March 1982

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Commission Decisions

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

Secretary of Labor, MSHA v. United States Steel Corporation, Docket No. KENT 81-136. (Judge Koutras, February 24, 1982).

Secretary of Labor, MSHA on behalf of Kenneth Bush v. Union Carbide Corporation, Docket No. WEST 81-115-DM. (Judge Boltz, February 17, 1982).

Review was Denied in the following cases during the month of March:

Victor McCoy v. Crescent Coal Company, Docket No. PIKE 77-71. (Judge Broderick, Interlocutory Review of February 10, 1982 Order).

Secretary of Labor, MSHA v. Valley Rock & Sand Corporation, Docket Nos. WEST 80-3-M, 79-385-M. (Judge Morris, January 28, 1982).

Secretary of Labor, MSHA on behalf of George Logan v. Bright Coal Company, Docket No. KENT 81-162-D. (Judge Moore, Interlocutory Review of January 27, 1982 Order).

Secretary of Labor, MSHA v. Cleveland Cliffs Iron Company, Docket Nos. LAKE 80-295-RM, 80-417-M. (Judge Broderick, February 1, 1982).

Secretary of Labor, MSHA v. Sierra Blanca Milling and Processing Company, Docket No. CENT 80-337-M. (Judge Boltz, February 2, 1982).

Secretary of Labor, MSHA v. Valley Limestone Company, Docket No. LAKE 81-87-M. (Judge Moore, February 12, 1982).

Secretary of Labor, MSHA v. Texas Industries, Inc., Docket No. CENT 79-60-M. (Judge Morris, February 12, 1982).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 79-9-M
v.	:	
AMERICAN MATERIALS CORPORATION	:	

DECISION

This case involves the interpretation of 30 C.F.R. § 56.20-11, a mandatory standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). That standard provides:

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required.

The administrative law judge held that a violation of the standard occurred because American Materials failed to post or barricade an area over which high voltage powerlines passed. 1/ For the reasons that follow, we affirm his decision.

American Materials extracts and stockpiles sand and gravel at its Harrison Pit and Plant. On April 26, 1978, during a fatal accident investigation at the Harrison operation, a notice of violation of section 56.11-20 was issued to American Materials. 3 FMSHRC 1527. The accident occurred the previous day when a driver for a customer of American Materials raised his truck bed near high voltage powerlines and was electrocuted. 3 FMSHRC 1528.

Prior to April 25, 1978, between fifty and one hundred and fifty customer trucks came onto the Harrison plant each day. Tr. 52. Of these, some forty to fifty hauled coal before entering the plant. Tr. 122-25. Some of these truck drivers cleaned coal residue from their truck beds by raising the truck bed and releasing the tail gate to dump the coal. 3 FMSHRC 1527. American Materials tried to prevent drivers from doing this to avoid contamination of its materials. Id. Company

1/ The judge's decision is reported at 3 FMSHRC 1524 (1981).

employees instructed drivers observed cleaning their beds to do so off the Harrison plant property. Id. Arrangements had not been made, however, to inform drivers at the entrance to the plant that they could not clean their truck beds on the premises. 2/ Id.

Although not determinative as to whether or not there was a violation of the standard, the record reflects certain circumstances concerning the death of the truck driver, Mr. Meyer. Meyer was found by the judge below to have entered the Harrison facility on April 25, 1978, to pick up some fill sand for the RBS Trucking Company, a customer of American Materials. 3 FMSHRC 1527-28; Tr. 162. Fill sand is unwashed sand used primarily to manufacture asphalt. Tr. 162. Meyer was not an employee of American Materials; rather, he either owned a truck and drove for RBS, or was an employee of RBS; in either case he was on American Materials' premises to haul sand and/or gravel from American's mine to RBS. 3 FMSHRC 1527. American Materials' records indicate that Meyer had been on the property before the date of the accident to pick up sand and gravel. Tr. 150-51. On April 25, Meyer was driving west on a haulage road marked one-way east, when he pulled off the hard-surfaced road on his left side. 3 FMSHRC 1527-28. Powerlines carrying 4,160 volts run parallel to this road, approximately 28-1/2 feet above the ground. Id. The day was wet and windy, and Meyer parked on muddy and unstable ground. Id.; Tr. 37. Meyer raised the bed of his tractor-trailer to its full height of 28-1/2 feet, and left the cab of his tractor. 3 FMSHRC 1528. As he stood on the frame of the tractor to pull the tailgate release, a powerline energized the raised trailer bed, and electrocuted Meyer. Id.

I.

The standard requires the posting of warning signs or the barricading of approaches to areas containing hazards that are not "immediately obvious to employees." 3/ Meyer was not employed by American Materials. Thus, the first question is whether under section 56.20-11, Meyer was an "employee." To determine the meaning of "employee" we examine that term in the context of the statute under which section 56.20-11 was promulgated, regulations which implemented that statute, and the successor statute under which the standard is currently enforced.

We note, as did the judge, that the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq (1976)(repealed 1977), used a variety of words when it referred to those persons for whom protection was intended, including "workers in such mines", "employees of the mine", "mine workers", and "employees." See sections 7(a), 8(a)(3), 10(c), 15, and 19(b) and (c) of the Metal-Nonmetallic Act. None of these terms was defined in the Metal-Nonmetallic Act; nor did

2/ After the accident, and before the hearing in August 1980, American Materials provided a waste area where truck beds could be cleaned. 3 FMSHRC 1535.

3/ The duty to comply with the standard is the operator's. The operator must barricade or post the hazardous areas. American Materials was charged with the violation based on its failure to act, not on Meyer's conduct.

that Act's legislative history refer to them. The Secretary of Interior promulgated Part 56, which contains § 56.20-11, to implement the Metal-Nonmetallic Act. Part 56 contains health and safety standards for sand, gravel, and crushed stone operations. In these regulations the Secretary also used a variety of words to indicate to whom a standard applies, e.g., "men", "persons" and "employees." 30 C.F.R. §§ 56.3-5, 56.6-90, 56.9-20. The Secretary defined the term "employee" as "a person who works for wages or salary in the service of an employer." 30 C.F.R. § 56.2.

Neither the term "employees" in the Metal-Nonmetallic Act nor the term "employee" as defined in Part 56 expressly limits protection to employees of the mine operator or to any particular type of "employee." The Secretary of Interior was required, however, to "develop ... and promulgate health and safety standards for the purpose of the protection of life, the promotion of health and safety, and the prevention of accidents in mines which are subject to this Act." 30 U.S.C. § 725(a)(1976)(repealed 1977). This reflects a broad intent to protect those working in mines regardless of the details of their employment contracts. Thus, even under the Metal-Nonmetallic Act, Meyer might well be an "employee" protected by the standard. We need not decide this because, as the judge noted, the Metal-Nonmetallic Act was repealed in 1977 and was replaced by the Mine Act.

Under the Mine Act, mandatory standards previously promulgated under the Metal-Nonmetallic Act:

> remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines ... under the Federal Mine Safety and Health Act of 1977 until such time as the Secretary of Labor shall issue new or revised health or safety standards.

30 U.S.C. § 961(a). This transfer section, as well as general principles of statutory construction, require, as the judge stated, that one read 30 C.F.R. § 56.20-11 in harmony with the Mine Act. 4/ In addition, the legislative history of the Mine Act clearly shows congressional desire to strengthen health and safety protection for metal and nonmetallic workers: "[T]he Metal Act does not provide effective protection for miners from health and safety hazards." Legis. Hist., at 596. See also Legis. Hist., at 597. Thus, we hold that "employee" as used in section 56.11-20 should be interpreted in conjunction with "miner" under the 1977 Mine Act. 5/ As the judge held, the protections afforded an

---

4/ See 1A Sutherland, Statutory Construction, § 23.34, at 196 (4th ed. 1973). We reject American Materials' argument that the transfer provision could be read to indicate that regulations promulgated under the Metal-Nonmetallic Act are to be interpreted as if that Act were yet extant. Rather, we believe the legislative history amply supports the conclusion that the provision was intended to prevent the wholesale application of coal mine regulations to non-coal mines. H. Rep. No. 95-312, 95th Cong., 1st Sess. 10, 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 366, 370 (1978)("Legis. Hist.").

5/ "[M]iner means any individual working in a coal or other mine." 30 U.S.C. § 802(g)(Supp. III 1979).

employee under the standard extend to those working in mines. 3 FMSHRC 1533-34. This interpretation accords with the protective purposes of Part 56 as expressed in section 56.1, which mirrors the statement of purpose in the Metal-Nonmetallic Act quoted above. 6/ We reject American Materials' arguments to the contrary.

The judge determined that Meyer was a "miner" entitled to the protection of section 56.20-11. The evidence supports this finding. Meyer had been on the Harrison facility previously to pick up and haul materials. He was driving for RBS Trucking, a customer of American Materials. He was on a haulage road that leads to a stockpile of fill sand. American argues, however, that the Secretary presented no evidence of Meyer's purpose on the property. Although there may be no direct evidence such as a purchase agreement between Meyer and RBS or between RBS and American Materials, the circumstantial evidence summarized amply supports the judge's finding that Meyer was on the Harrison property to obtain materials. Indeed, at the hearing before the judge, counsel for American Materials acknowledged that Meyer was not a trespasser, but was "doing business" at the facility. Tr. 171-72.

American also argues that Meyer was not engaged in activities that can be considered mining functions. Meyer, however, was driving a tractor-trailer, which was used to pick up and haul away mine products. In our view, such haulage activity is an integral part of this mining operation and we, therefore, affirm the judge's finding that Meyer was "working in a ... mine." See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 37 (1981).

II.

The remaining question is whether the hazard presented by the provision was "not immediately obvious." 7/ American Materials asserts that the powerlines were "very much in plain sight." Tr. 72. The judge acknowledged that the powerlines were "readily observable" but held that the hazard was not obvious:

> The fact that the powerlines themselves were readily observable under normal conditions is not dispositive of the question presented. The powerlines were sufficiently high above the ground that the hazard posed by raising a truck bed or operating other equipment in the area was not immediately obvious. The truck operator had raised the bed of the trailer from inside the truck cab. It was raining; the winds were gusting; and the operator of the truck, upon getting out of the truck, was engaged in operating

6/ Section 56.1 provides in part:

> The regulations in this part are promulgated pursuant to section 6 of the [Metal-Nonmetallic Act] and prescribe health and safety standards for the purpose of the protection of life, the promotion of health and safety, and the prevention of accidents in sand ..., gravel and crushed stone operations.

7/ American Materials does not argue that no hazard existed; rather it asserts that the hazard was obvious and, therefore, that the standard did not apply.

the tailgate. There is no way to know [sic] whether operators of trucks in the area would know about the high voltage of the wires in question. In view of all of these factors, I conclude that this was an area where a safety hazard existed which was not immediately obvious to a miner such as the subject truck driver and that neither barricades nor warning signs were posted at all the approaches.

3 FMSHRC 1535. We agree.

Approximately forty to fifty of the drivers who entered the Harrison pit and plant each day had "double hauls" -- they delivered coal one way and sand the other. Tr. 122-25. Some of these drivers cleaned coal residue from their truck beds by raising the truck bed and releasing the tail gate to dump the coal. 3 FMSHRC 1527; Tr. 52. "Evidence was found in the area after the accident indicating that other truck drivers had cleaned coal residue from their truck beds in the area where the accident occurred." 3 FMSHRC 1532. Substantial evidence supports the judge's finding that a driver might not notice whether these were powerlines, or if he did, could not determine what voltage they transmitted. The facts of this case clearly indicate how this hazard endangers health and safety when truck drivers raise and lower their beds in the vicinity of the powerlines. In short, although high voltage powerlines may be an ubiquitous feature of the mining landscape, the deadly hazards associated with them are not always evident. Such was the case at the Harrison operation.

Accordingly, we hold that Meyer was protected by the standard and that American's failure to post or barricade the unmarked powerlines violated the standard. 8/ The decision of the admininstrative law judge is affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

8/ To the extent American Materials may be arguing it is not liable for the violation because Meyer's conduct was unauthorized and aberrational, the Mine Act's imposition of liability regardless of fault, requires us to reject its contention. Allied Products, Co. v. FMSHRC, __ F.2d __, No. 80-7934, 5th Cir. Unit B, Feb. 1, 1982.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. VINC 75-247
	:	VINC 75-249
and	:	VINC 75-250
	:	VINC 75-251
UNITED MINE WORKERS OF AMERICA	:	
	:	
v.	:	IBMA No. 77-42
	:	
OLD BEN COAL COMPANY	:	

ORDER

The Secretary of Labor has filed a motion requesting dismissal of its appeal in the above-captioned cases, which arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the 1969 Coal Act"). The United Mine Workers of America ("UMWA"), the other appellant in this case, concurs in the Secretary's motion. Old Ben Coal Company has filed a response opposing dismissal.

The Secretary and the UMWA are the only appellants, and both seek dismissal. Granting the motion will not prejudice Old Ben as it was the party that prevailed below. Dismissal preserves the scarce administrative resources available to the Commission and to the Secretary. Furthermore, there are provisions in the 1977 Mine Act that are nearly identical to the provisions of the 1969 Coal Act involved in this case, and thus the question raised in these cases will probably arise in future cases before the Commission. 1/

Accordingly, we dismiss the above-captioned cases. Our order scheduling oral argument in these cases is also vacated.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

1/ We need not, and do not, decide that these cases are moot as a matter of law.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. HOPE 75-778
	:	HOPE 75-807
and	:	HOPE 76-9
	:	HOPE 76-10
UNITED MINE WORKERS OF AMERICA	:	HOPE 76-11
	:	HOPE 76-12
v.	:	
	:	
EASTERN ASSOCIATED COAL CORP.	:	IBMA 77-37

ORDER

Eastern Associated Coal Corporation has filed a motion to dismiss the appeal of the United Mine Workers of America (UMWA) in the above-captioned cases which arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the 1969 Coal Act"). The Secretary concurs with Eastern's argument that its payment of penalties has mooted the issues. The UMWA does not, in essence, contest Eastern's motion.

We are persuaded that dismissal is warranted in these 1969 Coal Act cases. The parties do not wish to pursue these cases. The time period involved in the chain of violations has long expired, and Eastern has paid the assessed penalties. In the interests of conserving scarce administrative resources, we decline to decide these cases under these circumstances. 1/ Eastern's dismissal motion is granted. We also vacate our order for oral argument in this case.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

1/ We need not, and do not, reach the issue of whether these cases are moot as a matter of law.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1982

SECRETARY OF LABOR,	:	Docket Nos. BARB 79-319-PM
MINE SAFETY AND HEALTH	:	SE 79-56-M
ADMINISTRATION (MSHA)	:	79-91-M
	:	79-92-M
v.	:	79-93-M
	:	79-94-M
CAROLINA STALITE COMPANY	:	79-95-M
	:	79-85-M
	:	79-87-M
	:	79-114-M
	:	80-35-M
	:	80-37-M
	:	80-44-M

DECISION

This civil penalty case is brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). On review Carolina Stalite Company (Carolina Stalite) contests the judge's finding that it is a mine subject to the 1977 Mine Act, his failure to suppress evidence, and his conclusion that a citation can be issued if an operator refuses entry to an inspector to conduct an inspection. 1/ For the reasons set forth below, we hold that Carolina Stalite's facility is not a "mine" subject to the Mine Act. 2/ We therefore reverse the judge's decision.

The essential facts are undisputed. Carolina Stalite produces a light weight construction material, "stalite," from slate gravel. It purchases the slate from an adjacent quarry. The quarry is owned and operated by an independent entity, Young Stone Company (Young Stone). There is no corporate affiliation between Carolina Stalite and Young Stone, and no business relationship other than that of vendor and purchaser. Young Stone mines, crushes and delivers on its conveyor belts three-quarter inch slate gravel to Carolina Stalite's premises. Carolina Stalite stores the stone. It then heats the slate gravel in rotary kilns to approximately 2,000 degrees fahrenheit. The heat processing transforms the

1/ These findings were made in an April 14, 1980, order denying Stalite's suppression motion. The final decision on the merits of the citations was issued on December 2, 1980. The decision incorporated the April 14 order and is reported at 2 FMSHRC 3509 (1981).
2/ In light of our conclusion, we need not address the other issues raised in this proceeding.

stone into a lightweight material by "bloating" or increasing its volume. 3/ Carolina Stalite subsequently crushes, sizes to specification, and sells the material to manufacturers who use it primarily to produce light-weight masonary blocks. We previously have acknowledged that a "broad interpretation is to be applied to the Act's expansive definition of a mine." Oliver M. Elam, Jr., Co., ___ FMSHRC ___ (VINC 78-447-P, etc., January 7, 1982). The inclusive nature of the Act's coverage, however, is not without bounds. In this case, we conclude that Carolina Stalite's operations do not fall within the Mine Act's coverage.

The Act classifies as mining, and therefore subjects to its coverage, the extraction, milling and preparation of minerals. 4/ Young Stone, rather than Carolina Stalite, is the entity engaged in the actual extraction of the slate. Therefore, Carolina Stalite is not engaged in "mining" in its classic sense. Young Stone also crushes the slate that it extracts. Although the question is not presented here, such crushing performed incident to extraction would appear to comprise "milling", and therefore "mining", under the Act. 5/ Again, however, Young Stone rather than Carolina Stalite, performs this operation.

3/ "Bloating" is the practice of "[e]xpanding raw materials such as clays, shale, perlite, slates, etc., by rapid heating to produce a lightweight vesicular structure." U.S. Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 186 (1968).

4/ The Act does not further define the terms "milling of minerals" or "work of preparing ... minerals." Facially, these appear distinct bases for jurisdiction. Conversely, "milling" and "preparation" can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market. This interpretation might better reflect the understanding of these terms within the mining industry. A Dictionary of Mining, Mineral and Related Terms (U.S. Bureau of Mines, 1968) at 707, defines milling as including "preparation for market." Indeed, it is easy to see how both words--milling and preparation--became part of the 1977 Mine Act without connoting entirely separate processes. The Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1976)(repealed 1977), spoke only in terms of "milling" in its definition of a mine, presumably because "milling" was the common word used to describe the entire process of preparing non-coal minerals for market. In contrast, the 1969 Coal Act spoke only in terms of "coal preparation," again presumably because this was the common language used to describe the processing of coal. Thus, we believe the 1977 Mine Act's use of both terms signals that an expansive reading is to be given to mineral processes covered by the Mine Act, rather than requiring a clear distinction between what is a milling or a preparation process.

5/ The 1966 Metal-Nonmetallic Act covered mineral "milling". The term was not further defined in the statute, but the Senate Committee stated that the term "mine" was meant to "extend[] beyond mining in the narrow and ordinary sense of the term, to the next sequential stage to that of the related milling operation." S. Rep. No. 1296, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. and Ad. News 2846, 2851.

Carolina Stalite's contact with the mineral at issue occurs only after Young Stone has extracted, crushed, sold and delivered the slate. It is then that Carolina Stalite subjects the slate to its heat processing treatment. We find Carolina's treatment of the mineral to be a manufacturing process that results in a product, rather than a "milling" process under the Mine Act. The crushing and sizing of the "stalite" that occurs after the heat processing is completed are simply final steps in the manufacture of the product. As we did in Oliver Elam, we reject the notion that Congress intended to subject to pervasive regulation of the Mine Act every business that in some manner handles minerals.

We have examined the MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (1979), and the MESA-OSHA Memorandum of Understanding, 39 Fed. Reg. 27382 (1974). They provide no assistance in the resolution of this case. These documents merely reflect the views of the agencies as to their respective jurisdiction. Simply because the agencies may agree between themselves as to which agency will inspect a particular business establishment does not insulate their determination from judicial review. MSHA's authority to regulate a workplace is determined by the scope of the Mine Act's coverage, not by its agreement with OSHA. To the extent that the agreements are intended to provide guidance as to which statute will be enforced in a particular situation, they are sorely deficient. They are replete with exceptions, provisos, and internal inconsistencies. For example, the agreements' definition of "milling" provides that "the essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." In the present case, no separation of constituents occurs, yet MSHA claims jurisdiction.

We note that section 3(h)(1) of the Mine Act, regarding the Secretary of Labor's determination as to what constitutes mineral milling, does not come into play. That provision allows the Secretary to determine which of his agencies will conduct inspections in cases of dual or overlapping jurisdiction. Conf. Rep. at 38; 1977 Act Leg. Hist. at 1316. That situation is not presented here.

Accordingly, the decision of the administrative law judge is reversed, the citations and orders vacated, and the petitions for assessment of civil penalties dismissed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

Commissioner Lawson dissenting:

A mine is defined by our statute, not by whether the operation performed is "'mining' in its classic sense", and the determination by the judge below that Carolina Stalite is a mine is clearly supported by the express terms of the statute. That determination is buttressed by the legislative history of the Act, judicial precedent, the Secretary of Labor's recognition of the parameters of the Act, and the record evidence.

The statute provides:

Sec. 3. For the purpose of this Act, the term--

. . .

> (h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment. (Emphasis added).

The legislative history of the Act is also pertinent and instructive. As the report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and

> it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. (Emphasis added).

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977 at 14; Legislative History of the Federal Mine Safety and Health Act, Committee Print at 602.

Additionally, during the Senate floor debate Senator Kennedy elicited from the Chairman of the Human Resources Committee, Senator Williams, confirmation that, in granting the Secretary full jurisdiction and authority to discharge his obligations, the Act covers "... any property or equipment whatsoever connected with or in proximity to mines." (Emphasis added). Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 997 (1978).

Similarly, the Conference Report commented that coverage extends to all "... surface facilities used in preparing or processing the minerals." (Emphasis added). Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess., 38 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1316.

It would therefore appear clear that Congress intended comprehensive regulation, and the inclusion under the 1977 Act as mines of facilities other than those operated by the particular mine operator actually engaged in extracting the coal or other minerals from the earth. Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert denied, 444 U.S. 1015 (1980). This recognizes the obviously complex and diverse nature of the mining industry, the various facilities existing and required, especially by those operators without their own preparation facilities, and the nature of mineral processing, which often takes place in several stages, depending upon the contemplated use and the degree of processing required for a particular mineral.

The majority examines in some detail the MSHA/OSHA Interagency Agreement and MESA-OSHA Memorandum of Understanding which conclude that separation is an essential step in determining whether an operator is milling. 1/ This contention would make the purity of the mineral in its natural state the measure of MSHA jurisdiction. Such a limitation has no statutory foundation. Separation, a term not employed by the statute, cannot therefore be construed as a necessary element of milling, but merely as illustrative of one milling practice. In the mining industry, the steps necessary to process a given mineral are dependent upon the unique characteristics of the particular substance.

1/ The majority finds however, that these agreements, despite this eclectic analysis, "provide(s) no assistance in the resolution of this case."

While the usual mill in a metal mine will separate contaminants from the mined mineral, such separation is often unnecessary in nonmetal mines. A Dictionary of Mining, Mineral, and Related Terms (U.S. Bureau of Mines, 1968), at page 707, defines "milling" as "the grinding or crushing of ore." Additionally, "the term may include the operation of removing valueless or harmful constituents and preparation for market." Id. at 707. "Processing" is defined as "the methods employed to clean, process, and prepare ... ores into the final marketable product." Id. at 866. Appellant would thus appear to be engaged in both milling and processing.

The Secretary has consistently interpreted "crushing", "sizing" and "heat expansion" activities such as those carried on at the Stalite mill as within the scope of the Mine Act. The Secretary's interpretation of the statute he is charged with administering is entitled to special weight under Commission precedent. Secretary of Labor v. Helen Mining Co., 1 FMSHRC 1796 (1979), rev. on other grounds, Nos. 79-2537, 79-2518 (D.C. Cir., February 23, 1982). In addition, although the majority correctly notes that the MSHA-OSHA Interagency Agreement, April 17, 1979, (44 FR 22.827) is not dispositive of the issue before us, that agreement does state that:

> "Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briqueting." (Emphasis added).

and is, at least to that limited extent, of interpretive assistance. The Secretary of Labor also has the responsibility for determining whether the Assistant Secretary of Labor for MSHA, or for OSHA, shall have "... all authority with respect to the health and safety of miners." Sec. 3(h)(1), supra. In any event, our jurisdictional concern is answered by the statute and the Interagency Agreement is one aid in its interpretation.

Finally, the precedents of those Courts which have interpreted the Act provide assistance.

In Marshall v. Stoudt's Ferry Preparation Company, supra, the court held that Stoudt's preparation plant, which processed material dredged from a river bed and separated such into sand, gravel, and a "usable anthracite refuse," was a "mine" as defined by the Act. Stoudt's purchased this dredged material from the mine operator who extracted it from the river bed, and transported it both by front-end loader, and, as here, by conveyor belt, to Stoudt's plant where processing was had and the sand, gravel and anthracite refuse thereafter sold. That court, citing the legislative history quoted above, held that:

> "We agree with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it--the word means what the statute says it means.
>
> Moreover, the record also establishes that the company processes and sells the sand and gravel it separates from the material dredged from the river. We are persuaded, as was the district judge, that in these circumstances, the sand and gravel operation of the company also subjects it to the jurisdiction of the Act as a mineral preparation facility. (Emphasis added)(602 F.2d at 592.)"

See also Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission et al., 664 F.2d 1116 (9th Cir. 1981); Harman Mining Corp. v. FMSHRC No. 81-1189 (C.A. 4 1981)(unpublished); and Marshall v. Tacoma Fuel Co., Inc., No. 77-0104-B, (W.D. Va. 1981)(Unpublished).

There is no dispute as to the essential facts in this case. Carolina Stalite receives the slate, partially crushed into gravel form, directly by conveyor belt from the immediately adjacent quarry owned and operated by Young. Stalite then stores this slate until, without further preparation, it heats the crushed slate in rotary kilns to approximately 2,000° Fahrenheit. As a result of that heating, the volume of the slate is increased.

Heat processing or "bloating" is generally recognized as a common method of processing several different minerals. See Mineral Facts and Problems, (1975 edition, Bureau of Mines) at 256 and 785. The MSHA-OSHA Agreement (supra) also includes "heat expansion" as a category of milling processes, and its definition precisely parallels Stalite's heating or bloating operation:

> "Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit of volume."

The widespread use of the heat expansion process for several minerals, coupled with the broad definition of mining, leads to the conclusion that Stalite is engaged in the work of milling or preparing minerals as a mine.

After this heat expansion preparation, Stalite crushes the now bloated slate, and sizes it to the specifications required by its customers. It then sells the slate ("stalite") 2/) which is used by Stalite's customers to manufacture lightweight concrete masonry blocks.

The related process of coal preparation is also defined in section 3(i) of the Mine Act as including crushing and sizing activities; see Chapter 27, "Mineral Processing" of 2 SME Mining Engineering Handbook (Cummings and Given Ed., 1973) at 27.5-1, 5-2 which lists and discusses crushing as a milling process. This lends additional support to the finding of the judge below that Stalite was subject to jurisdiction under the Act, since the crushing and sizing were performed to upgrade the product, and upgrading is an important component of a milling preparation process. (Cf. Oliver Elam Jr. Co., 4 FMSHRC 5 (1982), where crushing was solely performed for convenience in loading.) 3/

Stalite further contends that its crushing merely takes place as a final step in its manufacturing process and is not the type of crushing associated with a milling preparation process. Stalite's subsequent crushing of the slate, however, is not "milling", and therefore not "mining", according to the majority. While Stalite does not perform the primary crushing of the slate, minerals are often crushed more than once during the milling process, and such secondary crushing as was done here by Stalite, is a common process.

Much emphasis is also placed by the majority on Stalite's status as an "independent entity", with "no corporate affiliation" or "business relationship other than vendor or purchaser" between Young and Stalite. If Stalite's operations were performed by Young on the latter's property, there would be no question that the crushing, sizing and heating or bloating of the slate would constitute mining. Young's crushing of the slate "... would appear to comprise "milling", and therefore "mining", under the Act" according to the majority. But no reason is given by the majority, nor does any appear obvious, why the change in ownership of slate, and the location of the secondary crushing operation on the adjacent property of Stalite to which the slate is transported by conveyor belt, converts this operation from mining to manufacturing. A change in ownership of the mineral does not nullify the application or jurisdiction of the Act, nor does the majority cite any statutory justification for such a distinction, nor why, because Young rather than Stalite

2/ "Stalite" is an unregistered trade name used by appellant.

3/ In the Elam decision the Commission affirmed the judge's finding that a commercial dock facility was not a mine under the Act. In that instance, roughly half of Elam's operations did not involve mineral handling, and the work performed was the breaking and crushing, on some occasions, of coal by Elam, solely for its own convenience in loading the coal onto barges for shipment. Elam did not prepare coal for customers, nor to their market specifications or particular uses, nor did it separate waste from or add any material thereto.

is the corporate entity engaged in the actual extraction of the slate, Stalite is therefore not subject to the Mine Act. However, as the legislative history of the Act, and (e.g.) Stoudt's Ferry, (supra) confirm, whether or not extraction is being performed by the operator is not determinative of whether the operation is a "mine" within the meaning of the Act. As the Stoudt's court found, the mineral processing was there, too, being performed by a party other than the extracting operator. Stoudt's, the processor of the minerals it purchased, was nevertheless found to be a mine operator, and its processing operation mining under the Act.

The majority further errs in finding Stalite's treatment of the slate to be the "final steps" in the manufacture of the product. As is undisputed, the appellant's "stalite" is thereafter manufactured into lightweight concrete masonry blocks by Stalite's customers.

The conclusory rationale of the majority that Congress did not intend to "... subject to pervasive regulation of the Mine Act every business that in some manner handles minerals" does not address the issue presented. Rather, the crushing, sizing, and heating of the slate constitutes milling and fits precisely into the definition of a mine set forth in section 3(h) of the Act. We are not free to reject these statutorily mandated criteria, nor to conclude, absent statutory support, that Stalite's operations are outside the coverage of the Mine Act. That conclusion is unsupported by the statute, the legislative history, any judicial precedent or the facts.

I would therefore affirm the holding of the judge below, and dissent from the majority's opinion herein. 4/

A. E. Lawson

A. E. Lawson, Commissioner

4/ Although the majority because of its holding does not reach the denial of entry issue in this case, it is clear that this contention of Stalite is without merit under our precedents and those of all courts which have considered this issue, including the U.S. Supreme Court. Donovan v. Dewey, 101 S.Ct. 2534 (1981).

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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MAR 1 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CLIMAX MOLYBDENUM COMPANY a Division of AMAX, INC., and BOYLES BROS. DRILLING COMPANY, Respondents.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-157-M MSHA CASE NO. 05-02256-05005 MINE: Climax Open Pit

Appearances:

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Before: John A. Carlson, Judge

STATEMENT OF THE CASE

CITATIONS 331979, 331980 and 331982

This case arose out of an August 30, 1979 safety inspection of respondent Climax's surface mining operation in Lake County, Colorado. Three closely related citations, 331979, 331980, and 331982, were heard on the merits. As to each of these, the chief issue to be decided is whether a travelway standard published at 30 C.F.R. § 55.11-1 requires that Climax furnish certain pieces of heavy mobile equipment with flashers or with flags attached to "buggy whip" antennae. That standard reads:

> Safe means of access shall be provided and maintained to all working places.

The matter was heard at Denver, Colorado under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). The parties stipulated to jurisdiction. The petitioner seeks a penalty of $106 for each citation.

FINDINGS OF FACT

Upon the entire record, the following findings of fact are made:

(1) Respondent's open pit mine site includes approximately 10 miles of two-way haulage roads with widths ranging from 100 to 150 feet.

(2) In ordinary operation, the mine runs 3 shifts per day using 45 miners per shift. Daily, 80,000 tons of materials are removed and transported over the haulage roads, chiefly in 120 ton trucks. Including pickup trucks, some 45 vehicles are used on the site.

(3) Respondent also operates two heavy water trucks approximately 44 feet long and 12 feet high, and a Caterpillar number 988 B front-end loader 35 feet long and 13 1/2 feet high. These machines are operated on the roads and the pit floors, and are the subject of the Secretary's citations. The water trucks move at slow speeds to spread water to keep dust down.

(4) Respondent had equipped none of these 3 vehicles with an electrically operated flasher atop its highest part, or a "buggy whip" antenna and flag to alert other vehicles of its presence.

(5) Respondent did equip its pickup service vehicles with flashers, but no other vehicles, including its 120 ton trucks had either flashers or flags. The pickup trucks measure approximately 6 1/2 feet at their highest. Operator's eye level on the 120 ton trucks is about 14 feet 8 inches.

(6) Respondent had built berms along all open sides of its haulage roads, including corners. These varied in height from a maximum of 12 feet on the straight sections, declining to about 6 feet in curves.

(7) The roadways contained a number of curves, but these were laid out to provide 200 yards of forward visibility. The single crest or "hilltop" on the roads was flattened at the top and provided 80 to 100 yards visibility.

(8) To reduce the possibility of collisions between vehicles on its roadways the respondent maintained and enforced the following safety practices:

> (a) All mine vehicles are painted with high visibility paints.
>
> (b) All equipment has conventional head and tail lights for night operation.

(c) New operators and drivers are given two weeks of training which includes instruction on speed limits for varying conditions, equipment and areas. Speed limits range downward from a maximum of 20 miles per hour for unloaded trucks proceeding downhill. Climax officials routinely check speeds with a radar gun.

(d) All vehicles are equipped with two-way radios which place operators in contact with all other drivers and a "base coordinator" who is informed of vehicle movements.

(e) All vehicles are fitted with rear-view mirrors, and heavy equipment with reverse alarms.

(f) On roadways, respondent has placed mirrors on posts on the outer edges of the sharper curves.

(9) Climax experienced no collisions in its mine involving any of the three vehicles cited, or any other large pieces of mobile equipment.

(10) All of these findings relate to conditions at the time of inspection in this case.

DISCUSSION OF THE EVIDENCE

One may first question whether the cited standard, relating as it does only to "safe access" to work places, was intended to have application to warning devices on pieces of heavy mobile equipment. Review of the more specific standards which appear as a part of 30 CFR § 55.11 shows that all have reference to ladders, stairs, walkways and similar fixed structures over which miners could be expected to move. The standard at 30 C.F.R. § 55.11-25 does apply to mobile equipment, but merely prescribes the structural requirements for fixed ladders mounted on the equipment itself, presumably to assure to workers a safe access to elevated cabs or other work places.

For the purposes ot this decision, however, 30 CFR § 55.11 will be assumed to have the broader sweep which the Secretary claims. It is presumed, that is, to apply to the cited machines because they are used on roadways which are a "means of access."

Even so, for the reasons which follow, I must hold that no violations were proved. The language of the standard itself makes no reference, of course, to flags, flashers, or any other warning devices. When confronted with a standard which specifies neither the type of hazard nor the abatement method contemplated, an operator is placed in a far less certain position than when that standard identifies particular dangers and remedies. If the requirements imposed by a standard can be divined only by guess, fundamental questions of due process inevitably arise.

Decisions under the Act thus far have not dealt at length with this problem. 1/ The courts, however, have addressed the same problem under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) in numerous cases concerned with arguments of "unconstitutional vagueness." As a generality, these cases place a higher burden on the prosecutor than those involving narrow or specific standards. First, the courts have reasoned that the Secretary of Labor in enforcing these broad standards is held to essentially the same tests adopted under the "general duty clause" of the Occupational Safety and Health Act, (a clause which has no direct counterpart in the Mine Safety and Health Act). McLean Trucking Co. v. OSHRC 503 F. 2d 8, 10 (4th Cir. 1974); Cape and Vinyard Div. of New Bedford Gas v. OSHRC, 512 F. 2d 1148, 1152 (1st Cir. 1975).

Recognizing that some standards are necessarily broad, the courts have ultimately fashioned this test for standards such as the one we deal with here:

> The question then becomes what precautionary steps a conscientious safety expert would take to avoid the occurrence of the hazard. General Dynamics v. OSHRC, 599 F. 2d 453, 465 (1st Cir. 1979).

In its widest sense, the hazard in the present case is that other drivers might not see the massive loader or water trucks in time to avoid accidents. The Secretary claims that the best way to meet this hazard is to mount a small warning flag on an antenna, or to equip the vehicles with an electronic flasher. Climax contends that its existing safety practices [as described in the findings] were well calculated to minimize the hazard, and that the variations now proposed to the Secretary would be of dubious or even negative value. Through exhibits and testimony, for example, respondent seeks to show that the small, standard size warning flags (8 1/2 x 13 inches), of which the inspector approved, add nothing to the visibility of hugh, brightly painted vehicles. Climax also contends that flashers on machines in the pits create troublesome mirror reflections and other distractions to operators in loading areas during the night shift. Other shortcomings are more obvious. The real concern of the inspector was that roadside berms and banks hide vehicles in turns (Tr. 64, 65, 71). Obviously, to the extent that a road curves around a hillside, a mere flag flying above the loader or truck would still be obscure by a hill of any size. As to berms, the evidence tends to show that the superstructures of the cited vehicles should be visible far above the highest berms in turns. The inspector acknowledged that during daylight flashers would not reduce the hazard he envisioned; mounted atop the highest point on the vehicle they would not be visible over the brow of a hill or from around a corner (Tr. 69).

1/ See, however, two thoughtful, unreviewed judge's decisions, which discuss the matter in considerable depth: Evansville Materials Inc. 3 FMSHRC 704 (1981), Judge Fauver; Massey Sand and Gravel Rock Co., ____ FMSHRC _____, WEST 80-9-M (Feb. 2, 1982), Judge Morris.

The evidence does not convince me that the precautionary measures taken by respondent were less than the standard requires. On the contrary, the precautions appear to have been conscientiously devised and carried out. Respondent's accident-free record tends to show that. Moreover, the inspector himself, presumably a "conscientious safety expert" of the sort mentioned in General Dynamics, volunteered that he saw no problems as he watched the machines in use. Only after a vehicle operator raised the matter did it occur to the inspector that flags or flashers were necessary (Tr. 23). The ad hoc quality of this supposed requirement is thus apparent.

In sum, the Secretary attempts to hold the operator to an arbitrary and somewhat whimsical construction of the "safe access" standard, but fails to show that the measures already in force were not "the reasonably precautionary steps" implied by the standard. Cf. Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F. 2d 460, 463, (8th Cir. 1974). I therefore conclude that the cited standard was not violated. To hold otherwise would be to deprive Climax of due process. If the Secretary is convinced that flags or flashers are indeed the preferred way to minimize the hazard, a specific standard corresponding to those mandating backup alarms and similar warning devices should be promulgated.

CONCLUSIONS OF LAW

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent did not violate 30 CFR § 55.11-1 as alleged in citations 331979, 331980 and 331982.

ORDER

Accordingly, the petition for assessment of civil penalties is ORDERED dismissed and the underlying citations are ORDERED vacated.

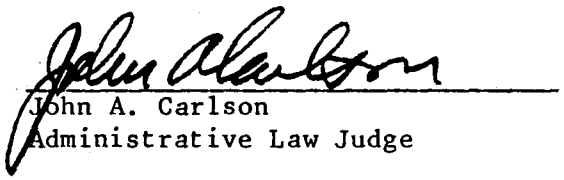
FURTHER ORDER ON SETTLED CITATIONS

This case included three additional citations, 331981, 331983 and 565721, which were not tried on the merits. Respondent agreed at trial to withdraw its contest of the $78 penalty sought in connection with citation 331981, and to pay that penalty. The proposed penalty is therefore ORDERED affirmed, and Climax shall pay the sum of $78 within 30 days of the date of this order.

At trial the parties indicated that the remaining two citations, 331983 and 565721, were the proper responsibility of Boyles Bros. Drilling Company, an independent contractor. They also indicated that that company was willing to substitute itself as the respondent, to accept full responsibility for the violations, and to pay in full the proposed penalties. Boyles Bros., by letter received October 5, 1981 formally agreed to do those things.

In accordance with the agreements then, Boyles Brothers Drilling Company is ORDERED substituted as the respondent with respect to citations

331983 and 565721; in that capacity it is ORDERED to pay, within 30 days of this order, a civil penalty of $66 in connection with citation 331983, and $72 in connection with citation 565721; and the attendant "history of previous violations" for those citations are ORDERED to be recorded against Boyles Bros. and shall be not reflected upon the record of the original respondent, Climax.



John A. Carlson
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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MAR 3 1982

PATRICK J. MOONEY, Complainant, v. SOHIO WESTERN MINING COMPANY, Respondent.	APPLICATION FOR REVIEW OF DISCRIMINATION DOCKET NO. CENT 81-157-DM MD 81-10 MINE: L-Bar Uranium Operation

DECISION

Appearances:

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Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

This proceeding was initiated by a complaint filed by Patrick J. Mooney (hereinafter "Mooney") under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (hereinafter cited as "the Act"). In his complaint, Mooney alleges that Respondent, Sohio Western Mining Company (hereinafter "Sohio"), unlawfully discriminated against him by discharging him from his employment at Sohio's mine on September 9. 1980, in violation of the Act. Mooney alleges that he had engaged in activities relating to health and safety protected by section 105(c) of the Act prior to the time of his discharge. Sohio contends that Mooney was discharged for absenteeism.

Pursuant to notice, a hearing was held on August 11, 1981, in Albuquerque, New Mexico. Mooney testified on his own behalf and called Omer Sauvageau, special investigator for the Federal Mine Safety and Health Administration (MSHA) as a witness. Witnesses for Sohio were Rudolph Siegmann, operations safety engineer, Alton H. Young, shifter and Mooney's immediate supervisor, Ruben Romero, supervisor of Area 5 of the mine, and Dorothy A. Stover, supervisor of employee relations, all employees of Sohio.

Post hearing briefs were filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. During the period of time involved herein, Sohio operated an underground uranium mine identified as J. J. No. 1 Mine approximately 75 miles from Albuquerque and near Sebago, New Mexico.

2. Mooney was hired by Sohio as an underground laborer on February 5, 1980 (Tr. 11 and 13).

3. On February 28, 1980, three weeks after Mooney was hired, he was absent one day from work due to illness and furnished Sohio with an explanation from the medical clinic he contacted regarding his absence (Tr. 49, Exhibit R-5).

4. On March 7, 1980, Mooney was absent from work due to dental work and furnished a note from the dentist for this one day absence (Tr. 50, Exhibit R-6).

5. On April 2, 1980, Mooney was absent from work for one day due to illness (Tr. 25). Upon his return to work on April 3, 1980, Mooney was given a warning slip by his supervisor Alton H. Young (Exhibit R-3). Mooney disputed the absence as being unexcused alleging he had called in to advise Sohio of his absence. Mooney was advised by Young that Sohio's policy was to issue a written warning if there was not a doctor's note submitted following an absence (Tr. 26).

6. On April 10, 1980, during the third shift (midnight to 8 a.m.) Mooney protested climbing a ladder underneath a shale bulge near the top of the rib because he felt it was too dangerous (Tr. 9). Another miner was sent up on the ladder instead of Mooney (Tr. 12). This protest by Mooney was made within a few hours of an injury that occurred to him that day (Tr. 12). Mooney and a second miner, Donald Benton, were standing in the bucket of a Wagner (tractor type equipment) fifteen feet in the air putting lagging up on steel sets to control the roof (Tr. 8). Mooney suffered an injury to his left foot when a slab of rock fell from the crown.

7. Mooney was off work due to his injury from April 10, 1980 until September 2, 1980 (Tr. 19)

8. Mooney reported to work on September 2, 1980 and presented to Sohio a statement from his doctor that he was released for regular duty (Tr. 18, Exhibit R-7).

9. Upon arriving at work, Mooney had a meeting with Rudolph Siegmann, Sohio's safety director. Mooney complained that there had been omissions in the accident reports regarding his injury that were filed with the workmen's compensation carrier for Sohio. He also complained that Donald Benton, the other man in the bucket of the Wagner, had not been interviewed

or listed as a witness, and that the area they were working in was not properly supported with rock bolts and mesh. Mooney stated that such omissions in the reports denied him a ten percent increase in his workmen's compensation benefits, which would have been paid him if Sohio failed to utilize safety equipment. Mooney told Siegmann he intended to pursue the matter further (Tr. 16, 17 and 18).

10. Following his conversation with Siegmann, Mooney was assigned to a job on the surface digging a ditch with a shovel (Tr. 19). He had failed to bring safety glasses that day and in accordance with company policy was not allowed to go underground (Tr. 170 and 171).

11. On the following day, September 3, 1980, Mooney felt pain in his left foot and did not report to work. He telephoned Sohio and talked to Ruben Romero, a supervisor at the mine. Mooney told Romero that he would not be reporting for work that day. Romero told Mooney to call the Safety Department which Mooney did talking to some person whose name he did not remember (Tr. 20).

12. Mooney made an unsuccessful attempt to see his physician on September 3, 1980 (Tr. 20).

13. On September 4, 1980, Mooney returned to work without a note from the doctor and as a result was given a three day suspension from work for an unexcused absence (Tr. 21, Exhibit R-4 1/).

14. Mooney reported to work on September 9, 1980 ten to fifteen minutes late and was notified that he was terminated for a third warning slip (Tr. 177).

15. Mooney filed a written complaint of discrimination with the Mine Safety and Health Administration (MSHA) on October 15, 1980 (Tr. 29). An investigation was conducted by an investigator for MSHA and Mooney was advised MSHA was of the opinion that Mooney had not been discriminated against in violation of the Act. A letter dated March 5, 1981 was sent to Sohio so advising them of this decision (Exhibit R-13).

16. Mooney filed a claim of discrimination with the Federal Mine Safety and Health Review Commission on March 25, 1981.

17. Mooney also filed a claim for unemployment insurance with the State of New Mexico.

1/ Exhibit R-4 states as follows: Warning slip Date 9-4-80 Name Patrick J. Mooney Dept. Mine Classification Labor Nature of Warning A.W.O.L. Second warning 3 days off Third warning Termination. Return to work 9-9-80 supervisors signature Earl Zimm.

ISSUE

Did Mooney engage in activity protected under section 105(c) of the Act, and, if so, was he discharged because of it?

DISCUSSION

This case involves section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), which sets forth certain types of employee activity which are protected by a prohibition against discrimination or interference, including:

> ... a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has previously considered questions raised concerning the burdens of proof in discrimination cases in Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980). rev'd on other grounds, No. 80-2600 (3rd Cir. Oct. 30, 1981), and Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). In Pasula, it held that a prima facie case is established:

> ... if a preponderance of the evidence proves (1) that (the miner) engaged in a protected activity, and (2) the adverse action was motivated in any part by the protected activity.

The first element of proof of a prima facie case is a showing that protected activity occurred. Mooney argues in his post-hearing brief that the motive for Sohio to discriminate against him was because of his complaints concerning safety violations and the preparation of false and inaccurate accident reports regarding his injury and except for this, Sohio had no valid reason to fire him (Mooney's post-hearing brief at page 8).

The facts show that on April 10, 1980, Mooney was injured while working in the underground shop area of Sohio's mine described as Area 5 in the J. J. No. 1 Mine. Earlier in the evening, Mooney had complained about an assignment requiring him to climb a ladder under a shale bulge at the top of the rib which situation he considered dangerous. His concerns in this matter were apparently accepted as valid and another employee was assigned to perform the task. There was no evidence presented in this case that Mooney protested his assignment later on in the shift to work in the bucket of the Wagner with Donald Benton in putting up lagging on the steel sets which resulted in his injury. The complaint by Mooney regarding his assignment on the ladder would be protected activity under the Act if it were shown that such refusal to work prompted his firing. The firing occurred approximately five months later and the ladder incident alone would seem rather remote. However, Mooney argues that subsequent events, specifically his complaints about the accident reports, was protected activity and the cause for his firing.

Upon his return to work in September 1980, Mooney met with Siegmann and complained that the accident reports filed with the workmen's compensation carrier were not accurate. If these complaints were motivated by a sincere belief by Mooney that such matters were related to safety and health conditions in the mine, it would constitute protected activity. However, the preponderance of the evidence shows that at the time Mooney made these complaints to Siegmann and subsequent thereto, Mooney was attempting to establish his right to an additional ten percent payment he would receive on his workmen's compensation benefit if it was shown that the accident was caused by a failure to utilize safety equipment (Tr. 17). Mooney in his statement to the MSHA inspector stated as follows:

> I was very angry that the report had been falsified. I was denied a substantial amount of money as a result of the report being falsified, and I wanted the report set straight it would have jeopardized my supervisors Alton Young's job" (Exhibit C-2).

Mooney testified at the hearing as follows:

> I had protested to Mr. Siegmann these omissions and discrepancies and at that time I told him that I would pursue this matter because I felt that I had been unjustly denied a penalty, an additional monetary benefit from my accident that I was entitled to under state law (Tr. 17).

These statements by Mooney and a careful review of the evidence shows that Mooney's purpose of pursuing this matter upon his return to work was motivated by monetary reasons rather than safety and health and would not constitute a protected activity under the Act. Mooney's statement that Alton Young's job was in jeopardy by his actions or that such acts would cause Siegmann to lose his job was not supported by the evidence.

Mooney argues that Sohio had no valid reason to fire him. The preponderance of the evidence contradicts this. Mooney worked for Sohio from February 5, 1980 until September 9, 1980. During that period of time, he had an excused absence for medical reasons on February 28, 1980, approximately three weeks after he commenced work, an excused absence for dental work on March 7, 1980 and an unexcused absence on April 2, 1980 for which he was issued a warning slip. On April 10, 1980, he was injured by the rock fall and was off work until September 2, 1980, when he returned for regular duty assignment. Mooney had an unexcused absence for medical reasons on September 3, 1980 and upon returning to work on September 4, 1980 was given a second written warning that he would be terminated if it occurred a third time and was given a three day suspension. On September 9, 1980, the date he was to return to work, Mooney was late and was discharged.

Mooney argues that Sohio did not follow its own policy regarding absences when it fired him. He contends in his post-hearing brief on page 6 that the two warning slips dated April 3, 1980 (Exhibit R-3) and dated

September 4, 1980 (Exhibit R-4) are unwarrantable reprisals. The fact is that the warning slip dated April 3, 1980 for the first unexcused absence was issued prior to the accident which occurred April 10, 1980 that triggered the events which Mooney claims as protected activity. This contradicts his argument that this first warning slip was a reprisal. Further, the preponderance of the evidence and particularly the two doctor's statements submitted by Mooney to Sohio for absences on February 28, and March 7, 1980 support Sohio's argument that Mooney was aware of their policy regarding attendance.

In its decision Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (November 13, 1981), the Federal Mine Safety and Health Review Commission considered a similar question regarding a company's business practices regarding disciplining employees. The Commission held as follows:

> ... Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. if a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality becomes appropriate.
>
> The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979)(Articulating an analogous standard).

I conclude that Sohio successfully defended by showing that it did have legitimate reasons to terminate Mooney for his attendance record.

Certainly, the evidence shows that Mooney was given adequate warning during a short period of time (April until September, 1980) that he was invoking a company rule regarding unexcused absences.

I have intentionally avoided an extended review of the facts surrounding the accident which occurred on April 10, 1980 causing Mooney's injury. This case was not intended as a forum for deciding whether a safety violation occurred or who was at fault. The issue here must be confined to whether Mooney's complaint of safety violations and inaccurate reports was protected activity and, as a result, produced a subsequent discrimination action by Sohio. I do not find that Mooney has made a prima facie case in either instance and find that Sohio did not violate section 105(c) when it discharged Mooney.

CONCLUSION OF LAW

1. I have jurisdiction over the parties and the subject matter of this proceeding.

2. Sohio did not violate section 105(c) when it discharged Patrick J. Mooney.

ORDER

The complaint of discrimination in this case is DISMISSED.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 4 1982

PEABODY COAL COMPANY,	:	Contest of Order
Contestant	:	
v.	:	Docket No. KENT 80-318-R
	:	
SECRETARY OF LABOR,	:	Order No. 796237
MINE SAFETY AND HEALTH	:	August 1, 1980
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
UNITED MINE WORKERS OF AMERICA,	:	
(UMWA),	:	
Respondent	:	
and	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 81-32
Petitioner	:	A/O No. 15-02079-03048 R
v.	:	
	:	Ken No. 4 Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

This matter is comprised of a contest proceeding under section 105(d) and a civil penalty proceeding under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the "Act"). Peabody Coal Company (hereinafter, "Peabody") seeks review of a citation issued on August 1, 1980, under section 104(a) of the Act 1/ because of Peabody's refusal to permit MSHA to inspect and copy certain records. MSHA seeks assessment of a civil penalty against Peabody for this refusal, an

1/ The citation, originally issued under section 104(b) of the Act on August 1, 1980, was subsequently modified on August 4, 1980, to a section 104(a) action.

alleged violation of section 103(d) of the Act 2/ and 30 C.F.R. § 50.41. 3/ Both parties agree that a hearing is unnecessary and request that a decision be made on the basis of stipulated facts and written briefs. On June 12, 1981, I received the parties' stipulations and written briefs were subsequently received. Based on the stipulations submitted, it is found:

1. The Ken No. 4 Mine is an underground, bituminous coal mine located near Beaver Dam in the County of Ohio, State of Kentucky.

2. Peabody is the operator of the Ken No. 4 Mine.

3. Peabody is subject to the provisions of the Act with respect to the subject mine and citation.

4. Jurisdiction exists over the parties to and the subject matter of these proceedings.

5. On July 29, 1980, a written request for a section 103(g) special investigation was submitted by a UMWA safety inspector to MSHA's office in Madisonville, Kentucky, indicating that there was an injury in a rock fall that had occurred at the Ken No. 4 Mine on May 9, 1977, and enclosing a copy of Peabody's report which states that no injury occurred. The UMWA official requested that a special investigation be made to determine whether an injury had in fact been reported. MSHA can find no record of the injury suggested by the letter of the UMWA official. However, an affidavit was executed by Byron L. Culbertson which, in pertinent part, alleges that while he was employed at cleaning up the rock fall on May 9, 1977, he injured his back and reported the injury to his face boss, and that later, with the aid of the assistant mine foreman, he completed an accident report. Additionally, MSHA has been informed by one C. J. Shipp, M.D., that the latter's medical clinic records show that on May 10, 1977 (the day after the accident), the said doctor examined Byron L. Culbertson.

2/ This provision provides:

"All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported at a frequency determined by the Secretary, but at least annually." 30 U.S.C. § 813(d) (Pocket Part 1981).

3/ 30 C.F.R. § 50.41, Verification of Reports, provides:

"Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illness which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this Part or relevant and necessary to a determination of compliance with the reporting requirements of this Part."

On August 1, 1980, Federal Inspector Jesse F. Rideout, pursuant to instructions of MSHA's district manager, went to the mine property to inspect the company records relating to the rock fall and purported injury. No request for any other record was made. Inspector Rideout informed Jerry Maggard, Safety Director at the Ken No. 4 Mine, as to the nature of his investigation and gave him a copy of Government Exhibit No. 3. 4/ Safety Director Maggard informed Inspector Rideout that Peabody had filed all required reports relating to the rock fall 2 years previously with MSHA and he refused to allow the inspector to see Peabody's accident records. The Safety Director arranged for the inspector to telephone Peabody's legal department whereupon the inspector was informed by Peabody's legal department that they would advise Clyde Miller, the mine superintendent, that MSHA personnel would not be permitted to examine the accident reports without a search warrant.

Inspector Rideout then contacted Dennis Ryan of the Arlington, Virginia Staff of Special Investigations, who after conferring with counsel from the Office of the Solicitor, instructed the inspector as to their next course of action. In accordance with his instructions, the inspector returned to the Ken No. 4 Mine property on August 1, 1980, and demanded to see the records required to be kept relating to the accident and injuries concerning the rock fall on May 9, 1977. Superintendent Miller responded that based on advice of Peabody's counsel, the inspector would not permit the inspector to examine the mine copies of the accident reports. Inspector Rideout then read Superintendent Miller section 103(d) of the Act, but Mr. Miller still refused. Inspector Rideout then issued Citation No. 796236 which is the subject of the instant proceeding.

The issue involved is whether MSHA must obtain a search warrant in order to obtain mine office accident records which are required to be kept under the Act and its implementing regulations.

It is noted initially that there was no actual physical search of Peabody's offices or physical seizure of Peabodys' records.

The Supreme Court of the United States in Donovan v. Dewey, ____ U.S. ____, 69 L.Ed.2d 262 (1981), hereinafter Dewey, held that search warrants were not required for a section 103(a) inspection to be conducted under the Act. The crux of the Dewey holding, which I find to be generally dispositive, is that the inspection process is not such an unreasonable intrusion upon the interests of the mine operator as to offend Fourth Amendment

4/ This exhibit is a copy of a letter dated July 28, 1980, addressed by a safety inspector employed by the United Mine Workers of America addressed to the MSHA office at Madisonville, Kentucky, requesting a section 103(g) special investigation to determine whether there was a 30 C.F.R. § 50.20 violation (which is similar to 30 C.F.R. § 80.31, 37 F.R., Page 5753 (March 21, 1972), which was the standard in effect at the time of the rock fall on May 9, 1977.

requisites. In its discussion, the Court specified three instances where inspections of commercial property may be found unreasonable:

(1) If they are not authorized by law,

(2) If they are unnecessary for the furtherance of Federal interests, and

(3) If the inspections are so random, infrequent, or unpredictable that the owner for all practical purposes has no real expectation that his property will from time to time be inspected by Government officials.

Since none of these were found applicable to section 103(a) inspections, the process was held to be reasonable. By virtue of Dewey, the mining industry apparently has joined the liquor and firearms industries as an exceptional enterprise subject to the warrantless inspection of its commercial premises. See Colonade Catering Corporation v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972), respectively.

Reconsideration of the three tests for reasonableness set forth in Dewey in connection with section 103(d) inspections is in order.

Is the Inspection Authorized by Law

At the time of the rock fall on May 9, 1977, the Federal Coal Mine Health and Safety Act of 1969 (hereafter, 1969 Act) was in effect. The Federal Mine Safety and Health Act of 1977 (hereafter, 1977 Act) did not become effective until March 9, 1978. Accordingly, examination of both the 1969 and 1977 Acts is desideratum.

Section 111 of the 1969 Act provides:

> Maintenance of records; investigation of accidents; accessibility; periodic reports to Secretary; publishing of reports; limitations
>
> (a) All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents, roof falls, and investigations shall be kept and and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported for periods determined by the Secretary, but at least annually.

(b) In addition to such records as are specifically required by this chapter, every operator of a coal mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary may reasonably require from time to time to enable him to perform his functions under this chapter. The Secretary is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this chapter, all records, information, reports, findings, notices, orders, or decisions required or issued pursuant to or under this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection. [Emphasis added.]

30 U.S.C. § 821 (1971).

Thus, under section 111, the operator clearly was required to keep records at the time of the rock fall and to make the same available to the Secretary. Additionally, the following three regulations were pertinent at the time of the rock fall.

(1) 30 C.F.R. § 80.22, which delineates what accident invesigation report records shall contain:

(a) The written record of each investigation of any accident shall contain:

(1) An identification of, and correlation with, the record or records of the accident, injury, or occupational illness reported and required to be maintained by Section 80.31.

(2) The date and hour upon which the accident occurred.

(3) The date and hour the investigation was started.

(4) The name of the person or persons who made the investigation.

(5) The specific location of the accident and a description of the location.

(6) Names, occupation at the time of the accident, and pertinent occupational experience for all persons who received disabling injuries and other injuries.

(7) A narrative description of the accident, including all pertinent related events prior to the accident, measurements of any dimension or clearance; type of equipment or

machinery, noise level, visibility, lighting (in general terms); any identifiable human behavioral factors contributing to the accident; or any other element contributing to or related to the accident.

(8) A description of the steps taken, or to be taken in the future to avoid a recurrence, including, where appropriate, suggestions for modification or improvement in operating rules and regulations, working rules and regulations, safety standards, modification of equipment, training of personnel, or any other changes needed to prevent recurrence of the accident.

(b) Additional records shall be kept as follows of all unintentional roof falls of a size that would restrict ventilation or the passage of men:

(1) a plot of the roof fall on a mine map.

(2) A rough sketch or sketches of suitable scale showing the dimensions of the fall, the type and location of the roof support used, the type and thickness of the strata above the coalbed, and a statement of the depth of overburden in the affected area. Abnormalities in the immediate roof structure also shall be located and described.

(2) 30 C.F.R. § 80.23, which states these records shall be maintained at the mine for a period of 5 years and available to MESA upon request of the district manager:

The written records of investigation of accidents required by this Subpart C shall be maintained at the mine for a period of 5 years from the date of the accident and shall be open for inspection by interested persons. A copy of the written record of each investigation of an accident made under section 80.22 shall be furnished to the Mining Enforcement and Safety Administration upon request by a Coal Mine Health and Safety District Manager.

(3) 30 C.F.R. § 80.31(a), which delineates record-keeping requirements for accidents:

The operator of a coal mine shall maintain at the mine office a Coal Accident, Injury, and Illness Report (Form 6-347) on which there shall be entered and recorded specified information with respect to each accident, and reach resultant injury by date of occurrence, and each occupational illness by date of diagnosis or occurrence. The Coal Accident, Injury, and Illness Report is organized to facilitate the recording

and compilation of information for each occurrence. The operator's copy (white) shall be maintained at the mine for a period of 5 years from the date of occurrence or diagnosis, whichever is applicable, and shall be open for inspection by interested persons.

The statutes and regulations in effect on the date of the accident required the mine operator to keep records of the type Inspector Rideout requested. Nothing in the 1977 Act suggests that the record-keeping requirements under the 1969 Act were to be disregarded. In fact, section 103(d) of the 1977 Act is substantially congruent to the 1969 Act's mandates. Consequently, since the accident occurred on May 9, 1977, and records were required to be kept for a period of 5 years from that date, I find that Inspector Rideout's August 1, 1980, request for records was in accordance with applicable law, that Respondent was required to keep such records by express provisions of both the 1969 and 1977 Acts, and that Respondent was likewise required to allow the Secretary to inspect such records.

Is the Inspection Necessary for the Furtherance of Federal Interests

Congressional concern over mine safety has been apparent since Federal intervention in the mining industry began in 1910 when the Bureau of Mines Act was enacted (Pub. L. No. 61-179, Ch. 240, 36 Stat. 369 (1910)). Of utmost concern has been the health and safety of the mining industry's most precious resource--the miner (see Preamble, 1977 Act, 30 U.S.C. § 801(a)) (Pocket Part 1981). Congress has taken pervasive measures to ensure the health and safety of the miner. It is manifest that record-keeping requirements are needed to monitor safety performances and to document accidents and their causes. MSHA uses this information to improve the overall quality of a mine's safety program.

In requesting records, MSHA sometimes touches upon another legitimate concern, that of the general expectation that a mine operator has of privacy in his offices. Judicial pronouncements involving these competing interests suggest that whenever an inspector seeks information that is required to be kept by law, the privacy expectations of the mine operator must yield to the Federal interest protecting the health and safety of the miner. 5/ For example, in Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973), the court noted:

> The governmental interest in promoting mine safety, it might be concluded, far outweighs any interest the mine operators may have in privacy. 364 F. Supp. 45, 51.

5/ The factual configuration underlying the decision of Judge Broderick in Sewell Coal Company v. MSHA, 1 FMSHRC 864 (July 6, 1979), is distinguishable from the instant matter in that a wholesale search of files and records (some records were required and others were not required to be kept under the Act) was involved.

and footnoted:

> The mine operator though, does have a general expectation of privacy in his offices on the mining property. There is, however, no expectation of privacy in the maps, books, and records which are maintained for and in compliance with the Mine Safety Act. These must, of course, be produced upon demand to the federal inspector when he makes his unannounced entry. 364 F. Supp. 45, 51. n. 5.

See also United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1976), which, at page 218, underscores a significant industry interest in maintaining this inherent part of the statutory scheme of self-regulation:

> It follows that business records and other paraphernalia, which are maintained pursuant to the Act, are appropriate targets for periodic federal scrutiny. * * * In the instant case, these materials constitute the veritable life blood of a statutory scheme which contemplates responsible, self-monitoring of working conditions by mine operators.

As noted above, the firearm's industry like the mining industry has been found to be pervasively regulated. In United States v. Biswell, supra, the Supreme Court of the United States upheld a statute authorizing warrantless searches of firearm's records required to be kept by law provided the inspection was during normal business hours. 6/

Section 103(e) of the 1977 Act requires that any information required to be kept should be obtained so "as not to impose an unreasonable burden with the underlying purposes of the Act." 7/ Accordingly, since the investigation occurred during regular business hours and Inspector Rideout's sole request was for information of an accident report of a rock fall on May 9, 1977, and since this information was required to be kept by law, I conclude (1) that the request was reasonable under section 103(e), (2) not burdensome, and (3) in furtherance of federal interests.

6/ Also see United States v. Petrucci, 486 F.2d 329 (9th Cir. 1973), to the same effect.

7/ Section 103(e) reads:

"Any information obtained by the Secretary or by the Secretary of Health, Education, and Welfare under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible." 30 U.S.C. § 811(c) (Pocket Part 1981).

Is the Inspection of a Type So Random, Infrequent, or Unpredictable That the Owner, for All Practical Purposes Has No Real Expectation That His Property Will from Time to Time Be Inspected By Government Officials

Peabody argues that since the request for the accident record was "special" (i.e., one not of certainty or regularity), it "cannot be expected to foresee an investigation that was created for the sole purpose of securing accident information." This contention is both specious and pernicious to the mututal interest of industry and the public in that it attacks the underpinnings of the concept of self-regulation, which ultimately must operate in a spirit of cooperation and good faith.

As the parties stipulated, Inspector Rideout "demanded to see the records required to be kept relating to the accident and injuries concerning the rock fall on May 9, 1977" (Stipulation, No. 6). These records are required to be kept by the mine operator by both the Act and the regulations and made available to the Secretary. Official notice is taken that, in the abstract, a rock fall is a most dangerous circumstance. Investigations of such are clearly a legitimate regulatory concern. Since the request was made during regular business hours for records specifically required to be kept and turned over, Peabody's claim that the request was uncertain and unforeseeable is not found meritorious. In this connection, I find that the request was "routine" in the sense that it was specifically authorized by the Act, even though it was not in furtherance of a common enforcement practice. Consolidation Coal Company, supra, p. 218, fn. 8.

Conclusion and Assessment of Penalty

Since it is concluded that Inspector Rideout's warrantless request for information relating to the records required to be kept should have been complied with, I find Peabody, a large mine operator, to be in violation of the Act. MSHA admits that the violation was not serious since no physical harm was posed to any miner by reason of the failure to produce the report. The culpability of this intentional violation is mitigated by its being in furtherance of advice from counsel. 8/ Peabody has but a moderate history of previous violations. Accordingly, a penalty of $500 is assessed which Peabody is directed to pay to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr., Judge

8/ A fact which was stipulated to by the parties (see Stipulation received June 17, 1981, p. 4).

Distribution:

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MAR 8 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. KENT 81-124-D
On behalf of ISAAC A. BURTON, ET AL., Complainants	:	No. 8 Mine
v.	:	
SOUTH EAST COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainants;
James W. Craft, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceeding was heard by Administrative Law Judge James A. Laurenson in Lexington, Kentucky, on December 2 and 3, 1981. William J. McCool, Rex V. Fields, Isaac A. Burton and Charles Miller testified on behalf of Complainants; William T. Cahoon, Estel Brown and Charles Holbrook testified on behalf of Respondent. At the conclusion of the hearing, both parties waived their rights to submit closing argument and to file posthearing briefs. Judge Laurenson left the Commission before he was able to decide the case and it was assigned to me. The parties have agreed that I may decide the case on the record made before Judge Laurenson and have stated that they do not desire to file posthearing briefs.

The proceeding involves the claims of nine miners, Isaac A. Burton, Alex Combs, Curtis Day, Donnie Dixon, Rex V. Fields, Henry Heron, Jack H. King, William J. McCool and Eugene Spencer that they were discriminated against in violation of section 105(c)(1) of the Mine Act by their employer, Respondent. As a result of the alleged discrimination, Complainants contend they lost time from work and lost pay and other employment benefits.

On the basis of the entire record, including the transcript of testimony, the exhibits introduced and the contentions of counsel I make the following decision:

FINDINGS OF FACT

1. Respondent was at all times pertinent to this case the operator of an underground coal mine in Letcher County, Kentucky, known as the No. 8 Mine.

2. The products of Respondent's No. 8 Mine enter into and its operations affect interstate commerce.

3. At all times pertinent Complainants Isaac A. Burton, Alex Combs, Curtis Day, Donnie Dixon, Rex V. Fields, Henry Heron, Jack H. King, William J. McCool and Eugene Spencer were employed by Respondent as miners.

4. The miners named above worked in the same continuous miner crew at the subject mine. McCool was the continuous miner operator; Dixon was the miner helper, also called the cable puller; Fields was a shuttle car operator; Burton was a scoop operator, the others had various other jobs in the production crew.

5. In mid-June, 1980, the development of the subject mine was in the direction of an old mine, which had been mined by the Smith-Elkhorn Coal Co. Both mines were in the Elkhorn No. 3 coal seam. Respondent intended to cut into the old mine and recover some of the coal that had not been mined out.

6. Respondent's mining engineer, under whose supervision the mine map of the subject mine was prepared, had done the engineering work on the Smith-Elkhorn Coal Co. Mine and was aware of the location of the workings in the latter mine.

7. About 3 or 4 weeks prior to June 18, 1980, a cut was made from the subject mine into the Smith-Elkhorn Mine. This occurred on a Saturday while the No. 8 Mine was otherwise idle. Test boreholes had been previously drilled and water had been pumped out.

8. A flame safety lamp check of the air coming from the old mine was made. It did not show the existence of "black damp."

DISCUSSION

There is a dispute between the testimony of William McCool, the miner operator and Charles Holbrook the mine foreman on this point. McCool was operating the miner and Holbrook handled the flame safety lamp. Therefore Holbrook was in the best position to testify on whether the lamp went out. McCool may have misunderstood Holbrook and clearly was not in as good a position to see the lamp.

9. Holbrook instructed McCool and the others to put a danger board in the entry with the notation "Danger. Keep Out," and they did so.

DISCUSSION

Once again the testimony of McCool and Holbrook is in conflict. I accept McCool's version since it is more definite (when asked if McCool hung such a sign, Holbrook answered "I don't think so") (Tr. II, 91) and since McCool was one of those who actually hung the sign.

10. About 1 week prior to June 18, 1980, McCool again cut into the old mine. He told Holbrook and Estel Brown, the section foreman. Brown performed a flame safety lamp test and the flame went out indicating bad air.

DISCUSSION

There is dispute as to whether this was an accidental cutting into the old mine or a planned one and as to whether the mine map was accurate. I accept Respondent's testimony on those issues, but I accept McCool's testimony concerning the flame safety lamp test. It was not clearly disputed by Brown.

11. After the old mine had been previously cut into as described in Finding of Fact No. 7, the mine foreman, Mr. Holbrook went into the Smith-Elkhorn works twice weekly to examine the areas approached by the advancement of No. 8 Mine. He walked to within 3 breaks (180 feet) of the junction. There was water on the floor of the old mine but "it wasn't real deep." (Tr. II, 87). Neither Holbrook nor Brown told McCool and the other members of his crew that these inspections were made.

12. On June 13, 1980, mine operator McCool and his crew began work at 2:00 p.m. They serviced the miner and checked the face area. Water was coming out from the face and was standing on the mine floor. The ribs were soft. On the previous day as cuts were made the coal kept getting softer and more water was encountered.

13. McCool then told section foreman Brown that he didn't want to cut into the face without drilling test holes because he was afraid of cutting into water and black damp in the old mine.

14. Brown then asked the miner helper, Donnie Dixon, if he would run the miner. Dixon said he was also afraid to cut the face.

15. Brown then told the entire crew to leave the mine. There was no discussion of the validity of the miner operators' fears and no offer of alternate work.

16. On the way out of the mine, the crew met MSHA inspectors coming in. Brown told them the crew was leaving because it had no cable to run the drill.

17. On June 19, 1980, when the crew returned to the mine, they were told by Holbrook that "if you was afraid to cut it yesterday, you would be afraid to cut it today and tomorrow." (Tr. I, 42). The crew was told to remain home until Monday, June 23, 1980.

18. On June 19, 1980, an MSHA inspector issued a citation for a violation of 30 C.F.R. § 75.1701 for cutting within 60 feet of an abandoned inaccessible area, without drilling boreholes. This was in the area involved in the present proceeding.

19. The proposal for a penalty based on the above citation was dismissed by a Commission Administrative Law Judge on July 13, 1981, on the ground that the areas to which the mine was being driven were neither abandoned nor inaccessible since they had been inspected and ventilated. Secretary of Labor v. South East Coal Company, Inc., 3 FMSHRC 1766.

20. On June 19 and 20, 1980, the face area in question was advanced by other crews about three cuts. The old mine was not cut into. Test holes were drilled and a pump was set up to pump out the water coming from the old mine. The pump was continued for several months, pumping water intermittently.

21. When the crew returned to work on June 23, 1980, they cut coal in other headings after test holes were drilled.

ISSUES

1. Were miner operator McCool and miner helper Dixon engaged in activity protected under the Mine Act when they refused to perform work on June 18, 1980?

2. If so, are they entitled to pay for the time lost from work on June 18 through 20, 1980?

3. If protected activity was involved, are the members of the crew who were sent home other than McCool and Dixon entitled to pay for the time lost from work June 18 through 20, 1980?

4. Did the Claimants who did not appear at the hearing abandon their cases?

5. Are the miners entitled to hearing expenses including lost pay for meeting with their attorney and for attending the hearing?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977, and the undersigned has jurisdiction over the parties and subject matter of this proceeding.

2. Mine Operator William J. McCool and his helper Donnie Dixon refused to perform work on June 18, 1930 because of a reasonable, good faith belief that it was hazardous.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall ____ F.2d ___ (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981). McCool and Dixon explicitly based their refusal to work on safety reasons. Respondent does not challenge their good faith and the record contains no reason to doubt it. The reasonableness of their belief has to be determined on the basis of what they knew at the time of the work refusal. The fact that the work was objectively safe and was known to Respondent to be safe is not enough to withdraw the protection of the Act. McCool at least had reason to believe that cutting into the old mine might expose him and his co-workers to water inundation and bad air based upon two prior experiences. He did not absolutely refuse to work but asked that test boreholes be drilled before cutting. It seems clear from the record that Respondent did not communicate the fact that the old mine was being ventilated and regularly inspected by mine management. Therefore these facts cannot be used to judge the reasonableness of Complainant's work refusal.

3. McCool and Dixon were sent home because of the refusal to work described in Conclusion No. 2 and remained out of work and unpaid for the same reason on June 19 and June 20, 1980.

4, Therefore, McCool and Dixon are entitled to back pay for the wages lost June 18 through 20, 1980.

5. Although the other members of the crew did not specifically refuse to work because of safety fears or otherwise, they were all sent home for the 3 days because of McCool's and Dixon's safety related work refusal. I conclude that McCool and Dixon were acting on behalf of the entire crew and they are all protected from retaliation under the Act.

DISCUSSION

In two cases, the Commission has rejected the notion that an individual safety complaint by each involved miner is necessary to sustain a discrimination case. Under the 1969 Coal Act the Commission adopted the judge's ruling that "it would be unrealistic to expect each man to make his own individual complaint to his supervisor . . . . It may be inferred that the fears and concerns expressed by the applicants who testified were shared by many of the other applicants." Local 1110, United Mine Workers of America, et al. v. Consolidation Coal Co., 2 FMSHRC 2812 (1930). In the recent case of Secretary/ Dunmire and Estle v. Northern Coal Co,, 4 FMSHRC ___ (1982), the Commission emphasized that the Act protected concerted activity and held that the communication of a refusal to work by one miner "may be deemed to be on behalf of all concerned even if not announced in such terms." Id, slip op. p. 9.

6. The failure of certain Complainants to appear at the hearing did not amount to an abandonment of their claims.

DISCUSSION

Respondent did not cite any authority for the proposition that by failing to appear at the hearing, certain of the Complainants abandoned their claims, and I am not aware of any such authority. Evidence was presented on Complainants behalf, from which I have concluded that they were discriminated against by Respondent. Their failure to appear at the hearing is irrelevant.

7. Complainants are entitled to reimbursement for incidental hearing expenses incurred in prosecuting their claims.

DISCUSSION

In Secretary/Dunmire and Estle v. Northern Coal Company, supra, the Commission held that the awarding of incidental, personal hearing expenses is an appropriate form of remedial relief.

8. Respondent has violated section 105(c) of the Mine Act by discriminating against the Complainants for exercising rights protected under the Act. The violation was moderately serious and was deliberate in the sense that it was intentionally done. There is no evidence as to the size of Respondent or whether a civil penalty will affect its ability to continue in business.

ORDER

Based on the above findings of fact and conclusions of law Respondent is ORDERED:

1. To reimburse Isaac A. Burton the sum of $220 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980; to reimburse Isaac A. Burton the following hearing expenses: $90 for pay lost November 30, 1981; $24 travelling expenses (120 miles at .20 cents/mile) on November 30, 1981; $90 for pay lost December 2, 1981; $62 travelling expenses (310 miles at .20 cents/mile) December 2, 1981, or total hearing expenses of $266 (interest need not be paid on hearing expenses if paid in accordance with this order).

2. To reimburse Alex Combs the sum of $231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

3. To reimburse Curtis Day the sum of $231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

4. To reimburse Donnie Dixon the sum of $225 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

5. To reimburse Rex V. Fields the sum of $220 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980; to reimburse Rex V. Fields the following hearing expenses: $90 for pay lost November 30, 1981; $22 travelling expenses (110 miles at .20 cents/mile) on November 30, 1981; $90 for pay lost December 2, 1981; $58.80 travelling expenses (294 miles at .20 cents/mile) December 2, 1981. or total hearing expenses of $260.80 without interest.

6. To reimburse Henry Heron the sum of $231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

7. To reimburse Jack H. King the sum of $220 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

8. To reimburse William J. McCool the sum of $231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980; to reimburse William J. McCool the following hearing expenses: $90 for pay lost November 30, 1981; $28 travelling expenses (140 miles at .20 cents/mile) on November 30, 1981; $90 for pay lost December 2, 1981; $60 travelling expenses (300 miles at .20 cents/mile) December 2, 1981, or total hearing expenses of $268 without interest.

9. To reimburse Eugene Spencer the sum of $231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

IT IS FURTHER ORDERED that Respondent pay to the Secretary of Labor, Mine Safety and Health Administration the sum of $100 as a civil penalty for the violation of section 105(c)(1) of the Act found herein to have occurred.

IT IS FURTHER ORDERED that Respondent shall pay the above amounts within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

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MAR 8 1982

CLINCHFIELD COAL COMPANY, Contestant	:	Contests of Citation and Order
v.	:	Docket No. VA 81-92-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 1080109 July 7, 1981
	:	Docket No. VA 81-93-R
	:	Order No. 1080112 July 9, 1981
	:	McClure No. 1 Mine

DECISION

Appearances: Timothy W. Gresham, Esq., Lebanon, Virginia, for Contestant; Catherine M. Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

These cases are before me upon Contests filed by the Clinchfield Coal Company (Clinchfield) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., "the Act," challenging a citation and an order of withdrawal issued under sections 104(a) and 104(b) of the Act, respectively. 1/

1/ Section 104(a) of the Act provides as follows:
"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall with reasonable promptness, issue a citation to the operator. 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. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Citation No. 1080109

This citation charges a violation of the regulatory standard at 30 C.F.R. § 75.1105 and alleges as follows:

> The battery-charging station (permanent) located in the No. 5 intake entry, Caney No. 2 section (005) was not housed in a fireproof structure in that the asbestos curtains used as fireproofing did not extend the length of the coal ribs back to the permanent stopping.

The cited standard reads in relevant part as follows:

> Underground * * * battery-charging stations * * * shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return * * *.

The essential facts in this case are not in dispute. The parties agree that the cited underground battery charging station was laid out as illustrated in Exhibit A, attached hereto. As shown in Exhibit A, the battery charger was centered in the subject station 29 feet 6 inches inby a permanent incombustible cinder block stopping but only 7 feet from the coal ribs. The station was 8 feet high and its roof and floor were composed of incombustible slate. Sections of fireproof asbestos curtain were hung alongside the right and left ribs in the general vicinity of the charging station but not immediately adjacent to the battery charger. It is undisputed that the coal ribs adjacent to the battery charger had been properly rock dusted but that did not make the coal in these ribs incombustible and certainly not fireproof.

In practice at relevant times batteries to be charged were removed from mining machinery and placed on one of several metal battery stands located within the charging station. At the time the citation was issued, one

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fn. 1 (continued)

Section 104(b) of the Act provides as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

battery was being charged about 8 feet from the battery charger. In the charging process explosive hydrogen gas is generated and accordingly ventilation must be maintained. There is no dispute that such ventilation was maintained in this case and that the hazard from hydrogen gas was accordingly minimal. The possibility of a short circuit in the charger resulting in fire and heat buildup is also mutually recognized.

Clinchfield admits that its battery-charging station was not completely "housed in fireproof structures or areas" but argues that it was impossible to comply with that requirement because it is in conflict with another requirement in the same standard that "air currents used to ventilate structures or areas enclosing electrical installations * * * be coursed directly into the return." It argues further that because of this conflict and the resulting ambiguities in the cited regulation it can be constitutionally enforced only if the operator had actual knowledge that the cited condition or practice was hazardous or if it can be shown that a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Bristol Steel and Iron Works v. O.S. and H. Review Com'n, 601 F.2d 717 (4th Cir. 1979). Such an analysis of a regulatory standard is not required, however, where the standard itself provides "reasonable certainty" and is facially unambiguous. Connally v. General Construction Company, 269 U.S. 385, 391; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337.

Indeed Clinchfield itself suggests in its brief how the two parts of the regulation may be read in harmony:

> The proper interpretation of this mandatory standard insofar as it states the charging station be housed in a fireproof area must be that the battery-charging station must be so housed as to prevent the spread of fire to combustible materials while, at the same time, allowing proper and necessary ventilation to carry away any and all gases and fumes which could contribute to an ignition and fire and all fumes and smoke that would result from an ignition or a fire.

I agree that the two parts of the standard are not in necessary conflict and that the standard may be read as a consistent and harmonious whole. See 73 Am. Jur. 2d Statutes § 254. Accordingly, I find that the standard provides constitutionally sufficient certainty. Boyce, supra. The only issue before me then is whether Clinchfield was complying with those specific requirements. On the undisputed facts of this case, I find that it was not. As shown in stipulated Exhibit A the battery charger was located only 7 feet from combustible coal ribs with admittedly no fireproof separation. Moreover, while short sections of asbestos curtains were hung in the vicinity of a battery being charged, that battery was situated within 10 feet of another coal rib. Even under the most liberal construction of the standard as advocated by Clinchfield the cited battery-charging station could not therefore have been "housed" within a fireproof structure or area.

Clinchfield nevertheless appears to claim as an affirmative defense that the absence of fireproof housing around portions of the battery-charging station was necessary to allow for the ventilation required by the second part of the standard. The proof in this case fails, however, to support the claimed defense. Indeed there is no evidence to show that the fireproof enclosure as finally approved by MSHA in this case prevented compliance in any way with the ventilation requirements of the standard. Clinchfield contends, finally, that the cited standard should be interpreted with deference to the MSHA Coal Mine Inspection Manual, Chapter 2, section (3) Page 514 (March 1978). The manual provides in relevant part that the " coal, or other combustible materials below, above and to the sides of the battery(s) should be protected." However, since Clinchfield in this case did not as a matter of undisputed fact protect all sides of the battery being charged, it was clearly in violation of the manual provisions as well as the standard. Accordingly, the contention is irrelevant.

ORDER

Citation No. 1080109 is AFFIRMED and the contest of that citation is accordingly DISMISSED.

Docket No. VA 81-93-R

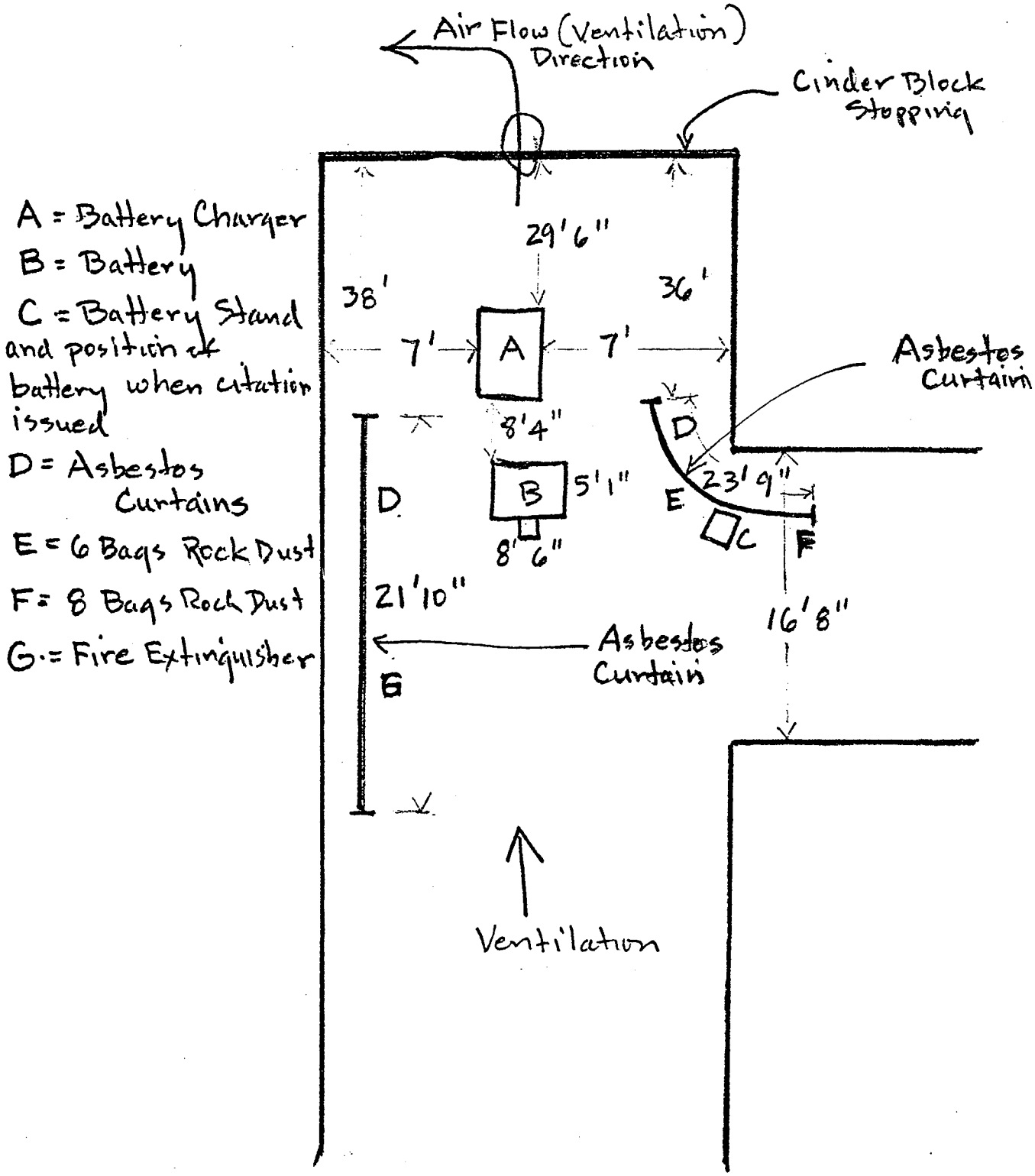
Clinchfield stipulated at hearing that the section 104(b) order of withdrawal in this case, Order No. 1080112, would not be disputed in the event that the underlying citation in Docket No. VA 81-92-R was affirmed. I consider that stipulation to be a request to withdraw the contest of the captioned proceeding conditioned upon the affirmation by the undersigned of the underlying citation in the preceding case. Since that citation has been affirmed, I approve of the withdrawal by Clinchfield of its contest in this proceeding.

ORDER

Order No. 1080112 is AFFIRMED and the contest of that order is accordingly DISMISSED.

Gary Melick
Administrative Law Judge

EXHIBIT "A"


Air Flow (Ventilation) Direction
Cinder Block Stopping
A = Battery Charger
B = Battery
C = Battery Stand and position of battery when citation issued
D = Asbestos Curtains
E = 6 Bags Rock Dust
F = 8 Bags Rock Dust
G = Fire Extinguisher
29'6"
38'
36'
7'
A
7'
Asbestos Curtain
8'4"
D
B
5'1"
D
E
23'9"
C
F
8'6"
21'10"
16'8"
Asbestos Curtain
G
Ventilation

Distribution:

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FMC CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. WEST 80-495-RM
	:	Citation No. 576956; 8/13/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 80-496-RM
	:	Citation No. 576970; 8/13/80
	:	FMC Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 81-259-M
	:	A.O. No. 48-00152-05045 I
v.	:	
	:	FMC Mine
FMC CORPORATION, Respondent	:	

DECISION

Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, P.C., Salt Lake City, Utah, for FMC Corporation; James R. Cato, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Secretary of Labor.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceedings were consolidated for hearing and for the purpose of this decision. They involve a contest of two citations issued the same day, August 13, 1980, and a civil penalty proceeding seeking penalties for the violations alleged in the same two citations. Pursuant to notice, the cases were heard before Administrative Law Judge John F. Cook on August 11 and 12, 1981, in Green River, Wyoming. Judge Cook left the Commission before he could issue a decision, and the parties have agreed that I may decide the cases on the basis of

the transcript of the hearing and the exhibits introduced before Judge Cook and the contentions of the parties in their posthearing briefs. Terri Matson, and Federal Mine Inspectors William W. Potter and Merrell Wolford testified on behalf of the Secretary of Labor; Jerry Doan, Jeffery Munk, Karl O. Christensen, David M. Smith, Charles R. Maggio, Russell W. Rollins and Dale Force, all employees of FMC, testified on behalf of FMC Corporation. On the basis of the entire record and considering the contentions of the parties, I make the following decision:

APPLICABLE REGULATIONS

1. 30 C.F.R. § 57.9-3 provides: Powered mobile equipment shall be provided with adequate brakes.

2. 30 C.F.R. § 57.9-37 provides: Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

FINDINGS OF FACT

1. The FMC Corporation (FMC) is the operator of a large underground mine in Sweetwater County, Wyoming, known as the FMC Mine.

2. The subject mine produces trona, a natural soda mineral, and its operation affects interstate commerce.

3. The parties have stipulated that FMC is a large operator, it could satisfy the penalties if any are assessed against it, its past history "is not extraordinary" and that the citations involved in this proceeding were abated in good faith.

4. On August 9, 1980, Terri Matson was employed in the subject mine as a lube truck operator. Her duties including driving her vehicle to the mining machines and providing necessary lubrication to them during the maintenance shift. Her truck included two oil tanks and a grease can all with pumps operated by an air compressor on the truck.

5. On the above date at about 8:00 p.m., she was servicing the miner to prepare it for production which was planned for the second half of the normal maintenance shift. Both lubrication pumps were operating: Matson was outside of the truck and was pumping the hydraulic fluid into the large tank (approximate capacity 50 gallons) on the miner and a mechanic, Roger Brown, was filling the oil tank at the head of the miner.

6. While the above operation was going on, the lube truck was parked on a slight grade. The motor was running and the truck was in second gear. The wheels of the truck were not blocked and the vehicle was not turned into a rib. No blocks or chocks were present in the vehicle. The parking brake was set.

7. The pumps "ran down" and Matson went back to "rev up" the engine to increase the air pressure. As she did so, the truck started forward. Matson stepped on the foot brake, but it went to the floor and did not respond. The truck struck Roger Brown; he was pinned between the truck and the miner and was injured.

8. The lube truck was equipped with an air over hydraulic braking system, the air acting as a power assist and operating from the same air compressor that powered the lubrication pumps.

9. On August 13, 1980, Inspector Wolford issued a citation under section 104(d)(1) of the Act charging a violation of 30 C.F.R. § 57.9-3 because the lube truck did not have adequate brakes.

10. On August 13, 1980, Inspector Potter issued a citation under section 104(a) of the Act charging a violation of 30 C.F.R. § 57.9-37 because on August 9, 1980, the lube truck was parked on a grade without being blocked or turned into a rib.

ISSUES

1. On August 13, 1980, did the lube truck in question have adequate brakes?

2. If it did not have adequate brakes, was this caused by the unwarrantable failure of FMC?

3. If a violation of 30 C.F.R. § 57.9-3 is found, what is the appropriate penalty?

4. On August 9, 1980, was the lube truck in question parked on a grade and neither blocked nor turned into a bank or rib?

5. If a violation of 30 C.F.R. § 57.9-37 is found, what is the appropriate penalty?

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

1. ADEQUATE BRAKES

Inspector Wolford testified that his inspection of the brakes indicated that the modification of the hydraulic braking system to provide the air assistance rendered the brakes marginal when the air compressor provided between 75 and 90 p.s.i. and inoperable when it fell below 75 p.s.i. He stated that the use of the air compressor for the lube system could reduce the air pressure to the above mentioned levels. Jerry Doan, FMC maintenance supervisor, testified that running the lubrication pumps depletes the pressure in the air system and that if the air pressure gets sufficiently low, the hydraulic brakes will fail. The figures referred to by Inspector Wolford were disputed by other witnesses for Respondent, but their precise accuracy is not important. Karl Christensen, FMC Diesel foreman, testified that if the hydraulic system is working properly and the brake pedal goes to the floor, it could be explained by inadequate air pressure. I accept as true and accurate Ms. Matson's testimony that when she stepped on the brake pedal just prior to the accident on August 9, 1980, the pedal went to the floor and the brake did not operate. The only logical explanation for this is a depletion in the air pressure as a result of using the lubrication pumps. On this basis, I conclude that the braking system was inadequate because of the possibility of failure due to its being tied in with the air compressor operating the lubrication system.

There was also testimony (disputed) concerning the holding ability of the parking brake while the vehicle was in second gear, but this is not referred to in the citation and I am not considering it.

(a) UNWARRANTABLE FAILURE

An unwarrantable failure to comply with a mandatory safety standard (section 104(d)(1) of the Act) has been defined as the failure to abate a condition which the operator knew or should have known existed or because of lack of due diligence or

reasonable care. Zeigler Coal Co., IBMA (1977) 1 MSHC 1518. The evidence in this record shows (1) the operator deliberately altered the braking system on the vehicle in question; (2) the operator knew or should have known that the use of the lubrication pumps could deplete the air pressure and cause a failure in the hydraulic braking system. Therefore, I conclude that the violation was caused by FMC's unwarrantable failure to comply with the regulation in question.

(b) PENALTY CRITERIA

The violation was directly responsible for the injury to Roger Brown. I conclude that it was serious. Since I have previously concluded that it was an "unwarrantable failure" violation, ipso facto, it was due to FMC's negligence. FMC is a large operator, with more than two and one half million man hours worked each year. The history of prior violations is not such that penalties otherwise appropriate should be increased because of it.

2. FAILURE TO BLOCK WHEELS OR TURN INTO BANK OR RIB

There is little or no dispute that on August 9, 1980, Terri Matson parked her mobile vehicle in order to lubricate the miner. The vehicle was on a slight grade and was not blocked. The vehicle was facing an upward grade and the rear wheels were 5 or 6 feet from the rib. That is, if it rolled backwards, it would roll 5 or 6 feet before being stopped by the rib. I conclude that these facts establish a violation of the standard contained in 30 C.F.R. § 57.9-37.

(a) PENALTY CRITERIA

Clearly the violation could have resulted in injury. However, because the grade was gradual and the distance the vehicle could have rolled was limited, I conclude that the violation was only moderately serious. This violation did not cause or contribute to the injury to Mr. Brown.

Matson testified that she had no blocks on her vehicle and had never blocked the vehicle in question. She stated that she did not block the vehicle on August 9, 1980 and did not turn the wheels into the

rib. She further stated that she had never seen other miners in her crew block the wheels of their vehicles or turn into a rib when they parked the vehicles.

Jeffrey Munk testified that although vehicles are supposed to be chocked or turned into a rib when parked, Ms. Matson (Foley) only "occasionally" followed this procedure. For his own part, Munk admitted that prior to August 9, 1980, he "might have been a little lax on it, but for the most part we did, yes." Matson's foreman testified that he instructed her to block her vehicle when she parked it. However, I conclude on the basis of all the testimony that the policy was not strictly or vigorously enforced. I therefore further conclude that the violation was caused by FMC's negligence.

ORDER

IT IS ORDERED that the Contest of Citations 576956 issued August 13, 1980, and 576970 is DENIED and the citations are AFFIRMED.

IT IS FURTHER ORDERED that Respondent in the penalty proceeding, FMC Corporation, shall within 30 days of the date of this decision pay the following civil penalties for the violations found herein to have occurred:

Citation	30 C.F.R. Standard		Penalty
576956	57.9-3		$ 500
576970	57.9-37		$ 300
		Total	$ 800

James A. Broderick
Administrative Law Judge

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FMC CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. WEST 80-506-RM
	:	Citation No. 576918; 8/27/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	FMC Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 81-260-M
	:	A.O. No. 48-00152-05046 I
v.	:	
	:	FMC Mine
FMC CORPORATION, Respondent	:	

DECISION

Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, P.C., Salt Lake City, Utah, for FMC Corporation; James R. Cato, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Secretary of Labor.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceedings were consolidated by a bench order of Judge Cook on August 12, 1981. They involve a contest of a citation issued August 27, 1980 and a civil penalty proceeding seeking penalties for the violation charged in the contested citation and two other citations. Pursuant to notice, the case was called for hearing by Judge Cook in Green River, Wyoming on August 12, 1981. The parties submitted a stipulation of fact on the record and agreed to certain exhibits being introduced. The case was submitted for decision on the basis of the stipulation and exhibits. Both parties have filed posthearing briefs. Judge Cook left the Commission before he could issue a decision, and the parties have agreed that I may decide the cases on the basis of the stipulation and exhibits submitted before Judge Cook and the contentions of the parties in their posthearing briefs.

APPLICABLE REGULATIONS

1. 30 C.F.R. § 57.9-1 provides: Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator * * *.

2. 30 C.F.R. § 57.9-3 provides: Powered mobile equipment shall be provided with adequate brakes.

3. 30 C.F.R. § 57.9-37 provides: Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

FINDINGS OF FACT

1. The FMC Corporation (FMC) is the operator of a large underground mine in Sweetwater County, Wyoming, known as the FMC Mine.

2. The subject mine produces trona and its products enter interstate commerce and its operation affects interstate commerce.

3. For all FMC mines, a total of 2,660,064 man hours are worked annually; for the subject mine, a total of 2,624,064 man hours are worked annually.

4. The subject mine had 245 paid violations of mandatory health and safety standards between August 14, 1978 and August 13, 1980. Twenty-nine of these violations involved the standards in 30 C.F.R. § 57.9; none involved violations of 57.9-1; two involved violations of 57.9-3; two involved violations of 57.9-37. In addition, I take notice of a violation of 57.9-37 occurring on August 9, 1980 (for which, however, the citation was not issued until August 13, 1980) which is the subject of a separate proceeding, Docket No. WEST 81-259-M. I conclude that this history is moderate in view of the size of the mine and penalties otherwise appropriate should not be increased because of it.

5. The parties have stipulated that penalties assessed in the proceeding will not affect FMC's ability to continue in business.

6. All of the citations involved in this proceeding were abated in good faith.

7. On August 12, 1980, John Nordgran, an employee of FMC, operated a lube truck in the subject mine.

8. The running brake and the parking brake on the lube truck were not operating properly on August 12, 1980: the parking brake wear surface was worn out on one side and covered with grease and oil on the other. The wheel brakes were substantially worn. The brakes were caked with trona which can cause or contribute to brake failure. Washing stations were available throughout the mine for washing trona accumulations from brakes on vehicles.

9. FMC posted a notice on the lube truck in question which read: ATTENTION OPERATOR WILL MAKE DAILY PRE-SHIFT EXAMINATION OF EQUIPMENT TO BE USED. (Tires, Brakes, Ground Trip, Dust Control System, Cables, Controls, etc.). REPORT ANY EQUIPMENT DEFECTS AFFECTING SAFETY IMMEDIATELY TO YOUR FOREMAN OR SUPERVISOR.

10. FMC enforces the requirement for preshift inspections pursuant to its labor agreement.

11. Lube truck operator Nordgran knew on August 12, 1980 that the brakes on his vehicle were inadequate. He did not report this fact to his supervisor. The condition of the brakes was not known to FMC.

12. On August 12, 1980, Nordgran performed his normal duties of lubricating mine equipment beginning at 4:00 p.m. At about 9:30 p.m. he drove his truck to the Number 11 drill in No. 7 room, No. 3 crosscut intersection in the subject mine to lubricate the drill.

13. Nordgran parked his lube truck on a slight incline sloping down toward the drill. He did not set the parking brake and he did not block the wheels nor was the vehicle turned into a rib.

14. No blocks or chocks were provided on the lube truck in question.

15. FMC has policies and regulations requiring mobile equipment operators to block or turn a vehicle into a rib when parked on a grade and to set the brakes of the vehicle when unattended.

16. The policies above described were enforced through disciplinary actions pursuant to the Labor Relations Agreement between FMC and the union representing the employees.

17. There was no record that Mr. Nordgran required close supervision or that he had previously violated safety regulations of FMC.

13. While Nordgran was lubricating the drill referred to in Finding of Fact No. 12, the lube truck rolled toward him and he was struck and pinned between the truck and the drill. Nordgran sustained two broken toes and contusions to his right leg.

19. There were no supervisory personnel in the area at the time of the injury and the failure of Nordgran to block the truck or turn it into a rib was not known to FMC.

20. The inadequate brakes contributed to the accident involving Nordgran.

21. On August 14, 1980, Federal Mine Inspector Robert Kinterknecht issued Citation No. 576909 alleging a violation on August 12, 1980 of 30 C.F.R. § 57.9-37 because the lube truck in question was parked on a grade of about one percent without being blocked or turned into a rib. The inspector issued Citation No. 576910 on the same day charging a violation of 30 C.F.R. § 57.9-3 because adequate brakes were not provided on the lube truck.

22. On August 27, 1980, Inspector Kinterknecht issued Citation No. 576918 charging a violation of 30 C.F.R. § 57.9-1 because the employee involved stated he had not reported the inadequate brakes to his supervisor but continued to operate the vehicle.

ISSUES

1. Did FMC violate the mandatory standards charged in the citations?

2. If it did, what is the appropriate penalty for each violation?

CONCLUSIONS OF LAW

1. On August 12, 1980, an FMC employee left the mobile equipment he was operating unattended without setting the brakes. He parked the vehicle on a grade without blocking it or turning it into a bank or rib. This constituted a violation of 30 C.F.R. § 57.9-37.

2. The violation directly resulted in an injury to a miner. I conclude that the violation was serious even though the injury was to a miner whose misconduct contributed to the violation. I do not believe that fact lessens the seriousness of the violation. This proceeding is not a private action for damages, but the enforcement of a public policy to bring a greater degree of safety to the nation's mines.

3. The parties have stipulated that FMC had and enforced policies requiring the blocking of a truck parked on a grade or turning the vehicle into a rib. However, blocks were not provided for the vehicle in question. The driver stated that he did not block the truck because it was too much bother for him to find blocks. The vehicle was normally used to service equipment in various parts of the mine, and when service was performed, it would be parked. Under the circumstances, a prudent mine operator would provide blocks for such a vehicle. I conclude that FMC was negligent in failing to provide blocks for the vehicle in question.

4. The parties have agreed that on August 12, 1980, the lube truck in question did not have adequate brakes. This constitutes a violation of 30 C.F.R. § 57.9-3.

5. The violation (inadequate brakes) contributed to the injury which occurred on August 12, 1980. Inadequate brakes on a vehicle used in an underground mine is self-evidently a serious safety hazard. I conclude that the violation was serious.

6. FMC argues that the inadequate condition of the brakes was solely caused by the failure of the vehicle driver to remove the caked trona dust from them and to report the condition of the brakes to his supervisor. However, the stipulated facts show that the parking brake wear surface was "worn out on one side and covered with grease and oil on the other wear surface. The wheel brakes were substantially worn." The caking of trona dust on the brake surfaces provided an additional inadequacy. However, the brakes were clearly inadequate without reference to the trona caking and had obviously been inadequate for some time. I conclude that FMC should have known of the inadequate brakes and was negligent for failing to have them repaired.

7. The parties have stipulated that the operator of the lube truck did not report the inadequate brakes on his vehicle - an equipment defect affecting safety - to the operator, and that it was not recorded by the operator. This constitutes a violation of 30 C.F.R. § 57.9-1.

8. The failure to report a safety defect is a serious matter, but in this case I conclude that the seriousness of the violation is merged in the violation of 30 C.F.R. § 57.9-3. That is, the operating of the vehicle without adequate brakes was the serious violation. The failure to report it, I conclude was nonserious.

9. There is no indication in the record that FMC knew or had reason to have known of the violation. I conclude that the violation was not caused by FMC's negligence.

ORDER

IT IS ORDERED that the contest of Citation No. 576918 is DENIED and the citation is AFFIRMED.

IT IS FURTHER ORDERED that the FMC Corporation, Respondent in the civil penalty proceeding, shall, within 30 days of the date of this decision, pay the following civil penalties for the violations found herein to have occurred:

Citation	30 C.F.R. Standard		Penalty
576909	57.9-37		$ 500
576910	57.9-3		500
576918	57.9-1		40
		Total	$1,040

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 15 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of THOMAS H. MAY, Complainant	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. KENT 81-216-D
v.	:	
EASTERN COAL CORPORATION, Respondent	:	

ORDER GRANTING MOTION TO WITHDRAW

Counsel for the Secretary of Labor filed on March 8, 1982, in the above-entitled proceeding a motion to withdraw the complaint filed on behalf of Mr. Thomas H. May because the Secretary has found that no violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred. Paragraph 6 of the complaint filed in Docket No. KENT 81-216-D alleged that respondent had refused to hire Mr. May "* * * because he was the subject of a medical evaluation in that his pre-employment chest X-ray revealed evidence of pneumoconiosis." The motion to withdraw states that it has now been determined that Mr. May was not at any time the "* * * subject of medical evaluations and potential transfer under a standard published pursuant to section 101" of the Act. The motion, therefore, concludes that the statutory prerequisite, that is, the existence of a protected activity required in order to establish a violation of section 105(c)(1), does not exist.

The motion further states that Mr. May has been advised of the aforesaid finding and that he has been told that he may file a complaint with the Commission within 30 days after he receives notification of the fact that the Secretary has found that no violation of section 105(c)(1) has occurred. The motion to withdraw requests that the motion be granted with the understanding that Mr. May will have 30 days from the time he receives the order granting the motion to file his own complaint with the Commission pursuant to section 105(c)(3) of the Act.

Section 105(c)(3) of the Act provides, in pertinent part, as follows:

> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). * * *

The Act does not specifically cover a situation, such as this, in which the Secretary has reversed his original belief that a violation did occur to a finding that a violation of section 105(c)(1) did not occur. The Secretary cannot be forced to pursue an action before the Commission after further review of the facts convinces him that his original finding of a violation was in error. Therefore, I find that the motion to withdraw should be granted with the understanding that Mr. May has a period of 30 days after receipt of this order within which to file a complaint in his own behalf under section 105(c)(3) of the Act.

The answer to the complaint raises some legal issues which will be difficult for a non-lawyer to understand and oppose either with an evidentiary presentation or with countervailing legal arguments. The certificates of service show that a copy of the complaint, a copy of respondent's answer to the complaint, and a copy of the motion to withdraw the complaint were sent to Mr. May. I strongly recommend that Mr. May take the three aforementioned documents to an attorney and seek legal advice in determining whether he should file a complaint under section 105(c)(3) and, if so, how he should frame the allegations which would constitute the basis for his argument that a violation of section 105(c)(1) of the Act has occurred.

Nearly all complainants who file their own complaints under section 105(c)(3) do so under the mistaken impression that they are filing an appeal of the Secretary's finding that no violation occurred. Most complainants also assume that the Commission operates just like MSHA in that they think the Commission has investigators who interview respondent's employees and officials for the purpose of gathering information to support the Commission's findings. I should note, first of all, that the Commission is not a branch of the Department of Labor. Therefore, we do not have in our files copies of the data gathered by MSHA's investigators and the Commission does not have investigators. When a complaint is filed with the Commission, it is assigned to an administrative law judge who holds a hearing at which the complainant has the burden of proving that a violation of section 105(c)(1) occurred. The proof is normally presented through witnesses under oath who will be subject to cross-examination by counsel for respondent. Respondent will have the opportunity of presenting witnesses to testify in opposition to any statements made by complainant and his witnesses. Both the complainant and respondent will also be permitted to introduce documentary evidence when it is properly supported by witnesses who can attest to its authenticity.

After the judge assigned to the case has heard any arguments which either party wishes to offer, he will study the testimony and documentary evidence and make findings of fact. Based on his findings of fact, he will determine whether a violation of section 105(c)(1) has been proven by complainant.

I have pointed out the way complaints are handled so that Mr. May can determine for himself whether he should try to proceed in a case as

complicated as his without first securing an attorney to represent him. It should also be noted that if Mr. May wins his case, respondent will be ordered to reimburse Mr. May for legal expenses, but if Mr. May loses his case, he will be liable personally to pay all expenses associated with filing the complaint and presenting evidence in support of the complaint when the case is eventually scheduled for hearing.

WHEREFORE, for the reasons given above, it is ordered:

(A) The Secretary of Labor's motion to withdraw the complaint is granted, the complaint is deemed to have been withdrawn, and the proceedings in Docket No. KENT 81-216-D are dismissed.

(B) If he so desires, Mr. Thomas H. May has a period of 30 days from receipt of this order to file a complaint in his own behalf under section 105(c)(3) of the Act.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 16 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 79-39
	A/O No. 42-01202-03011
PRICE RIVER COAL COMPANY, successor to, BRAZTAH CORPORATION, Respondent.	MINE: Braztah 5

Appearances:

Phyllis K. Caldwell, Esq., Office of Henry C. Mahlman, Regional Solicitor, United States Department of Labor, Denver, Colorado
For the Petitioner

Stanley V. Litizzette, Esq., Price River Coal Company, Helper, Utah
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration (MSHA), charges respondent Price River Coal Company, successor in interest to Braztah Corporation, with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Petitioner issued his citation number 9945672 under the authority of Section 104(f) of the Act alleging that Braztah violated Title 30, Code of Federal Regulations § 70.100B.

The cited standard provides as follows:

Subpart B - Dust Standards

§ 70.100 Dust standards; respirable dust. (b) Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

The Secretary proposes a civil penalty of $240 for this violation.

ISSUES

The issues are whether Price violated the standard and, if it did, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

The evidence, which is uncontroverted, shows that the citation here was issued by MSHA inspector Al Gray on the basis of an analysis generated by a computer printout (Tr. 4). Ten samples, which were submitted by respondent to MSHA, show accumulated respirable dust totals of 21.3 milligrams. Within limits MSHA deems that a violation occurs at 20.9 milligrams (Tr. 5).

The citation issued to respondent cites as violative of the Act the following condition:

> The concentration of respirable dust in section 030-0 is above the 20 milligram limit. Based on the results of 10 samples collected by the company's sampling program, the cumulative total is 21.3 milligrams for an average of 2.1 milligrams per cubic meter of air. See attached computer printout dated 11/20/70. Respirable dust samples shall be collected from the working environment of the high-risk occupation in section 030-0 on all production shifts and continued until compliance is attained. Approved respiratory equipment shall be made available to all persons working in the area (Exhibit P-1).

The potential health hazard of contracting pneumoconiosis arises from prolonged exposure to respirable dust (Tr. 5, 15). Four miners were exposed (Tr. 15-16).

DISCUSSION

The Commission has ruled that the respirable dust standard is enforceable. Alabama By-Products Corporation 2 FMSHRC 2760 (October 1980). Further, the foregoing facts establish a violation of the standard.

Respondent offered no evidence but contends that the government cannot prevail such it failed introduce an essential part of its case (Tr. 27).

Respondent did not identify the "essential part" of MSHA's case but I assume respondent refers to the failure of MSHA to introduce the computer printout.

I find no merit in this contention. Respondent could have, but did not, move that the printout be produced. Further, respondent apparently had the computer printout in its possession. The citation reads in part: "See attached computer printout" (Exhibit P1). The citation should be affirmed.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] contains the statutory criteria for assessing a civil penalty.

In considering that criteria in the light of the facts presented here I deem that the proposed penalty of $240 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citation 9945672 and the proposed penalty therefor are AFFIRMED.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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MAR 16 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
	DOCKET NO. WEST 79-59
v.	A/C No. 42-00165-03016
PRICE RIVER COAL COMPANY, successor to BRAZTAH CORPORATION, Respondent.	MINE: Braztah No. 3

Appearances:

Phyllis K. Caldwell, Esq.,
Office of Henry C. Mahlman, Regional Solicitor,
United States Department of Labor,
Denver, Colorado
For the Petitioner

Stanley V. Litizzette, Esq.,
Price River Coal Company,
Helper, Utah
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent Price River Coal Company, successor in interest to Braztah Corporation, with violating a safety regulation adopted under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Citation 247212 alleges a violation of 30 C.F.R. 75.400. The regulation provides as follows:

§ 75.499 Accumulation of combustible materials.

(Statutory Provision)

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.

A penalty of $225 is proposed for the foregoing violation.

Citation 247213 alleges a violation of 30 C.F.R. 75.316. The regulation provides as follows:

> § 75.316 Ventilation system and methane and dust control plan.
>
> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

A penalty of $130 is proposed for this violation.

ISSUES

The threshold issue is whether the proposal to assess penalties should be dismissed for late filing; if not, a further issue is whether respondent violated the regulations and, if so, what penalty is appropriate.

LATE FILING OF PROPOSED PENALTIES

The threshold issue determinative of this case is whether the proposed penalties should be vacated due to the late filing by petitioner of his proposal for penalties.

The record shows that respondent was cited on December 20, 1978 for the alleged violations of the regulations. On November 5, 1979 petitioner filed his proposal for penalties together with a motion for the Commission to accept such late filing. In support of his motion petitioner recited that he had a high volume of case workload; further, he had lacked clerical personnel since mid-September, 1979.

Respondent opposed the motion for late filing and renewed the objection at trial (Tr. 3). In its written motion in opposition Respondent states that its key witness, Stewart Jones, on whom the initial citation was served, had resigned his position with the company and his present whereabouts were unknown.

On January 4, 1980 an order was entered accepting the late filing. Respondent's objection were overruled but it was indicated that respondent could offer evidence of prejudice at the hearing on the merits. The hearing took place in Salt Lake City, Utah on March 19, 1981.

In Salt Lake County Road Department 3 FMSHRC 1714 (July 1981) the Commission considered the effect of the Secretary in failing to comply

with 29 C.F.R. § 2700.27.1/ Basically, the Commission directs that any late filing by the Secretary must be based on adequate cause. In addition, an operator may object to a late penalty proposal on the grounds of prejudice.

At the hearing the evidence showed that during the inspection company representative Stewart Jones accompanied MSHA inspector Ted Coughman (Tr. 9, 10). At some point Jones called John Presett, a company safety inspector (Tr. 20, 24). Presett knew the area of the west belt drive had been rock dusted and he went to that location but he didn't walk the cited area (Tr. 25-28).

At the hearing John O'Greene, the director of safety for respondent, testified he did not know of Jones' whereabouts (Tr. 40).

DISCUSSION

On the authority of Salt Lake County Road Department, supra, respondent's motion to dismiss is sustained.

Other than to refer to his high volume of cases the Secretary offers no explanation for his failure to file his proposal for penalty from the time the notice of contest was received until his clerical personnel problems arose in mid-September, 1979.

I further find that the absence of a key witness, Stewart Jones, prejudiced respondent's case. I do not consider that the two page hand written statements of Stewart Jones received in evidence alleviates the prejudice to respondent's defense (Exhibit R1).

For the foregoing reason I enter the following

ORDER

Citations 247212 and 247213 and all proposed penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

1/ The Commission regulation pertaining to filing provides as follows:

§ 2700.27 Proposal for a penalty.

(a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 16 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-366
v.	)	A/C No. 42-01202-03019
PRICE RIVER COAL COMPANY, successor to BRAZTAH CORPORATION,	)	MINE: Braztah No. 5
Respondent.	)	

Appearances:

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United States Department of Labor,
Denver, Colorado
For the Petitioner

Stanley V. Litizzette, Esq.,
Price River Coal Company,
Helper, Utah
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent Price River Coal Company, successor in interest to Braztah Corporation, with violating a safety regulation 1/ adopted under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Respondent denies the violation occurred.

1/ The cited regulation, 30 C.F.R. 77.1104 provides as follows:

§ 77.1104 Accumulations of combustible materials.

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

After notice to the parties a hearing on the merits was held on March 19, 1981 in Salt Lake City, Utah. The parties waived the filing of post trial briefs.

ISSUES

The issues are whether the citation was vague, whether Price violated the regulation and, if so, what penalty, is appropriate.

SUMMARY OF THE EVIDENCE

On June 12, 1979, MSHA's duly authorized representative Blake Hanna and Braztah safety manager John Tatton, inspected the mine (Tr. 11, 13, 82, 83).

Over a period of time coal dust, the consistency of sand, had accumulated two to six inches deep along the full 1200 foot length of the #4 belt conveyor. The 42 inch wide conveyor was touching the pile for about 12 feet (Tr. 13, 14, 19-23, 28, P1, P2).

A pile of coal dust, estimated to weigh 10 tons, was located 33 to 60 feet from the mine fan (Tr. 45, 58, P1, P2).

Dry tumble weeds, brush and small pieces of paper were under a nearby bridge (Tr. 27, P2).

Oil cans, weeds, and grease cartridges littered the area (Tr. 18, 19, 41, P1, P2).

Ignition sources included possible spontaneous combustion from the accumulated coal dust, a nearby battery charging station, a welder, and electrical boxes (Tr. 17, 22-23, 28-29, 42, P1).

DISCUSSION

Respondent contends that the citation is vague (Tr. 10, 107). The citation issued on the day on the inspection recites that Section 77.1104 was violated and it further reads as follows:

> The operating number 4 surface belt had accumulations of fine dry coal dust and other combustible materials, from the number 4 portal to the tailpiece (amended to headpiece, Tr. 7), a distance of about 1200 feet.
>
> The fine dry coal dust was from 2" to 6" deep under the belt. A pile of loose coal (about 10 tons) was stored within 60 feet of the mine fan. Dry weeds, wood, paper, and empty oil cans were scattered throughout most of the area surrounding the belt.

Section 104(a) of the Act requires, in part, that a citation be in writing and "shall describe with particularity the nature of the violation." In this case the company safety inspector had no difficulty in starting to abate the violative conditions. In fact, the next morning when a closure order was issued Tatton told the inspector he didn't know why the

work wasn't finished (Tr. 88). I find no merit to respondent's argument. Cf Jim Walter Resources, Inc., 1 FMSHRC 1827 (November, 1979).

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties stipulated that Price employes 870 miners and this particular mine produces 2400 tons of coal a day (Tr. 5).

The gravity is severe. I consider the negligence of respondent to be relatively high although in its favor is the fact that it did abate the violative conditions.

Considering the statutory criteria I am unwilling to disturb the proposed civil penalty of $395.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

Citation 789593 and the proposed civil penalty therefor are AFFIRMED.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FMC CORPORATION, Contestant	:	Application for Review
v.	:	Docket No. WEST 81-169-RM
	:	Citation/Order No. 577094; 1/6/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	FMC Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 81-278-M
	:	A.O. No. 48-00152-05044 H
v.	:	
	:	FMC Mine
FMC CORPORATION, Respondent	:	

DECISION

Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, P.C., Salt Lake City, Utah, for FMC Corporation; James R. Cato, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Secretary of Labor.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceedings were consolidated by an order of Judge John F. Cook for hearing and for the purpose of this decision. FMC Corporation filed an Application for Review and Notice of Contest of an order/citation issued under section 107(a) and 104(a) of the Federal Mine Safety and Health Act. The order charged that an imminent danger existed and the citation alleged three violations of mandatory safety standards. The Secretary filed a civil penalty proceeding seeking penalties for the alleged violations. Pursuant to notice, the cases were heard before Judge Cook on August 13, 1981 in Green River, Wyoming. Judge Cook left the Commission before he could issue a decision, and the

parties have agreed that I may decide the cases on the basis of the transcript of the hearing and the exhibits introduced before Judge Cook, and the contentions of the parties in their posthearing briefs.

Federal Mine Inspector Merrill Wolford testified on behalf of the Secretary; Steven M. Simpson, Darrel R. Nystrom, Ted K. Walker and Karl D. Christensen testified on behalf of FMC. On the basis of the entire record and considering the contentions of the parties, I make the following decision:

STATUTORY PROVISIONS

1. Section 107(a) of the Act provides in part:

> If, upon any inspection or investigation of a coal or other mine which is subject to the Act, an authorized representative of the Secretary finds that an imminent danger exists, [he] . . . shall . . . issue an order requiring the operator . . . to cause all persons, except those persons referred to in section 104(c), to be withdrawn from, and to be prohibited from entering [the area of danger] . . . .

2. Section 3(j) of the Act provides: "'imminent danger' means the existence of any condition or practice in a coal or other mine, which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

REGULATORY PROVISIONS

1. 30 C.F.R. § 57.9-3 provides: "Powered mobile equipment shall be provided with adequate brakes."

2. 30 C.F.R. § 57.4-24(c) provides: "Fire extinguishers and fire suppression devices shall be: * * * replaced with a fully charged extinguisher or device, or recharged immediately, after any discharge is made from the extinguisher or device."

3. 30 C.F.R. § 57.9-2 provides: "Equipment defects affecting safety shall be corrected before the equipment is used."

FINDINGS OF FACT

1. The FMC Corporation (FMC) is the operator of a large mine in Sweetwater County, Wyoming known as the FMC Mine.

2. The operation of FMC's mine affects interstate commerce.

3. For all FMC mines, a total of 2,660,064 man hours are worked annually; for the subject mine, a total of 2,624,064 man hours are worked annually.

4. The subject mine had a total of 254 paid violations of mandatory standards between January 6, 1979 and January 5, 1981. Thirty-two of these violations involved the standards in 30 C.F.R. § 57.9; 12 involved violations of 57.9-2; two involved violations of 57.9-3. Eighteen involved the standards in 30 C.F.R. § 57.4, four of which involved violations of 57.4-24. I conclude that the history is moderate in view of the size of the mine, and penalties otherwise appropriate will not be increased because of it.

5. The parties have stipulated that any penalties assessed in this proceeding will not affect FMC's ability to continue in business.

6. The violations alleged in the order/citation involved herein were abated in good faith.

7. On January 6, 1981, at about 10:00 a.m., Darrel Nystrom, a mechanic employed by FMC, drove the No. 7 Size Brute mantrip an unknown distance to the 3 shaft warehouse in the mine to pick up some parts. Earlier that morning, Steven M. Simpson, also a mechanic at FMC, drove the same vehicle a distance of about 1 mile underground to the place where Nystrom obtained it. Both men made a general inspection of the vehicle before driving it including the brake pedal. Simpson noticed that the leaf spring was disconnected from the shackle. Neither found any difficulty with the brakes, either before or during their operation of the vehicle.

8. On January 6, 1981, Federal Mine Inspector Merrill Wolford conducted a regular inspection of the subject mine. He saw the No. 7 Sign Brute Mantrip being driven up to the shop area, so he inspected it.

9. On January 6, 1981, the front brake lining on the subject vehicle was broken off and hanging down underneath the vehicle. The line had been flattened and doubled to seal it off and prevent the fluid from braking. This rendered the front wheel brakes of the vehicle inoperative. The real-wheel brakes were operative at this time.

10. On January 6, 1981, the battery behind the passenger seat in the subject vehicle had exposed, uncovered connectors and had a hole of undetermined size in the top of it.

11. On January 6, 1981, the fire extinguisher on the vehicle was completely discharged.

12. On January 6, 1981, the front spring was separated from the shackle because of a missing bolt.

13. On January 6, 1981, Inspector Wolford issued a combined order and citation in which he found that the condition of the vehicle constituted an imminent danger and ordered it removed from service until repaired. He also cited FMC for three alleged violations of mandatory safety standards.

14. The vehicle in question was ordinarily not driven at a speed in excess of 10 miles per hour. The rear wheel brakes are capable of stopping the vehicle under normal circumstances, but the braking capacity of the vehicle was diminished by the absence of the front-wheel brakes.

15. The condition of the brakes was evident and should have been known to FMC.

16. The condition of the spring shackle could affect the driver's ability to steer and stop the vehicle. It was an equipment defect affecting safety.

17. The hole in the battery could have caused an injury by permitting acid to be splashed on a passenger in the mantrip. However, the hole was very small and the battery out of the way of passengers so the likelihood was injury was small. This was an equipment defect affecting safety.

18. The conditions described in Findings 16 and 17 were evident and should have been known to FMC.

19. The discharged fire extinguisher on the vehicle was evident and should have been known to FMC.

ISSUES

1. Did the condition of the No. 7 Sign Brute Mantrip in the subject mine on January 6, 1981, constitute an imminent danger?

2. Did the vehicle in question have adequate brakes on January 6, 1981?

3. If a violation of 30 C.F.R. § 57.9-3 is found, what is the appropriate penalty?

4. Did the condition of the battery and the spring shackle on the subject vehicle on January 6, 1981, constitute equipment defects affecting safety?

5. If a violation of 30 C.F.R. § 57.9-2 is found, what is the appropriate penalty?

6. What is the appropriate penalty for the violation of 30 C.F.R. § 57.4-24?

CONCLUSIONS OF LAW

1. Imminent Danger

The imminent danger withdrawal order by its terms resulted from all of the cited conditions. However, the inspector testified that neither the condition of the battery nor the condition of the fire extinguisher was by itself an imminent danger, and there is no evidence that either of these conditions was related to or exacerbated the conditions caused by the brakes or spring shackle. Ultimately, I conclude, the existence vel non of an imminent danger depends upon the condition of the brakes, and possibly the extent to which that condition may have been exacerbated by the condition of the spring shackle.

Typically, an imminent danger withdrawal order involves a general condition of the mine: float dust, gas, a roof condition. See Old Ben Coal Corporation v. Interior Board, 525 F.2d 25 (7th Cir. 1975); Freeman Coal Mining Company v. Interior Board, 504 2d 741 (7th Cir. 1974); Cyprus Industrial Mineral Corp. v. Secretary of Labor, 1 FMSHRC 2069 (1978). Of course, an item of equipment can cause an imminent danger where its condition may threaten an explosion or fire. Further, a vehicle without any brakes could be an imminent danger - to its occupants and to others in the mine. The condition found here is a closer question. It seems reasonable to conclude that a vehicle equipped with four wheel brakes has diminished stopping power if its front brakes are inoperative. But the vehicle normally is operated at 10 miles per hour or less. It was driven prior to the order by two operators a total of more than a mile and no difficulty in stopping was encountered. After issuing the order, the inspector permitted FMC to move the vehicle which argues against a finding of imminent danger. I conclude that the condition of the vehicle in question was not such as could reasonably be expected to cause death or serious physical harm before the condition could be abated.

UNWARRANTABLE FAILURE

No order or citation was issued under section 104(d)(1) of the Act for an unwarrantable failure violation. The Secretary argues that if the condition of the vehicle did not constitute an imminent danger, it was an unwarrantable failure violation under section 104(d)(1). Since FMC was not charged with an unwarrantable failure violation, I conclude that this question is not before me in these proceedings, and I do not rule on it.

ADEQUATE BRAKES

I conclude that a vehicle equipped with front and rear wheel brakes does not have "adequate" brakes within the meaning of that term in 30 C.F.R. § 57.9-3 when the front brakes are inoperative. Since the front brakes supply more than 50 percent of the stopping power, the violation of the standard was serious. The condition was obvious to visual inspection and therefore the violation was due to the negligence of FMC.

EQUIPMENT DEFECTS

The condition of the spring shackle and the condition of the battery were defects affecting safety. Therefore, a violation of 30 C.F.R. § 57.9-2 was shown. Each of the conditions was moderately serious since either could have resulted in injury. Both were due to FMC's negligence.

FIRE EXTINGUISHER

FMC has conceded that the discharged fire extinguisher constituted a violation of 30 C.F.R. § 57.4-24(c). The condition was moderately serious even though there is no specific requirement that a fire extinguisher be on the vehicle, since in an emergency, a miner might rely on a functioning extinguisher being on the truck. The condition was long standing and caused by FMC's negligence.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that the application for review of Order No. 577094 IS GRANTED and the ORDER, as an order, IS VACATED.

IT IS FURTHER ORDERED that the Citation 577094 is AFFIRMED.

IT IS FURTHER ORDERED that FMC Corporation shall, within 30 days of the date of this order, pay the following civil penalties for violations found herein to have occurred.

30 C.F.R. Standard		Penalty
57.9-3		$ 500
57.9-2		250
57.4-24(c)		150
	Total	$ 900

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 19 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-165-M
v.	)	ASSESSMENT CONTROL NO. 48-00155-05010
ALLIED CHEMICAL CORPORATION,	)	MINE: Alchem Trona
Respondent.	)	

Appearances:

Edward H. Fitch, Esq., Office of the Solicitor,
United States Department of Labor, Arlington, Virginia
For the Petitioner

John A. Snow, Esq., VanCott, Bagley, Cornwall and McCarthy,
Salt Lake City, Utah
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Allied Chemical Corporation, (Allied), with violating various safety regulations adopted under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Respondent denies that the violations occurred.

After notice to the parties a hearing on the merits was held in Green River, Wyoming.

ISSUES

The issues are whether Allied violated the regulations and, if so, what penalty, is appropriate.

CITATION 336653

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.9-2 which provides as follows:

> 57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible.

In Allied's mine the mineral trona is sheared from the face and deposited on a chain conveyor. By other conveyors and crushers the trona is then moved to a shaft area (Tr. 36). The mining technique at this site features a longwall mining unit. The roof of the mine at this location is supported by an overhead canopy which is a portion of the longwall miner. The canopy is, in turn, supported by hydraulic jacks. There are probably 180 chocks, or jacks, in the 400 feet of the longwall mine. There are six legs supporting the canopy at the tailgate and headgate areas (Jansen 20, 64).

The cause of this litigation is a 3/4 inch soft steel bolt 1/ either six or eight inches long which intersects the chock near the point where the cylinder fits into a two or three inch cup (Tr. 35, Jansen 20-21, 38; G 27, G 29).

The purpose of the steel bolt is to keep the chock from twisting. If the chock twisted it could tear up the packing (Jansen 20-21). In addition, hydraulic lines are wrapped around the legs. If, due to the twisting motion, the lines broke you would start to loose hydraulic pressure (Jansen 22). The bolts are of a soft steel and are designed to break (Jansen 24, 38).

The citation here was issued because two bolts were missing (Tr. 111, 231). MSHA inspector Wolford's opinion was that this was a serious maintenance defect affecting safety (Tr. 232). Further, in Wolford's view anything made to certain specifications should be maintained that way (Tr. 242).

The metal of the longwall unit weighs 50 tons and each chock can support 100 tons of overburden (Jansen 61, 64). As the mining for the trona advances the longwall miner and its chocks are pulled forward (Jansen 64).

1/ The bolt received in evidence was larger than the type used on the chocks in this case (Exhibit 18).

DID A VIOLATION OCCUR

The vital portion of the standard in contest requires that "equipment defects affecting safety" shall be corrected.

It is uncontroverted that the soft steel bolts in two different chocks were missing. It is clear that the steel bolts 2/ prevent the chocks from twisting. By preventing the twisting the integrity of the fittings and their attached hydraulic lines is preserved. The absence of any bolt is accordingly an "equipment defect."

The next and more difficult question is whether, within the terms of the regulation, the described equipment defect was one "affecting safety."

Allied strenously argues that only its experts are credible since they have worked for many years with this complex machine which is the only one in the area and the only one in the United States not located in a coal mine.

Allied also vigorously attacks the credibility of the MSHA inspectors due to their lack of expertise concerning any longwall miner.

The Commission does not blindly follow any expert witness. However, I am persuaded by MSHA's evidence. In view of the close issue concerning the respective experts I deem it necessary to set out MSHA's credible evidence on this point. The testimony of inspector Jacobson: you would want the bolt in place to prevent it from detaching itself (Tr. 47-48). A lack of bolts could bring about a serious failure in the equipment (Tr. 54). If after the machine is moved forward there wouldn't be proper support without the bolt (Tr. 63). If the chock fell it could fall on a person working under them (Tr. 63). Further, inspector Wolford testified that Allied was cited because the ram was out of the socket and the bolts were out (Tr. 231-232). In Wolford's opinion this was a serious maintenance problem affecting safety (Tr. 232).

I have studied Allied's contrary evidence but I am not persuaded. Allied's expert evidence is simply not credible. In addition, witness Jansen principally focused on the stop valve in the equipment. Briefly stated, Jansen's uncontroverted evidence shows that if all the chocks lost pressure the canopy wouldn't come down because a stop valve prevents the hydraulic equipment from failing. In fact, if the stop valve becomes operative it would be necessary to go in and bleed off the equipment to release the canopy (Jansen 22-26).

2/ A portion of Allied's case dealt with the evidence that the bolts did not, and could not, bear any of the downward pressure from the roof. I agree. The evidence clearly supports this view.

Allied misjudges the thrust of 30 C.F.R. 57.9-2. The standard requires the remedy of equipment defects "before the equipment is used." Allied's stop valve can only become operative after use of the equipment, and after a failure of the pressure in the hydraulic jacks (Tr. 54).

Allied asserts that it cannot be held liable because the bolts were being replaced in the chocks. This evidence arises from the testimony of Bertagnolli and Jansen (Tr. 201, Jansen 10). Further, Allied asserts as a defense that there was no power in the longwall unit (Tr. 169).

I am not persuaded by Allied's evidence concerning repairs. Assigning a mechanic to do the work and having it done are two different facets. As will be noted, infra, Allied produced an electrician who had been assigned to repair equipment and who was doing it when later events interrupted him. In addition, I find the testimony of MSHA inspector Wolford to be credible: no one claimed maintenance work was being done at the time. Further, he didn't recall seeing any tools lying about (Tr. 236, 237).

The applicable law is stated in Ziegler Coal Company, 3 IMBA 336, 373 (1974) wherein the Interior Board held as follows:

> The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under repair, and had not been used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

Allied relies on Phelps Dodge Corp., WEST 79-67-M, 1 MSHC 2286 wherein Judge Merlin cites Plateau Mining Company, 2 IMBA 303 (1973), and Ziegler Coal Company, supra. None of the cited cases support Allied. Basically Allied did not demonstrate by a preponderance of the credible evidence that the equipment was under repair, and had not be used, and was not to be operated until it met the required safety standards. I note that at a CAV (no penalty) inspection several weeks before these citations were issued some 32 or 34 bolts were missing from the chocks (Tr. 38-41).

It further follows that the mere fact there was no power in the shear at the time of the violation does not relieve Allied from liability for violating the standard.

In sum, within the meaning of 30 C.F.R. 57.9-2, an "equipment defect" arises when equipment is not maintained in the manner in which it is received from the manufacturer. Further, on the basis of the evidence as stated, MSHA has proven that the equipment defect affected safety.

APPLICABILITY OF STANDARD

An additional issue here is whether 30 C.F.R. 57.9-2 applies to chocks. Allied asserts that safety regulations under § 57.9 relate only to loading, hauling, dumping as stated in the heading at 30 C.F.R. § 57.9. Allied also relies on the evidence from MSHA inspector Jacobson's testimony that the chocks do not relate to loading, hauling and dumping. Further, in support of its position Allied cites Judge Broderick's decision in The Hanna Mining Co., Docket No. 79-103-M (1 MSHC 2488).

Reliance on a heading to determine the scope and application of a standard is inconsistent with the usual rule of statutory construction. As noted by the OSHA Review Commission titles and headings are useful tools for resolving doubt as to the interpretation to be accorded a standard or regulation but they cannot be used to limit or alter the meaning of the text, Continental Oil Company, OSHRC Docket No. 13750 (June 1979); Wray Electric Contracting, Inc., 78 OSHRC 78/A2, 6 BNA OSHC 1981, 1978 CCH OSHD ¶ 23,031 (No. 76-119,1978).

In reviewing the text I note that 30 C.F.R. § 56.1 defines the purpose and scope of the regulations as follows:

> § 56.1 Purpose and scope.
>
> The regulations in this part are promulgated pursuant to section 6 of the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 725) and prescribe health and safety standards for the purpose of the protection of life, the promotion of health and safety, and the prevention of accidents in sand (including industrial sands), gravel and crushed stone operations which are subject to that Act. Each standard which is preceded by the word "Mandatory" is a mandatory standard. The violation of a mandatory standard will subject an operator to an order or notice under section 8 of the Act (30 U.S.C. 727).

Simply stated, the scope of the regulations is to prevent accidents in those operations which are subject to the Act. To construe the heading in the manner urged by Allied would conflict with the broad scope of the text.

For a comparison note how the text in 30 C.F.R. 57.1 limits the various headings. It provides, in part, as follows:

> Those regulations in each subpart appearing under the heading "General - Surface and Underground" apply both to the underground and surface operations of underground mines; those appearing under the heading "Surface Only" apply only to the surface operations of underground

> mines; those appearing under the heading "Underground Only" apply only to the underground operations of underground mines.

I am aware of Judge Broderick's contrary decision in The Hanna Mining Company, supra, and I disagree. I am also aware that the Commission reviewed and affirmed that decision on September 22, 1981. However, a reading of the decision on review indicates the Commission did not consider that particular aspect of Judge Broderick's decision (2 MSHC 1433).

Allied finally contends that no violation occurred because there was no evidence that the bolts were missing before use. The basic argument urged by Allied arises from the evidence that bolts are checked every shift, that is, every eight hours.

I disagree with Allied's position. I presume Allied would have an inspector wait until the equipment is used and possibly a miner exposed to a hazard before an operator could be cited for the violation. The enforcement of a mandatory safety or health regulation is not amenable to being reduced to such a charade.

Further, in support of its position Allied cites Grove Stone and Sand Co., 1 MSHC 2473 (July 1980). Allied has misread Judge Steffey's decision. The actual use of equipment is not a condition precedent to establish a violation of § 56.9-2.

For the above stated reasons I conclude that the citation should be affirmed.

CIVIL PENALTY

The Secretary proposes a penalty of $114 for the violation of 30 C.F.R. 57.9-2. The statutory criteria for assessing a civil penalty is set forth in Section 110(i) of the Act [30 U.S.C. 820(i)] which provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In connection with the violation of this regulation the record indicates that in 1979 Allied had 17 violations of § 57.9-2. On the other hand Allied abated the condition.

At the trial the Secretary requested that the Commission increase the proposed penalties (Tr. 4, 5). However, this contention was not further pursued in the Secretary's post trial brief.

Considering the statutory criteria I deem that the proposed civil penalty of $114 is appropriate.

ELECTRICAL VIOLATIONS

Citations 336654, 336655, and 336656 respectively allege violations of Title 30, Code of Federal Regulations, § 57.12-30, § 57.12-25 and § 57.12-32. The cited regulations provide as follows:

> 57.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.
>
> 57.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.
>
> 57.12-32 Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

SUMMARY OF THE EVIDENCE

The evidence is conflicting. I find the following facts to be credible.

On January 26, 1979 MSHA inspectors were conducting a 103(i) gas inspection at the longwall mining unit of Allied's trona mine. Inspector Hansen indicated that the methane concentration exceeded one percent and Allied personnel agreed (Tr. 19-23, 156). Hansen issued a closure order. Schultz and Bertagnolli, Allied supervisors, told the workers to stop their work and leave (Tr. 158-159). At this time electrician Bruton was trying to repair or replace a flag switch box (Bruton 10, G 25, G 26). While working on the box Bruton found it necessary to secure additional tools which were in his jeep in the intake airway. When Bruton was enroute to his jeep Bertagnolli told him to get out of the mine. Bertagnolli refused Bruton's request to return to the flag switch box to retrieve his tools (Tr. 159, Bruton 20). There was also a new box sitting alongside the box

being repaired (Jansen 6). The work Bruton was doing required the longwall miner to be down (Bruton 21). All of the orange colored lights were off. This would indicate that the flag switch box was not energized (Tr. 195).

Three days later, after ventilation had removed the methane, Allied's Jansen and the MSHA inspectors returned to the longwall panel. The inspectors noticed the disconnected wires, and the missing bolts at the flag switch. Jansen said the power was off [because of the closure order] and there was no power in the longwall miner or the flag switch box (Jansen 6).

DISCUSSION

The electrical violations, involving a single flag switch box, were cited after the methane closure order was issued and before it was lifted. When they reentered the mine the inspectors "had not abated the order and had not given the company permission to start their operation at that point" (Tr. 83).

On reentering the mine the inspectors found three bare wires protruding six to eight inches from an emergency stop control device (Tr. 68, 69, 89). The device, also called a flag switch box, was located 25 to 60 feet from the face of the longwall (Tr. 71-72).

The Secretary contends that the citation was properly issued because the wires were exposed at a time when the lines were energized. They believed the lines were energized because an unidentified electrician checked them.

On the other hand Allied claims that the inspectors did not call for an electrician. Further, Allied asserts there was no power in the lines feeding the flag switch box and the longwall miner. Allied contends that its electrician Bruton was interrupted by the methane closure order as he was repairing the flag switch box.

Prior events often cast a shadow. In this case, when the methane closure order was issued, the MSHA and Allied safety experts were dynamic in their reaction: all workers were immediately withdrawn and all power to the longwall unit was cut (Tr. 144-145, 163, 177, 194, Hansen 17).

At this point in time Bruton, who was repairing the flag switch box, was ordered from the mine by his supervisor. On their return the MSHA inspectors decided the wires were energized because "we had an electrician come up and check the wires." I do not credit the Secretary's evidence because it is considerably less than unequivocal. The witness characterizes this pivitol testimony as "to my knowledge" (Tr. 82), "just a recollection, this is two years ago" (Tr. 82). Further, "it seems to me we had an electrician come up ..." (Tr. 83), and "to the best of my recollection there was power on ..." (Tr. 84).

The Allied representative flatly contradicts the Secretary's evidence on this point. The inspector didn't ask for an electrician and the power was off (Tr. 49, 50, Jansen 6).

In addition, I further credit Allied's version that there was no power in the longwall miner and the flag switch box because they were familiar with the two electrical systems at this location. The inspectors disclaimed any electrical expertise and Allied's representative knew the power was off because it had been shut off and locked out at the time of the closure order. In addition, there were no orange colored lights burning at this location.

The facts involved in the missing bolts in the chocks are different from the alleged electrical violations. The principal difference lies in the fact that Bruton was repairing the flag switch box when he was interrupted by the closure order. I conclude that the circumstances surrounding the electrical citations invoke the doctrine expressed in Plateau Mining Company and Ziegler Coal Company, supra.

For the foregoing reasons citations 336654, 336655, and 336656 should be vacated.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citation 336653 and the proposed civil penatly therefor are AFFIRMED.

2. Citations 336654, 336655, and 336656 and all proposed penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 26 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS DOCKET NO. WEST 79-101-M A/C No. 48-00152-05004
v.	DOCKET NO. WEST 79-166-M A/C No. 48-00152-05005
FMC CORPORATION, Respondent.	MINE: FMC

DECISION

APPEARANCES:

James R. Cato, Esq., Office of the Solicitor
United States Department of Labor
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Kansas City, Missouri 64106
For the Petitioner

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1800 Beneficial Life Tower
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Salt Lake City, Utah 84111
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

These proceedings were brought pursuant to section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitions for assessment of civil penalties were filed by the Mine Safety and Health Administration (MSHA), on September 17, 1979 and timely answers were filed thereafter by respondent. A hearing was held in Salt Lake City, Utah, at which both parties were represented by counsel.

WEST 79-166-M

At the beginning of the hearing, the petitioner moved to withdraw Citation No. 336426 issued under Docket No. WEST 79-166-M, Assessment Control No. 48-00152-05005, for the reason that the citation was issued under the wrong standard. As the respondent had no objection to this, a decision was rendered at the hearing approving petitioner's motion of dismissal. I hereby AFFIRM that decision.

WEST 79-101-M
STIPULATION

The parties agreed to the following stipulations for the remaining docket: (1) That the respondent is the operator of the FMC Mine which is a large mine; (2) The history of prior violations is not extraordinary; (3) That issuance of the order/citation was in accordance with proper procedures of MSHA; (4) Respondent's ability to continue in business after imposition of a reasonable civil penalty is not an issue; (5) That respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and I have jurisdiction over these proceedings.

STATEMENT OF PROCEEDINGS

Thereafter, the parties presented evidence regarding order/citation No. 335727. Witnesses for the Secretary were M.C. Jacobson, field supervisor for MSHA, William W. Potter, mine inspector. Witnesses called by the respondent were John V. Corra, respondent's assistant production superintendent at the time the order was issued, Don Warne, area supervisor for the section of the mine involved herein, Julius Jones, company safety manager, Warren Sherwood Coleman, co-chairman of the Union safety committee and steward of the Union at the time the citation was issued, William G. Fischer, respondent's chief mining engineer and Mahlon Grubb, general mining superintendent.

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/

The issues are:

1. Whether the conditions cited and described by the inspector in the

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1/ The respondent did not file a timely appeal as to the issuance of a 107(a) withdrawal order in this case. Therefore, this is not a proceeding to review the order but rather a civil penalty proceeding and the issue is whether the violation charged in the order's citation occurred.

order issued in these proceedings existed in respondent's mine on September 18, 1978?

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 September 16, 1978, a roof fall occurred at the intersection of number 5 room and number 26 crosscut in respondent's mine. The fall caused no injuries but put a stammler feeder located in this area out of commission. MSHA was notified of the roof fall (Tr. 26, 139). [3]

2. On September 18, 1978, at approximately 9:30 a.m. mine inspectors Jerry Thompson, William Potter and Gary Ferrin, accompanied by company employees proceeded to 1 East 2C panel in respondent's mine to conduct an examination of the roof fall (Tr. 27 and 39).

3. As the inspection party proceeded to the roof fall site, areas of loose rock were observed in the 1 East 2C panel near the site of the roof fall which areas were ordered barred down by inspector Thompson (Tr. 43, 44, 85, 86, 89 and Exhibit R-1).

4. At the intersection where the roof fall occurred and men were working, a loose slab was observed which was ordered barred down by Thompson (Tr. 89, Exhibit R-1).

5. A miner (electrician) was observed working near an energized circuit center in room 7 between crosscut 27 and 28 under loose rock located on the rib above him (Tr. 58, Exhibit P-3).

6. Respondent's employees barred down the loose rock observed on the way to the roof fall with very little effort (Tr. 46).

7. A flat piece of loose material approximately 5 or 6 feet tall and a couple of feet wide on the rib near the crosscut where the roof fall occurred and the stammler was located was barred down at the request of inspector Thompson. It was near the travelway used by miners to get to the stammler (Tr. 48 and 49).

8. A piece of loose rock on the rib near the energy circuit breaker was removed by touching the rock which fell in pieces approximately one or two feet in size (Tr. 57 and 58).

2/ The parties stipulated that the Commission has jurisdiction in this case.

3/ Respondent's Brief, page 4.

9. There was no production or mining of ore in progress at the time of the inspection in section 1 East 2C panel of the mine. However, miners were in the area working to remove the stammler and a man was tramming back and forth getting material out (Tr. 51 and 90).

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

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

12. The respondent demonstrated ordinary good faith in abating the violation.

DISCUSSION

The FMC Mine, located near Green River, Wyoming, is one of the largest underground mining operations in the United States. The mine produces approximately 4.5 million tons of trona ore per year utilizing the room and pillar mining method. On September 16, 1978, at approximately 6:30 p.m., a roof fall occurred at the intersection of number 5 room and number 26 crosscut in section 1 East 2 C panel. The fall caused no injury to miners, but placed a stammler feeder (machine used to crush and feed ore onto a conveyor belt) out of commission. The respondent notified MSHA of the roof fall shortly thereafter and all miners, except personnel assigned to cleanup were removed from the panel (Tr. 104 and 106).

On September 18, 1978, mine inspector Thompson and inspector trainees Potter and Ferrin proceeded to the FMC Mine to conduct an examination of the roof fall. The inspection party was accompanied by respondent's employees into the mine. Inspector Thompson, who issued the order involved in this case, was unavailable as a witness at the time of the hearing. Inspector Potter testified at the hearing that the inspection party entered the mine at approximately 9:30 a.m. and proceeded towards the roof fall. He testified that while enroute Thompson stopped the inspection party on two occasions so that loose material could be barred down from the back and rib of the area they were traveling through (Tr. 42 and 44). At the intersection where the roof fall occurred he described a flat piece of material five or six feet tall and a couple of feet wide on the rib which was loose and Thompson requested it be pryed (barred) down (Tr. 49).

Potter testified that he saw a man working near the power center which is the power source that feeds power to the stammler and other equipment. The inspection party proceeded to the power center where loose material was observed on the rib (side of the drift) above the electrician working there. Potter testified that he observed that the material only required to be touched and it fell down in what was described as being a "bunch" of small rocks anywhere from one to two feet in size and weighing one to 50 pounds (Tr. 58 and 59). Inspector Thompson issued a withdrawal order after he left the mine based upon what he had observed (Exhibit P-1 and P-3).

Respondent introduced evidence that 1 East 2C panel had presented poor ground conditions due to unusual geologic conditions including difficulties in maintaining roof control integrity. Testimony was presented that slabbing and spalling of the roof and ribs occurred with greater than usual frequency and that supervisory personnel and miners were conscious and aware of this condition (Tr. 110, 112, 129, 156 and 170). Respondent argued that the section of the mine cited by inspector Thompson had not been operating for over 36 hours pending cleanup and securing the area after the fall. Because the panel had been inactive for over a day and a half, the slabbing that had occurred was not surprising. 4/ Further, that the order's references to loose ground at the 27 crosscut between rooms 5 and 6 and inspector Potter's testimony in reference to 26 crosscut between rooms 5 and 6 was not supported by other witnesses as to location or degree of seriousness. Respondent's safety director Julius Jones testified that the slab observed in the 27 crosscut did not constitute a danger and did not need to be barred down as the pieces were locked in the roof with steel mats that were secured to the roof with roof bolts 5/. Jones further testified that in his opinion inspector Thompson did not test the slab in the rib at the southeast corner of the 27 crosscut at room number 5 intersection to determine its stability and that rather than being barred down, the slab was removed with a cutting machine (Tr. 120 and 133). Testimony was also presented regarding other areas included in the order and described by inspector Potter contradicting the danger or seriousness of these conditions.

A careful review and consideration of all the evidence in this case persuades me that inspector Thompson and Potter observed loose rock at various locations in 1 East, 2C panel which constituted a danger to miners working in the area. Potter identified the areas as best he could under the circumstances and testified that in each situation described in the order, he was of the opinion that loose material needed barring down. This opinion was based upon his ten years of underground mining experience. The facts further show that a roof fall had occurred in this area which fortunately did not result in injury but indicates the area was unstable. In refuting the violations included in the order, respondent presented a distinguished and experienced array of witnesses who contradicted the petitioner's witness that the various areas cited therein presented a danger. However, I find the testimony of inspector Potter more credible than respondent's witnesses as to the condition in the mine and the dangers presented at the time of the inspection. Further, respondent's witnesses in their testimony confirmed that a problem existed in this section of the mine with slabbing and spalling of the roof and ribs occurring with greater than usual frequency which contraducts their argument that the area was not unsafe. The issue here is not whether there was an imminent danger that warranted a withdrawal order but whether there was a violation of mandatory standard section 57.3-22.

4/ Respondent' Brief, pages 7 and 8.

5/ Respondent's Brief, page 9.

I reject the argument of respondent that the miners in the roof fall area were not exposed to danger. The standard requires that miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. These men, including the electrician, were all miners and were required to take down loose ground both at their working place and along haulageways and travelways. Obviously, the areas traveled by the inspection party to get to the site of the roof fall would fall into a category of a travelway. Further, supervisory employees of the respondent testified that they had visited the site of the roof fall subsequent to its occurrence and would have had an opportunity to observe the conditions described by Potter and contained in the order. This opportunity for observation also includes a responsibility to insure that proper testing and ground control practices are being followed.

The gravity of the violations in this case was quite serious since it could have resulted in a fatal injury. Petitioner argues that rapid abatement was not achieved. I disagree with this argument and find that the evidence shows the respondent complied with the inspector's instructions by barring down the loose material as it was pointed out to them. In view of all of the evidence herein I have determined that respondent made special efforts to insure rapid abatement of the violation. In view of this, the appropriate penalty to be assessed, under all circumstances, is $1,000.00.

CONCLUSIONS OF LAW

The conditions found by inspector Thompson on September 18, 1978, at the subject mine, and described by him on Order No. 335727, and described by inspector Potter at the hearing constituted a violation of 30 C.F.R. § 57.3-22.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following:

1. It is ORDERED that petition FOR ASSESSMENT OF A PENALTY in Docket No WEST 79-166-M be DISMISSED WITH PREJUDICE.

2. Order/Citation No. 335727 contained in Docket No. WEST 79-101-M is affirmed.

3. Respondent, FMC Corporation, is ORDERED TO PAY the sum of $1,000 within 30 days of this order as a civil penalty for violation found in Docket No. WEST 79-101-M.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-289
Petitioner	:	A.C. No.
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Rowland Burns, Esq., Consolidation Coal Company, for Respondent.

Before: Judge Moore

The above civil penalty proceeding was tried before Commission Administrative Law Judge John F. Cook, on September 18, 1980, in Meadow Lands, Pennsylvania, on March 5, 1981, in Washington, Pennsylvania, and on July 28, 1981, in McHenry, Maryland. On January 19, 1982, I notified the parties that Judge Cook was no longer with the Federal Mine Safety and Health Review Commission and that the case had been reassigned to me. The parties were requested to advise me if the reassignment created any problem. I have had no response from the parties, and I hold that by their silence the parties have waived any right to present further evidence or to object to a decision based on the record made before Judge Cook.

The procedure followed in this case was somewhat out of the ordinary. An unintentional roof fall had buried the continuous miner with the operator inside. The operator was trapped for approximately an hour but was not injured. In support of its case, the government produced two witnesses who had been to the scene of the accident after the roof fall. From the conditions they observed, they inferred that the roof had been bad and that Respondent failed to take proper precautions. After presenting a basically circumstantial evidence case, the government rested and Judge Cook denied Respondent's motion for judgment. In effect, he ruled that the government had made out a prima facie case. I consider Judge Cook's ruling as law of the case, and as such, it is binding upon me.

The defendant then produced three witnesses who had been at the scene prior to the roof fall, one being the foreman, one being the bolting machine operator, and the other being the continuous miner operator who was covered up in the roof fall. All of these witnesses stated that they had examined

the roof and that it was sound prior to the roof fall. In fact, the operator of the continuous miner said that the roof fall began in front of him at the face and worked back toward the intersection where he was located and where he was covered up by the roof fall. The bad top that the government claimed existed, was located along the inby edge of the intersection where No. 3 heading was started. This was 17 feet from where the roof fall started.

Respondent produced a fourth witness who had overheard some conversations during the course of the investigation subsequent to the roof fall. During cross-examination of this fourth witness, a Mr. Gross, government counsel inquired about some handwritten notes that he thought Mr. Gross had made. Mr. Gross denied making the notes and stated that he was not present at the investigation where the notes were made. (There were investigatory conferences on August 10 and August 15, 1979). The records available clearly showed that Mr. Gross had not been present when the notes were made, and Judge Cook properly refused to require Mr. Gross to testify concerning someone else's notes. A Mr. Webber had made the notes and the government attorney obviously was prepared to cross-examine Mr. Webber. Respondent chose not to put Mr. Webber on the stand and in my opinion, that should have ended the matter. I respectfully disagree with Judge Cook's decision to reconvene the hearing at a later date for the purpose of hearing Mr. Webber's testimony. The government had rested and had not announced its intent to put on any rebuttal witnesses. Mr. Freme, who later testified in rebuttal, was present on September 18, 1980.

If the record had been closed at that time, as I think it should have been, the vast weight of the evidence would have been on the side of Respondent.

The next hearing was on March 5, 1981, in Washington, Pennsylvania, and at that hearing Respondent's counsel Mr. Burns stated (Tr. 182) when referring to the end of the earlier hearing, "Thereupon, Mr. Street called Bob Gross, a Consol employee to the stand as his first rebuttal witness, and I stress the word 'rebuttal'." In fact, Mr. Gross had not been Mr. Street's first rebuttal witness, but had been Mr. Burns' own witness (Tr. 154). Judge Cook apparently thought that Mr. Gross had been a rebuttal witness (Tr. 201) and Mr. Street who certainly should have known whether Mr. Gross was his own witness or not, did not bother to correct the misinformation of the Judge and Respondent's counsel. Nor had Mr. Street been surprised by the absence of Mr. Webber at the first hearing as stated by Respondent's counsel (Tr. 197). His only surprise was that Mr. Gross had not made the notes that he had in his possession for cross-examination purposes.

Another odd circumstance that developed during the second hearing, was the fact that Inspector Freme had based his entire testimony during the first hearing on the basis of notes taken by Inspector O'Neal rather than on his own notes. It is not clear whether Mr. Street knew that the notes were not Mr. Freme's notes. He asked Mr. Freme if he testified with the help "of notes" (Tr. 303). The response was "yes I looked at the notes." He made further reference to "the notes" not "your notes" (Tr. 303, 304). On voir dire on the notes, the following took place (Tr. 307).

THE WITNESS: I dont' remember exactly what the date was. August. I remember it being on the day shift. I have my notes in my pad.

MR. BURNS: Who's notes are these?

WITNESS: These are the notes that Mr. O'Neal wrote down while we were questioning the people involved in this event.

It was almost as if Mr. Burns had been led into asking Mr. O'Neal to testify concerning his own notes. It was after he made a statement that he would not object to Mr. O'Neal taking the stand that Mr. Burns realized that Mr. O'Neal had been sitting at counsel table throughout the entire proceeding whereas the other witnesses all been sequestered. Again, it's the law of the case, and I feel bound by the ruling that was made to allow the testimony. I will take these facts into consideration in the weight given to Mr. O'Neal's testimony and I will give very little weight to Mr. Freme's testimony in the first hearing since it was based, not on his recollection, or on a refreshed recollection, but on notes made by some other person about the incident.

Mr. O'Neal's testimony at the second hearing was not damaging to Respondent, but Mr. Burns apparently felt obliged to cross-examine any way, and managed to bring out testimony that it was company policy to treat a crack such as that found in the No. 3 entry in a manner different than that followed by the crew involved in the roof fall accident. That will be discussed further when the events surrounding the roof fall are discussed.

Exhibit M-10 is a four page handwritten document prepared by Mr. Webber which purports to summarize the statements made during the post-accident investigation. It is apparently the document that Mr. Street had in his possession when he was cross-examining Mr. Gross under the impression that M-10 was prepared by Mr. Gross. Mr. Webber's recollection was not refreshed by reading the document and he could not currently vouch for the statements therein. He admitted that he had prepared it from notes that he had taken during the investigation, but stated that the proceedings were so confusing that he might well have been inaccurate as to who said what. He was not the only witnesses to testify as to the confusion during the investigation. In these circumstances, the exhibit is of little help in resolving the differences in testimony among the witnesses. */

I will be referring hereinafter, to Exhibit No. M-6 which is a sketch of the roof fall area. There are two copies of M-6 in the record, and they are not identical. In one the exhibit No. "M-6" is in blue ink and the words "pressure crack" appear. In the other exhibit the marking "M-6" appears to have been made in black ink and the words "pressure crack" have been inked over, so they can not be read. While I am leaving both exhibits in the file, I will be referring to the one that does contain the words "pressure crack."

*/ Under rule 803(5) of the Federal Rules of evidence, the document should have been read into the record rather than offered as an exhibit. In a nonjury trial, however, I fail to see that this makes any difference.

The roof fall involved in this case occurred on August 10, 1979, in the intersection formed by the No. 3 entry and the last open crosscut, in the 3 West section of Respondent's Blacksville No. 1 Mine. Exhibit M-6, M-8, and O-1 are all depictions of the accident scene. Just prior to the beginning of the shift in question, the intersection was in the form of a T because the No. 3 entry had not yet been started on the inby side of the intersection. The face of No. 3 entry was actually just a part of the crosscut rib at this time. On the day before the roof fall, Richard Bissett, a miner operator who was running a roof bolter at the time, testified that there was a crack in the roof right at the edge of the rib that was later to become the face of entry No. 3. He bolted the area outby the crack and was of the opinion that the area was safe when he left it. Another roof bolter, Darrell Tucker, saw a crack in the intersection on August 9, but does not remember where the crack was. It was somewhere along the rib line in the intersection though, and he bolted the center of the intersection. Robert Burke was there working with Darrell Tucker and he described the intersection as follows: "The place was working, starting to break along the rib. Coal was flaking off . . . just a little rip, a crack. You could hear just a little. You could see a little coal flake off." (Tr. 293-294). He says Tucker bolted the crack (Tr. 294) whereas Tucker said he bolted the center of the intersection (Tr. 273) (it must be remembered that the roof fall was in August of 1979 and the second hearing in this case did not occur until March 5, 1981).

The three men most closely involved with the roof fall were Mr. Newhouse a loader operator, Mr. Bracken, the foreman, and Mr. Spooner the continuous miner operator who was covered up in the roof fall. All three testified for Respondent that the roof was good and solid when they started mining the No. 3 entry on August 10. The continuous miner drove 17 feet into the new face of the No. 3 entry, tested the roof with a scissors jack, and all who could hear it agreed that the roof sounded good. Just before they backed out, the roof began to fall at the face of No. 3 entry and worked back to the intersection and eventually the entire intersection fell trapping Mr. Spooner in his mining machine within the intersection. See Exhibit Nos. M-6 and O-1. While there was no testimony indicating that this roof fall, beginning at the face 17 feet away from the crack, was caused by the crack, it is nevertheless the government's position that the procedure used by this particular crew was incorrect. It states that the correct procedure would have been to mine in just a few feet to establish a brow, back out and then bolt the inby side of the crack. That argument assumes there was a crack all across the face area. As stated before, there was testimony that it was mine wide policy to mine in the manner described, but Mr. Phillips, the superintendent testified that there was no such policy although he recognized that a big slip should be bolted on both sides (Tr. 412). It apparently depends upon the extent of the flaw involved. The witnesses in this case described what they saw as a crack, a cutter, a slip, a rip, and a nick. Some witnesses say the "crack" went all the way across the intersection while others say that it was only on the right hand side. Mr. Newhouse, the loader operator that witnessed the fall, stated that there was a small crack in the head coal on the right hand side of the face. He admitted that he may have been confused during the accident investigation and said left side but that in fact the "slip" was on

the right side. He also used the word "crack" and said extra bolts had been placed in that area. Mr. Bracken,the foreman stated that the mining machine had earlier nicked the roof and that the bolts were placed in the area of this nick on the right hand side of the entry. He said the nick was not a crack (Tr. 137), he said the extra bolts were all across the crosscut. When recalled at the last hearing, Mr. Braken denied that he had said during the accident investigation that there was a crack all the way across the intersection. (Tr. 415). He said a little head coal had fallen out and the area had been bolted. According to him after there has been a nick, air gets in the coal and in a few days some head coal falls out. He says there was no crack. Mr. Spooner, the miner who was trapped in the mining machine testified concerning the scissors jack test he made and said the roof sounded good and did not move. (Tr. 146). He also said that there was no "crack" going across the intersection, but he referred to a nick on the right hand side. He said that the fall could not have been foreseen. (Tr. 150).

While I generally favor the so called Susanna rule (Daniel, Chapter 13 Catholic Bible: Rule 615 of Federal Rules) I think sequestration of the witnesses may have backfired in this case. Some of them might have been using different words to refer to the same phenomenon. Also, I might be more impressed with a witnesses' description of the area if he knew that someone else had already sworn to a different description.

In the circumstances, taking into consideration all of the evidence including that which I would not have allowed had I been in charge of the case, I am nevertheless of the opinion that while it is a close question, the government has not sustained its burden of proof in this case. It has not shown that the roof fall was caused by mining inby the bolts in the intersection nor has it shown that the action of mining 17 feet inby those bolts was a violation of the standard. The citation is vacated and the case is dismissed. **/

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

**/ Respondent's attorney insisted that his motion for a directed verdict filed at the conclusion of the government's case and renewed after the entire case had been presented was properly so designated. Our rules do not provide for such a verdict and the federal rule providing for that procedure does not seem applicable to an administrative hearing. If Respondent's attorney means that the evidence was such that if it were a jury case I would direct a finding for Respondent then he is in error. I have already indicated that it is a close question. If he seeks a judgment in his favor, based on all of the evidence, then he has it. No motion was necessary at the end of the trial.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 82-13 A.C. No. 36-00970-03108
v.	:	
U. S. STEEL MINING CO., INC., Respondent	:	Maple Creek No. 1 Mine
U. S. STEEL MINING CO., INC., Contestant	:	Contest of Citation
v.	:	Docket No. PENN 82-57-R Citation No. 1050753 12/21/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Robena No. 1 Mine

DECISION

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner/Respondent, MSHA; Louise Q. Symons, Esq., U. S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for Respondent/Contestant, U. S. Steel Mining Company, Inc.

Before: Judge Merlin

Statement of the Case

Docket No. PENN 82-13 is a petition for the assessment of a civil penalty. At the hearing the Solicitor moved to withdraw this petition. I granted the motion and dismissed the petition.

Docket No. PENN 82-57-R is a notice of contest filed by U. S. Steel to review a citation and an underlying notice to provide safeguards issued by an inspector of the Mine Safety and Health Administration under Section 104(a) of the Act.

By notice of hearing dated February 3, 1982, this matter was set for hearing on March 3, 1982. The hearing was held as scheduled. At the hearing the parties agreed to 24 stipulations which I accepted and made part of the record.

Applicable Statute and Regulations

Section 314(b) of the Act which also appears as 30 C.F.R. 75.1403 provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Notice to Provide Safeguards and Citation

The subject notice to provide safeguards dated September 10, 1981 provides as follows:

> Notice to provide a safeguard for each station where mine cars are moved by means of a hoist (or car spotter). Two separate and independent methods of stopping the movement of the mine car. The second method shall provide control in case the main control fails because the contactor or the switch fails in the run position. Area all sections.

The subject citation dated December 21, 1981, provides as follows:

> Action was not taken to provide a second means of deenergizing the main power on the car spotters in case the contactor sticks. This notice covers all car spotter winches in the entire mine. (10 car spotter winches).

Discussion and Analysis

On March 5, 1981, a fatality occurred at the Banning Mine of Republic Steel Corporation. Coal was being loaded from a shuttle car by means of the shuttle-car's discharge boom onto a trip of mine cars. At Banning a locomotive brings the mine car trip to the designated location and is supposed to disengage. The mine car trip then is moved along by a car spotter. The spotter at Banning has an electric motor which drives a hydraulic pump which in turn

powers hydraulic jacks positioned between the rails to catch the axle of each mine car on the trip and push the car forward. The activation of the spotter and therefore the movement of the mine car trip is controlled by the shuttle-car operator who has an electrical pull-type switch on each side of the loading ramp. By controlling the movement of the mine car trip the shuttle-car operator can achieve even distribution of coal from the shuttle car into the mine cars. On March 5, the shuttle-car operator could not stop the movement of the mine cars and this caused the discharge boom of the shuttle car to become caught on the top of one of the moving mine cars, pulling the shuttle car itself sideways. At the time, the shuttle-car operator shouted that he could not stop the mine car trip, had his head outside of the canopy of the shuttle car and was caught and crushed between the canopy and a post. The mine cars continued to move forward and then stopped.

The evidence of record including the testimony of MSHA's witnesses indicates that during the investigation on the day of the Banning fatality the contactors in the spotter's circuitry were alright and not sticking but that the electrical system did not work properly, apparently because a State inspector had pulled out a wire. Five days after the fatality the car spotter was checked again and at that time the mine car trip continued to run after the release switch had been turned off. Examination of the car spotter's electrical circuitry revealed that the contactors were "hanging up" in the closed position thereby keeping electric current flowing, allowing the spotter to continue operating and pulling the mine car trip forward. The contactors were not burnt. They subsequently disengaged on their own, falling out.

As a result of its investigation MSHA attributed the fatality to two causes. The first, the amount of clearance between the shuttle-car discharge boom and the mine cars, is not involved in this case. The second, stuck contactors in the electrical circuitry, in MSHA's opinion caused the spotter to continue to run and move the mine cars after the release switch had been pulled, resulting in the discharge boom falling on top of the mine cars and skewing the shuttle

car sideways, crushing the shuttle-car operator. The District Manager of District 2 thereafter issued the following memorandum dated March 27, 1981:

> Each station where mine cars are moved by means of a hoist, spotter, or other device shall be provided with two separate and independent methods of stopping the movement of the mine cars. The second method shall provide control in case the main control fails because the contactor or the switch fails in the run position.

The foregoing memorandum applies to all mines in District 2 which load coal in the same manner as the Banning Mine including U. S. Steel's Robena No. 1 Mine. At Robena a locomotive is not used to position the mine car trip and the car spotter does not have a hydraulic motor and jacks as at Banning. Instead, the electrically powered winch or hoist pulls the cars forward by means of a steel cable. However, the configuration of the contactors which participate in the generation and supply of electric power to the car hoist is the same.

The issue to be decided is whether the notice to provide safeguards and the citation based upon it issued to U. S. Steel at Robena were proper under 30 C.F.R. 75.1403. This section deals with transportation of men and materials. Coal was being transferred from the shuttle car to the mine cars on the way from the face to the surface. This transfer was an integral part of the transportation of the coal. I conclude the circumstances here constitute transportation of materials within the meaning of 75.1403. The specific subsections of 75.1403 which follow are merely examples and not exclusive.

Beyond the definition of what constitutes transportation is the inquiry whether this notice to provide safeguards is in accordance with the basic characteristics of safeguards and the principles which should govern their use. //Safeguards are designed to cover situations where conditions vary on a mine-to-mine basis. Mandatory standards cannot anticipate every possible physical condition in every mine and therefore with respect to the transportation of men and materials the Act allows flexibility. By means of a safeguard MSHA can impose certain requirements on a particular mine which are peculiar to that mine because of its physical configuration and circumstances. However, in order to be fair to the operator by giving due notice, the requirements being imposed

upon its mine are set forth first in the safeguard notice which carries no civil penalty. Only in the subsequent citation based upon the safeguard can a penalty be imposed. In the area of transportation of men and materials, safeguards embody and effectuate flexibility and adaptability to individual circumstances in the administration of the Act. However, the potential scope of safeguards is very broad and accordingly, care must be taken to ensure that they are employed only in the proper context and do not become a means whereby the normal rule-making process is ignored and circumvented.

As already noted, the memorandum upon which the instant safeguard was based covered all mines in District 2 which load coal by means of a shuttle-car discharge boom and a mine car trip. The testimony at the hearing indicated that in District 2 three mines out of 17 load coal in this manner. The issuance of this safeguard and citation has nothing to do with conditions peculiar to the Robena No. 1 Mine as opposed to all other mines. Rather the safeguard applies to the method used at Robena to load and transport coal. This method might be employed in all, in a majority or as here in a significant minority of mines in the district. This is not what the safeguard device was designed to be used for. I conclude therefore that the safeguard and the citation based upon it were improperly issued and are invalid. If MSHA believes certain back-up requirements should be imposed for this type of coal loading process to make sure that contactors in the circuitry of car spotters disengage, electric current stops, and mine car trips do not run after the release switch is pulled, MSHA should undertake rulemaking. This is not to say that MSHA was not justified in having serious concerns after the fatal accident at the Banning Mine. However, such concerns cannot be satisfied through a blanket use of safeguards which disregards the rulemaking procedure. And this is especially so where, as here, the requirements imposed by the safeguard and citation in question apply in only one MSHA district but no other. Such uneven enforcement is irrational, unfair and does little if anything to advance the purposes of the Act. If MSHA believes remedial action is necessary as well it may be, MSHA must propose a uniformly applicable course of action and give operators and other interested parties appropriate opportunity to comment.

The subject safeguard and citation must be invalidated for other reasons also. After reviewing all the exhibits and testimony, I conclude the evidence falls far short of showing that a safeguard at Robena was warranted. First, MSHA's own evidence at the hearing shows that stuck contactors could not in fact be identified as the cause of the fatality at Banning. The MSHA fatality investigator testified that contactors were not stuck on the day of the fatality and that the cause of the accident could have been stuck contactors, a malfunctioning switch, or something else. It was only five days later upon testing that the contactors for the car spotter at Banning stuck so that the spotter's motor continued to run and move the mine trip. Solely from the fact of stuck contactors at Banning five days after the fatality, the requirements embodied in the subject safeguard and citation were applied to all other mines in District 2 which load coal like Banning. However, no attempt was made to determine whether the circumstances in those other mines in District 2, of which Robena was one, were the same. The MSHA electrical inspector who issued the subject safeguard and citation at Robena expressly admitted that the contactors at Robena had never been tested, and that a car spotter which did not stop could be due to a defective switch as well as a defective contactor. He also testified that insofar as he knew there had been no problem with contactors at Robena. Therefore, even if the requirements of the safeguard could have been properly imposed at Banning, MSHA had no basis to apply those requirements to Robena. Indeed, the evidence presented at the hearing showed that relevant conditions at the two mines were not the same. MSHA's own electrical expert testified that the contactors used at Banning and Robena were different makes. Ohio Brass contactors were used at Banning whereas Joy contactors were used at Robena. The expert who was familiar with both kinds testified that Joy contactors stick less than Ohio Brass contactors and he was not aware of Joy contactors ever sticking in a car hoist. Further, both MSHA and operator expert testimony demonstrated that amperage capacity is greater in the contactors at Robena than at Banning reducing the chances of sticking contactors at Robena. Gravity in the armature assembly also is a factor in the Joy contactor decreasing the likelihood of sticking and increasing the possibility of disengagement of contactors as opposed to Ohio Brass contactors. Finally, the MSHA electrical expert stated that he believed the contactors could have caused the accident at Banning because of the different nature of the two contactors used at Banning and Robena. The expert's

subsequent attempt to retract or diminish the effect of his initial testimony regarding contactors is not found credible. I have not overlooked the testimony of the UMW safety inspector who based upon his employment at Robena in the mid-1970's stated that he knew of stuck contactors in car hoists. However, in light of the other evidence already set forth I do not find the safety inspector's testimony persuasive with respect to what allegedly happened several years ago. The record demonstrates so many significant differences between the circumstances at Banning and Robena that there was no basis to apply conclusions from an event occurring at Banning to Robena. On this basis also the subject safeguard and citation must be invalidated.

Both parties have filed briefs which I have carefully reviewed. As I stated at the hearing, the presentations of counsel were most helpful in understanding the technical aspects of this case.

ORDER

It is Ordered that the petition for civil penalty in PENN 82-13 be and is hereby DISMISSED.

It is hereby Ordered that the notice of contest in PENN 82-57-R be and is hereby Granted and that the subject notice to provide safeguards and citation be and are hereby VACATED.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

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NORTH RIVER ENERGY COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. SE 82-21-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 755885; 11/5/81
	:	North River No. 1 Mine

DECISION

Appearances: Bronius Taoras, Esq., Assistant Counsel, Republic Steel Corporation, Meadow Lands, Pennsylvania, for Contestant; George D. Palmer, Esq., Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

North River Energy Company filed a Notice of Contest on November 25, 1981, alleging that a citation issued on November 5, 1981, was improperly issued. The notice also challenged the findings accompanying the citation that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard and was caused by an unwarrantable failure to comply with the standard. Contestant filed a motion for an expedited hearing, and pursuant to notice, a hearing was held in Birmingham, Alabama, on December 8, 1981. Newell E. Butler, a Federal coal mine inspector, testified on behalf of the Secretary. Michael R. Vickers, Assistant Safety Supervisor for Contestant, Steve Green, Manager of Safety, and Jerry Omer, Assistant General Manager of Operations, all with North River Energy Company, testified on behalf of Contestant.

Both parties filed posthearing briefs on March 17, 1982. Based on the entire record, including the testimony and exhibits introduced at the hearing, and the contentions of the parties contained in their briefs, I make the following decision:

STATUTORY PROVISION

Section 104(d)(1) of the Act provides in part:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

REGULATORY PROVISION

30 C.F.R. § 75.400 and 75.400-1 provide:

§ 75.400 Accumulation of combustible materials.

[STATUTORY PROVISION]

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.

§ 75.400-1 Definitions.

(a) The term "coal dust" means particles of coal that can pass a No. 20 sieve.

(b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.

(c) The term "loose coal" means coal fragments larger in size than coal dust.

FINDINGS OF FACT

1. Contestant is the owner and operator of an underground coal mine located in Berry, Alabama.

2. Contestant's operation of said mine affects interstate commerce.

3. On or about October 1, 1981, Jerry Omer of North River asked Inspector Butler if the company would be permitted to stockpile coal in the face areas of the mine. Butler told him that this would constitute an accumulation of coal in active workings, and a citation would be issued if it were to occur.

4. On or about October 7, 1981, Inspector Butler and supervisory Inspector Mize discussed with Mr. Omer North River's request that it be permitted to stockpile coal within 40 feet of the face. Both Mize and Butler told Omer that coal could not be stockpiled underground.

5. On or about November 4, 1981, Contestant implemented a written plan called "Cutting Plan for Periods of Belt Down Time," under which it was proposed to store coal in adjacent supported face areas when the belt was not operating. The plan provided that the coal should not be placed outby 40 feet from the face; the coal was to be placed on the wide side away from the line curtain with sufficient area to allow for proper air flow; a minimum of 3,000 c.f.m. of air was to be maintained. (Joint Exh. 2). This plan was not submitted to MSHA.

6. On November 5, 1981, Inspector Butler issued a citation charging a violation of 30 C.F.R. § 75.400. The condition or practice cited was described in the citation as follows:

> Combustible material was allowed to accumulate in the 1 Right working entrie on the A-11 section. Coal was being stockpiled in the 1 Right entrie. Coal was being cut in the 1 left entrie with a Joy Miner and loaded in shuttle car and hauled to the 1 right entrie and dumped. Coal was 37 foot long and 12 foot wide and 4 foot 6 inches deep. Company officials had been told that coal could not be stockpile in mines.

7. On November 5, 1981, before Inspector Butler arrived at the section the belt was not operating. Contestant continued to cut coal and take it by shuttle car from the left to the right entry where it was stockpiled, in accordance with Contestant's cutting plan for periods of belt down time.

8. The pile of coal in the entry was approximately 37 feet by 12 feet and averaged about 4 and one-half feet deep, when the inspector issued the citation. It representated 10 to 15 shuttle car loads and totalled more than 80 tons of coal.

9. Coal dust was present in the air while the coal was being dumped, and the dust travelled around the line curtain toward the miner crew. The amount of float coal dust was not substantial.

10. The subject mine liberates more than one million cubic feet of methane in a 24-hour period. At the time the citation was issued, a reading of .3 percent methane was recorded in the area of the mine involved herein.

11. When the coal was stockpiled as described in Finding No. 7, the shuttle car was driven into the coal already piled and the shuttle car cable was pushed up into the pile of coal dumped previously.

12. As the coal was piled in the right entry, it cut down the amount of air reaching the face area.

13. The coal and this area of the mine were moist.

14. There were approximately seven men working in the section: the shuttle car operator; the continuous miner operator and his helper working in the left entry; the roof bolting crew in the face area; the ventilation man; and the section foreman.

ISSUES

1. Whether the intentional stockpiling of coal within 40 feet of the face pursuant to a plan for doing so when the belt is not operating is a violation of 30 C.F.R. § 75.400?

2. If it is a violation, do the facts in this case show that it was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard?

3. If it is a violation, was it caused by the unwarrantable failure of the operator to comply with the mandatory safety standard?

CONCLUSIONS OF LAW

A. Violation

The standard involved herein is a statutory standard, contained in section 304(a) of the Act. It clearly provides that loose coal shall not be permitted to accumulate in active workings. There is no dispute that the stockpile involved herein consisted of loose coal and that it was in active workings. Was it "permitted to accumulate?" The Commission has stated that "an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized

representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." Secretary v. Old Ben Coal Company, 2 FMSHRC 2806, 2809 (1980), emphasis added. See also Secretary v. Old Ben Coal Company 1 FMSHRC 1954, 1958 (1977). Contestant seems to argue that only accidental or negligent accumulations are proscribed. I find no warrant in the language of the statute (regulation) for such an interpretation. Contestant also argues that in many situations in a mine, coal is unavoidably stockpiled without an operator being cited for an accumulation violation: coal held in shuttle cars, coal shot from the face in conventional mining, coal stored in a transfer point. These are not situations before me here, and do not help in determining the meaning of the regulation. It is clear to me and I hold that the coal stockpiled in 1 right entry of A-11 section in the subject mine was an accumulation of loose coal. Since it was an intentional accumulation, the condition or practice was a violation of the mandatory standard contained in 30 C.F.R. § 75.400.

B. Significant and Substantial

The Commission has held that a violation significantly and substantially contributes to the cause and effect of a hazard, if (1) there exists a reasonable likelihood that the hazard contributed to will result (2) in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, 4 FMSHRC 822, 825 (1981). The inspector pointed to two hazards here: a mine fire or explosion and an interruption of ventilation. This is a gassy mine and though no significant methane was detected at the time of the inspection, methane is a constant threat. Evidence was introduced of prior methane gas ignitions occurring at the mine. The area of the mine involved herein was damp, but, of course, damp coal can burn. There was an ignition source: the shuttle car cable which was subjected to abrasions as it was pushed into the pile of coal. Is there a "reasonable likelihood" that this will result in a fire or explosion? I find the question a close one, but on balance, I conclude that the conditions cited here are reasonably likely to cause or propagate a fire or explosion. The second part of the test is not so difficult: if a fire or explosion occurred, resultant injuries would certainly be of a reasonably serious nature. Therefore, I conclude that the violation found herein could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

UNWARRANTABLE FAILURE

The violation here was intentional in the sense that the condition was deliberately created. Contestant wished to test MSHA's interpretation of the Act and, so far as this record shows, did so in good faith. Is this an unwarrantable failure to comply? In an analogous situation,

I found a deliberate violation to challenge an MSHA interpretation, "the equivalent of ordinary negligence" in a penalty case. Secretary v. Cleveland Cliffs Iron Company, 1 FMSHRC 1965, 1972 (1979). It would, I believe, be anomalous to treat a negligent violation as unwarrantable, and hold a deliberate violation not unwarrantable. I hold that a good faith challenge to a standard or an MSHA interpretation of a standard is, if a violation is found, an unwarrantable failure to comply with the standard.

ORDER

Based upon the above findings of fact and conclusions of law IT IS ORDERED that the Contest of the citation is DENIED and the citation 755385, November 4, 1981 is AFFIRMED.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: CENT 80-380-M A.O. No: 23-00458-05013
v.	:	Frank R. Milliken Mine
OZARK LEAD COMPANY, Respondent	:	

DECISION

This case was first submitted on Motions for summary judgement to Judge Laurenson. Judge Laurenson denied the motions but stayed the proceedings pending a Commission decision in Homestake Mining Company, Docket CENT 79-27-M, et. seq. The Commission has now decided Homestake Mining Company 4 FMSHRC 146 (February 16, 1982), and the decision was adverse to the government's position in this case. Secretary vs. Climax Molybdenum Company, 4 FMSHRC 159 (February 16, 1982) was also decided adversely to the government's position as was Secretary vs. Local 5024, United Steel Workers and White Pine Copper Division, Copper Range Company, 4 FMSHRC 155 (February 16, 1982).

The only remaining issue is whether a violation can be established by the fact that the inspector observed vehicle tire tracks under loose roof. The parties have stipulated that there is no evidence as to when the tire tracks were made or as to when the roof became loose and unconsolidated. The evidence contained in the stipulation amounts to at most the proposition that a vehicle may have been driven under loose roof. That is not enough to sustain the government's burden of proof in a penalty case.

The citations are vacated and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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*U.S. GOVERNMENT PRINTING OFFICE : 1982 O- 361-638/4369