m.	.25
D. Wytovich	7:45 a.m.	.50
R. D. Stauffer	8:00 a.m.	.25
F. Pabian	7:45 a.m.	.50
T. M. Burger	8:00 a.m.	.25
C. Zukauckas	8:00 a.m.	.25
R. Mulac	8:00 a.m.	.25
T. P. Grimes	8:00 a.m.	.25
S. Clark	8:00 a.m.	.25
F. Perri	8:00 a.m.	.25
J. Viara	8:00 a.m.	.25
W. White	7:45 a.m.	.50
N. Guriel	7:45 a.m.	.50
J. C. Fiem	7:45 a.m.	.50
S. Robertson	7:45 a.m.	.50
C. J. Washlack	7:45 a.m.	.50
R. B. Taylor	7:45 a.m.	.50
J. Fidazzo	7:45 a.m.	.50
R. L. Emery	7:45 a.m.	.50
R. A. Chaney	7:45 a.m.	.50

L. T. Bizet	7:45 a.m.	.50
T. Taylor	7:45 a.m.	.50
F. DiBasilio	7:45 a.m.	.50
J. Antanovich	7:45 a.m.	.50
J. Fidazzo	7:45 a.m.	.50
S. Kotchman	8:00 a.m.	.25
C. E. Montgomery	7:00 a.m.	1.25
J. E. Carnatham	8:00 a.m.	.25
J. G. Zerambo	8:00 a.m.	.25
R. S. Martos	7:00 a.m.	1.25
A. J. Martos	8:00 a.m.	.25
C. M. Vilcesk	7:00 a.m.	1.25
K. E. Wiley	7:00 a.m.	1.25
J. J. Stepko	7:00 a.m.	1.25
F. V. Femia	8:00 a.m.	.25
S. W. Perchinsky	7:00 a.m.	1.25
S. Ezarik	7:00 a.m.	1.25
J. S. Glemba	7:00 a.m.	1.25
T. E. Zgorliski	7:00 a.m.	1.25
A. R. Fiem	7:00 a.m.	1.25
R. L. Scicchitano	7:00 a.m.	1.25
J. Stepko	7:00 a.m.	1.25
R. Hopkins	7:00 a.m.	1.25
P. A. Skirchak	7:00 a.m.	1.25
L. N. Hrutkay	7:00 a.m.	1.25
G. C. Denny	7:00 a.m.	1.25
G. Bostich	7:00 a.m.	1.25
D. L. Tiberie	7:00 a.m.	1.25
J. H. Zamiska	8:00 a.m.	.25
J. F. Piasecki	7:45 a.m.	.50
R. Gatling	8:00 a.m.	.25
B. F. Vischio	7:45 a.m.	.50
J. L. Antanovich	8:00 a.m.	.25
J. S. Kubovcik	8:00 a.m.	.25
N. Bosick	8:00 a.m.	.25
M. J. Rebich	8:00 a.m.	.25
L. Huey	8:00 a.m.	.25
J. Motichak	8:00 a.m.	.25
E. J. Lacock	8:00 a.m.	.25
M. Poye, Jr.	8:00 a.m.	.25
E. Ambrosey	8:00 a.m.	.25
J. E. Puskarich	8:00 a.m.	.25
K. G. Thompson	8:00 a.m.	.25
L. Rossero	8:00 a.m.	.25
J. Linnen	8:00 a.m.	.25
L. DiBasilio	8:00 a.m.	.25
A. Kiski	8:00 a.m.	.25
E. Deresh	8:00 a.m.	.25
J. J. DiBasilio	8:00 a.m.	.25
R. E. Main	8:00 a.m.	.25
J. L. Johnson	8:00 a.m.	.25

C. IT IS FURTHER ORDERED that the Complainants identified in Part B of this order, be and hereby are, awarded interest at the rate of 6 percent per annum on their respective back pay awards, commencing on the day following the day upon which such pay was due in 1980, and ending on the day when such back pay award is actually paid.

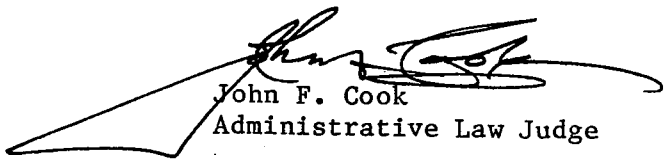
D. IT IS FURTHER ORDERED that the Respondent pay the back pay and interest awarded herein within the next 30 days.

E. IT IS FURTHER ORDERED that the Respondent clear the employment records of the Complainants identified in Part B of this order of all unfavorable references, if any, concerning the activities that occurred prior to 8:15 a.m. on January 30, 1980.

F. IT IS FURTHER ORDERED that Respondent refrain from discriminating against or interfering with the Complainants identified in Part B of this order because of any activities which are protected under section 105(c) of the 1977 Mine Act.

G. IT IS FURTHER ORDERED that Respondent reimburse the Complainants identified in Part B of this order for all costs and expenses, including attorney's fees, reasonably incurred in connection with this proceeding. Counsel for the parties are directed to confer and attempt to agree as to the amount of such costs and expenses. If they are unable to agree, the Complainants identified in Part B of this order will, within 60 days from the date of this decision, file an itemized statement of costs and expenses. Thereafter the Administrative Law Judge will, after affording the parties an opportunity to be heard, determine the amount of reimbursable costs and expenses to be recovered by the Complainants identified in Part B of this order. For this purpose, I retain jurisdiction of this proceeding.

H. IT IS FURTHER ORDERED that the Respondent within 15 days from the date of this order, post a copy of this decision and order on all bulletin boards at the mine where notices to miners are normally placed and shall keep it posted there, unobstructed and protected from the elements and from unauthorized removal, for a consecutive period of 60 days.



John F. Cook
Administrative Law Judge

Distribution:

Kenneth J. Yablonski, Esq., Yablonski, King, Costello & Leckie, 500 Washington Trust Building, Washington, PA 15301 (Certified Mail)

Thomas W. Ehrke, Esq., Senior Industrial Relations Attorney-Coal, Bethlehem Mines Corporation, Room 1871, Martins Tower, Bethlehem, PA 18016 (Certified Mail)

Harrison B. Combs, Jr., Esq., United Mine Workers of America, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

COMPLAINANT STATUS SUMMARY

KEY: 3rd Shift = Midnight Shift
1st Shift = Day Shift
2nd Shift = Evening Shift
(RSST) = Regularly scheduled starting time

HECK UMBER	NAME	Jan. 30, '80 REGULARLY SCHEDULED HOURS	Jan. 30, '80 HOURS WORKED AND PAID FOR	AMOUNT OF HOURS REQUESTED	INELIGIBLE COMPLAINANTS, AND REASON FOR INELIGIBILITY
503	M. Mayernik	8 -	0	None	Absent-did not report to work
510	S. J. Ezarik	8 (RSST-8AM)	6.4	1.6	
76	E. P. Avery	8 "	6.6	1.4	
349	A. Antanovich	8 "	6.6	1.4	
51( )	E. H. Rosemier, Jr.	8 "	6.6	1.4	
655	M. Zoldak	8 "	6.4	1.6	
72	J. Olesky	8 "	6.6	1.4	
87	C. Avery	8 "	6.6	1.4	
132	W. E. Clark	8 "	6.4	1.6	
152	L. Casper	8 "	6.6	1.4	
674	F. Paulish	8 "	6.6	1.4	
449	J. H. Thompson	10 -	10	None	Worked on 1st Shift
112	A. R. Barker	8 (RSST-8AM)	6.6	1.4	
114	A. Rusilko	8 "	6.6	1.4	
273	W. F. Pape	8.5	8.5	None	Worked on 2nd Shift
625	P. D. Nonack	8 -	8.5	None	Worked on 3rd Shift
35	M. Wytovich	8 -	8.5	None	Worked on 1st Shift
598	W. A. Rosena	8 -	8	None	Worked on 3rd Shift
611	J. Vahaly	8 -	8.5	None	Worked on 1st Shift
21	B. G. Miller	8 (RSST-8:15AM)	6.6	1.4	
36	E. Scott	8 -	0	None	Workmen's Compensation-Absent
78	R. Filby	8 (RSST-8:15AM)	6.6	1.4	
89	C. L. Phillips	8 (RSST-8AM)	6.6	1.4	
101	A. J. Seykoski, Jr.	8 "	6.6	1.4	

CHECK NUMBER	NAME	Jan. 30, '80 REGULARLY SCHEDULED HOURS	Jan. 30, '80 HOURS WORKED AND PAID FOR	AMOUNT OF HOURS REQUESTED	INELIGIBLE COMPLAINANTS, AND REASON FOR INELIGIBILITY
123	D. Johnson	8 -	0	None	Workmen's Compensation-Absent
129	D. W. Clark	8 (RSST-8:15AM)	6.6	1.4	
160	A. Cursi, Jr.	8 -	6.6	None	Voluntarily Quit
279	C. J. Zukauckas	8 (RSST-8:15AM)	6.6	1.4	
280	S. A. Jestat	8 "	6.6	1.4	
322	T. L. Pysh	8 "	6.6	1.4	
8	J. M. Jiblets	8 (RSST-8AM)	6.6	1.4	
345	W. L. Brown	8 "	6.6	1.4	
352	S. T. Forte	8 "	6.9	1.1	
402	G. J. Evans	8 "	6.6	1.4	
434	K. R. Watkins	8 (RSST-7:45AM)	6.9	1.1	
435	J. J. Kurucz	8 (RSST-8AM)	6.9	1.1	
436	M. L. Hoyt	8 "	6.6	1.4	
438	T. J. Smith	8 "	6.4	1.6	
439	D. Wytovich	8 (RSST-7:45AM)	7.3	.7	
444	R. D. Stauffer	8 (RSST-8AM)	6.6	1.4	
446	W. L. Conner	8 -	0	None	Personal & Sick Leave-Absent; went home over elevator dispute
93	R. T. Harris	8 (RSST-8:15AM)	6.5	1.5	
474	D. Phillips	8 "	6.6	1.4	
498	F. Pabian	8 (RSST-7:45AM)	6.9	1.1	
664	M. F. Zaharsky	8.5 -	0	None	Floating Vacation Day-Absent; went home over elevator dispute
137	G. R. Wheeler	8 (RSST-8:15AM)	7.3	.7	
171	C. J. Rocco	8 "	7.3	.7	
235	T. M. Burger	8.5 (RSST-8AM)	6.9	1.6	
341	C. Zukauckas	8.5 "	6.9	1.6	
392	R. Mulac	8.5 "	6.9	1.6	

CHECK NUMBER	NAME	Jan. 30, '80 REGULARLY SCHEDULED HOURS	Jan. 30, '80 HOURS WORKED AND PAID FOR	AMOUNT OF HOURS REQUESTED	INELIGIBLE COMPLAINANTS, AND REASON FOR INELIGIBILITY
477	T. P. Grimes	8.5 (RSST-8AM)	6.9	1.6	
513	P. Error	8.5	0	None	Floating Vacation Day-Absent; went home over elevator dispute
630	S. Clark	8.5 (RSST-8AM)	6.9	1.6	
668	S. Stachowicz	8.5	0	None	Absent; went home over elevator dispute
281	R. M. Merashoff	8.5	9.0	None	
42	S. Durko, Jr.	8 (RSST-8:15AM)	6.6	1.4	
[illegible]	L. T. Pruski	8 "	6.6	1.4	
431	F. Perri	8 (RSST-8AM)	6.4	1.6	
504	J. Viara	8 "	6.4	1.6	
50	D. Royster	8 -	0	None	Absent; went home over elevator dispute
57	W. White	8.5 (RSST-7:45AM)	7.8	.7	
73	N. Guriel	8.5 "	6.9	1.6	
82	J. C. Fiem	8.5 "	7.8	.7	
117	S. Robertson	8.5 "	6.9	1.6	
131	C. J. Washlack	8.5 "	6.9	1.6	
188	S. Mox, Jr.	8 -	0	None	Personal & Sick Leave-Absent; went home over elevator dispute
302	R. B. Taylor	8.5 (RSST-7:45AM)	7.8	.7	
400	J. Fidazzo	8.5 "	7.8	.7	
475	F. J. Stein	8.5 -	0	None	Absent; went home over elevator dispute
511	R. L. Emery	8 (RSST-7:45AM)	6.9	1.1	
521	R. A. Chaney	8.5 "	6.9	1.6	
10	L. T. Bizet	8.5 "	6.9	1.6	
31	T. Taylor	8.5 "	6.9	1.6	
124	F. DiBasilio	8.5 "	6.9	1.6	
628	J. Antanovich	8.5 "	6.9	1.6	
121	A. Ercegovich	8 -	0	None	Personal & Sick Leave-Absent; went home over elevator dispute

HECK UMBER	NAME	Jan. 30, '80 REGULARLY SCHEDULED HOURS	Jan. 30, '80 HOURS WORKED AND PAID FOR	AMOUNT OF HOURS REQUESTED	INELIGIBLE COMPLAINANTS, AND REASON FOR INELIGIBILITY
659	J. Fidazzo	8 (RSST-7:45 AM)	6.4	1.6	
660	S. Kotchman	8 (RSST-8AM)	6.4	1.6	
6	P. Bostich	8.5 -	0	None	Absent - reported off sick
23	L. Palovich	8 -	9.0	None	Worked 1st Shift
45	C. E. Montgomery	8 (RSST-7AM)	5.9	2.1	
46	J. E. Carnathan	8 (RSST-8AM)	7.5	.5	
60	J. G. Zerambo	8 "	6.4	1.6	
118	R. S. Martos	8 (RSST-7AM)	5.9	2.1	
219	A. J. Martos	8 (RSST-8AM)	6.6	1.4	
286	C. M. Vilcesk	8 (RSST-7AM)	6.6	1.4	
303	K. E. Wiley	8 "	5.4	2.6	
310	J. J. Stepko	8 "	5.4	2.6	
340	F. V. Femia	8 (RSST-8AM)	6.4	1.6	
364	S. W. Perchinsky	8 (RSST-7AM)	7.9	.1	
369	S. Ezarik	8 "	5.4	2.6	
387	J. S. Glemba	8 "	6.9	1.1	
401	T. E. Zgorliski	8 "	5.4	2.6	
40	A. R. Fiem	8 "	5.4	2.6	
406	R. L. Scicchitano	8 "	7.9	.1	
427	J. Stepko	8 "	7.9	.1	
455	R. Hopkins	8 "	5.4	2.6	
457	P. A. Skirchak	8 "	5.4	2.6	
500	L. N. Hrutkay	8 "	5.9	2.1	
509	G. C. Denny	8 "	6.9	1.1	
515	G. Bostich	8 "	5.4	2.6	
527	D. L. Tiberie	8 "	5.4	2.6	

CHECK NUMBER	NAME	Jan. 30, '80 REGULARLY SCHEDULED HOURS	Jan. 30, '80 HOURS WORKED AND PAID FOR	AMOUNT OF HOURS REQUESTED	INELIGIBLE COMPLAINANTS, AND REASON FOR INELIGIBILITY
299	D. F. Rados	8 (RSST-8AM)	9.0	None	Worked 1st Shift
331	J. H. Zamiska	8 "	6.6	1.4	
377	J. F. Piasecki	8 (RSST-7:45AM)	6.4	1.6	
407	R. Gatling	8 (RSST-8AM)	6.6	1.4	
606	B. F. Vischio	8 (RSST-7:45AM)	6.4	1.6	
638	J. L. Antanovich	8 (RSST-8AM)	6.6	1.4	
6[illegible]	J. S. Kubovcik	8 "	6.6	1.4	
199	A. Rankl	8 -	8.5	None	Worked 1st Shift
25	N. Bosick	8 (RSST-8AM)	6.6	1.4	
65	M. J. Rebich	8 "	6.6	1.4	
86	L. Huey	8 "	6.6	1.4	
107	D. Levers	8 -	0	None	Sick & Accident Benefits-Absent
163	J. Motichak	8 (RSST-8AM)	6.6	1.4	
189	E. J. Lacock	8 "	6.6	1.4	
522	M. Poye, Jr.	8 "	6.6	1.4	
654	D. Dreyer	8 -	0	None	Absent; went home over elevator dispute.
699	E. Ambrosey	8 (RSST-8AM)	6.4	1.6	
2[illegible]	J. R. Kennedy	8 (RSST-8:15AM)	6.6	1.4	
263	J. E. Puskarich	8 (RSST-8AM)	6.6	1.4	
441	R. T. Rados	8 (RSST-8:15AM)	6.6	1.4	
502	T. Pasqualiucci	8 -	9.5	None	Worked 3rd Shift
60	S. Phillips	8 -	8.0	None	Worked 3rd Shift
143	J. E. Karpoff	8.5 (RSST-8:15AM)	6.0	2.5	
253	T. M. Cecil	8 -	0	None - Absent; went home over elevator dispute	
297	R. A. Dranzo	8 -	0	None - Absent; went home over elevator dispute	
432	W. J. Merashoff	8 -	0	None - Personal & Sick Leave-Absent; went home over elevator dispute	
472	K. G. Thompson	8 (RSST-8AM)	6.5	1.5	

CHECK NUMBER	NAME	Jan. 30, '80 REGULARLY SCHEDULED HOURS	Jan. 30, '80 HOURS WORKED AND PAID FOR	AMOUNT OF HOURS REQUESTED	INELIGIBLE COMPLAINANTS, AND REASON FOR INELIGIBILITY
645	L. Rossero	8 (RSST-8AM)	6.5	1.5	
676	J. Linnen	8 "	6.5	1.5	
157	W. Dean	8 -	8.5	None	Worked 2nd Shift
161	G. D. Black	8.5 -	8.5	None	Worked 2nd Shift
128	L. DiBasilio	8 (RSST-8AM)	6.9	1.1	
173	A. Kiski	8 "	6.9	1.1	
[illegible]	E. Deresh	8 (RSST-8:15AM)	6.6	1.4	
172	M. Toth	8 "	6.6	1.4	
105	J. J. DiBasilio	8 (RSST-8AM)	6.4	1.6	
115	R. E. Main	8 "	6.4	1.6	
164	J. L. Johnson	8 "	6.4	1.6	
14	J. E. Prepski	8 -	8.0	None	Worked 2nd Shift
187	R. A. Boothe	8 -	8.5	None	Worked 1st Shift
191	J. E. Timlin	8 (RSST-8:15AM)	6.5	1.5	
80	N. W. Franklin	8 -	0	None	Workmen's Compensation-Absent
267	J. H. Thompson, Jr.	8 -	0	None	Sick & Accident Benefits-Absent
176	H. W. Ambrosy	8 (RSST-8:15AM)	6.6	1.4	
[illegible]	G. A. Dean	8 "	6.6	1.4	
260	G. S. McKeta	8 "	6.6	1.4	

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MAGMA COPPER COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-79-M A/O No. 02-00151-05009 DOCKET NO. WEST 79-158-M A/O No. 02-00842-05007 DOCKET NO. WEST 79-351-M A/O No. 02-01391-05004 DOCKET NO. WEST 79-382-M A/O No. 02-00151-05011 DOCKET NO. DENV 79-485-PM A/O 02-00151-05008 MINE: SAN MANUEL

ORDER OF CORRECTION

After issuing his decision in the above captioned cases, the undersigned Judge became aware of a clerical discrepancy between the body of the decision, and the conclusions and order. So that the conclusions and order conform to the body of the decision, the following corrections are made:

1) The first sentence on page fourteen (14) should read: "Respondent violated 30 C.F.R. § 57.12-16 as alleged in Citation 377071."

2) On page fourteen (14), above the heading, "Docket Number WEST 79-351," is inserted a heading, "Docket number WEST 79-79-M." Under that heading an entry reading "Citation Number 377071: $50.00" is inserted. The total for that docket number should also be $50.00.

3) On page fifteen (15), on the last line of the order, the total assessed penalty is corrected to be $342.00 instead of $292.00.

Decision Dated: February 4, 1981
Volume 3, Number 2
Pg. 345

Additionally, on page fourteen (14), the second line under the sub-heading "Docket Number WEST 79-158-M" is corrected to read "Citation Number 376969 $225.00."

John A. Carlson
Administrative Law Judge

Distribution:

Alan M. Raznick, Esq.
Office of the Solicitor
United States Department of Labor
11071 Federal Building
450 Golden Gate Avenue
San Francisco, California 94102

N. Doublas Grimwood, Esq.
Twitty, Sievwright & Mills
1700 Towne House Tower
100 West Claredon
Phoenix, Arizona 85013

Dated: March 6, 1981

*U S GOVERNMENT PRINTING OFFICE: 1981 341-638/4153