March 1983

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

MARCH

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

Secretary of Labor, MSHA v. Elk River Sewell Coal Company, WEVA 82-307; (Judge Merlin, Default Decision, January 25, 1983)

Secretary of Labor, MSHA v. Carbon County Coal Company, WEST 82-106; (Judge Moore, Interlocutory Review of February 4, 1983 Order)

Kitt Energy Corporation v. Secretary of Labor, MSHA, WEVA 83-65-R; (Judge Broderick, February 10, 1983)

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

Elias Moses v. Whitley Development Corporation, KENT 79-366-D; Request by Whitley Development Corp. to remove ALJ.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 11, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 80-363-M LAKE 80-364-M
v.	:	
SELLERSBURG STONE COMPANY	:	

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The administrative law judge concluded that Sellersburg Stone Company violated three mandatory standards: 30 C.F.R. § 56.6-106, 30 C.F.R. § 50.10 and 30 C.F.R. § 50.12. 1/ He assessed Sellersburg penalties

1/ Section 56.6-106 provides:

> Faces and muck piles shall be examined by a competent person for undetonated explosives or blasting agents and any undetonated explosives or blasting agents found shall be disposed of safely.

Section 50.10 provides:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, collect at (202) 783-5582.

Section 50.12 provides:

> Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

of $7,500, $1,000 and $1,000, respectively. 4 FMSHRC 1362 (July 1982) (ALJ). The issues before us on review are whether the judge's conclusion that a violation of section 56.6-106 occurred is properly supported and whether the penalties assessed by the judge for the three violations are excessive. 2/

Concerning the violation of 30 C.F.R. § 56.6-106, the judge made the following enumerated findings of fact which are not controverted by the parties on review:

1. At all pertinent times, Respondent operated an open-pit, multiple-bench, crushed limestone operation in Clark County, Indiana; its products were regularly produced for sales or use in or substantially affecting interstate commerce.

2. After material was blasted from the side of the quarry ("primary blasting"), a front-end loader was used to gather boulders that were too large to go through the stone-crusher. These were moved to the floor of the quarry where they were exploded by "secondary blasting."

3. "Secondary blasting" involved: a) drilling a hole into a boulder with a jackhammer drill; the hole was about 1 inch x 18 inches; b) loading the hole with a 1-inch x 4-inch stick of dynamite; adding a primer cord; and packing the hole with fine stones; and c) detonating the dynamite, in blasts of about 20 boulders at a time. The boulders were piled or grouped in a rather close cluster for drilling and blasting.

4. In secondary blasting, at times a dynamite charge would not explode. After the blast, the standard safe practice in the industry was to inspect all boulders remaining to see whether any contained undetonated dynamite, and this inspection required turning the boulder over to [check] all sides for a drill hole. However, Respondent did not follow the practice of turning boulders over, and relied upon visual inspection of the top and sides of a boulder.

5. In secondary blasting, at various times some boulders would be turned over by the blast so that if a boulder were unexploded the drill hole might be on the bottom and not detectable unless the boulder was turned over for visual inspection.

6. The boulders were about two to four feet in diameter, and usually the drill hole did not exit, so that there would be only one hole visible on a boulder.

2/ On review Sellersburg does not contest the judge's determination of liability for the sections 50.10 and 50.12 violations.

7. On December 13, 1979, two men were assigned to do secondary blasting. Carl Sparrow, the blaster, had about four or five months experience in blasting and David Hooper the driller had about three months experience. Neither was carefully or well trained in the performance of his duties.

(a) That morning they inspected about 20 boulders; Hooper drilled them and Sparrow loaded them with dynamite and primer cord. At times Hooper helped pack or load a hole.

(b) They set off a blast of about 20 boulders, and went to lunch. When they returned, Sparrow worked around his truck and Hooper started inspecting and drilling boulders. The first boulder he inspected had no visible drill hole, but he could not see the bottom. The boulder was about four feet in diameter and too heavy to turn over without equipment, such as a front-end loader. Respondent had such equipment, but did not use it or make it available for turning over boulders for inspection. He started drilling a hole. When he was about halfway through the boulder it exploded. Hooper received permanent disabling injuries, including loss of the sight of one eye and a crippled leg.

4 FMSHRC at 1362-63. Based on these findings, the judge concluded that "Respondent did not properly examine the muck pile after secondary blasting, because after such blasting it drilled boulders without turning them over to examine each boulder for a dynamite drill hole on the bottom of the boulder." 4 FMSHRC at 1364 (emphasis added).

On review Sellersburg argues that the judge's conclusion that a violation of section 56.6-106 occurred is without proper foundation because his decision contains no finding of fact that the boulder which exploded was a "muck pile" or "a portion of a muck pile." 3/

Our review of the judge's decision leads us to conclude that he implicitly found that the boulder was part of a muck pile. His enumerated findings describing the grouping of boulders that was blasted, coupled

3/ Sellersburg maintains the judge failed to make an expressed finding of fact and thus did not comply with Commission Rule 65(a) (which is patterned on section 8 of the Administrative Procedures Act (5 U.S.C. § 557(c)) and provides:

> The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented by the record, and an order.

with his statement that "the muck pile" was not properly examined, provide a sufficient foundation upon which to conclude that he found that the boulder in question was part of a muck pile. Furthermore, unrebutted testimony of the Secretary's witnesses clearly support the conclusion that the boulder was a part of a muck pile. Tr. 90-91, 110-12, 135-136. 4/ Thus, we conclude that the judge's decision finding a violation of 30 C.F.R. § 56.6-106 is properly supported. 5/

Sellersburg also argues that the penalties assessed by the judge for the three violations are excessive and constitute an abuse of discretion. Sellersburg's argument is premised largely on the judge's purported failure to follow MSHA's penalty assessment regulations set forth in 30 C.F.R. Part 100. Sellersburg cites the decision of the Fifth Circuit in Allied Products Co. v. FMSHRC & Donovan, 666 F.2d 890 (1982), in support of its argument, and requests that new penalty calculations and findings consistent with 30 C.F.R. Part 100 be made. Sellersburg and, we believe, the Fifth Circuit have misperceived the penalty assessment authority of the Commission and its judges under the Act. For the reasons that follow, we reject the contention that the judge's failure to follow the Secretary's penalty assessment regulations, in and of itself, constitutes an abuse of discretion.

In the Mine Act, Congress divided enforcement responsibility between two separate and independent agencies. The Secretary of Labor is granted authority to promulgate mandatory safety and health standards, to enforce such standards through inspections, and to issue citations and withdrawal orders for violations of the Act and mandatory standards. This Commission was established as an agency independent of the Department of Labor and is authorized to adjudicate contested cases arising under the Mine Act. 30 U.S.C. § 823. Consistent with this bifurcated enforcement structure, the Act's penalty assessment scheme divides penalty assessment authority

4/ The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior (1968), in part defines "muck" as:

> a. stone; dirt; debris .... d. Rock or ore broken in the process of mining....

5/ The Secretary argues that Sellersburg did not raise the issue of whether the boulders constituted a "muck pile" either at the trial or in its posthearing brief. Citing 30 U.S.C. § 823(d)(2)(a)(iii), the Secretary avers that the judge was thus never afforded an opportunity to rule on this issue and therefore Sellersburg cannot raise it on review. We disagree. Proof that the boulders were part of a muck pile is an element of the Secretary's case in proving a violation of the cited standard. In this regard, the Secretary's witnesses testified that the boulder that exploded was part of a muck pile. Accordingly, by virtue of the nature of the Secretary's case and the evidence proffered in support thereof, the judge was afforded the opportunity to address the muck pile question.

between the two agencies. Section 105(a) of the Act provides that if the Secretary of Labor issues a citation or order, "he shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited and that the operator has 30 days within which to contest the ... proposed assessment of penalty." 30 U.S.C. § 815(a) (emphasis added). If an operator does not contest the Secretary's proposed penalty assessment, by operation of law the proposed assessment becomes a final order not subject to review by any court or agency. Id.

If an operator contests the Secretary's proposed assessment of penalty, however, Commission jurisdiction over the matter attaches. 30 U.S.C. § 815(d). When a proposed penalty is contested, the Commission affords an opportunity for a hearing, "and thereafter ... issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." Id. (Emphasis added). See also 30 U.S.C. § 810(i)("The Commission shall have authority to assess all civil penalties provided in this Act"). Thus, it is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent. The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a penalty based on record information developed in the course of an adjudicative proceeding. See 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 89, 632-635, 656-657, 666-662, 906-907, 910-911, 1107, 1316, 1328-29, 1336, 1348, 1360.

The respective governing regulations adopted by the Commission and the Secretary regarding penalty assessments clearly reflect the Act's bifurcated penalty assessment procedure. Commission Rule of Procedure 29(b) provides:

> In determining the amount of the penalty neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary....

29 C.F.R. § 2700.29(b). The Secretary's regulations in 30 C.F.R. Part 100 expressly apply only to the Secretary's proposed assessment of penalties. See also 47 Fed. Reg. 22287 (May 1982)("If the proposed penalty is contested, the [Federal] Mine Safety and Health Review Commission exercises independent review and applies the six statutory criteria without consideration of these [MSHA penalty assessment] regulations.")

Thus, in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. Rather, in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act (30 U.S.C.

§ 820(i)) and the information relevant thereto developed in the course of the adjudicative proceeding. Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, 652 F.2d 59 (6th Cir. 1981). Cf. Long Manufacturing Co. v. OSHRC, 554 F.2d 903 (8th Cir. 1977); Clarkson Construction Co. v. OSHRC, 531 F.2d 451 (10th Cir. 1976); Dan J. Sheehan Co. v. OSHRC, 520 F.2d 1036 (5th Cir. 1975); California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975).

Accordingly, we reject Sellersburg's argument that the judge abused his discretion in not following the Secretary's regulations governing proposal of penalties, including the Secretary's penalty point formula and special narrative findings procedures.

Our inquiry does not end here, however, because Sellersburg also raises broader challenges to the penalties assessed by the judge, i.e., whether the judge adequately considered and discussed the statutory criteria bearing on penalty assessments and whether the penalties assessed are otherwise consistent with the criteria or are excessive.

Section 110(i) of the Act mandates Commission consideration of six criteria in assessing appropriate civil penalties: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation. 30 US.C. § 820(i).

As to each of the three violations at issue, the judge's decision contains discussion and findings on only two of the six statutory criteria, i.e., the operator's negligence and the gravity of the violations. The decision is devoid of specific facts and findings bearing on the remaining four criteria. 6/ When an operator contests the Secretary's proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria must be made. 30 U.S.C. § 815(d). Cf. National Independent Coal Operator's Assoc. v. Kleppe, 423 U.S. 388, 46 F.Ed 2d 580, 96 S.Ct. 809 (1976)(The 1969 Coal Act "does not mandate a formal decision with findings as a predicate for a penalty assessment order unless the operator exercises his statutory right to request a hearing on the factual issues relating to the penalty.... (Emphasis added.)) But see, B.L. Anderson v. FMSHRC, 668 F.2d 442 (8th Cir. 1982). Findings of fact on each of the statutory criteria not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts, in their

6/ The judge did generally state that the penalties assessed were "[b]ased upon the statutory criteria for assessing a penalty."

review capacities, with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient. Therefore, we conclude that the judge erred in failing to make findings of fact on four of the six statutory criteria bearing on his assessment of penalties against this operator. 7/

Also, in this case there is a wide divergence between the penalties proposed by the Secretary and those assessed by the judge. 8/ As we discussed previously, in a contested case the Secretary's penalty proposals are not binding on the Commission or its judges. Thus, the penalties assessed de novo in a Commission proceeding appropriately can be greater than, less than, or the same as those proposed by the Secretary. However, the Secretary's proposed penalties are usually of record in a Commission proceeding. When based on further information developed in the adjudicative proceeding, it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness. See Dan J. Sheehan Co. v. OSHRC, supra, 520 F.2d at 1040-1042; Clarkson Construction Co. v. OSHRC, supra, 531 F.2d at 456.

Based on the above considerations, one course to follow in the present case would be to remand this proceeding to the administrative law judge to cure his error and make the necessary findings pertaining to the remaining four penalty criteria. For the following reasons, however, we find that in the circumstances of the present case a remand for the entry of such findings by the judge is unnecessary and would unnecessarily prolong these proceedings.

The statutory penalty criteria on which the judge failed to make findings are the following: the operator's history of previous violations; the appropriateness of the penalty to the size of the operator's business; the effect on the operator's ability to continue in business; and the good faith abatement of the violations. A

7/ In the present case the operator requested a hearing and the case, in fact, proceeded through a full hearing to a decision on the merits. Thus, we are not presented with any question concerning the extent of the findings necessary where the parties have presented a proposed settlement that accords with the Commission's requirement for approval of penalty settlements. 29 C.F.R. § 2700.30.

8/ The Secretary originally proposed penalties of $1,000, $78 and $78 for the three violations at issue. The judge assessed penalties of $7,500, $1,000 and $1,000, respectively.

review of the record indicates, however, that there was no controversy between the parties concerning the record evidence bearing on each of these criteria. 9/ The parties stipulated that the operator demonstrated good faith in abating the violations. Relevant to the operator's size it was stipulated that the mine's annual production was about 450,000 tons and that between 14 to 20 persons were employed. Concerning the operator's history of violations, the Secretary entered an exhibit into evidence which indicates that 35 violations were charged and penalties for 29 violations paid during the period January 1978 through January 1980. The operator did not challenge this evidence. The operator refused to stipulate that payment of civil penalties would not affect its ability to continue in business, but did not offer any argument or evidence that its ability to continue in business would be impaired. See Buffalo Mining Co., 2 IMBA 226, 24748 (1973). Because the above information comprises all of the record evidence as to the penalty criteria on which the judge failed to make express findings, in the interests of judicial economy we enter the above as the required findings rather than remanding for the judge to do so.

The question remains as to whether, in light of the above findings on four of the penalty criteria and the express findings made by the judge concerning the remaining two, i.e., the negligence and gravity criteria, the penalties assessed by the judge are excessive. The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf. Long Manuf. Co. v. OSHRC, supra, 554 F.2d at 908. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Regarding the statutory penalty criteria, the record reflects that the operator has at least a moderate history of previous violations. It is a small to medium sized crushed limestone operation. In the absence of proof that the imposition of authorized penalties would adversely affect its ability to continue in business, it is presumed that no such adverse affect would occur. Buffalo Mining, supra. Good faith was demonstrated in abating the violations. As to the negligence and gravity criteria, regarding the violation of 30 C.F.R. § 56.6-106 the judge found that the operator's blasting practice constituted "gross negligence" and was a "most serious" violation posing a "grave risk" to employees. Concerning the violation of 30 C.F.R. § 50.12 requiring the preservation of accident sites pending completion of an investigation thereof, the judge found that the operator was negligent in failing to comply with the standard and that this was a serious violation since it hindered MSHA's ability to conduct an appropriate investigation. As to the violation of 30 C.F.R. § 50.10 requiring immediate contact with MSHA when an accident occurs, the judge found that the operator's notification by mail resulted from its negligence and seriously affected MSHA's ability to conduct an effective investigation.

9/ The uncontroverted nature of the evidence bearing on these criteria may explain why the judge did not make express findings in his decision.

On review the operator has not challenged the facts found by the judge concerning its blasting procedures, its preservation of the accident site, or its failure to immediately contact MSHA. Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record we cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, we find that the judge's penalty assessments do not constitute an abuse of discretion.

Accordingly, the decision of the administrative law judge finding violations of 30 C.F.R. §§ 56.6-106, 50.10 and 50.12, and assessing penalties of $7,500, $1,000, and $1,000, respectively, is affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

Distribution

Anna L. Wolgast
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Anne Marie Sedwick
Sedwick and Sedwick
102 N. Indiana Avenue
Sellersburg, Indiana 47172

Administrative Law Judge William Fauver
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 23, 1983

OFFICE OF THE GENERAL COUNSEL

ELIAS MOSES	:	
	:	
v.	:	Docket No. KENT 79-366-D
	:	
WHITLEY DEVELOPMENT CORPORATION	:	

ORDER

On March 7, 1983, the Commission received a motion filed by Whitley Development Corporation seeking the disqualification or removal of the administrative law judge assigned to this matter, and the vacation of all previous orders entered by him. This motion was simultaneously filed with the Commission and the judge. Upon the Commission's receipt of the motion, the record in this matter was forwarded by the judge to the Commission.

Insofar as the operator seeks action by the full Commission on its motion at this time the request is denied. Commission Rule of Procedure 81 governs requests for disqualification and provides:

*****

(b) Request to withdraw. Any party may request a Commissioner, or the judge (at any time following his designation and before the filing of his decision), to withdraw on grounds of personal bias or disqualification, by filing promptly upon discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) Procedure if Judge does not withdraw. If the judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings by granting a petition for interlocutory review.

29 C.F.R. § 2700.81.

In light of the foregoing, the judge is required to act on the motion and the record is returned to him for further proceedings on the operator's request consistent with the Commission's rules.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

Distribution

David Patrick, P.S.C.
P.O. Box 9
Harrodsburg, Kentucky 40330

William E. Hensley
P.O. Box 1263
Corbin, Kentucky 40701

Administrative Law Judge Richard Steffey
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 24, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISRTATION (MSHA)	:	
	:	Docket Nos. PENN 80-260-R
v.	:	PENN 81-35
MATHIES COAL COMPANY	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The judge held that Mathies Coal Company violated 30 C.F.R. § 75.1722(a) and assessed a $750 penalty. 3 FMSHRC 1998 (August 1981)(ALJ). For the reasons that follow we reverse.

Section 75.1722(a) provides:

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

On May 16, 1980, Mathies received a citation alleging a violation of section 75.1722(a) stating:

> It was revealed during a fatal accident investigation that the automatic elevator and associated parts ... was [sic] not guarded adequately to keep persons from coming in contact with the elevator as it was moving in the shaft along the stairways at the first and second landings.

The elevator shaft and the adjacent stairway mentioned in the citation extend from the surface to the mine floor 273 feet below. The first landing of the stairway is above the surface and the second landing is approximately level with the surface. Two doors provide ingress and egress to the stairwell; one at the first landing above ground level and one at the mine floor. From the mine floor up to approximately 24 to 32 inches above the floor of the second landing, the elevator and stairwell are separated by corrugated metal. Parallel to and level with the top of the corrugated metal is an I-beam. At the

time of the citation, above the I-beam, the elevator shaft was separated from the first and second landings and the first flight of stairs only by handrails. Thus, above and below the handrails no separation between the landings and stairs and the elevator shaft existed, except for the first 24 to 32 inches from the second landing. It was this lack of separation between the elevator shaft and the stairwell that the Secretary alleged constituted a violation of the cited standard. 1/

The citation was issued during an investigation of a fatal accident that occurred at the mine. On May 16, 1980, a miner who apparently intended to leave work early, walked up the stairs to the top of the stairwell, opened the door and stepped outside. He saw his foreman and, to avoid being seen, went back down the stairs to the second landing. There, he stepped onto the I-beam to gain access to a loose metal grate on one side of the elevator shaft from which he could exit to the surface. The elevator descended however, and a retiring cam 2/ affixed to the cage apparently struck the miner causing him to fall to the shaft bottom. 3/

The judge concluded that the "elevator cage together with its retiring cam constituted moving parts of a machine ..." within the meaning of the standard. 3 FMSHRC at 2001. On review, the Secretary argues that the purpose of section 75.1722(a) is to "protect miners from injury caused by moving machinery," and that the elevator cage is subject to the standard "because it is an 'exposed, moving machine part which may be contacted by persons and which may cause injury.'" Sec. br. at 5. He, like the judge, interprets the standard to cover not only the listed machine parts but all machine parts that are exposed and moving. Sec. br. at 5-6. We disagree. We find that such an interpretation ignores the grammar of the standard and makes the list of items covered surplusage.

1/ The judge stated that the area that the Secretary sought to have guarded included only a 26" by 54" space on the second landing. Our review of the citation and the testimony and arguments presented at the hearing convinces us that the alleged violative condition encompassed all the open area between the elevator shaft and the stairway and landings at the first and second levels.

2/ The retiring cam is a metal bar attached to and protruding from one side of the elevator cage. When the cage reaches the top or bottom landing of the shaft, the cam hits a switch on the side of the shaft, and causes the elevator door to open.

3/ As the parties and the judge agreed, the fatality is not determinative as to whether a violation of the standard occurred. The violation was alleged because the elevator cage and its parts were not guarded to prevent a person from contacting them and being injured. These circumstances existed regardless of the specifics of the accident.

"Similar," "exposed," and "moving" are all adjectives modifying "machine parts" in the standard at issue. Thus, the standard as written applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed. The pivotal inquiry, therefore, is whether the elevator cage and its associated parts, including the retiring cam, constitute moving machine parts "similar" to those listed. We think not. "Similar" is defined as:

> 1. having characteristics in common; very much alike ... 2. alike in substance or essentials ... 3a. having the same shape: differing only in size and position ....

Webster's Third New International Dictionary 2120 (unabridged 1971). Given this definition we find it unnecessary to resort to a detailed, technical analysis of the nature of the listed moving machine parts as compared to an elevator cage. Although an elevator cage has a common characteristic with the enumerated items, i.e., motion, it is not "very much alike", "alike in substance or essentials" or of the "same shape" as the others. Quite simply, in our view, it does not even remotely resemble, in form or function, those machine parts specifically listed in the standard.

The observation of the Fifth Circuit in a case arising under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1976) is particularly appropriate here:

> The [Secretary] contend[s] that the regulation should be liberally construed to give broad coverage because of the intent of Congress to provide safe and healthful working conditions for employees. An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.... A regulation should be construed to give effect to the natural and plain meaning of its words....
>
> If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.... We recognize that OSHA was enacted by Congress for the purpose stated by [the Secretary]. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.

Diamond Roofing Co. v. OSHRC & Secretary of Labor, 528 F.2d 645, 649 (1976)(citations omitted). Accord, Phelps Dodge Corp. v. FMSHRC & Secretary of Labor, 681 F.2d 1189, 1193 (9th Cir. 1982).

As we have previously acknowledged, "Many standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances'". Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982), quoting Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). However, even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard. Alabama By-Products Corp., supra; U.S. Steel Corp., FMSHRC Docket No. KENT 81-136 (January 27, 1983). We find this to be the case here. 4/

We emphasize that this conclusion does not mean that miners must be left at risk against dangers posed by unguarded elevators. 5/ The Secretary has adopted detailed regulations specifically applicable to hoisting equipment, including elevators. 30 C.F.R. Part 75, Subpart O, § 75.1400 et seq. The Secretary is free to adopt an improved standard expressly requiring that elevators be guarded, thereby generally giving operators adequate notice of what is required. More pertinent to the circumstances of the present case, however, the Secretary had available a specific statutory avenue authorizing him to require "other safeguards adequate ... to minimize hazards with respect to transportation of men and materials...." 30 U.S.C. § 874(b); 30 C.F.R. § 75.1403. Through application of this provision in the first instance the Secretary could have accomplished abatement of the hazardous condition while at the same time avoiding the due process problems posed by seeking a civil penalty for a violation of a standard that did not provide adequate notice to the operator. 6/

Accordingly, the decision of the administrative law judge is reversed and the citation and penalty assessed are vacated.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

4/ As the administrative law judge so aptly stated at the hearing: "If you start taking these words like a rubber band and stretching [them], pretty soon you end up with some really fantastic results." Tr. 95.

5/ In fact, the alleged hazardous condition at this mine was promptly abated by the operator through installation of a wire mesh grate, similar to cyclone fencing.

6/ At the hearing, counsel for the operator suggested the appropriateness of the Secretary's recourse to a safeguard notice requiring the installation of an appropriate guard. Tr. 81.

Jestrab, Commissioner, dissenting:

I most respectfully dissent.

The facts as stated by my learned colleagues are not in dispute. The investigation by MSHA concluded that the unguarded retiring cam probably caught the victim on a tool pouch which was attached to his belt. (T-48) According to the evidence, the retiring cam "...is a bar that protrudes, sticks out from the elevator that controls a switch that will either let the doors open or remain shut." (T-36, and see Operator's exhibits 10 and 21 and Gov't exhibit 6.) It thus appears that the cam was properly described and was designed to perform the usual mechanical function of a cam, that is to say, was employed to actuate nonuniform or rectilineal movement of the elevator doors. 1/ The regulation described in the citation is section 75.1722(a) which reads as follows:

> Gears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; sawblades; fans inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

If the unguarded cam in this case had been in the form of a gear or sprocket or other form of wheel, it could not be doubted that the cam would fall within the express language of the regulation. To exclude this exposed moving machine part from coverage because it is not attached to a wheel is to exalt form over function.

Finally, the witness described the cam as a bar. Bar is synonymous with shaft. 2/

I would sustain the Administrative Law Judge.

Frank F. Jestrab, Commissioner

1/ Oxford English Dictionary, Oxford 1933. Cam - ...A projecting part of a wheel or other revolving piece of machinery, adapted to impart an alternating or variable motion of any kind to another piece pressing against it, by sliding or rolling contact. Much used in machines in which a uniform revolving motion is employed to actuate any kind of a non-uniform, alternating elliptical, or rectilineal movement. The original method by cogs or teeth fixed or cut at certain points in the circumference or disc of a wheel, but the name has been extended to any kind of eccentric, heartshaped, or spiral disc, or other appliance that serves a similar purpose.

2/ The Century Dictionary and Encyclopedia, The Century Co., New York (1899). Shaft - (e) In mach: (1) ...connected bars serving to convey force which is generated in an engine or other prime mover to the different working machines...

Commissioner Lawson, dissenting:

Although I am not in disagreement with my colleague Commissioner Jestrab, I would offer further explication of my reasons for dissenting from the views of the majority.

The majority interprets too narrowly a broad standard whose clear purpose is to protect miners from injury caused by contact with exposed moving machine parts, including the elevator cage and retiring cam in this case. The standard in question states:

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

Mathies received a citation for failing to guard "the automatic elevator and associated parts ... adequately to keep persons from coming in contact with the elevator as it was moving in the shaft along the stairway." The majority does not disagree with the finding of the judge that an elevator cage with its retiring cam is a "machine part", nor do I, and that conclusion is supported by the operator's own witness. He testified that the elevator cage moves up and down the shaft, receives power from an external source, and the hoist equipment includes the cage, and a motor and pulleys. Tr. 117, 120, 123. Thus, the elevator cage is clearly a "machine part." The majority also concludes that the elevator cage with its cam is not "similar" to the items listed in the standard, and, therefore is beyond its reach. That determination is not supported by the evidence in this case.

First, the machine parts enumerated in section 75.1722(a) are quite dissimilar, and, when considered together, comprise a broad spectrum of parts that must be guarded. What they have in common, as the majority notes, is motion and the elevator cage shares this characteristic. Slip. op. at 3. The majority states, "Quite simply, in our view, [the elevator cage] does not even remotely resemble, in form or function, those machine parts specifically listed in the standard." Id. The majority fails, however, to examine the parts listed and deduce their "form and function," and then consider whether the elevator cage with its retiring cam is "similar." Clearly, sawblades, which come in various configurations, and fan inlets, neither resemble nor function in the same manner as gears and sprockets. Attempts to classify the parts enumerated in the standard fail because the parts have little in common. Mathies suggested in its brief that the listed parts are all the "inner workings" of machinery, and are unlike the elevator cage because the movement "is the product of the parts which transmit the power." Mathies br. at 11. This theory is deficient, however, because saw-

blades actually perform the function of the saw, and "fan inlets" describes an area on one side of a fan, thus, both are certainly not within the "inner workings" of a machine. The Secretary deliberately included a wide range of items in the standard to give notice that the standard applies to a variety of machine parts in mines. Nothing in the standard limits its coverage to particular types of machine parts; rather, by its very nature, section 75.1722(a) encompasses many exposed moving machine parts. It is one of the many standards made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). See also Capitol Aggregates, Inc., 4 FMSHRC 846 (May 1982). Thus, the broad phrase "and similar exposed moving machine parts" must be read inclusively to apply to moving machine parts, such as the elevator cage, which may be contacted and may cause injury.

Second, the purpose of the standard is obvious--it is to protect miners from hazards caused by exposed moving machinery. Therefore, focusing on those hazards will provide additional information on the scope of the standard. Some of the listed parts, for example, gears, sprockets, flywheels, and pulleys, could catch the limbs or clothing or a person and cause injury by pulling the object caught into the moving machinery. This concept of a "pinch point" has been used many times by our judges to describe a hazard to be avoided by this standard. See, e.g., Missouri Gravel Co., 3 FMSHRC 1465 (June 1981)(ALJ)(interpreting identical standard, 30 C.F.R. § 56.14-1); N.Y. State Dep't of Transportation, 2 FMSHRC 1749 (July 1980)(ALJ)(interpreting 30 C.F.R. § 56-14-1); FMC Corp., 2 FMSHRC 1315, 1319-22 (June 1980)(ALJ)(interpreting identical standard 30 C.F.R. § 57.14-1). The elevator cage as it ascends and descends in the shaft also creates such a "pinch point," both on the stairs with the railing, and on the landing with the I-beam. Thus, the hazard presented by the elevator with its retiring cam is similar to that presented by many items enumerated in section 75.1722(a). The moving elevator cage in this case could catch the arm of a person who tripped while going up or down the first flight of stairs, as the judge noted. 3 FMSHRC at 2002. In addition, the retiring cam could catch on a person's clothing and pull him or her down the shaft, as happened in this case, resulting in a fatality.

Third, even if one limits the standard, as the majority does, to very specific machine parts "having characteristics in common" or "alike in substance or essentials," the cage and retiring cam fall within the standard. Slip op. at 3, quoting Webster's Third New International Dictionary. The retiring cam, which is affixed to the cage and moves with it, has the same function as gears, sprockets and couplings, all of which transfer power or motion. The function of the retiring cam is to allow the cage door to open when the cage reaches the top or bottom of the mine shaft. The retiring cam meets a roller, causing the roller to revolve and operate the switch which opens the doors. Tr. 42, Operator's Exhibit 1. Thus, the retiring cam transfers its linear motion to rotary motion to operate the switch, as Commissioner Jestrab has stated so well. This function is "alike in substance or essentials" to that of gears, sprockets and couplings, and thus brings the retiring cam within the reach of section 75.1722(a).

Accordingly, whether one accepts a more liberal interpretation of the standard, or that espoused by the majority, the elevator cage and retiring cam fall within the category of "similar exposed moving machine parts."

The remaining question is whether the cage with its cam "may be contacted by persons... and may cause injury..." 1/ The judge correctly found that the elevator cage with its retiring cam "may be contacted" and "may cause injury to persons. He stated:

> [I]t is clear that an individual while performing his regular routine work duties in a prudent manner might lose his footing and trip and fall on the second landing thereby putting part of his body into the unguarded space and coming into contact with the elevator and its retiring cam if the elevator were descending at that time. Also, the arm of an individual descending the stairs from the top to the second landing could come in contact with a descending elevator cage.

3 FMSHRC at 2001-02. In this case, as the judge found, weekly examinations of the entire stairwell were required, and the stairs could be used to enter and leave the mine, as "a few miners" including the decedent were doing in this case. Tr. 47. The elevator is used daily. Thus, in this case the elevator cage "may be contacted"

1/ Mathies also presents two procedural issues, but its arguments are not persuasive. Mathies first asserts that the judge erred in failing to rule at the hearing on its motion for a directed verdict. Initially, in a case tried without a jury the appropriate motion is one for involuntary dismissal under Federal Rule of Civil Procedure 41(b). A trial court's reservation of ruling on such a motion is, in effect, a denial of the motion. 5 Moore's Federal Practice ¶41.13[1] at 41-176 to 41-178 & n.31 (1982 & 1982-83 Supp.) Mathies had the choice of proceeding or standing on its motion. By presenting evidence, Mathies waived its right to appeal from the judge's "denial" of its motion.

Mathies' other claim of procedural error is that the judge "permitte[d] MSHA to change its theory of prosecution after MSHA had rested its case." Mathies br. at 6. Mathies made no objection on this ground at the hearing and thus has waived any objection.

within the meaning of that phrase in section 75.1722(a). 2/ The possibility of injury from such contact is apparent, and need not be described in detail, for example, a person or one's clothing or limb could be caught between the elevator cage and the stair railing on the first flight of stairs, or between the I-beam and the elevator on the second landing.

I therefore dissent and would affirm the judge.

A. E. Lawson

A. E. Lawson, Commissioner

2/ It is not necessary to decide in this case whether or not a particular "degree of probability" of contact should be read into section 75.1722(a). 3 FMSHRC at 2002. Whatever the precise contours of the phrase "may be contacted," they are satisfied in this case.

Distribution

Anthony J. Polito, Esq.
Corcoran, Hardesty, Ewart, Whyte & Polito, P.C.
Suite 210
Two Chatham Center
Pittsburgh, PA 15219

Ann Rosenthal, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Chief Administrative Law Judge Paul Merlin
FMSHRC
1730 K Street, N.W., 6th Floor
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 81-132-RM
WESTERN STEEL CORPORATION	:	

DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation and application of 30 C.F.R. § 57.4-33, a fire prevention standard for metal and nonmetal underground mines. The standard provides: "Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used." 1/ On the grounds explained

1/ MSHA has been in the process of reviewing its metal and nonmetal standards. On December 27, 1982, MSHA released preproposal draft revisions of the metal/nonmetal fire prevention and control standards. These draft revisions would combine the fire prevention and control standards of 30 C.F.R. Parts 55, 56, and 57, into a new Part 58. One of the preproposal drafts, section 58.4-65(G), if ultimately promulgated, would revise section 57.4-33, the standard involved in this case. Section 58-4-65(G) (draft) provides:

> Valves on oxygen and acetylene tanks shall be kept closed when--
>
> (a) the tanks are moved;
> (b) the system is left unattended; or
> (c) the task is completed.

An accompanying note states:

> [.4-33] When valves on storage cylinders are open, the connecting hoses are extensions of storage cylinders. Without close attention, the hoses could become damaged and release gases, creating a flammable atmosphere. The standard has been revised to clarify when valves must be closed to prevent this hazard.

As is plain from a facial comparison, there are significant differences in the texts of the present standard, section 57.4-33, and the draft revision. Our decision in this case is based upon the standard in existence at the time of the citation, section 57.4-33.

below, we affirm the administrative law judge's decision vacating a citation issued against Western Steel Corporation for an alleged violation of the standard. 2/

The facts are largely undisputed. At the time of the citation, Western was installing a dust control system in an underground mine in Wyoming. In the course of this work, Western employees were using an oxyacetylene torch welder to make brackets for a new air duct. The torch welder operator would first cut appropriate pieces of angle iron and then weld the pieces into place to form the brackets. The torch head consisted of a burner, to which were attached hoses that led to two gas tanks, one containing oxygen, the other acetylene. The tanks were located in a cage over the headframe about 50-70 feet from the mine entrance. These gases could be shut off by turning valves located either at the tanks or at the burner.

On December 3, 1980, the day of the citation, the torch head was in an underground tunnel at a worksite approximately 30-40 feet from the tunnel entrance. The torch hose ran for a distance of 100 feet through the tunnel and out the entrance to the oxygen and acetylene tanks located on the surface. The Western iron worker who was operating the torch welder on December 3d turned on both sets of gas valves at the tanks and at the burner when he arrived at the worksite about 8:00 a.m. He then cut angle iron in the tunnel until he depleted his supply. At that point, around 10:15 a.m., he turned off the burner gas valve and left the tunnel worksite to get more angle iron from a stockpile on the surface about 50 feet from the tunnel entrance. At that location, long pieces of angle iron were kept on a table. The stockpile was about 50-60 feet from the gas tanks. The employee did not pass the tanks on his way to the stockpile, and did not turn off the valves at the gas tanks.

Upon reaching the table, the employee noticed another torch. He decided to cut usable lengths of iron at the table instead of taking a large piece back to the worksite and cutting it there. Shortly after the employee left the tunnel, an MSHA inspector arrived at the mine. The inspector noticed the gas tank valves open and followed the hoses down into the tunnel to inspect the torch head. He found the torch head valves turned off and the burner tip cold. The inspector returned to the surface and turned off the valves at the gas tanks. Then about 10:35 a.m., he spoke with the welder operator, who was still at the table. It appears that the employee was just about to return to the tunnel worksite with the iron he had cut at the table. Tr. 10, 31-32, 54-55. After discussing the matter with the employee and others in the area, the inspector issued the citation.

2/ The judge's decision is reported at 3 FMSHRC 2666 (November 1981) (ALJ). When the citation was issued, Western was performing work for FMC Corporation at an FMC mine. FMC was the original contestant in the proceeding, and Western was substituted as contestant without objection. The judge subsequently dismissed the case as against FMC Corporation and amended the caption to reflect the substitution. 3 FMSHRC at 2666.

The judge vacated the citation. He concluded that while the welder operator was away from the tunnel obtaining more angle iron for his work the contents of the oxygen and acetylene tanks were "being used" within the meaning of the standard, and, therefore, the tank valves did not need to be closed. However, the judge rejected an interpretation of the standard that would allow a miner to be absent for "a substantial period of time" from an oxyacetylene torch welder without closing the tank valves. 3 FMSHRC at 2669. In essence, the judge adopted a two-part test for analyzing alleged violations of the standard: (1) a temporal test that if welding equipment were left unattended for a "substantial period of time," the tank contents would be deemed "not being used" and the tank valves would have to be closed; and (2) a job-related test that tank valves could be left open for a non-substantial period of time while the torch welder operator was engaged in an activity related to the cutting or welding operation. 3 FMSHRC at 2668. Applying these criteria to the facts, the judge determined that the employee's cutting additional pieces of angle iron on the surface was an activity connected with the cutting and welding in the tunnel, and that his 20-minute absence from the torch head was not a substantial period of time. 3 FMSHRC at 2668-69.

On review the Secretary argues that if a welder operator leaves the immediate area of a welding operation for "any length of time," the tank contents cease to be in use and therefore the tank valves must be closed. The Secretary would, however, permit the welder operator to cease cutting or welding temporarily without turning off the tank valves so long as he "remains in the area of the torch, hose, and tanks attending to the welding activities commonly associated with his immediate job." We are persuaded only in part by the Secretary's approach.

Before construing the standard we examine the evidence in this case, which indicates that cutting and welding tasks are often, if not typically, performed in an intermittent manner. Tr. 19-20, 24-25, 46-47. For example, as this case illustrates, it is common practice to use a torch welder to cut metal and then weld the metal in place. In making the transition, the operator must turn off the torch head, adjust it to allow for welding, and then turn it back on. In addition, the gas tanks may be located for safety purposes some considerable distance from the burner head. Tr. 19-20, 24-25. Given that the distance between torch and tanks may be substantial (not only in terms of distance but also in terms of difficult terrain separating tanks and torch), it follows obviously that some measure of time must elapse for one person to shut off the torch valves and then proceed to the place where the tanks are stored. Further, in some circumstances the tanks may be stored, for safety reasons, in a place not easily and readily accessible. We note that the MSHA inspector who issued the citation testified that if the gas tanks were not located in the immediate vicinity of the torch, the operator could leave the torch for brief periods of time (under 10 minutes in duration in the inspector's opinion) without being required to turn off the gas tanks. Tr. 46-47, 49. In view of the foregoing

considerations, it is not surprising that all parties agree that requiring the tank valves to be closed every time a burner is temporarily laid aside and turned off during the performance of a task would be very impractical and an unreasonable construction of the standard. 3/

Thus we come to interpretation of a standard aimed at promoting safety for an essential welding operation within an underground mine. Absolute safety would require prohibition of hoses carrying oxygen and acetylene into a mine. Neither the Mine Act nor the regulatory standard at issue here imposes that prohibition. Instead, we confront a brief, generalized standard which, in contemplation of practicalities, requires interpretation for reasonable application in varying circumstances. The standard refers only to an "in use" criterion. As contrasted with MSHA's preproposal draft revision (n. 1 supra), the standard does not include an "attendance" test.

The basis of the Secretary's argument on review appears to be concern for the possibility that the gas hoses could leak or be ruptured accidentally, while the tank valves are open, thereby causing release of the oxygen and acetylene with the further possibility of ignition or explosion within the mine. Clearly, avoidance of a disaster of that nature is the concern of Congress, the Secretary, the Commission, mine operators and, especially, miners. As the facts in this case show, the tanks were located on the surface about 100 feet from the torch head in the mine. For one person to traverse such distance, with no unusual obstacles, would require a few minutes -- perhaps 3 minutes and maybe more if the traverse were difficult. Consequently, even in the best of circumstances, instant communications between the torch site and the tank site would seem to be the proper means of adhering exactly to the mandate implicit in the Secretary's argument. But the standard makes no reference to such communication.

Similarly, if the laying of hoses from oxygen and acetylene tanks located outside a mine to connect with a torch head inside a mine inherently represents a dangerous hazard, then it would seem plausible that the standard should have required a protective cover or sheathing for the hoses. This protective requirement, however, does not appear in the standard, which simply requires that the tank valves be closed "when the contents are not being used."

3/ We note too that the relevant OSHA fire prevention standard for the construction industry, 29 C.F.R. § 1926.352(g), also promulgated by the Secretary of Labor, recognizes the intermittent nature of torch welding tasks and permits the torch to be laid aside temporarily without tank valve closure. That standard provides in part:

> For the elimination of possible fire in enclosed spaces as a result of gas escaping through leaking or improperly closed torch valves, the gas supply to the torch shall be positively shut off at some point outside the enclosed space whenever the torch is not to be used or whenever the torch is left unattended for a substantial period of time, such as during the lunch period.

(Emphasis added.)

It must have been contemplated in the drafting of the standard that some reasonable lapse of time be permitted between cutting and welding with the torch and closing of the tank valves. And, indeed, as we noted above, the Secretary would permit the welder operator to cease cutting or welding without closing the tank valves so long as he "remains in the area of the torch, hose, and tanks attending to the welding activities commonly associated with his immediate job." The OSHA construction standard would similarly allow intermittent laying aside of the burner without tank valve closure for non-substantial periods of time.

We must interpret the standard involved in this case as it is written, and will not attempt at this time to essay a rule that would cover all situations of intermittent cutting and welding during the performance of a task. We conclude, for purposes of deciding this case, that an oxyacetylene torch welder being used for a task may ordinarily be laid aside without tank valve closure for reasons immediately related to the performance of that task and for a temporary period of time not inconsistent with the continuous performance of the task. We agree with the judge and the Secretary, however, that at some point such temporary laying aside during the performance of the specific task shades into a status of "not being used" within the meaning of the standard and does require tank valve closure. The presence of unusual risks or special circumstances may also require tank valve closure. In the absence of detailed guidelines in the standard itself, alleged violations of this standard must be evaluated on the basis of all the circumstances in each case. 4/ If the Secretary wishes to have a more detailed regulation incorporating such factors as attendance, two-way communications, protective sheathing for hoses, and specific temporal criteria, he is authorized under the Mine Act to revise the standard. As we have already noted, he is presently in the process of considering revisions to the standard.

Our dissenting colleague argues that our interpretation engrafts new "exceptions" onto the standard. We respectfully disagree. This case requires us to construe the meaning of the key phrase, "not being used." "Use" has a temporal meaning because tasks extend over time. "Use" itself in this context refers to performance of work. Our "temporal" and "task-related" criteria are therefore natural constructions of the words in issue. Our interpretation is also consistent with the evidence showing the intermittent nature of torch welding tasks and with general safety considerations in this field, as evidenced by the Secretary's OSHA construction standard mentioned above. It appears to us that the differences between the Secretary's arguments in this case and our decision are differences of degree, not kind.

4/ This case does not require us to, and we do not, decide whether a temporary laying aside of the torch welder for other work-related reasons or for such purposes as coffee breaks, trips to the lavatory, or the like, would require a different approach.

Applying the foregoing principles to this case, we affirm the judge's vacation of the citation. On the morning of the citation, the torch welder was being used to make brackets. When the welder operator went to the mine surface, that task had not been finished. The purpose of his trip was certainly task-related--to obtain additional angle iron for completion of the job. The angle iron was in stockpile located about 50 feet from the tunnel entrance and about 50-60 feet from the oxygen and acetylene tanks in the cage over the headframe. He did not pass the gas tanks, and could not see them from the stockpile. Tr. 11, 13. By happenstance, a torch was available at the stockpile site, so he used that torch to cut iron needed at the worksite, thereby apparently spending a few minutes more than was intended when he left the worksite. He was ready to return to the torch head after an absence estimated to be of no more than 20 minutes. This approximate 20-minute absence from the torch head was of temporary duration and directly related to the continuous performance of the specific welding task. The Secretary did not prove the existence of any special or unusual circumstances that would otherwise have required turning off the tank valves. Given these circumstances, we conclude that substantial evidence supports the judge's conclusion that the oxygen and acetylene were in use within the meaning of the standard and that the welder operator's relatively brief absence from the torch head to obtain materials for his on-going work did not create a non-use situation.

On the bases explained above, we affirm the judge's decision.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lawson dissenting:

The majority has not only created its own interstices in this case, but by fiat added to the standard and created confusion and ambiguity. It is both unnecessary and undesirable to add temporal and vocational exceptions to what is, after all, an uncomplicated standard with a clear purpose.

That standard, under the rubric "Fire Prevention and Control" requires that "Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used." Webster's New Third International Dictionary (Unabridged) (1971) defines "use" as: "the act or practice of using something; to put into action or service; putting to service of a thing; to employ; to expend or consume by putting to use." Here the contents of these tanks were indisputably being used prior to the miner abandoning his underground work site to travel to the surface, and were not being used until the miner returned to the tunnel, and his underground job site.

Stated otherwise, if this miner had not returned to this torch welder no further consumption of the contents of these tanks would have taken place, and the tank valves were required to have been closed upon his departure. It is beyond dispute that tanks with open valves are more dangerous than those with closed valves. It is admittedly not difficult, nor even inconvenient (Tr. 12), to manually shut off these valves.

The statute--and the standard promulgated thereunder--was enacted to prevent mine disasters and death and injury to miners. Section 2(e). Secretary v. Old Ben Coal Co., 1 FMSHRC 1954, 1956-57 (1979). It is self-evident that permitting two separate, hundred foot lengths of rubber hoses (Tr. 8, 28), filled with oxygen and acetylene, to remain unattended (Tr. 13, 16, 22) along an underground mine floor subject to mine traffic (Tr. 33), connected to tanks full of these same flammable gases, is to invite disaster. 1/ Nor is the possibility of leaks from these hoses merely speculative. The miner witness of this operator testified to several prior occurrences, including ones where a "... piece of iron has fallen and sliced the hose." (Tr. 21, 22).

1/Acetylene, used in manufacturing explosives, is a "brillant ... illuminating gas," which "[w]hen combined with oxygen ... burns to produce an intensely hot flame and hence ... is used principally in welding and metal-cutting flame torches." Dictionary of Mining, Mineral and Related Terms. Department of Interior, U. S. Bureau of Mines (1968). Another dictionary defines acetylene as: "A colorless, highly flammable or explosive gas...." American Heritage Dictionary of the English Language New Collegiate Ed., at 10 (1968).

Acetylene has an odor (Tr. 52) (Operator's Brief, p. 9) as contrasted with methane which has none (Tr. 51), and is admittedly highly combustible (Tr. 25). The hazards associated with the use of these tanks are well recognized elsewhere in 30 C.F.R. 57.4 and its subsections.

"Use" of the torch, the tool in this case, necessarily included the consumption of the oxygen and acetylene in the burning or cutting function being performed. The burning or cutting in this case requires human control, involvement and observation of the equipment, both to perform the work, and to prevent malfunction or accident. The standard contemplates that meaningful attention be given this burning operation because of the inherent dangers. (Tr. 25-27).

When the miner using the torch leaves the work site, the equipment is not being used, nor observed, nor are the contents of the tank being consumed. The language of the standard permits no exception to the requirement that the valves must be turned off at the tank. Indeed, even the miner operating the torch here conceded that he had "... been instructed (by this operator) if I am going to be gone an unreasonable length of time and too far away, that we do turn our bottles off and bleed the lines." (Tr. 15). Testimony was also presented that the likelihood of a leak being detected is greater if there were an employee attending the tanks. (Tr. 50-52).

The confusion reflected in the majority's opinion is even more vividly revealed by the operator's own witness, Supervisor Powers, who testified that: "...in use means you're actually using the torch. That means you actually have it running." (Tr. 32, 58-59).

As the majority notes, the facts in this case are "largely undisputed." Slip op. at 2. From those facts, however, the majority has determined that a miner engaged in operating an underground torch welder, who both ceases to operate that welder, and leaves the job site, in this instance for at least twenty minutes, is still using the contents of the tanks involved. 2/

Beyond the obvious--the contents of the oxygen and acetylene tanks were not being used or consumed during the miner's absence--the majority's opinion fails to provide any guidance to either the mine operator or the Secretary as to what will or will not henceforth be deemed a violation of the standard. Comments on possible revisions of the standard, or how it might have been written, may be commendable but fail to address the case before us. Nor is any precedent cited by the majority in support of its opinion.

"A temporary period of time" may be superficially comfortable--if awkward--language but hardly withstands critical analysis. Slip op. at 5. The majority not only fails to define "temporary", but its addition to the standard is not explained by reference to either the Act, its legislative history, or precedent. Twenty minutes, at a minimum, is now clearly established as a permissible period of time. No upper limit on "temporary" is enunciated; presumably the establishment of such will henceforth depend on the imagination and inventiveness of counsel, of whose ingenuity I have no doubt.

2/ The majority errs in asserting that the MSHA inspector who issued the citation approved the torch operator's absence for "under ten minutes" without being required to turn off the gas tanks. (Tr. 46, 47). Slip op. at 3. Nor is there any record evidence of "difficult terrain" or "traverse" difficulties. Slip op. at 3, 4.

The judge's vitiation of the standard by his declaration that "...I am not convinced that Warner's actions created any hazard because that condition will always exist whenever the lines are in use.", 3 FMSHRC 2668 (Nov. 1981) (ALJ), begs the question, as does the majority's approval of the judge's holding. 3/ If that be so, then it must follow that any absence, for any reason and for any length of time, is permissible.

The Secretary's pending attempt to revise the standard also fails to address the situation presented, since neither "system", "task", nor "unattended" are defined.

Even less persuasive is the majority's attempt to additionally gloss this standard, or confuse the Secretary and mine operators, by requiring that the absence of the miner from the tanks be "...for reasons immediately related to the performance of that task." Slip op. at 5. One searches fruitlessly for any relationship between either the language or the purpose of the standard, and the reason for the absence of the miner. Nor does the majority explain the relevance of the reason for the absence to the standard's requirement for the safeguarding of the contents of these tanks, and most importantly, the miners who work with them. It appears self-evident that, whatever the reason for the absence, it bears no relationship to the purpose of the standard, which is to guard against malfunctions, and the accidental escape and ignition or explosion of this oxygen/acetylene mixture. A three minute trip to pick up one's paycheck is apparently now impermissible, while a twenty minute drive to the hardware store for task related reasons is non-violative, under the majority's reasoning.

In summary, the standard has now been rewritten by the majority, without even the assertion of a statutory, legislative, regulatory or judicial source for this newly promulgated modification. Fidelity to the Act compels acceptance of the interpretation--if there is an amgibuity, which does not appear to be the case--which will promote safety and prevent death or injury to miners. District 6, United Mine Workers of America et al v. United States Dept. of the Interior, Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (1977); UMWA v. Kleppe, 532 F.2d 1403, 1406 (1976) cert. denied 429 U.S. 858 (1976); Munsey v. Morton 507 F.2d 1202, 1210 (1974); Reliable Coal Corp. v. Morton 478 F.2d 257, 262 (1973), and Secretary v. Old Ben Coal Co., supra at 1957, 1958.

3/The quantity of gas which could be released, and the consequent area of hazard, would obviously be limited by closure of the valves at the tanks. And, of course, in an underground setting with conditions conducive to concentration of the escaped gas, the likelihood of explosion or fire in the confined and hazardous environs of a mine will grow accordingly. (Tr. 44, 48, 49). These tanks when in use are kept in a welded frame for protection to keep them from falling over. (Tr. 19).

The contents of these tanks were not being used or consumed at the time this citation was issued. The tank valves were not closed. Nor was this a situation in which the torch operator momentarily extinguished the torch while remaining at his work bench. The hazard of accidental ignition of highly flammable gases in an underground mine needs no verbal underpinning. "Temporary" periods of absence, for task related reasons, is not approved in this or any related standard.

To me a violation of the standard, a very serious violation, of a magnitude with devastating potential for injury or death to miners, for whose protection this Act has been written, has been established.

I therefore dissent.

A. E. Lawson, Commissioner

Distribution

John A. Snow
Van Cott, Bagley, Cornwall & McCarthy
Suite 1600
50 South Main Street
Salt Lake City, Utah 84144

Michael McCord
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge John Morris
Fed. Mine Safety & Health Review Commission
333 West Colfax Ave., Suite 400
Denver, Colorado 80204

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 2 1983

UNITED STATES STEEL CORP.,	:	Contest of Orders
Contestant	:	
	:	Docket No. WEST 81-356-RM
v.	:	Order No. 0583637; 7/6/81
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 81-357-RM
MINE SAFETY AND HEALTH	:	Order No. 0583638; 7/6/81
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 81-358-RM
	:	Order No. 0583639; 7/6/81
	:	
	:	Keigley Quarry
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-395-M
Petitioner	:	A.O. No. 42-00021-05006
	:	
v.	:	Docket No. WEST 81-394-M
	:	A.O. No. 42-00021-05005V
UNITED STATES STEEL CORP.,	:	
Respondent	:	Keigley Quarry

DECISIONS

Appearances: Louise Q. Symons and Billy Tennant, Attorneys, Pittsburgh, Pennsylvania, for U.S. Steel Corp.; Robert A. Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for MSHA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings were docketed for hearings on the merits in Salt Lake City, Utah, during the term September 21-22, 1982. Dockets WEST 81-394-M and 81-395-M are the civil penalty proposals filed by the Secretary pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for a total of four alleged violations of mandatory safety standard 30 CFR 56.9-2. Dockets WEST 81-356, 81-357, and 81-358 are contests filed by the United States Steel Corporation challenging the legality of the issuance of three of the citations.

The citations and orders which are the subject of these proceedings are as follows:

Docket Nos. WEST 81-395-M and WEST 81-356-RM

Citation No. 0583637, is a combination section 104(a) citation and a section 107(a) "imminent danger" withdrawal order issued by an MSHA inspector on July 6, 1981. The inspector cited a violation of mandatory safety standard 30 CFR 56.9-2, and indicated that the alleged violation was "significant and substantial". The condition or practice cited by the inspector on the face of the citation is as follows:

> The service brakes on the company No. 7 Euclid Water truck would not hold the truck in 1st, 2nd, 3rd or 4th or in neutral gears on the ramp by North Truck shop. Also, the other three brakes applied along with service brakes would not hold. This truck works in the plant and pit apron around pool traffic, small vehicle and haul truck traffic.

Docket Nos. WEST 81-394-M and 81-358-RM

Section 104(d)(1) citation No. 0583636 was issued on July 6, 1981, at 2:00 p.m., and cites a violation of mandatory safety standard 30 CFR 56.9-2. The inspector indicated that the violation was "significant and substantial", and the condition or practice is described as follows on the face of the citation:

> The emergency brake to the drive line, the torque brake to the converter, and the dump park brake would not hold the company No. 7 Euclid water truck. Would not hold in 1st, 2nd, 3rd or 4th gear in idle. This truck waters the plant area 8 times daily, the haul roads, and the pit area. These areas are used by foot traffic, small vehicle and have truck traffic. These conditions have been reported several times to supervision. This is an unwarrantable failure.

The inspector fixed the abatement time for the citation as 12:00 p.m., July 12, 1981. However, he subsequently terminated the citation on July 8, 1981, and the reason for this action is shown on the face of his termination notice as follows:

> The battery for the No. 7 Euclid Water truck was removed. The truck was put on the repair line.

Section 104(d)(1) Order of Withdrawal No. 0583639, was issued at 2:10 p.m., July 6, 1981, and the inspector cited an alleged violation of

mandatory safety standard 30 CFR 56.9-2. He also found that the alleged violation was "significant and substantial", and his order removed the Dart 35 ton haul truck no. 18 from service. The condition or practice cited by the inspector on the face of the order is stated as follows:

> The service brakes and dump brakes on the Dart 35 ton company No. 18 haul truck when applied on the level at idle, 550 RPM, wouldn't hold. This truck works in the pit and around other haul trucks, small vehicle and foot traffic. These conditions have been reported to supervision. This is an unwarrantable failure.

The inspector relied on the previous section 104(d)(1) citation number 0583636, July 6, 1981, as the basis for his order (See modification of July 7, 1981). The order was subsequently terminated at 3:30 p.m., on July 8, 1981, and the action taken by the operator is described on the face of the termination notice as follows:

> All brakes were restored to adequate operating condition.

Docket Nos. WEST 81-394-M and 81-357-RM

Section 104(d)(1) Order No. 0583638, is a withdrawal order issued at 3:00 p.m., July 6, 1981. The inspector cited an alleged violation of mandatory safety standard 30 CFR 56.9-2, and concluded that the violation was "significant and substantial". The condition or practice cited is described by the inspector on the face of the order as follows:

> The service brakes, dump brakes, and park brakes on the haul pack 35 ton company No. 10 haul truck would not hold on the grade at the North truck shop. All three brakes were applied and the truck was placed in 1st, 2nd, 3rd, 4th and neutral gears and the brakes would not hold. This truck works in the pit area around other haul trucks, small vehicle and foot traffic. This is an unwarrantable because this has been turned into supervision.

The inspector cited the previous section 104(d)(1) citation number 0583636, July 6, 1981, as the basis for his order, and the order withdrew the cited No. 10 haul pack truck from service.

The order was subsequently terminated on July 8, 1981, at 3:00 p.m., and the action taken to by the operator is described on the face of the termination notice as follows:

> All brakes were put into adequate operating condition.

Issues

Docket WEST 81-356, concerns a combined section 107(a) order and section 104(a) citation. The issues presented are whether the conditions or practices cited by the inspector constituted a violation of the cited mandatory safety standard, and whether those conditions constituted an imminent danger.

Dockets WEST 81-357 and 81-358, concern the legality and propriety of two section 104(d)(1) unwarrantable failure orders, which the inspector believed were "significant and substantial" violations. The remaining civil penalty dockets, WEST 81-394 and 81-395, are the civil penalty proposals filed by MSHA seeking civil penalty assessments for the citations which have been contested.

In determining the amount of a civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that the Keigley Quarry is subject to MSHA's jurisdiction, that the operator U.S. Steel Company is a large operator and that any reasonable penalties assessed will not affect its ability to continue in business. The parties also agreed that all of the citations issued in these proceedings were abated in good faith, that the inspectors who issued them were duly authorized representatives of the Secretary, and that for the purposes of these proceedings U.S. Steel's history of prior violations at the quarry in question consists of six citations issued during the 24-months prior to the issuance of the citations in question in these cases (Tr. 4, Exh. G-1).

MSHA's Testimony and Evidence

Bernard A. Oberg, Maintenance Foreman, Keigley Quarry, testified that he was working at the mine on July 6, 1981, during the day shift, and

he indicated that he is responsible for maintaining the trucks in good repair after he receives notification from the drivers or foremen that repairs are needed. His procedure is to schedule maintenance work from any notes turned in by the truck drivers on their daily reports which may reflect that some work is required on a particular vehicle. Generally, the decision as to whether any particular truck may be kept in service and driven is left to the driver, but trucks with bad brakes are not permitted out of the shop (Tr. 9-13).

Mr. Oberg testified that in July 1981, he was in charge of the maintenance program at the quarry, and he confirmed that there were some problems because of the age of some of the trucks, lack of manpower, and the lack of money to purchase new ones. He described the trucks as being in "fair to good condition", and indicated that in general "most of the vehicles have pretty good brakes". He also confirmed that because of equipment breakdowns, all of his manpower was used to repair other equipment and less attention was paid to the trucks (Tr. 15).

Mr. Oberg confirmed that MSHA Inspector Goodspeed cited several trucks on July 6, 1981, because of inadequate brakes, and he confirmed that the No. 7 water truck was ordered removed from service by the inspector because he believed the brakes were inadequate. The inspector gave him permission to take the batteries out of the truck, but he (Oberg) did not speak with truck driver Charles Gonzales about the condition of the truck, but he did confirm that he received a written report from Mr. Gonzalez about the inadequate brakes on the truck and it was dated that same day. However, he had no idea when Mr. Gonzales made his report, but indicated that they are usually turned in at the end of the shift at 4:00 p.m. Mr. Oberg conceded that the No. 7 water truck brakes "needed some minor attention", and he did not dispute Mr. Gonzales' report which indicated that the brakes "were bad". Mr. Oberg conceded that the brakes "were poor" (Tr. 20).

Mr. Oberg described the braking systems on the No. 7 water truck, and he confirmed that repair work on the truck was made in his maintenance shop, and he indicated that new brake shoes were installed on all four wheels and that a chipped bearing on the front wheel was replaced. The drive line to the parking brake had to be replaced because it had been left on. He confirmed that the parking brake was not working, and that if the truck were parked on a hill "it may run away depending on where it was at" (Tr. 22). He also confirmed that the retarder braker was working, but that the dump brake "would not hold the truck on the level that he wanted us to hold it on" (Tr. 24). He indicated that after the truck was repaired, it was road tested and that all of the brakes worked much better after they were repaired. He conceded that the brakes on the truck in question were in need of repair (Tr. 25).

Mr. Oberg stated that the No. 7 water truck was converted from an old haulage truck, but that nothing was done to the brakes at the time of the conversion. He confirmed that the truck travels the same roads as the haulage trucks, but that drivers "did not care to use the truck on the hill, hauling loads, because of the fact that it did have poor brakes. They were poor when the truck was new", and he explained the situation further as follows (Tr. 44):

A. Every time you would ask the people who delivered the truck there, they said, "Hey, these brakes are only meant to stop the truck on a final stop. They are not to bring the truck off the hill. That is done by the converter brake."

Q. So the reason it was changed from a haulage truck to a water truck was because you had complaints on the vehicle?

A. We had drivers that didn't want to drive the truck.

Mr. Oberg confirmed that the No. 10 K-W haul truck was also taken out of service by the inspector on July 6, 1981, because the inspector believed that it had "bad brakes". Mr. Oberg stated that the truck "hauls off the hill every day of the week, on every shift that we work it" (Tr. 26). He confirmed that after the truck was cited the driver and a mechanic drove it and they found that the brakes were "not working properly". Although the truck had brakes, the mechanic found that they "were not working the way that he felt they should". The truck was taken to the shop and the brake linings on all four wheels were replaced. He also had a local brake contractor, Southwest-Kenworth, check out the truck hydraulic master cylinders, and they found two that were not working properly. However, all four of the master cylinders were repaired. The faulty master cylinders would affect the brake pressures, but the brake linings which were on the truck before they were replaced had about "three quarters of linings left". In addition, the truck parking brake needed to be adjusted, and the linings were replaced, but the torque brake was functioning fine and was not repaired. Mr. Oberg identified exhibit G-5 as a copy of the field service report prepared by the contractor for the No. 10 truck (Tr. 26-31).

Mr. Oberg testified as to the condition of the brakes on the No. 18 haulage truck, and he confirmed that it was an old secondhand truck. He confirmed that when the truck was checked there were "a few minor problems with the brakes, mainly on the left side" (Tr. 32). He indicated that the brake cam shafts that rotate the brake shoes and lock the wheels were worn, had not received enough grease, and were starting to freeze up. He confirmed that these conditions would possibly affect the ability of the vehicle to stop within a certain distance and that the brake shoes "would have to travel farther and wouldn't come on quite as quick" (Tr. 32). He also confirmed that he did not personally road test the truck, but that the mechanics stated that "there were brakes on there, but they needed adjusting." Once the mechanic began to adjust them he found the shaft that was not operating, and all of the wheels were pulled and the repairs were made (Tr. 33). The front brakes were adjusted and an air leak was repaired (Tr. 34). The malfunctioning front brakes would also affect the functioning of the service brake (Tr. 38).

Mr. Oberg testified that he did not personally work on any of the cited trucks, but that the work was done under his direction. He also confirmed that he did not drive any of the trucks because it is against company policy for a foreman to drive any trucks, and he indicated that the last time he drove one when when he was employed as a shop mechanic (Tr. 40). He identified exhibit G-6 as a copy of the repair report for the No. 18 truck prepared by Southwest-Kenworth (Tr. 42). He also confirmed that the report reflects that the truck brakes were "very poor", and while the truck did have brakes he conceded that they were not adequate (Tr. 42). Mr. Oberg stated that had he known of the conditions of all of the trucks prior to the time the inspector cited them for the braking conditions in question he would have pulled them all in and had them repaired (Tr. 44-45).

Charles Gonzales testified that he is employed as a laborer at the quarry, but that in July 1981 he worked as a temporary haulage truck driver filling in for drivers who were on vacation. He confirmed that he is president of the local union at the mine, and was in that capacity in July 1981. He also confirmed that he drove the No. 7 water truck, and also drove the other water truck, and that the water trucks are used to keep the dust down on the mine haul roads. The No. 7 truck has a 2,000 gallon capacity, and while he drove it approximately eight hours a day, he could not state how many miles it would be driven on any given day (Tr. 50-52).

Mr. Gonzales testified that on July 6, 1981, he accompanied Inspector Goodspeed on a walkaround inspection, and when Mr. Goodspeed inquired about the condition of the brakes on the No. 7 water truck, Mr. Gonzales told him that "they weren't very good". Mr. Goodspeed then accompanied him in the truck to the water tower for a load of water, and as they descended from the "pretty sharp incline" he advised Mr. Goodspeed that the brakes were "not very good". He then traveled to another hill leading towards the north shop and when Mr. Goodspeed asked him to try the brakes "they wouldn't hold on that hill". Mr. Gonzales indicated that when he first started down the hill from the water tower he was in first gear because he did not want to come down too fast with a load of water, and he confirmed that this was his usual procedure because he feels safer driving in first gear and that this gives him additional braking (Tr. 52-54). He was aware that the truck brakes were not very good, but he did not test them at that time (Tr. 55).

Mr. Gonzales stated that after coming off the hill from the water tower, the road straightened out just before descending towards the shop area and that this portion of the road is a long incline. He was traveling at a speed of five to ten miles an hour and when he applied the foot brake pedal the vehicle would not stop and it "just kept rolling". Had the brakes been working properly, the truck should have stopped on the hill. He also confirmed that he applied the "oil" or retarder brake and the park brake, but that these would not stop the truck (Tr. 57). He believed that the application of these two braking systems should have slowed the

truck down, but indicated that they are not meant to stop the vehicle completely. He confirmed that the parking brake would not hold the truck on the hill (Tr. 58).

Mr. Gonzales stated that drivers "walkaround" their truck to check the tires and lug nuts, but that the only way to check the brakes is while the vehicle is in motion. He confirmed that he could refuse to drive a truck if he is not happy with the brakes, and while the brakes on the water truck were inadequate prior to July 6, 1981, he never refused to drive it because he was trying to do the best that he could to keep the dust down on the roads with the truck that he had. If he refuses to drive any particular truck, he would be given another truck to drive or assigned to other work (Tr. 60). He confirmed that he orally advised hill foreman Keith Barnett a week prior to July 6, 1981, that the water truck brakes would not hold the truck on the hills. He assumed that Mr. Barnett would report this condition to Mr. Oberg, and he (Gonzales) did not follow up on it because he "expected that they would get them fixed when they got around to them (Tr. 62). The truck was not taken out of service and it was driven until the inspector issued the citation. He drove it about three months prior to the time it was cited and he indicated that the brakes "were getting bad then. They just kept getting worse all the time" (Tr. 62).

Mr. Gonzales identified exhibit G-7 as the report he filled out on July 6, 1981, for the water truck in question, and while he could not recall when he filled it out, he confirmed that they are usually turned in at 3:45 p.m. Mr. Gonzales stated that the inspector advised him to take the truck out of service after they tested the brakes on the hill incline north of the shop, and he indicated that the inspector was not hostile but "just doing his job" (Tr. 64). He confirmed that he drove the truck after it was repaired and that the brakes would hold the truck on the hill and he felt safer driving it (Tr. 65). When asked whether the condition of the brakes on July 6, 1981, before they were repaired affected safety, he replied as follows (Tr. 67-68):

> A. Well, let me put it this way. I could stop the truck. But if it had been an emergency, say if I had to stop it in a hurry, I couldn't stop it.
>
> Q. Can you visualize a situation where you would have to do that in the operation of your daily routine?
>
> A. Well, I'm in and out of haulage trucks, and I have to come down that incline and go through the north shops, and in front of the other shops. Somebody could pull out in front of me, or something, and if I would have to stop real quickly, I don't think I could have done it, no.

Q. Are there miners walking on the road where you generally operate your vehicle?

A. Just down in the shop area.

Q. In your daily operation, would you pass fairly close to these people?

A. Yes. I used to drive in front of the shops three or four times during the day for a sprinkle of water out there, to keep the dust down.

Q. Could you visualize a situation, under those circumstances, where you would have to stop quickly?

A. Like I say, if I would have had an emergency stop, I couldn't have made it.

Q. You thought you couldn't have done it?

A. Yes. That's exactly right.

On cross-examination, Mr. Gonzales confirmed that he drove the water truck for some three hours before the inspector arrived for his inspection. He also confirmed that he was with the inspector for a couple of hours before he got around to inspecting the water truck, and that prior this time the inspector had inspected some other haulage trucks in the pit area. Mr. Gonzales confirmed that during his normal course of work he would drive with a load of water down the same slope where the truck was tested with the inspector (Tr. 71). He confirmed that he did not previously report the brake conditions of the truck in writing on his daily reports, but did report it orally and the foreman "writes it down on a notebook" (Tr. 74). He also indicated that foreman Barnett told him he "was tired of writing it down" (Tr. 75).

Norman Thomas confirmed that he was employed at the quarry on July 6, 1981, as a truck driver and that he operated the No. 10 haul truck from the pit area to the mill or to the waste dump. He indicated that the truck is a 35 ton truck, and he confirmed that it was cited by Inspector Goodspeed on July 6, 1981, and that he was the driver during the day shift. He confirmed that the brakes on the truck "haven't been good for three or four months, maybe longer than that" prior to the time the inspector cited it (Tr. 98). He stated that on July 6 "you could put on all the brakes and they wouldn't hold you with a load on that hill". He identified "the hill" as "the one by the north shop that we tested it on" (Tr. 98). He confirmed that he had previously reported the brake conditions to shift boss Ed Westover or Keith Barnett within a month prior to July 6th, and that the reports were either oral or in writing (Tr. 99-100).

Mr. Thomas confirmed that he has the right to refuse to operate a truck that is not in safe condition, but he could not recall refusing to operate the No. 10 truck. He did not believe that the truck could be safely operated on July 6, but he indicated that "we did it just to get by". He also stated that the shift boss would comment "Well, if we can just get by today, maybe we can get with it" (Tr. 101). He confirmed that the mechanics had a lot of work, and he indicated that because of the brake conditions he had to take extra precautions when driving the truck. He confirmed that he operated the truck at speeds of 15 to 20 miles an hour, but indicated that the speedometers would never work (Tr. 102).

Mr. Thomas stated on July 6th Inspector Goodspeed tested his truck by having him apply the brakes while the gas pedal was depressed and the truck engaged in third gear. The brakes would not hold the truck and "it just creeped away". The truck was then driven to a hill and placed in neutral, and when the brakes were applied while going three or four miles an hour "it still just rolled off" (Tr. 104). Mr. Thomas stated that he applied the service brake and the retarder and it still would not stop the truck. He also indicated that the dump brake was not working properly, and that when he was loading the force of the load being dumped into the truck would push the truck forward and the brake would not hold. He conceded that he did not report that specific condition to mine management but simply told them that "the brakes were no good" (Tr. 107). He believed that the defective dumping brake posed a hazard around the loading areas and that the other bad brakes posed a hazard since he would be unable to stop the truck if someone were to run in front of him (Tr. 107-108).

Mr. Thomas confirmed that the truck was taken out of service after it was cited by the inspector, and that after it was repaired the stopping capacity of the brakes improved (Tr. 110). He confirmed that it was company policy to report truck defects to the shift boss, but that the mechanics did not come to the pit areas to inspect any of the trucks. When asked whether the condition of the truck brakes affected his ability to safely operate the vehicle he replied "yes and no. Yes, they wasn't good enough to stop if you had to stop real quick" (Tr. 112). He did consider the brake conditions to be "a minor problem", and he stated that "They could be fixed. But how long it was going to take them to fix them, I didn't know" (Tr. 113). He also indicated that "you could get by with it, but it wouldn't be something you wanted to drive every day of the week". He never reported the brake conditions to the safety committee because he did not know who was on the committee, and he could recall no instances when the company took the No. 10 truck out of service after he reported the brake conditions (Tr. 114).

On cross-examination, Mr. Thomas confirmed that he had driven the No. 10 truck for four or five hours on July 6th before the inspector arrived on the scene. He described his normal route of travel that day, but could not recall whether he had driven the truck the week before, nor could he recall exactly when he had reported the brake conditions to

his foreman (Tr. 118). He confirmed that Inspector Goodspeed asked him to drive the truck to a hill that he ordinarily used to get back and forth from the shops and that the brakes were tested in that hill area. He confirmed that he applied all of the brakes on a level while also applying the accelerator and the brakes would not hold (Tr. 120-121). After this test, he proceeded to the hill and applied the dump brake while coming down the hill at five miles an hour, but the wheels did not lock and it would not stop the truck (Tr. 123). He stated that "I might as well have pushed in on the clutch, if I had one, because it didn't slow me down one bit" (Tr. 125). He confirmed that the truck was in neutral when he tested the brakes, and conceded that he normally kept it under control by driving it in second gear when descending a hill (Tr. 126). He confirmed that he had filled out reports stating that the brakes were bad, but he could not recall when he did this (Tr. 127-128). When asked why he had not reported the brake conditions before the inspector cited the truck, he replied (Tr. 131):

> Because on the back of this, I had writer's cramp from writing down the things. After recording them for so long, they don't want to fix them, so what do you do? I got a family to feed, so that's what I do instead of getting in trouble with the management.

In response to further questions, Mr. Thomas confirmed that when the truck brakes were tested on the flats and on the hill, the brakes would not hold, and he also confirmed that he knew before the test that the brakes weren't very good but that he had no idea about the kinds of tests that would be made by the inspector (Tr. 135). He also confirmed that no one from maintenance tested the brakes while he was driving the truck in question (Tr. 135).

Stephen Farr testified that he is unemployed but that he did work at the quarry in question and that on July 6, 1981, he was employed there as a truck driver on the No. 18 truck. He stated that except for the brakes the truck was in good condition. He stated that the drive-line brake, the service brake, and the dump brake would not stop the truck when they were tested (Tr. 140). He confirmed that the inspector got into the truck and it was first tested on level ground in front of the hopper. The park brake was engaged and the engine was under 1,000 rpm's when the brake was engaged and the truck moved forward. The truck advanced at a slow speed and then picked up a bit, and this indicated to him that the brakes weren't very good. He also tested the service brake in the same gear and with the same rpm's and the truck continued forward, even with the brake pedal all the way down. The same result was achieved when the dump brake was similarly tested (Tr. 140-144). After these tests, Mr. Goodspeed advised him that the truck did not meet the standards and he instructed him to drive it down the same hill that the other trucks had been tested on to a parking area past the north shop. As they proceeded down the hill, the inspector asked him to again test the brakes and the brakes would not hold. Mr. Farr had to slow the truck down by putting the transmission in reverse, and he believed he was half way down the hill in third or fourth gear at this time doing about five miles an hour (Tr. 145).

Mr. Farr stated that had the truck brakes been in good condition the service brake would have stopped the truck on the hill where it was last tested, and that after the brakes were repaired the truck could be stopped by the service brake. He believed that the test performed by him and the inspector was a fair test and that the road grade where the test was performed was similar to the road grades he used every day during the course of driving the truck in question and the conditions were similar. In fact, he indicated that the brake tests were conducted while the truck was unloaded. Mr. Farr believed that each driver should test his truck daily to insure that the brakes operated properly. However, he indicated that the former site superintendent insisted that each driver arrive at his work station within ten minutes and that this resulted in the driver's making a hasty walkaround inspection of their vehicles (Tr. 149).

Mr. Farr confirmed that he was a member of the mine safety committee and that safety meetings were called to discuss the possibility of driver's being given more time to inspect their vehicles with company management, but nothing ever came of this (Tr. 150-151). He also confirmed that prior to July 6, 1981, he had made both verbal and written reports about the brake conditions on the No. 18 truck, but he could not confirm the dates on which these were made. He also indicated that reports were made to Mr. Barnett or Mr. Westover, but that no one would ever tell him what was done to correct any problem. However, he did confirm that he was given the opportunity to use other trucks while his was being repaired (Tr. 155).

Mr. Farr confirmed that he was aware of the fact that he could refuse to drive a truck which he felt was unsafe. He also confirmed that he had previously refused to drive the No. 18 truck because of a steering problem and not because of faulty brakes. He indicated that the steering problem was corrected the next day, and no one told him he had to drive it when he initially refused to do so (Tr. 157). When asked to explain why he continued to drive the drive the truck if he thought the brakes were inadequate, he responded as follows (Tr. 158):

> A. Well, I think that your brake wear is kind of a gradual thing. Sometimes that creeps up on you before you realize that you are already there, as far as wearing goes. So the, I think the Federal Mine Safety Board sets standards to help us to determine when we've reached that point. This particular day, when Mr. Goodspeed came down, we were reminded of what those are. Like anyone else, if you're not making your employer money, they are not wanting you around, either.
>
> Q. Were the brakes on the No. 18 truck gradually getting worse up until the time that the order was issued, or were they in the same relative condition for a period of time?

A. I don't think it was a sudden thing, no. As I commented before, there was a time prior to that date that the parking brakes did work and, I think, the park brake is the easiest of any of them, you might say, to burn out or wear out. While the wheel brakes take longer to wear out. I don't believe that truck had worn out brake shoes on it, except for the drive-line brake. It has smaller shoes and heats up faster.

Mr. Farr could not specifically recall when he had last driven the truck in question prior to the inspection of July 6th, but he was aware of the fact that the brakes were not working properly that same morning before the inspector cited it because of the tests that he (Farr) had performed on it. He had tested the service and dump brake on an incline and they were not operating according to his own standards, and while he had the option of turning the truck down he elected to go ahead and drive it. He indicated that he would probably have continued driving it all day if the inspector had not arrived on the scene (Tr. 162). He later determined from Mr. Oberg that the drive-line brake shoe linings were burned out, and he received a list showing the repairs which were made to the truck in question. He also learned that the truck was out of service for several days awaiting parts, but that after the repairs were made the truck brakes worked better and the service brake was able to bring the truck to a stop (Tr.163-164). When asked whether he believed the condition of the brakes prior to the issuance of the order on July 6th had any affect on safety, he replied as follows (Tr. 166):

THE WITNESS: Like I say, if I were to happen to stop that truck on a hill, on an incline, it wouldn't have held. There have been occasions where there have been parts of vehicles laying alongside the road, lug nuts, rock bars, whatever else it might be. It's our responsibility, the driver's to move them out of the road, rather than run over them and ruin tires. That's pretty hard to do if your truck won't hold you.

On cross-examination, Mr. Farr explained the operation of the dump brake on the No. 18 truck, and he conceded that it was not intended

to hold a truck while it is in motion. However, he believed that a park brake should hold a vehicle from going backward or forward, and he confirmed that when he was with the inspector he tested the park brake "on the mill flat by the hopper, and on the hill" (Tr. 177). He also stated that during his normal operation he used the truck retarder brake and also his gears while descending grades (Tr. 178-179). He also confirmed that all of the brakes were tested on July 6th on the level and on the hill when he was with the inspector (Tr. 180).

Mr. Farr confirmed that MSHA had conducted previous inspections at the quarry and that other inspectors had tested the brakes on the trucks. Some were tested "on the level", some inspectors simply determined whether the brakes would stop a truck, and other inspectors wouldn't check them at all (Tr. 182). He also confirmed that he reported the brake condition on the truck in question the day of the inspection but he could not recall the date when he reported it previously, but believed it may have been a week or two prior to the inspection (Tr. 186). He also confirmed that the brake conditions on the trucks were discussed at safety committee meetings where Mr. Barnett was present, but he could not recall any of the specifics, nor could he recall whether the No. 18 truck was specifically mentioned (Tr. 187-191).

Mr. Farr confirmed that he knew the brakes were bad when he drove the No. 18 truck on July 6th, and he also knew that he was putting his own personal safety in danger but stated "I was going to ride it" (Tr. 197). He could not state why the inspector did not cite the "park brake" or the "truck brake on a slope" as part of the cited conditions (Tr. 198).

MSHA Inspector Tyrone Goodpseed, confirmed that he has had prior truck driver experience, and has taken some MSHA training courses dealing with loading, hauling, and dumping. He confirmed that he conducted a regular mine inspection at the quarry on July 6, 1981, and that this was his first visit to that mine. He also confirmed that he inspected the trucks which were cited. He bagan with the No. 7 water truck because it was the first one available. He accompanied truck driver Gonzales on a test run of the truck, and then asked him to make his normal run to see how the brakes worked. The brakes were tested during the trip along the road by the water incline. The service brake and park brake were tested on the flat level area of the roadway and they would not slow the truck down (Tr. 203-212).

Mr. Goodspeed stated that when the No. 7 truck was tested on the level flat area, it was going four or five miles an hour, and when he asked Mr. Gonzales to apply the service brake fully, it did not hold and the truck kept rolling. After "pumping" the brakes and applying the parking brake, the truck gradually stopped. Mr. Goodspeed confirmed that he issued imminent danger order No. 583637 primarily because of the service brake, even though the other three brakes did not work (Tr. 214). When the service brake was applied during the test, the truck was in third gear while in motion, and after coming to a complete stop, he goes through a regular procedure in testing the truck brakes with the engine running and while the truck is in a "creeping motion". The procedures he uses are detailed in certain guidelines as reflected in exhibits G-8, G-9, and G-10, and he uses these in conjunction with what he has learned during his inspector's training (Tr. 214-221).

Mr. Goodspeed confirmed that he tested the truck on the level portion of the property and also on a nine percent hill, and he explained how he asked Mr. Gonzales to test the brakes. After the testing, he advised Mr. Gonzales that he considered the truck to be an imminent danger and that he was going to ask the company representative to take it out of service (Tr. 223). He advised Mr. Westover that he was going to issue him an imminent danger order, and told him that the truck would have to be fixed before it could be put back in service. Mr. Westover had the mechanics remove the battery from the truck and render it inoperable (Tr. 224).

Mr. Goodspeed stated that Mr. Gonzales told him that he had informed mine management on several occasions that the brakes did not work, and that Mr. Oberg informed him that "the brakes on this unit have never worked" (Tr. 224). Mr. Goodspeed also indicated that he reviewed some company maintenance records, but he could not state with any certainty whether or not he found any recorded record or notations concerning the brakes in question (Tr. 225-226). He also indicated that his notes do not reflect that he found any records to show that anyone had complained about the brakes (Tr. 228).

When asked for his opinion as to whether the brake conditions he cited had an affect on safety, Mr. Goodspeed stated as follows (Tr. 229-231):

> Q. Do you have an opinion as to whether the conditions described in the citations had an affect on safety?
>
> A. Did it have any affect on safety?
>
> Q. Yes.
>
> A. Yes, it did. Definitely.

Q. Why do you say that?

A. Because there was no way that he could control that vehicle when we were coming off that hill, as far as braking it and stuff like that, and being able to stop it.

Q. Did you reach an opinion as to the condition of the service brakes on the No. 7 water truck after your test, as to the condition of the service brakes?

A. Yes, I did. When we came down the hill and the service brakes would not even slow it down. And this vehicle operates in and around that plant area with foot traffic and et cetera, and in the shop area, and you have your general offices and there were people in the area at this time --

Q. I understand that. But what was your opinion of the condition of the brakes?

A. I thought that they were inoperable. They were very unsafe.

Q. There must have been some affect that the service brake had on slowing the vehicle. Was it completely inoperable?

A. I would say that it maybe had some affect, yes. I would definitely say that it had some drag or tension on it.

Q. But they were not adequate?

A. Definitely not.

Q. Do you have an opinion of whether they were capable of bringing a vehicle to a stop on an incline?

A. Certainly it would not. We tried it.

Q. That, in your mind, is an important criteria for determining whether the brakes on a particular vehicle are adequate or not adequate?

A. Certainly.

Q. If the brakes were proper, if the service brakes were working, were adequate and in good condition, should they have been able to bring the vehicle to a halt upon an incline?

A. Certainly.

Q. Are you saying that the condition itself, if allowed to continue, would reasonably, likely, cause an accident?

A. Yes. I would say so. I very definitely believe so.

When asked about his imminent danger finding, he stated (Tr. 231-232):

Q. Here you issued an Imminent Danger Order. When could this condition cause this accident, in your opinion?

A. Anytime anybody would walk out in front of that vehicle and go through that yard, or somebody would back out in front of them, or go down one of those ramps, or whatever -- meeting head on with a truck and couldn't stop -- you could create a heck of a problem. And to me, that's an imminent danger. And if it was not corrected --

Q. Could it have happened that day?

A. It could have happened at any time.

When asked about his "significant and substantial" finding, he stated (Tr. 232):

Q. Now, you also marked on the violation, "S" and "S". Now, I think you explained that somewhat, but just to explain why you indicated that this particular violation was "S" and "S", what does that term mean to you?

A. Significant and substantial is the boxes that I marked. It's what we are referring to. Significant and substantial. It could significantly cause or create an accident. That's what we are talking about, reasonably seriously and reasonably likely to happen.

Q. So you are saying that you felt that the condition was reasonably serious, very serious, or what?

A. I think that it is very serious. You take a truck that size, and if you should be struck by it or run over by it, definitely it would be serious. We have fatal grounds in the past that have so indicated --

Mr. Goodspeed stated that he concluded that management knew or should have known about the brake conditions because of Mr. Oberg's statements that they never did work, and also by his own observations when he first

observed the truck in the morning after Mr. Gonzales was "waved down". When he came off the hill after being waved down, "he just kept going", and when "I asked him what was the matter, he said his brakes didn't work too well" (Tr. 210, 234).

On cross-examination, Mr. Goodspeed stated that he could not recall issuing any citations for violations of section 56.9-1 during his inspection of July 6, 1981 (Tr. 235). He denied that Mr. Oberg ever explained to him that driver inspection reports are turned in only if a driver reports something, and that if he doesn't, they are thrown away (Tr. 236). He also indicated that he was informed that drivers sometimes made verbal reports (Tr. 237).

Mr. Goodspeed stated that section 56.9-1, only requires reports of defects, that it does not require records of repairs or daily reports (Tr. 238). He confirmed that the No. 7 truck was totally full of water when it was tested, and that the 2,000 gallons of water weighed approximately 16,000 pounds (Tr. 239). He explained the braking procedures utilized by the driver during the testing on the level as well as on the hill going toward the shop (Tr. 239-241). He stated that it took the truck 200 yards to come to a complete stop after they left the level area where the service brakes were first applied (Tr. 242).

Mr. Goodspeed went on to describe the tests which were performed on the truck while he was with the driver, including the different brake systems which were applied during the test (Tr. 242-247). He conceded that the torque converter was operable and that over the speed of five miles an hour, it did have a "slowing action" effect on the truck. However, he confirmed that when he issued the citation, he was concerned that even with the other brakes applied, the truck would not hold (Tr. 248). Mr. Goodspeed described the "hill area" where the truck was also tested, and described the different gears used by Mr. Gonzales in his attempts to stop the truck. He denied that he himself had created the imminent danger by instructing the driver to drive the truck into the shop area, and conceded that he only instructed him to "take the truck to the shop" (Tr. 249-254). His testimony in this regard is as follows (Tr. 255-256):

> Q. You have testified that when you came off the first hill, it took you 200 yards to stop. And yet you didn't consider those brakes so bad that you needed to stop that truck right on the spot?
>
> A. Right on the spot?
>
> Q. Yes.
>
> A. You mean to take it out of service right on the spot?
>
> Q. Yes.

A. I definitely knew there was a problem. I definitely knew there was a serious problem with the brakes. There was no doubt about it. We were going to take the truck back to the shop and put it on the line until they had it fixed.

Q. But if it was actually an imminent danger coming off that hill because you couldn't stop in 200 yards, why didn't you stop the truck right there and walk down the 90 yards to the shop and get people to go back and fix it?

A. Because it was not an imminent danger at that time. It had defective safety. We took it back to have it corrected.

Q. What made it an imminent danger?

A. Because we never tried it on the hill there and when it came down off of this small incline and the grade that they had there were people there. It totally surprised me, it really did.

Q. If it took 200 yards to stop it coming down the first hill, I don't know why it would surprise you that it took 90 yards to stop before it came down the second hill.

A. I have no comment on that.

Q. I think the answer was that an Imminent Order was the only way you could take the truck out of service. The truck was parked, initially when Mr. Gonzales reported the brakes were bad and sat there for three hours, then they went back and got in it and conducted the test. Isn't that true?

A. Somewhat, yes.

THE COURT: The inspector was first notified about the faulty brakes when they first flagged Mr. Gonzales down. The inspector testified that Mr. Gonzales had some problems slowing the truck down. He went right by the inspectors party. That indicated to him that the brakes were bad. The inspector said to Mr. Gonzales, "How come you rolled past us? What's the problem? Have you got a brake problem?" And he said, "Yes." The brakes on his truck weren't that good. He told him to leave the truck there. That they had to go inspect the shop and do these other things and then they would come back and get the truck later. The truck stood there for three hours, approximately. Then they came back and got in the truck and went up and got the water and proceeding with all of these other tests. Is that true?

MS. SYMONS: Yes.

THE COURT: Okay. Quit while you are ahead. The question, it's obvious to me why he issued an Imminent Danger Order.

BY MS. SYMONS (Resuming):

Q. Why didn't you take the truck out of service in the morning when Mr. Gonzales told you that the brakes were bad?

A. Why didn't I take it out?

Q. Why didn't you issue a withdrawal order at 10:30 in the morning when Mr. Gonzales told you the brakes were bad?

A. A withdrawal order for what, ma'am?

Q. Bad brakes.

A. Is that a withdrawal order situation, bad brakes?

Q. You cited a lot of other trucks for it.

THE COURT: The answer is, he hadn't inspected the truck at that point. There is no way he's going to pull the order on it. He just said, "Leave the truck, we'll get to it." That's what happened.

BY MS. SYMONS (Resuming)

Q. Aren't your instructions as an inspector that you are not supposed to subject yourself or any miner to hazardous conditions.

A. Yes.

Q. Yet you took a truck that you knew had bad brakes, put a maximum load on it, and brought it down the hill into an area where you knew there were people, and you knew you couldn't control the truck. And both you and the truck driver were in danger.

A. That's true. To find out how bad the brakes were, you had to test them under normal conditions. We did it with a full load. I realized the brakes were bad and they definitely were. We took it back to the shop to have it fixed. We could not stop it and it would not hold. I guess you might say that I probably did, actually, endanger mine and his life. We really did. We could have overturned coming down that incline. We could have run into somebody. That's true. I'll agree with that.

Mr. Goodspeed identified exhibits G-9 and G-10, as "checklists" which he obtained a year and half ago during his training (Tr. 261-263). He explained that he did not cite the truck for "inadequate brakes" under mandatory safety standard section 56.9-3, because he believed that if maintained in a proper condition, the brakes would not be inadequate. He believed the truck had "defective brakes that affected safety", and his intent in issuing the citation was to bring the brakes up to the manufacturer's specifications (Tr. 264-265). He explained his answer further, at Tr. 272:

> THE COURT: Mr. Inspector, you did not cite them for 58.9-3, for inadequate brakes with what?
>
> THE WITNESS: They did have brakes on the trucks. They brakes were there. It's just that they didn't work. I can't say that these brakes have been modified to where they were inadequate. They were a manufactured brake. And it was an adequate brake for the haul unit, or I'm sure they wouldn't have bought it. They didn't work so they affected safety.
>
> THE COURT: Now, if the brakes were not capable of stopping the truck and holding a fully loaded vehicle on the grade that it came down, that would fit the definition of inadequate, wouldn't it?
>
> THE WITNESS: Yes. That's true.

Mr. Goodspeed confirmed that he advised the mine representative the cited truck was under an imminent danger order after all of the tests had been completed and the truck had been driven back to the shop area (Tr. 270). He conceded that when he first tested the truck on the level he thought about issuing only a section 104(a) citation, but that coming off the hill and "it just kept going", and in view "the exposure that you have to people and everything else, to me, that was definitely, at that time, an imminent danger" (Tr. 271)

Mr. Goodspeed confirmed that he issued a section 104(d)(1) unwarrantable withdrawal order on the No. 18 haul truck, and that he did so after being informed by the driver, Mr. Farr, that "they were having problems with the brakes", and after the truck was road tested. Mr. Goodspeed confirmed that his "walkaround and visual" inspection of the truck when he first observed it detected nothing with the truck. He had the driver test the dump brake at the dump area, and it would not hold the truck. He also had the driver test the other braking systems, and he explained the tests which were performed on the service brake as well, and he indicated that the service brakes were tested on the level and on the hill (Tr. 275-284; 289-291).

Mr. Goodspeed testified that the No. 18 truck brake conditions which he cited were "significant and substantial" because "it was reasonably serious and reasonably likely", and that an accident was reasonably likely to occur and someone could have been injured by the inability

of the truck to stop (Tr. 285). He based his conclusion that the citation was"unwarrantable" on the information given to him by the driver that the brake conditions had been reported to mine management verbally and in writing, but that his check of the company records failed to disclose any record of the defects (Tr. 285-287). He also confirmed that he knew that a section 104(d)(1) citation had been issued, and he didn't consider the condition of the No. 18 truck to be an imminent danger because the "personal exposure" was not present, there was a "lesser degree of danger", and there was less traffic in the pit area (Tr. 288).

On cross-examination, Mr. Goodspeed conceded that his citation on the No. 18 truck does not state that it was tested on a grade and he confirmed that he cited the truck because the service brake failed his test on both the level and on the hill grade (Tr. 292). He also confirmed that since the service brake would not hold the truck while it was idling in third gear on the level area where it was tested, he concluded that the brakes were defective and that the condition affected safety (Tr. 293-294). He also confirmed that the dump brake was tested while the truck was in the "dump position", but he could not specifically recall how far the truck moved forward while the brake was applied (Tr. 297). In his view, the brakes were not working at all, and he saw no reason to note the distances which the truck moved (Tr. 298).

Mr. Goodspeed confirmed that he decided to issue the unwarrantable failure order on the No. 18 truck after it was tested on the level by the mill area, and the truck was then "taken down and parked on the line. Then I told the operator" (Tr. 299). He explained further that he had the driver take the truck to shop to the shop to have it repaired, and he saw no hazard in having him drive it to the shop because it was unloaded and was a different weight than the water truck (Tr. 300-301), and he did not believe that an imminent danger existed with the No. 18 truck (Tr. 301-302).

Mr. Goodspeed stated that when he first spoke with the driver of the No. 18 truck, the driver told him that he had spoken with Mr. Barnett and Mr. Westover, and informed them numberous times that the brakes didn't work, and that they informed him that they needed time to fix them (Tr. 303-304). Mr. Goodpseed could not specifically recall speaking with Mr. Barnett or Mr. Westover about the truck in question, and indicated that they are required to know the regulations (Tr. 308).

Mr. Goodspeed confirmed that he issued a section 104(d)(1) Order for the No. 10 truck, and that he first observed it when it came to the dump. He and the driver, Mr. Thomas, walked around the truck and visually inspected it, but nothing in particular caught his eye at that time. Mr. Thomas informed him that "as far as he was concerned, the brakes didn't work very good" (Tr. 311). They then got into the truck, and he instructed Mr. Thomas to perform certain tests on the brakes, and he followed the same procedures as he did for the other trucks which he cited that day (Tr. 312). Mr. Goodspeed confirmed that the dump brake, park brake, and service brakes were all tested, and he described the tests as being similar to those administered to the other trucks (Tr. 312-315), and he confirmed that the brakes would not hold the truck when tested.

Mr. Goodspeed confirmed that he decided to issue the order on the No. 10 truck when it was first tested at the dump. He knew at that time that the brakes were not working properly, and he instructed the driver to take the truck to the shop to be repaired, and while in transit down the ramp he had the driver test the service brake and included that condition in the order (Tr. 317). He confirmed that Mr. Thomas told him that he had reported the brake conditions to management, and this gave him the impression that management had prior knowledge of the brake conditions (Tr. 317). He also checked the company records, and found nothing pertinent, and he considered the brake conditions to be serious, but not as serious as the brakes on the No. 7 truck (Tr. 318).

Mr. Goodspeed believed that the No. 10 truck brakes were defective, and that the defective brakes would affect safety because "they would not be able to stop under emergency type conditions" (Tr. 320). He could not recall precisely when he told mine management that he was going to cite the truck (Tr. 321).

On cross-examination, Mr. Goodspeed went over the tests conducted on the truck, and he confirmed that he told Mr. Thomas that he was citing the truck for an unwarrantable failure when he first tested it on the level (Tr. 322). The truck was then taken "on the line, and it was parked there until it was rendered safe to operate" (Tr. 323). When asked why he didn't park the truck immediately, Mr. Goodspeed replied "an unwarrantable failure has nothing to do with how bad they are, does it really" (Tr. 324). He explained further as follows (Tr. 324):

> Q. Well, you labeled this citation, significant and substantial.
>
> A. Reasonably serious and reasonably likely --
>
> Q. But not that serious that it was too dangerous to take it down to the shop?
>
> A. I think under a controlled situation -- the truck was empty and everything else.
>
> Q. How could you keep it under control if you didn't have brakes?
>
> A. We kept it under control enough to stop it, to get it down there under those conditions -- not full --

Mr. Goodspeed confirmed that Mr. Thomas told him he had "turned in the truck numerous times", but that a search of the mine records failed to disclose any written reports filed by Mr. Thomas on the truck in question (Tr. 326).

Contestant's testimony and evidence

Phillip Rusti, testified that he has been the quarry superintendent since February 12, 1982, but was not there at the time of Mr. Goodspeed's inspection in 1981. He sketched the slopes and shop area of the quarry (exhibit R-1), and testified as to the degree of slopes and grades, including the distances and grades over which the trucks which operate at the quarry are expected to travel. He stated that the trucks are not designed to travel on a 20 degree grade, and that the manufacturer recommends that they be restricted to travel over an eight percent grade, and that the grade has a definite effect on a truck's braking capability. He also confirmed that he has driven the trucks in question and that he would use first gear to travel down the hill in question. He also explained the different braking systems on the trucks in question, and explained their functions (Tr. 341-347).

Mr. Rusti testified that he would test the brakes on a 35 ton truck on a two percent grade and that he would never test the park brake on such a truck while it was in motion for fear of burning them. He also described the service brakes on the trucks, and indicated that they are air shoe-type brakes activated by a pedal in the cab. He agreed that a truck which "creeps a little" on a level area while in gear with the engine at 650 rpms is "allowed", but that "excessive creep" would indicate that the brakes needed adjustment. He described "excessive" as a creep of more than a foot or two while the truck was "held" for 15 seconds (Tr. 349). He stated that he expected his drivers to test the brakes while going downhill, and that if the brakes are not holding "that's a test in itself". He also saw not much need for the brakes on a hill if the proper gears and torque features are used properly (Tr. 349).

Mr. Rusti explained the functions of an emergency, park, and retarder brake, and stated that problems are caused when drivers use service brakes on hills rather than retarders, and that this causes excessive brake wear, burning, and the bleeding off of the air from the system (Tr. 351).

On cross-examination, Mr. Rusti confirmed that prior to his employment at the quarry in question, he worked as a general foreman at a large limestone quarry in Michigan, and that large haulage trucks were used in that operation, and that a preventive maintenance program was in being at that operation (Tr. 354). While at that operation, he relied principally on the drivers to determine the adequacy of the brakes on the trucks they were driving (Tr. 355). He confirmed that he never drove the three trucks which were cited by Inspector Goodspeed, nor did he road test them or any other vehicles (Tr. 355). He did not believe that a braking system should be designed to stop a truck on a 20 percent grade, such as the hill where the trucks in question were tested, and he explained his answer as follows (Tr. 356-358):

Q. When you are talking about, in your opinion, in third gear, going down an incline at five miles an hour, you don't think that if you apply the service brakes, the No. 7 vehicle, it would be able to stop. Is that just conjecture on your part?

A. No. It's not conjecture. I'm quite certain it wouldn't. You have to remember, now, we are talking about 100 feet of horizontal distance on that incline. Now, if you were going to go half a mile, I'm sure you could stop eventually, but in 100 feet, that's an awful short distance. That's only about twice the length of this room.

Q. I think the testimony was that, though the hill might have been 100 feet, the vehicle never stopped, and, in fact, rolled down into the flat area.

A. Where it stopped?

Q. Where it eventually stopped. You don't think a braking system should be designed to stop a vehicle on an incline?

A. Not a 20 per cent.

Q. That's incredible. How did you measure the 20 per cent incline?

A. With a tape.

Q. With a tape? Did you go out there?

A. Yes.

Q. When was this?

A. When Mr. Gonzales, the federal investigator, was out at our property going over citations. We measured this distance. We also measured the distance to the water tower. We did quite a bit of measuring.

Q. You said that the haulage trucks weren't designed to go down that particular incline?

A. No, I didn't say that.

Q. I thought you did.

THE COURT: He said they weren't designed to be operated on a 20 per cent grade.

BY MR. COHEN (Resuming):

Q. Is that what you said?

A. That's right.

Q. If this was a 20 per cent grade, they weren't designed to go down this particular grade.

A. They were not designed to operate on that particular grade. You can go down there.

Q. What's the difference between operating and going down?

A. With a load, you shouldn't go up or down a 20 per cent grade. It's not your normal operating procedure. This road is a service road. By a service road, that means that you take a vehicle out of there, mainly for maintenance purposes. This is not a normal haulage operation. On our haulage operations, we maintain an 8 per cent maximum.

Q. I thought the testimony was, in fact, that the vehicles did use this road?

A. But not for haulage.

Q. Well, I don't know about that. Do you know, in fact, that they didn't use the road for haulage back in that time?

A. Yes.

Q. How would you know that?

A. Just by the pattern of what we are doing now, and we haven't changed that any. Why would you want to haul something to the shop?

Q. Well, how about going down with a full load of water to the shop area?

A. That's very possible. But you are talking about tons versus thirty-five or forty.

Mr. Rusti was of the opinion that the fact that service brakes on the three trucks in question would not slow them down on a 20 per cent incline does not indicate a problem with the brakes. Although he indicated familiarity with the manufacturer's specifications for the

trucks in question, he indicated that they "were sketchy" and found nothing to support his opinion other than the "test" used on a horizontal level where the service brakes were applied while the engine was running at 650 rpm's (Tr. 360-361). He confirmed that this test was essentially the same one used by the inspector when he tested the truck brakes on level ground (Tr. 361).

Mr. Rusti stated that since he was not at the mine site at the time of the inspection and citations, he had no way of knowing whether the brakes on the trucks which were cited were adequate or not, and when asked an opinion as to whether the conditions cited by Inspector Goosdpeed were an "imminent danger" or an "unwarrantable failure", he responded "I won't even make an observation" (Tr. 362). When asked to account for the fact that Inspector Goodspeed found the brakes in such a condition as to warrant the issuance of such orders, he responded "I wasn't there so I don't know" (Tr. 370).

Mr. Rusti confirmed that subsequent to the issuance of the citations in question by Inspector Goodspeed, MSHA conducted another investigation to determine whether any "willful" violations should be issued because of the truck brake conditions, and he identified the MSHA Investigator who conducted that investigation as a Mr. Gonzales. He also confirmed that his measurements of the distances previously referred to by him in his testimony took place at that time, and he confirmed that MSHA found no basis for issuing any "willful" citations (Tr. 363-369). Mr. Rusti also confirmed that the normal procedure is to service the trucks every 1,000 hours, and that they are brought in for lubrication and a general checkup (Tr. 369).

Keith M. Barnett, production foreman, testified that he supervised the drivers of the trucks which were cited and that during the period May through the first part of July 1981, none of them reported any problems with the trucks. If anything had been wrong with the trucks, they would have ordinarily reported it to him. When asked whether any drivers had ever reported "problems with the brakes on the No. 7 water truck", he responded "not to a degree that it would create a safety hazard" (Tr. 392). When asked about the other two trucks, he responded as follows at Tr. 392:

> Q. How do you judge what is a degree that would create a safety hazard?
>
> A. It's in the daily operation of the truck. And I observe each piece of equipment each day. If I notice the operator is having trouble controlling the truck, if there is an unusual circumstance, or if the operator does indicate that there is a serious problem with the truck.
>
> Q. Did anyone report to you that there was a problem with the brakes on No. 10?
>
> A. No.
>
> Q. During the period of May, June or July of 1981?

A. There again, that's a specific question. I mean, that's over a period of several months. There could have been some discussions to that point, but, there again, nothing that would have created a serious safety situation.

Q. What about with Truck No. 18? Do you remember anybody reporting any problems with the brakes on Truck No. 18?

A. No. That was very much a surprise to me.

Mr. Barnett confirmed that he was probably the one who first "flagged down" driver Gonzales, and he confirmed that it took him some 100 feet to stop the truck. He did not believe this to be unusual since "it takes that kind of distance to stop most of those pieces of equipment". After he stopped, Mr. Gonzales made no specific complaint about the truck (Tr. 393).

On cross-examination, Mr. Barnett indicated that he considered Mr. Thomas to be a good, conscientious driver who is safety conscious. As for Mr. Farr, he stated that he made a lot of safety complaints, some of which were frivolous, and a lot of them were made to him orally rather than in writing (Tr. 394). "Oral complaints" are usually noted in a book kept on Mr. Oberg's desk, and written ones are on forms used for that purpose (Tr. 395). Mr. Gonzales "was not shy" about making complaints (Tr. 402).

When asked about any prior knowledge of the condition of the brakes on the trucks in question and the field service report prepared by the contractor, exhibit G-6, after one of the trucks was repaired, Mr. Barnett stated as follows (Tr. 398-400):

Q. Are you saying, sir, that you were completely unaware of the condition of the defective brakes on the Nos. 7, 10 and 18 trucks on July 6th, 1981? Is that what you are saying?

A. No, sir. I'm not saying I was unaware at all. I try to keep very close tabs on my equipment. I try to keep track of the condition of the brakes on all my equipment, not only the brakes, but the general operating condition.

Q. So you were aware of the brakes?

A. Yes. I would say I was.

Q. How were you made aware of that fact?

A. Being in contact with the drivers and the equipment itself on a daily basis.

Q. Would you agree that the brakes on the No. 7 truck on July 6th, 1981 were not sufficient?

A. No, I wouldn't agree to that at all.

Q. You think they were safe?

A. In my estimation, they were adequate.

Q. How about No. 10?

A. The same thing.

Q. How about No. 18?

A. That's the same thing.

* * * * * * * * * *

Q. If I told you that their description of the condition, after looking at the brakes, subsequent to the issuance of the order, that the brakes were -- I'll use the very term, "Very poor brakes." Would you disagree with that statement?

A. This was his assessment of the situation. I couldn't agree or disagree.

Q. Were you made, subsequently, aware of the repair work that was done on the brakes after the inspector issued his orders?

A. Yes, I think so.

Q. Did that, in any way, change your mind with regard to the general condition of the brakes?

A. No. Because it verified Mr. Oberg's testimony, that all the mechanical parts of the brakes were there in the truck. Some of them were under limited operating conditions, but generally they were in operating condition.

Q. How about the master cylinders? Didn't he testify that two of the master cylinders were defective?

A. Yes.

Q. That doesn't cause you any concern?

A. Yes. Of course, it causes me concern.

Mr. Barnett testified that at no time on July 6, 1981, between 9:30 a.m. and 1:30 p.m., when Mr. Goodspeed started his testing of the trucks, did he observe anything in the operation of the trucks that led him to believe that the brake conditions presented a safety hazard, and had he observed such conditions, the trucks would have been parked (Tr. 405).

The parties stipulated that if Mr. Edward Westover were called to testify, he would also testify that he received no complaints concerning the brakes on the three trucks which were cited by Inspector Goodspeed (Tr. 405).

Mr. Oberg was recalled and confirmed that he told Mr. Goodspeed that the No. 7 water truck never had good brakes (Tr. 374). He explained the braking system and confirmed that the brakes on that truck were the ones that the manufacturer put on it (Tr. 375). He also confirmed that after the citation was issued, the wheels were pulled off the truck and he found "three quarters of a brake shoe left on the truck", and he indicated that these were sufficient to stop the truck "if they are adjusted right" (Tr. 376). He believed the citation could have been abated by merely adjusting the brakes (Tr. 377).

Mr. Oberg confirmed that the No. 10 truck wheels were also pulled off, and he found two out of the six master cylinders to be defective. He found the other four to be "pretty well up to par" (Tr. 377). He also confirmed that No. 18 truck wheels were also pulled off, and when the brake shoes were inspected "we figured there was at least 50 to 80 percent on them". In his opinion, this was enough to stop the truck if the brakes were adjusted (Tr. 378).

Mr. Oberg testified further that at no time prior to the Inspection in question did the drivers of the trucks in question or their foremen tell him that the brakes were defective, and had he been told he would have taken them off the line (Tr. 379). In response to further questions, he testified as follows (Tr. 380-381):

> Q. Mr. Oberg, when you testified yesterday, I believe you said you were aware of the condition of the trucks. That you subsequently learned, after the trucks were pulled off the line and inspected, you said that you would have taken them off the line yourself. Do you stand by that statement?
>
> A. If I would have known, I would have taken them off, yes, knowing that they had bad brakes.
>
> Q. You still agree that all three trucks had bad brakes?
>
> A. I'm not saying one way or the other on that, no. I feel that all three trucks had partial brakes on them.

Q. Partial?

A. At least partial.

Q. But they weren't adequate, were they?

A. I don't know whether they were adequate or not.

Q. Because, in effect, you don't really look at them. Didn't your mechanics, really, inspect the brakes?

A. They did after they were pulled off.

Q. So you really didn't have any independent knowledge, because you just relied on your mechanics.

A. I rely on my mechanics all the time.

Q. I think you stated in your prior testimony, the best indication that there is a problem with the brakes, is the truck drivers? Is that right?

A. That's right.

Q. That's how you base if there is a problem? You rely on the truck drivers to tell you?

A. There's a problem with the truck, I depend on those truck drivers to report it to their foreman. I, in turn, depend on the other foremen to report it to me.

Q. But by the same token, you would agree that they would be the best judges of whether a particular truck has adequate brakes or inadequate brakes, because they are the ones that drive it every day?

A. They drive it every day. They are the ones that would know.

Q. You heard the three truck drivers testify yesterday. Would you question any of their judgment as far as their opinion that the brakes on the trucks were inadequate?

A. I won't question anybody's judgment.

And, at Tr. 386-388:

THE COURT: Now, if they weren't adjusted correctly, what would your answer be.

THE WITNESS: Okay. If you are back to yesterday's testimony, I made a statement that that left-hand wheel had bearings on the cams that was froze up. So, therefore, that was not functioning properly.

THE COURT: Okay. Let me ask you this question. Do you consider brakes that are 75 per cent good, 50 to 85 per cent good, to be effective brakes, adequate brakes, or is it hard to answer?

THE WITNESS: If it's got 50, 75, or 85 per cent of the linings there, there's no reason why that brake couldn't be good.

* * * The three trucks that were cited by the inspector, when you pulled the wheels, did you actually see the conditions themselves? Were you actually physically there when the mechanic broke these three trucks down and pulled the wheels?

THE WITNESS: You bet. I was there when they pulled the wheels off. After we got the drums off and everything, the linings were there. They came and found me and said, "I would like you to come and look at the linings on this truck."

THE COURT: Now, given the conditions that you observed on the three trucks when the wheels were dismantled, place yourself in the position of the inspector, and you had knowledge of the condition of all of these three trucks. Without subjecting those trucks to any tests or anything, could you come to any conclusion that these brakes were defective or inadequate?

THE WITNESS: I don't think 18 was up to par, but it was actually not totally out of brakes, either. Any time you have a cam bearing which is particlly froze up, you have got one wheel that is not functioning. And if your other wheel is, say, flacked off from wear or use, then you aren't going to have number one brakes, no.

THE COURT: How about the other two trucks?

THE WITNESS: I feel they were all about the same.

THE COURT: You have been here two days listening to the testimony of the inspector, listening to his testimony concerning the tests that he subjected these trucks to. And his testimony was that they wouldn't stop on certain grades, and under certain conditions. Do you have any comment as to whether or not you feel that these citations were in order?

THE WITNESS: Well, I thought he was quite severe.

THE COURT: Did you voice your objections to tell him that at the time?

THE WITNESS: I was never asked.

Stipulations

The parties stipulated that the Keigley Quarry is subject to MSHA's jurisdiction, that the operator U.S. Steel Company is a large operator and that any reasonable penalties assessed will not affect its ability to continue in business. The parties also agreed that all of the citations issued in these proceedings were abated in good faith, that the inspectors who issued them were duly authorized representatives of the Secretary, and that for the purposes of these proceedings U.S. Steel's history of prior violations at the quarry in question consists of six citations issued during the 24 months prior to the issuance of the citations in question in these cases (Tr. 4, Exh. G-1).

Findings and Conclusions

These consolidated dockets present somewhat similar factual situations concerning the braking systems on three trucks being operated at the quarry at the time of the inspection of July 6, 1981. Inspector Goodspeed's "inspection" of the three trucks included his visual inspection of each vehicle, as well as a "check ride" where he accompanied the drivers and requested them to perform certain "tests" on the braking systems. The inspector's special attention to the trucks was the result of certain observations made by him as to how one of the trucks was being driven, and certain comments made by the drivers concerning the condition of the brakes. All of these factors prompted the inspector to inspect the No. 7 water truck, and two haulage trucks, and his inspections resulted in the sequential issuance of a section 104(d)(1) unwarrantable failure citation and an imminent danger order for the brake conditions on the water truck, and two section 104(d)(1) unwarrantable failure orders for the brake conditions on the No. 18 and No. 10 haul trucks. The inspector also cited violations of mandatory safety standard 30 CFR 56.9-2, and found that each of the alleged violations were "significant and substantial".

Fact of Violations

At pages 1, 2 and 7, of its brief, respondent makes reference to the inspector's citation of section 30 CFR 55.9-3. This is in error. Respondent is not charged with any violations of that section, it is charged with violations of section 56.9-2. In each of his citations, Inspector Goodspeed asserted that the cited conditions of the truck brakes constituted a violation of mandatory standard section 56.9-2, which provides that "Equipment defects affecting safety shall be corrected before the equipment is used". Therefore, one of the initial questions presented is whether MSHA has established by a preponderance of the evidence that the cited brake conditions constituted a violation of section 56.9-2.

The No. 7 Water Truck

Although Contestant's maintenance foreman Oberg asserted that the brakes needed "minor attention", he did not dispute driver Gonzales' report that they "were bad", and he conceded that the brakes were poor. He confirmed that the parking brake was inoperative and had to be replaced, that one of the front wheels had a chipped bearing which had to be replaced, that new brake shoes were installed, and that the dump brake would not hold the truck on level ground.

Mr. Oberg confirmed that the water truck was a converted haulage truck and that the drivers were reluctant to drive it on a hill because it had poor brakes. He conceded that the brakes were in need of repair.

The driver of the truck, Charles Gonzales, confirmed that when the truck brakes were tested on hills they would not hold, and when he applied the foot brake at a speed of five to ten miles an hour the truck would not stop and just kept rolling. He also confirmed that the retarder and park brakes, when applied, did not slow the truck, and that the park brake would not hold the truck on a hill.

Mr. Gonzales confirmed that after the brakes were repaired he could hold the truck on hills and felt safer driving it.

The No. 10 Haul Truck

Mr. Oberg confirmed that after the truck was cited and taken out of service, the driver and a mechanic drove it and found that the brakes were not working properly. He also confirmed that the truck had two faulty master cylinders which had to be repaired, and that the faulty cylinders would affect the brake pressures. He also confirmed that the parking brake needed to be adjusted, and that all of the brake linings were replaced even though they had three-quarters of the linings left.

The driver of the truck testified that when the truck brakes were tested on the hill they would not hold the truck. He also testified that the service brakes and retarder would not hold the truck at three or four miles an hour and that the dump brake was not working properly because the truck would move forward when loaded with the brakes applied. He confirmed that the brakes would not hold when they were tested on the level with the engine idling.

The No. 18 Haul Truck

Mr. Oberg testified that this truck was an old secondhand truck and that when the brakes were checked the left wheel cam shaft that rotates the brake shoes and locks the wheel was worn and was beginning to freeze up. He indicated that these conditions would affect the ability

of the vehicle to stop within a certain distance. He also confirmed that in addition to repairing the defective wheel cam shaft, the front brakes were adjusted and an air leak was repaired. He confirmed that the malfunctioning front brakes would affect the functioning of the service brakes and he conceded that the brakes on the truck were not adequate.

Truck driver Stephen Farr testified that the service brakes and dump brakes would not hold when tested. He confirmed that the truck was out of service for several days awaiting parts, but that after the brakes were repaired the service brakes were able to bring the truck to a stop.

Inspector Goodspeed testified as to the conditions of the brakes on each of the trucks which he tested and cited, and he confirmed that the brake conditions which he found affected the safe operation of each of the trucks. With regard to the No. 7 water truck, Inspector Goodspeed stated that the conditions of the brakes prevented the driver from controlling the vehicle on the hill where it was tested. He concluded that the inability of the driver to slow the truck down when the service brake was applied indicated to him that the brakes were inoperative and unsafe and were incapable of bringing the truck to a stop on an incline.

With regard to the No. 18 haul truck, Inspector Goodspeed testified that when the driver applied the service brake while the truck was in idle and while on an incline, the brakes would not hold the vehicle. He also confirmed that the dump brake was not working at all, and when it was applied the truck simply rolled forward and would not hold. As for the No. 10 haul truck, he confirmed that when tested, the dump brake, park brake, and service brake would not hold the truck. He believed that the truck braking systems were defective and affected safety because the driver would be unable to bring the truck to a quick stop in an emergency.

In defense of the citations, the contestant presented the testimony of quarry superintendent Rusti and production foreman Barnett. Mr. Rusti was not employed at the quarry at the time the citations were issued, and he did not drive or test the trucks cited by Inspector Goodspeed. Further, he declined to offer an opinion as to whether the brake conditions warranted the orders issued by the inspector, and he confirmed that he had no way of knowing whether any of the truck brakes cited were adequate or not.

Mr. Barnett testified that he believed the brakes on all of the trucks were adequate. However, when asked to comment on the contractor's assessment that the brakes on one of the trucks were "very poor", he said that he could not agree or disagree with that assessment. He conceded that the work done on the brakes after the orders were issued confirmed that some of the brakes were in limited operating condition, and that the two defective master cylinders did cause him some concern.

Contestant also called Mr. Oberg as its witness. He confirmed that he told the inspector that the No. 7 water truck never had good brakes. He also confirmed that two of the six master cylinders on the No. 10 truck were defective, and while he would not concede that all three trucks had bad brakes, he did say that they all had partial brakes. Further, he could not say whether the brakes on all the trucks were adequate, and he did not question the judgment of the drivers when they testified that the truck brakes were inadequate.

Mr. Oberg confirmed that while the No. 18 truck was not totally out of brakes, it was not up to par because one wheel had a frozen cam bearing which would prevent that wheel from functioning.

The driver of the No. 7 water truck, Gonzales, confirmed that he drove the truck for about three hours before the inspector arrived on the scene. As a matter of fact, when he was first "flagged down", he experienced some difficulty in bringing his truck to a stop, and that prompted the inspector to ask him to park his truck so that it could be inspected more thoroughly after the inspector completed his other inspection rounds. The driver's statements that the brakes "were bad" led the inspector to a more thorough inspection of that truck as well as the other two trucks which were subsequently inspected.

The driver of the No. 10 haul truck, Thomas, confirmed that he had driven that truck for 4 or 5 hours before the inspector inspected it on July 6th, and the driver of the No. 18 haul truck, Farr, admitted that he had driven that truck prior to the inspection knowing full well that the brakes were bad.

In view of the foregoing testimony and evidence, it seems clear to me from the record in these proceedings that MSHA has established by a preponderance of the evidence that the brakes on the three trucks which were cited by Inspector Goodspeed were defective, that these defects affected the safe operation of those trucks, and that the cited trucks were in fact used and operated before the necessary repairs and corrections which were required were made. This is not a case where there is an honest difference of opinion between and inspector and mine management as to the defective conditions of the brakes. The record here establishes that without a doubt the brakes on all three of the cited trucks were defective, and these conclusions are supported not only by the drivers and the inspector who subjected them to certain tests under actual operational conditions, but also by U.S. Steel's maintenance foreman who was responsible for maintaining and repairing the trucks, the records of the contractor who made repairs to the two haul trucks, and by the evidence which establishes the extent of the repairs which were necessary to render the braking systems operational and safe.

Respondent's defense to the alleged defective braking conditions consists essentially of an attempt to establish that the testing methods and procedures followed by the inspector were somehow suspect. In addition, respondent argues that the conditions of the brakes, as found after the trucks were taken out of service, were the result of abuse and wear and tear which happened while the inspector was testing the trucks with the drivers.

Respondent's argument that MSHA has failed to establish through any objective tests that the brakes were worn to the point where they constituted defects affecting safety is rejected. While one may agree with the proposition that a large haul truck, fully loaded and coming down a hill, is not engineered to "stop on a dime" when the brakes are applied, in this case the testimony and evidence establishes that the drivers were having problems holding the trucks on levels and hills using all of the braking systems. Again, this is not a case where there is a difference of opinion as to whether the brakes were defective or not. All of the truck wheels were pulled after the trucks were taken out of service, and the brake defects and repairs which were made are detailed and documented through the testimony and evidence of record in this case, and leave little room for argument.

While it is true that the "tests" applied by Inspector Goodspeed, as detailed in his testimony, as well as exhibits G-8, G-9, and G-10, may not be part of any officially adopted mandatory MSHA regulation, I am not convinced that the tests were totally irrational or wrong, and respondent has not advanced any testing procedures of its own to dispute what the inspector did in this case. What the inspector did in this case was to test the brakes on a level area with the engine running and on certain inclines and hills with the truck in certain gears. While one may question the inspector's judgment in taking a truck on a hill for a test when he had reason to believe that the brakes were bad, this fact does not detract from the fact that when the brakes were applied to the trucks coming off the hills, they could not hold the trucks.

Respondent presented no credible testimony or testing procedures of its own to establish that the brakes on the cited trucks were in fact not defective and could do the job. As a matter of fact, respondent's witness Rusti, who was not at the quarry when the trucks were cited, and who had never driven or tested them, agreed that Inspector Goodspeed's test of the brakes on the level with the engine idling was a proper and acceptable test. His dispute was over the number of rpm's applied to the engine, and the resulting "allowable" or "excessive" creep which may result. As for the testing on the hills, he candidly admitted that he expected his drivers to test the truck brakes while driving them on hills and inclines, and he agreed that if the brakes were not holding that "this was a test in itself". His after-the-fact dispute seems to lie with whether or not the driver may have had the truck in the proper gears while applying the brakes. He also took issue with the areas

where the trucks were tested, and maintained that they were not designed to operate on 20 percent grades. However, his opinion in this regard is rejected as totally unsupported by any credible evidence. He never drove the trucks, he never tested them himself, and he admitted that the manufacturer's braking specifications "were sketchy". As a matter of fact, respondent did not produce any manufacturer's information as to the braking systems, and relied on Mr. Rusti's testimony, to which I give very little weight.

I find Mr. Barnett's testimony as to the condition of the truck brakes to be rather equivocal. He conceded that he was not completely unaware of the defective brakes on all three trucks. When asked whether it was true that the brake conditions on all three trucks were not sufficient, he disagreed and state they "were adequate". Yet, he did not disagree with the contractor's assessment that one of the trucks had "very poor brakes", nor did he disagree with the fact that one of the trucks had two defective master brake cylinders which in fact caused him some concern, and he candidly admitted that some of the trucks were operating under limited braking conditions.

On the basis of the foregoing findings and conclusions, I conclude that MSHA has established the fact of violation as to all three trucks and that it has proven by a preponderance of the credible and probative testimony and evidence that the brakes on the three cited trucks in question were defective and that these defects affected the safe operation of those trucks. I reject the respondent's suggestions that the defective brake components which were found after the trucks were taken out of service for repairs were caused by the inspector or the drivers during the testing of the vehicles. The evidence in this case makes it clear to me that the defective brake conditions were present on the trucks prior to the inspection and that they were driven in those conditions. Clearly, the facts and circumstances here presented meet the tests laid down by the Commission in Secretary of Labor v. Ideal Basic Industries, Cement Division, 3 FMSHRC 843, decided April 10, 1981. Inspector Goodspeed's actions in citing the respondent with a violation of section 56.9-2, in each of the three contested citations are AFFIRMED.

The alleged imminent danger - Order No. 0583637

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 820(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 44 (March 1970), states in pertinent part as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added]

And, at page 89 of the report:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd., Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 405 F.2d 741 (9th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman phrased the test for determining an imminent danger as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the

> disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the facts presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspector's education and experience would conclude that the condition of the brakes on the truck which was cited constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Likewise, MSHA must also show that the defective brakes at the time the order issued also presented such an imminently dangerous situation.

The evidence in this case stablishes that the brakes on the No. 7 water truck were first tested by the inspector when he and the driver were on an incline after obtaining a load of water. Driver Gonzales advised the inspector at that time that the brakes were "not very good". The inspector then had him test the truck on another hill, and when the service brake was applied, the driver had some difficulty holding the truck, even though he was in first gear. As they descended off the hill traveling towards the shop area at a speed of five to ten miles an hour, the driver applied the service brakes and the truck would not stop and simply kept rolling, even after the driver applied the retarder and park brake. The inspector testified that the service and park brakes had previously been tested on a flat area and they would not slow the truck down. After "pumping" the service brakes, the truck eventually was brought to a gradual stop. However, after the test on the hill, the inspector advised the driver that he was issuing an imminent danger order and the truck was taken out of service for repairs by a company mechanic removing the battery. Once the truck was taken in for service, and the wheels pulled, a chipped front wheel bearing was discovered, and it was replaced. In addition, the parking brake had to be replaced and new brake shoes were installed on all four wheels.

Although it is true that the driver drove the No. 7 water truck on July 6, 1981, before it was removed from service and the brakes repaired, maintenance foreman Oberg candidly admitted that the drivers did not like to drive it on hills because the brakes "were poor". In my view, this evaluation of "poor brakes" was confirmed by the test on the hill and on the level, as well as the subsequent repairs which were made to the brakes. Under these circumstances, I conclude and find that the inspector's

decision to issue an imminent danger order after finding that the service brakes would not slow or hold the vehicle while descending the incline by the shop area was reasonable in the circumstances. While there may be some question as to the validity or wisdom of applying a dump or park brake while descending a hill, the fact is that the main braking system, the service brakes, were not functioning properly and in fact proved to be defective and would not do the job. Further, even though the inspector may have contradicted himself when he stated that the brakes were not "inadequate" for purposes of a possible violation of section 56.9-3, and even though the inspector may have exposed himself and the driver to an imminent danger when they drove down the hill towards the shop and found that the service brakes would not slow or stop the truck, U.S. Steel has not rebuted the fact that the service brakes were defective and that this defect affected the safety of the driver and the inspector. Under all of these circumstances, I conclude and find that the inspector acted reasonably and the imminent danger order IS AFFIRMED.

The modifications of the section 104(d)(1) citations

At the hearing, MSHA's counsel moved to vacate the section 104(d)(1) Citation No. 0583636, the underlying citation which supported the subsequent section 104(d)(1) withdrawal orders, and the motion was granted (Tr. 7-8). U.S. Steel's counsel argued that since the underlying citation has been vacated, the subsequent withdrawal orders must also be vacated since they are now unsupported. Counsel's motion for dismissal was denied and taken under advisement (Tr. 8), and MSHA's counsel suggested that the circumstances and facts developed during the course of the hearing would support a modification of the first 104(d)(1) withdrawal order to a citation, and that this citation may serve as the support for the remaining withdrawal order. The hearing proceeded, and testimony and evidence was presented concerning all of the citations in issue.

In its posthearing brief, MSHA cites the Commission decision in Secretary of Labor v. Consolidation Coal Company, 4 FMSHRC 1791, October 29, 1982, in support of its argument that I may modify the first section 104(d)(1) order issued by Inspector Goodspeed, No. 0583639, back to a section 104(d)(1) citation, and that this citation may then support the section 104(d)(1) order, No. 0583638. In the Consolidation Coal case the Commission held that the statutory provisions found in sections 104(h) and 105(d) of the Act expressly authorize the Commission to "modify" any "orders" issued under section 104. The Commission noted that "this power is conferred in broad terms and we conclude that it extends, under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations", 4 FMSHRC 1794. The Commission went on to discuss what it believed to be the "appropriate circumstances" in the case under consideration, and these included such factors as prejudice, any lack of proper or fair notice to the operator charged, and whether the operator's defense would have been any different had the modification not been allowed. In upholding the Judge's authority to modify the citation in question, the Commission

also noted that to do otherwise would allow the kind of serious violation encompassed by section 104(d) to fall outside of the statutory sanction expressly designed for it--the 104(d) sequence of citations and orders, and that "such a result would frustrate section 104(d)'s graduated scheme of sanctions for more serious violations", 4 FMSHRC 1794.

In the instant proceedings, MSHA's counsel points out that he requested me to modify the withdrawal order in question at the beginning of the hearing before any testimony or evidence was presented, and that U.S. Steel had an ample opportunity to present any evidence as to why the requested modification should not have been granted. MSHA concludes that there has been no prejudice and that if I find that the first issued section 104(d)(1) order met the requirements of a validly issued 104(d) citation, then I should modify the order and preserve the unwarrantable failure chain.

In its posthearing brief, U.S. Steel concedes that the Consolidation Coal Company decision authorizes me to modify the order in question to a citation if the evidence supports such citation. However, counsel argues that Order No. 0583639 citing the No. 18 haul truck does not support a finding that the violation was of a significant and substantial nature. In support of this conclusion, counsel argues that even though Inspector Goodspeed testified that it was reasonably likely that a miner at the quarry would receive a reasonably serious injury from the cited brake conditions, he ignored the fact that the quarry had gone eight years without an accident or fatality involving the trucks, and that his testimony that someone could get hurt by walking in front of the trucks that were dumping or parked on hills also ignores the driver's testimony that there is no pedestrian traffic on the inclines. Counsel suggest that Mr. Goodspeed's "theory" that the driver himself was in a position of peril makes little sense in light of the accident history at the quarry. Further, counsel points out that the order the Secretary chose to modify to a citation does not even allege the brakes were not adequate to hold the vehicle, but merely that they would not hold at idle of 550 rpms (Government Exhibit 4), and even assuming the inspector followed his test procedures (Government Exhibits 9 and 10), he would only conduct this test where there was no pedestrian traffic.

After careful consideration of the arguments presented in this case, I conclude and find that MSHA's position is correct and that I do have the authority and discretion to modify the section 104(d)(1) order in question. Further, I conclude that while the better practice is for MSHA to file its motion in advance of any hearing, on the facts of this case I cannot conclude that U.S. Steel has been prejudiced by the solicitor making the motion at the hearing before any testimony or evidence is taken. Here, U.S. Steel had ample time to present its defense and I cannot conclude that it would have done anything different by way of any defense. It has had a fair opportunity to present its defenses and to cross-examine all of MSHA's witnesses, including its own employees called as adverse witnesses. If the record supports the requisite "significant and substantial" and

"unwarrantable failure" findings, the first section 104(d)(1) order, as modified, will stand in support of the second order. If it is unsupported, it will fall, and the "chain" will be vacated. My findings and conclusions on these issues follow below.

Significant and Substantial

The test for a "significant and substantial" violation was laid down by the Commission in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, April 7, 1981, a civil penalty case. In that case the Commission held that a violation is "significant and substantial" if --

> based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

104(d)(1) Order No. 0583639, issued at 2:10 p.m. July 6, 1981

Although Section 104(d)(1) of the Act does not require an inspector to make an "S&S" finding to support an unwarrantable failure order, Inspector Goodspeed made such a finding when he issued the 104(d) Order for the defective brake condition on the No. 18 haul truck, and the fact that he did so does not in my view ipso facto render the order illegal. Inspector Goodspeed cited a violation of mandatory safety standard section 56.9-2, found that the violation constituted an unwarrantable failure to comply, and his "S&S" finding was a "gratuity", which if supported, will stand. If not supported, it will fail.

U.S. Steel argues that the brake condition cited by the inspector is limited to an assertion that the brakes would not hold at a certain "idle" speed, and that the inspector's testimony that someone could be injured by inadvertently walking in front of the truck ignores the fact that there is no evidence that there were any pedestrians on the hill roads or in the area where the truck may have been dumping. Further, U.S. Steel maintains that the inspector's belief that the violation presented a reasonable likelihood of anyone being injured also ignores the eight year accident-free history of the quarry.

The accident-free record of the quarry is commendable, and I have considered this fact in assessing the civil penalties in this case. However, I cannot ignore the fact that the evidence and testimony in this case reflects that the service brakes were defective, that these defects affected the safe operation of the truck in question, and that the service brakes would not hold the truck on the level as well as on the incline where it was driven. The question of whether the violation is a significant and substantial one must be decided on the basis of the evidence presented to support that finding.

In this case, U.S. Steel's contention that the condition cited on the face of the citation issued by Inspector Goodspeed is limited to the inability of the brakes to hold the truck on the level while idling at 550 rpm's is correct. However, the driver and the inspector confirmed that the service brakes were also tested on an incline while the truck was being driven to the shop and that the brakes would not hold the truck. They also confirmed that the dump brake was tested and that it would not hold the truck. Although the conditions recorded by the inspector on the face of the citation are not a model of clarity, and the inspector's failure to include the fact that the brakes would not hold when tested on the hill and dump area as part of the cited conditions remains unexplained, the fact is that the evidence establishes that the service brakes were inadequate, the brake cam shafts were worn, and that the brakes needed adjustment.

Inspector Goodspeed's testimony in support of his "S&S" finding is that the violation "was reasonably serious" and that an accident "was reasonably likely to occur", and that someone would have been injured because of the inability of the truck to stop. Although his conclusions in this regard may be unreasonable in a situation where the truck is simply idling at a level location, they are not so unreasonable when one considers the fact that the service brakes would not hold the truck while it was being driven to the shop area to be taken out of service for repairs. The defective service brakes exposed the driver and the inspector to possible injury, as well as any other vehicular or pedestrian traffic which may have been encountered by the truck on the way to the shop. Further, while it is true that the inspector did not consider the seriousness of the situation to be such as to warrant an imminent danger order, and while it is also true that his initial decision to issue the order was made at the time the brakes were tested on the level, I cannot ignore the fact that the brakes would not hold the truck and that they proved to be defective. In these circumstances, I conclude and find that the violation was significant and substantial and the inspector's finding in this regard IS AFFIRMED.

104(d)(1) Order No. 0583638, issued at 3:00 p.m., July 6, 1981

Inspector Goodspeed found that the violation for the brakes on the No. 10 haul truck was "significant and substantial". Although he testified that he first decided to issue the order when he tested the dump brake on the level dump area, he also had the driver test the service brakes on an incline while the truck was being driven to the shop area for repairs, found that the brakes would not hold the truck on the incline, and he included all of these facts on the face of the order.

In support of his "significant and substantial" finding, Mr. Goodspeed testified that he believed the defective brakes would not be able to stop the truck "under emergency type conditions". He explained his rationale for permitting the truck to be driven to the shop with defective brakes by stating that the truck was empty and that the driver was able to keep

it under control, and that under these "controlled conditions" he had no serious reservations about permitting the truck to be driven to the shop. Although the inspector's rationale may seem contradictory, and while it may have been wiser for the inspector to simply abandon the truck when he first decided to cite it, and have it towed to the shop, his decision to have the driver drive it to the shop, does not, in my view, lessen the fact that the brakes were defective, that they were in need of repair, and that they could not hold the truck on the incline. Given all of these circumstances, the fact that no one was run over on the way to the shop, does not detract from the dangerous and hazardous conditions of the brakes. Both the driver and the inspector were exposed to a hazardous condition, and the fact that the inspector may have used poor judgment does not excuse or cure the defective brake conditions. I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure

A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296 (1977).

It seems clear to me from the testimony in this case that Inspector Goodspeed's decision to issue the unwarrantable failure orders was prompted by the fact that the truck driver's initially told him that their complaints to mine management about the defective brake conditions on the trucks which were cited fell on deaf ears and repairs were not made. While it is true that some of the drivers may have reported the faulty brake condition the same day that the inspector was at the mine, I honestly believe they did so to protect themselves from criticism, and not so much out of any concern for their safety. If this were all of the evidence present in this case to support the inspector's unwarrantable failure findings, I would rule in favor of U.S. Steel on this issue. However, for reasons which follow, I believe that the record supports a finding that mine management was well aware of the defective brake conditions, and simply ignored them because they either did not have the available manpower to correct the conditions immediately, or simply did nothing because the drivers either did not complain or "assumed the risks".

Maintenance foreman Oberg candidly and honestly admitted that while most of the trucks at the quarry were generally maintained in "fair to good condition", because of certain budget and equipment constraints, "less attention" was paid to the trucks which were cited. Mr. Oberg also candidly conceded that the brakes on the cited trucks were in need of repair or adjustments, and he conceded that had he been aware of the brake conditions

on the trucks in question prior to the inspector's arrival on the scene on July 6, 1981, he would have pulled them all into the shop for the needed repairs. That is precisely the point. As maintenance foreman, it seems to me that it is his primary responsibility to insure that the trucks are periodically road tested and checked to insure that the brake systems are maintained in a safe condition. On the facts of these cases, it should be abundantly clear to U.S. Steel that shifting this responsibility to the driver is simply inadvisable, particularly when U.S. Steel, and not the driver, is ultimately held accountable by MSHA.

The driver of the No. 10 haul truck testified that he had orally reported the conditions of the brakes to shift boss Westover and Barnett at least a month before the inspection, and he also indicated that the brakes "haven't been good" for three or four months prior to that time. The driver of the No. 18 truck also testified that he had made similar complaints, and while he conceded that he was given the opportunity to drive other trucks while the No. 18 was under repair, there is no evidence that the No. 18 was ever taken out of service or that mine management assigned him another truck on their own initiative. Given these circumstances, it seems clear to me that the maintenance boss or foreman was aware of the conditions of the truck or they would not have offered the driver an option of driving another one. Rather than doing that, these foremen should have taken the truck out of service and made the necessary repairs. By not doing this, they exposed themselves to the actions taken by the inspector in this case and they did so at their own peril.

Mr. Barnett denied that any of the drivers ever specifically complained to him about the brake conditions on the trucks. However, when asked specifically about any complaints on the No. 10 truck during the period May through July 1981, he indicated that there "could have been some discussions" but "nothing that would have created a serious safety situation". As for the No. 18 truck, he claimed that this "was very much a surprise to me". However, on cross-examination, he confirmed that he was not completely unaware of the defective brake conditions on all of the trucks which were cited, that he was in fact aware of the brake conditions, and that his "awareness" came about as a result of his being in daily contact with the drivers and the equipment.

Upon being recalled for testimony on behalf of U.S. Steel, Mr. Oberg again reitereated that he depends on his drivers and mechanics to inform him of defective brake conditions, and if they do not report the defects to him, he has no way of knowing that defects need correcting. Again, the short answer to this is that the man in charge of vehicle maintenance should make it his business to know about those conditions, and if he has subordinates who fail in their obligations, appropriate management measures should be taken to correct such a situation.

In view of the foregoing, I conclude and find that the record here fully supports the inspector's findings that the two violations issued for the brake conditions on the No. 10 and 18 trucks resulted from U.S. Steel's

unwarrantable failure to comply with the requirements of mandatory safety standard section 56.9-2, and that this failure by U.S. Steel was a direct result of a lack of due diligence and a lack of reasonable care to insure that the defective brake conditions were corrected prior to the time they were cited by the inspector on July 6, 1981. Accordingly, Inspector Goodspeed's unwarrantable failure findings as to both section 104(d)(1) orders in issue ARE AFFIRMED.

IT IS FURTHER ORDERED that the section 104(d)(1) Order No. 0583639, is modified to a section 104(d)(1) citation, and as modified IS AFFIRMED. The subsequent section 104(d)(1) Order No. 9583638 is also AFFIRMED.

Civil Penalty Assessments

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

The parties stipulated that U.S. Steel is a large mine operator and that any reasonable penalties assessed for the violations in question will not adversely affect its ability to remain in business. I adopt these stipulations as my findings on these issues.

History of Prior Violations

The parties stipulated that for the 24-months prior to the issuance of the citations in issue in these proceedings six citations were issued at the mine in question. However, the computer print-out submitted by MSHA, exhibit G-1, containing a summary of the history of citations at the Keigley Quarry, reflects a total of 39 assessed violations and three paid violations for the period July 6, 1979 to July 5, 1981. Three of these assessed violations are for citations concerning section 56.9-2. While the apparent discrepancy here remains unresolved, for purposes of my civil penalty assessments they are not critical, and I cannot conclude that respondent's history of prior violations is such as would warrant any additional increases in the proposed penalties. As previously noted, I have considered the fact that the quarry has a commendable accident-free safety record insofar as trucks and brakes are concerned, and this is reflected in my penalty assessments.

Good Faith Compliance

The parties stipulated that all of the violations in these proceedings were abated in good faith, and I adopt this as my finding on this question.

Gravity

I conclude and find that the brake conditions cited as violations in the section 104(d)(1) citations were serious. The failure of the brakes to hold the trucks while they were in operation exposed both the drivers and possibly other miners to injuries which I believe were reasonably

likely to result from any accident resulting from the failure of the brakes to hold the trucks on the hills and inclines where they were driven. I also find that the violation affirmed in the imminent danger order was very serious and that an accident was highly likely to occur since the driver was unable to stop the truck while going five to ten miles an hour even after he applied two additional braking systems.

Negligence

I conclude and find that all of the violations resulted from the negligence of U.S. Steel to insure that the brake conditions on the cited trucks were corrected before the trucks were operated. As indicated earlier in my findings and conclusions, the quarry maintenance department should have been more alert to the conditions of the trucks, and rather than relying on the drivers and mechanics, should have taken the initiative to insure that trucks with defective brakes are taken out of service and repaired.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me as reasonable penalties for the violations which have been affirmed:

Citation No.	30 CFR Standard	Assessment	
104(a)-107(a) No. 0583637	56.9-2	$ 750	
104(d)(1) No. 0583639	56.9-2	$ 500	
104(d)(1) No. 0583638	56.9-2	$ 500	
		$ 1750	Total

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of these decisions and order, and upon receipt of payment by MSHA, these matters are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Robert A. Cohen, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Corp., 600 Grant St., Rm. 1580, Pittsburgh, PA 15230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PITT 79-11-P
	:	A.C. No. 36-00926-03001
v.	:	
	:	Homer City Mine
HELEN MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

ORDER TO PAY

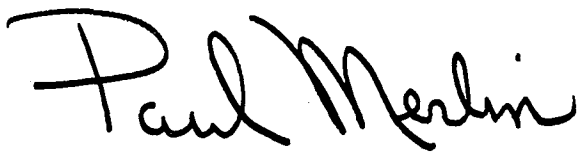
In accordance with the decision of the Court of Appeals for the District of Columbia Circuit the Commission remanded this matter. 4 FMSHRC 880 (1982). On August 11, 1982, the case was continued since the operator had filed a petition of certiorari with the Supreme Court. The Supreme Court now has denied the petition for certiorari. 74 L.Ed.2d 189 (1982).

In accordance with the decision of the Court of Appeals it must be held that a violation occurred. The only issue remaining for decision is the amount of penalty to be assessed. On January 27, 1983, the operator filed a motion to approve a settlement. The operator's motion sets forth the circumstances involved including the test case nature of this proceeding. A penalty of $20 was recommended. On January 31, 1983, the Solicitor filed a letter in agreement with the operator's motion.

After a review of the matter and especially in light of the unusual nature of this case which was brought to obtain a definitive interpretation of Section 103(f) of the Act, I conclude the recommended settlement should be approved.

ORDER

The operator is ORDERED to pay $20 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

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

Richard McMillan, Jr., Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 3 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. SE 81-43 AC No. 01-00550-03020
v.	:	Docket No. SE 81-44 AC No. 01-00550-03022
BURGESS MINING & CONSTRUCTION CORPORATION, Respondent	:	Boothton Mine

DECISION

APPEARANCES: George D. Palmer, Esq., Associate Regional Solicitor
United States Department of Labor, for Petitioner;

W.E. Prescott, III, Esq., for Respondent

Before: Judge William Fauver

These proceedings were brought by the Secretary of Labor under Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., for assessment of civil penalties for alleged violations of mandatory safety or health standards. The cases were consolidated and heard in Birmingham, Alabama.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent operated a surface coal mine known as Boothton Mine, in Alabama, which produced coal for sales in or substantially affecting interstate commerce.

2. Respondent closed down the mine operations in December, 1980. At the time of the inspection involved here, in November, 1980, the mine was active, its annual tonnage was about 23,738 tons of coal, and its employment was about 20 mining personnel.

Citation No. 749494

3. This citation charges a violation of 30 CFR § 77.1605(b), alleging that, "The brake was not adequately working on the No. 12-22 Cat. Road Grader 14G was being operated on the roads in 1420 pit." The citation actually refers to the parking brakes on the equipment. However, the standard cited does not require parking brakes on this kind of equipment. Section 1605(b) requires that mobile equipment shall be equipped with adequate brakes and that trucks and front-end loaders shall also be equipped with parking brakes. At the commencement of the hearing, Petitioner moved to amend the citation to substitute a different standard, § 77.404(a), which requires that equipment shall be maintained in safe operating condition. The motion to amend was denied. Petitioner stated that a violation could not be proved unless the motion to amend was granted. Accordingly, no evidence was offered on this citation and the citation was ordered to be dismissed.

Withdrawal Order and
Citation No. 750400

4. The citation charges a violation of 30 CFR § 77.1710(g), which requires:

(g) Safety belts and lines where there is a danger of falling ....

An employee was operating a large drill, weighing several tons, near the edge of the highwall. When observed by the inspector, the employee was holding on to the drill with one hand and operating it with the other hand. He was standing about one foot from the edge of the highwall, which was a steep drop of about 75 feet. He was not wearing a safety belt or other kind of protection to prevent a fall down the highwall. The inspector issued an imminent danger withdrawal order and citation. The alleged violation was abated by removing the drill from the edge of the highwall and issuing the employee a safety belt.

5. The condition observed by the inspector constituted an imminent danger. The condition was readily observable and could have been prevented by the exercise of reasonable care. The factual allegations in the citation and order were proved by a preponderance of the evidence.

Citation No. 751050

6. The citation alleges a violation of 30 CFR § 77.400, which provides in subsections (a) and (b):

(a) Gears: sprockets; chains, drive, head, tail, and takeup pulleys; fly wheels; couplings; shafts; sawblades fan inlets; and similar exposed moving machine parts which may cause injury to persons shall be guarded....

***

(b) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

7. The citation charges that, "A guard was not provided between the master clutch and the drag drum on the 480 dragline. The oiler travels daily between the clutch and the drum to grease." The factual allegations of the charge were proved by a preponderance of the evidence. A large clutch device, about 3 to 4 feet in diameter, with a general appearance of a fly wheel, was unguarded on each side. The outside part of the wheel revolved at a swift speed, perhaps 200 rpm, and presented a serious danger to the oiler, who could have become entangled in the moving equipment without a guard.

Citation No. 751052

8. The citation charges a violation of 30 CFR § 77.205(e), which provides:

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

The factual allegations of the charge were proved by a preponderance of the evidence. An elevated walkway in the upper structure of the 480 drag-line was about 20 feet above the top of the house body of the dragline. The inside of the walkway was unguarded. There were metal structural support pieces along the inside of the walkway, but these left openings sufficient for a person to fall through. This condition constituted a serious hazard.

9. The citation charges a violation of CFR § 77.1302(b), which provides:

(b) Vehicles containing explosives or detonators shall be maintained in good condition and shall be operated at a safe speed and in accordance with all safe operating practices...

The citation charges that a power truck used to transport explosives was not maintained in good condition in that the tie rod ends were worn out and the steering section was loose on the frame. The inspector testified that the steering box was so "loose ... you could shake it with your hand" and threatened to come off at any time. If it fell off, the operator would have lost control of the vehicle. The factual allegations of the charge were proved by a preponderance of the evidence. This condition presented a serious safety hazard.

Citation No. 751057

10. The citation charges a violation of 30 CFR § 71,402(a), which provides:

(a) All bathing facilities, change rooms, and sanitary flush toilet facilites shall be provided with adequate light, heat, and ventilation so as to maintain a confortable air temperature and to minimize the accumulation of moisture and odors, and the facilities shall be maintained in a clean and sanitary condition....

The factual allegations of the charge were proved by a preponderance of the evidence. The bathing and toilet facility was dirty, smelled very bad, and had inadequate lighting in that some of the light bulbs in the shower area were burned out. The condition was unsanitary and unsafe.

Citation No. 753705

11. The citation charges a violation of 30 CFR § 77.1002, which provides:

> When box cuts are made, necessary precautions shall be taken to minimize the possibility of spoil material rolling into the pit.

The box cut involved is shown in Exhibits G-4 and G-5. Exhibit G-5 is a photograph from the drag-line and loader area and pictures the box cut made by the drag-line with the spoil material on the right side of Exhibit G-5. Exhibit G-4 pictures the same spoil material from the opposite side of the box cut; that is, G-4, was taken from the left-side perspective of G-5. The road for the coal trucks was next to the spoil bank as shown in Exhibit G-5.

12. The MSHA inspectors observed rocks rolling off the spoil bank into the pit where the road was being used by the coal trucks and further noticed a "big crack" in the spoil bank which "could have caved off on the vehicles ... (and) just covered them up." The inspectors ordered the hauling stopped immediately. Since only five or six loads were left to haul out of this particular box cut, the inspectors permitted the operator to move the hauling road to the opposite side of the pit and complete the hauling while the inspectors carefully observed. The box cut was then closed. If the box cut had been originally cut smaller, the amount of the spoil would not have been so large as to create this problem in the first place. Another alternative would have been to put some of the spoil on the other side of the box cut. The factual allegations of the charge were proved by a preponderance of the evidence.

Citation No. 754282

13. The citation charges a violation of 30 CFR § 77.1109(c)(1), which provides:

> (c)(1) Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

The citation alleges that the Mark M 3200 coal hauler was not equipped with at least one portable fire extinguisher. The parties stipulated that this violation occurred.

Citation No. 754283

14. The citation charges a violation of 30 CFR § 77.1605(a), which provides:

> (a) Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

The front cab window on a Clark 275B Front End Loader had two shattered breaks, with "spider lines" radiating from them. The breaks obstructed part of the view through the window and presented a hazard of glass falling upon the operator. The factual allegations of the charge were proved by a preponderance of the evidence.

15. Concerning each of the charges in Fdgs. 4-14, the condition was readily observable and could have been prevented or corrected by the exercise of reasonable care before the time of the inspection.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of the above proceedings.

2. The Secretary failed to prove a violation as charged in Citation No. 749494. As to each of the other citations involved, Respondent violated the the safety or health standard as charged.

3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety or health standard, Respondent is assessed the following civil penalties:

Citation	Civil Penalty
No. 750400 (including withdrawal order)	$530.00
No. 751050	114.00
No. 751052	150.00
No. 751053	180.00
No. 751057	78.00
No. 753705	106.00
No. 754282	66.00
No. 754283	60.00

Proposed findings of fact or conclusions of law inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that:

1. The charge based on Citation No. 749494 is DISMISSED.

2. The Respondent, Burgess Mining & Construction Corporation, shall pay the Secretary of Labor the above-assessed civil penalties, in the amount of $1,284.00, within 30 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

George D. Palmer, Esq., Office of the Solicitor, US Department of Labor, 1929 South Ninth Ave., Birmingham, AL 35256

W.E. Prescott III, Esq., Burgress Mining & Construction Corp., PO Box 26340, Birmingham, AL 35226

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 3 1983

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 82-209-R Citation No. 864590; 2/16/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Blacksville No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 82-245 A.C. No. 46-01867-03102
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
UNITED MINE WORKERS OF AMERICA, Representative of the Miners	:	

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, appeared for Consolidation Coal Company;
Janine C. Gismondi, Esq., and Matthew J. Reider, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, appeared for the Secretary of Labor;
The representative of the miners did not appear at the hearing. A brief was filed on behalf of the miners representative by Mary Lu Jordan, Esq., Washington, D.C.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The Secretary issued a citation on February 16, 1982, under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a), charging a violation of 30 C.F.R. § 100(a). The citation was based on samples of respirable dust collected by Consol (the operator) on 5 successive days - January 20 through January 24, 1982, which had an average concentration of respirable dust of 4.1 milligrams per cubic meter of air (4.1 mg/m3). The citation charged that the violation was of such nature as could significantly

and substantially contribute to the cause and effect of a mine safety or health hazard. The operator admits the violation of the standard but contests the propriety of the significant and substantial finding.

Pursuant to notice the case was heard in Washington, Pennsylvania, on November 9 and 10, 1982. Barry L. Ryan, Thomas K. Hodous, M.D., William Sutherland and Thomas Tomb testified on behalf of the Secretary of Labor. Earl Kennedy and Warfield Garson, M.D. testified on behalf of the operator. Post-hearing briefs have been filed by the Secretary, the operator and the Representative of the Miners.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Consolidation Coal Co. was the owner and operator of the Blacksville No. 1 Mine located in Monongalia County, West Virginia. The operation of the subject mine affects interstate commerce. Consol is a large operator.

2. The subject mine had a history of 554 paid violations of mandatory health and safety standards in the 2-year period from February 16, 1980 to February 15, 1982. Three hundred seventy three of these violations were designated significant and substantial.

3. Payment of the proposed penalties in this case will not impair Consol's ability to continue in business.

4. During the 12 months prior to February 16, 1982, MSHA did not issue any citations for respirable dust violations for section 026 (the section involved in this case) of the subject mine. No citations charging respirable dust violations were issued for the section between February 17, 1982 and November 9, 1982, the date of the hearing in this case.

5. During the 2 years prior to November 9, 1982, two citations were issued for alleged ventilation violations on section 026 of the subject mine.

6. The dust controls on section 026 including high pressure water sprays, and a new 40 horsepower auxiliary fan, were generally very effective.

7. The dust samples taken from section 026 during 18 months or 2 years prior to the citation contested herein averaged approximately .4 mg/m3 to .7 mg/m3. The section had one of the best dust control records of any working section in Northern West Virginia.

8. The five required samples for the bi-monthly period January and February 1982 for the continuous miner operator in section 026 of the subject mine showed respirable dust levels of 8.1, 0.4, 5.1, 6.3 and 0.7 mg/m3 on January 20, 21, 22, 23 and 24. The average concentration for the five samples was thus 4.1 mg/m3.

9. The operator wrote a note on two of the samples asking MSHA to check for contamination, rock dust and oversized particles.

10. MSHA did not microscopically check any of the samples involved, based on MSHA policy of not microscopically examining samples with less than an MRE equivalent of 8.6 mg.

11. Citation No. 864590 was issued on February 16, 1982, charging a violation of 30 C.F.R. § 70.100 because of the average respirable dust concentration of 4.1 mg/m3 in the samples submitted. The violation was cited as significant and substantial based on MSHA policy that violations charging overexposure to respirable coal mine dust are normally considered significant and substantial.

12. The citation was terminated when five valid samples were collected during five consecutive production shifts, and submitted to MSHA showing an average concentration of respirable dust of less than 2.0 mg/m3. The termination was issued on March 5, 1982. No changes were made in ventilation or mining procedures following the issuance of the citation. The samples showed respirable dust concentrations of 0.2, 0.5, 0.7, 0.8 and 0.2.

13. There is no evidence in this record concerning the mining employment history of the miner or miners whose environment was measured by the respirable dust samples which resulted in the citation involved herein. 1/

14. The sampling device used by the operator is designed to collect the coal mine dust that will be deposited in the human lung. It is so designed that essentially no dust particles greater than 7.1 microns in size pass through the filter; approximately 50 percent of the particles 5 microns in size and 98 percent of the particles one micron in size pass through the filter. It collects all the dust in the atmosphere, including coal dust, rock dust (limestone), mica, kaolin and silica to the extent that any of these elements is present in the atmosphere being sampled. There is no evidence in this record concerning the nature of the dust in the samples involved herein. I am assuming that the samples contained coal dust, but am not able to assume they contained rock dust, mica, kaolin or silica.

15. The sampling devices are not foolproof however, and can pick up oversized non-respirable particles. They are subject to misuse, deliberate contamination, improper miner work habits, defective parts, etc. The operator is required to submit the samples to MSHA even if one of these potentially distorting factors is observed. There is no evidence in this record that the samples which resulted in the citation involved herein were affected by misuse, deliberate contamination, improper miner work habits, or defective equipment.

1/ "Still we know how Day the Dyer works, in dims and deeps and dusks and darks." J. JOYCE, FINNEGANS WAKE, 226 (1939).

16. Some medical and mortality studies have suggested an increasing risk of stomach cancer among coal miners. The studies are inconclusive, however, and there is no present evidence linking this disease to exposure to respirable coal mine dust.

17. Coal miners who are exposed to silica dust, those whose jobs require cutting through rock or throwing sand on haulage tracks, have an increased risk of contracting silicosis. Some studies have shown that other coal miners have an increased risk of silicosis, but these are inconclusive.

18. Silicosis is an aggressive, serious lung disease which can result from short term exposure to high levels of silica dust. It can lead to tuberculosis, heart failure and death.

19. Chronic bronchitis is a chronic productive cough and can be caused by any bronchial and lung irritant. It most commonly results from cigarette smoking but can be caused by the deposition of coal dust in the larger or smaller airways of the lung. It results in some loss of lung function. It may be disabling to some degree though not in all people. It can result in increased susceptibility to colds or other respiratory infections. In susceptible individuals, bronchitis can result from relatively short term exposure to coal mine dust - that is from exposure of 6 to 12 months. Studies have indicated that approximately 3 or 4 percent of new miners subjected to respirable coal mine dust in the 2.0 mg/m3 range will develop symptoms of bronchitis in a 12-month period. After a 24-month period, approximately 12 percent of such miners showed symptoms of bronchitis. Exposure to respirable coal mine dust levels of 4.1 mg/m3 over a 5-day period would not in itself cause or significantly contribute to the development of chronic bronchitis.

20. Coal workers pneumoconiosis is a lung disease caused by the deposition of coal dust on the human lung and the body's reaction to it. The dust accumulates in the small airways and the macrophagia of the lungs are unable to clear it. Continuous exposure to coal dust may cause the condition to spread and to involve most parts of the lung. In some individuals the condition may progress to progressive massive fibrosis which involves the destruction of alveoli and distortion of the remaining lung tissue.

21. Simple coal workers' pneumoconiosis usually is asymptomatic. It is diagnosed by x-ray examination. Progressive massive fibrosis or complicated coal workers' pneumoconiosis commonly causes symptoms of shortness of breath and cough. It can cause severe pulmonary impairment and early death.

22. Both simple coal workers' pneumoconiosis and progressive massive fibrosis are chronic diseases and there is no known treatment which can reverse the disease process. In the case of simple pneumoconiosis, removing the afflicted person from the offending exposure will prevent further progression. This is not true of progressive massive fibrosis which may cause further lung deterioration without continued exposure to coal dust.

23. Approximately 11 percent of new miners with healthy lungs (category 0/0) who are exposed to respirable dust levels of 4.1 mg/m3 will contract simple coal workers' pneumoconiosis (category 1/0) if the exposure continues over a working life. Approximately 3 or 4 percent of such miners will develop category 2/1 pneumoconiosis, and approximately 1 percent will develop progressive massive fibrosis. A miner with category 1/0 pneumoconiosis who is exposed to respirable dust levels of 4.1 mg/m3 has approximately five times greater risk of progression than a miner with category 0/0. Approximately 8 percent of miners who have category 2/1 coal workers pneumoconiosis will develop progressive massive fibrosis with continued exposure to coal mine dust.

24. Exposure to average respirable coal mine dust levels of 4.1 mg/m3 over a 5-day period would in itself not cause coal workers' pneumoconiosis and its effect on the development of the disease would be miniscule.

DISCUSSION

The medical evidence upon which Findings of Fact 16 through 24 are based is generally in agreement. Dr. Garson who testified on Consol's behalf was less positive on the relationship of bronchitis to exposure to respirable dust than was Dr. Hodous who testified for the government. But when Dr. Garson was asked:

> Q. At the present time is there any accepted scientific or medical agreement that bronchitis is caused by excessive levels of respirable dust?

he answered:

> A. I think most reasonable pulmonary physicians and occupational physicians suspect there is. They also know doggone well that there are many instances that you can clearly define that it isn't. Our problem is we really can't tell.
>
> * * * * * * *

(Tr. 467-468).

Dr. Hodous testified that an exposure to respirable dust levels of 4.1 mg/m3 for a 2-month period "would significantly or at least play some role in increasing the chance of getting chronic bronchitis. How much that would be, would be very difficult to say." (Tr. 117).

Dr. Hodous and Dr. Garson were in general agreement on the question of the relationship of dust exposure to coal workers' pneumoconiosis.

STATUTORY PROVISIONS

Section 104(a) of the Mine Act provides:

(a) 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.

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

(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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

Section 104(e) of the Act provides:

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

Section 202 of the Act provides in part:

(a) Each operator of a coal mine shall take accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed. Such samples shall be taken by any device approved by the Secretary and the Secretary of Health, Education, and Welfare and in accordance with such methods, at such locations, at such intervals, and in such manner as the Secretaries shall prescribe in the Federal Register within sixty days from the date of enactment of this Act and from time to time thereafter. Such samples shall be transmitted to the Secretary in a manner established by him, and analyzed and recorded by him in a manner that will assure application of the provisions of section 104(i) of this Act when the applicable limit on the concentration of respirable dust required to be maintained under this section is exceeded. The results of such samples shall also be made available to the operator. Each operator shall report and certify to the Secretary at such intervals as the Secretary may require as to the conditions in the active workings of the coal mine, including, but not limited to, the average number of working hours worked during each shift, the quantity and velocity of air regularly reaching the working faces, the method of mining, the amount and pressure of the water, if any, reaching the working faces, and the number, location, and type of sprays, if any, used.

(b) Except as otherwise provided in this subsection--

(1) Effective on the operative date of this title, 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 3.0 milligrams of respirable dust per cubic meter of air.

(2) Effective three years after the date of enactment of this Act, 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.

REGULATORY PROVISIONS

30 C.F.R. § 70.100(a) provides:

(a) 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 each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

30 C.F.R. § 70.201 provides in part:

(a) Each operator shall take respirable dust samples of the concentration of respirable dust in the active workings of the mine as required by this part with a sampling device approved by the Secretary and the Secretary of Health, Education, and Welfare under Part 74 (Coal Mine Dust Personal Sampler Units) of this title.

(b) Sampling devices shall be worn or carried directly to and from the mechanized mining unit or designated area to be samplied and shall be operated portal to portal. Sampling devices shall remain operational during the entire shift or for 8 hours, whichever time is less.

30 C.F.R. § 70.202 and 70.203 provide:

§ 70.202 Certified person; sampling.

(a) The respirable dust sampling required by this part shall be done by a certified person.

(b) To be certified, a person shall pass the MSHA examination on sampling of respirable coal mine dust.

(c) A person may be temporarily certified by MSHA to take respirable dust samples if the person receives instruction from an authorized representative of the Secretary in the methods of collecting and submitting samples under this rule. The temporary certification shall be withdrawn if the person does not successfully complete the examination concluded by MSHA on sampling of respirable coal mine dust within six months from the issue date of the temporary certification.

§ 70.203 Certified person; maintenance and calibration.

(a) Approved sampling devices shall be maintained and calibrated by a certified person.

(b) To be certified, a person shall pass the MSHA examination on maintenance and calibration procedures for respirable dust sampling equipment.

(c) A person may be temporarily certified by MSHA to maintain and calibrate approved sampling devices if the person received instruction from an authorized representative of the Secretary in the maintenance and calibration procedures for respirable dust sampling equipment under this rule. The temporary certification shall be withdrawn if the person does not successfully complete the examination conducted by MSHA on maintenance and calibration procedures within six months from the issue date of the temporary certification.

30 C.F.R. § 70.207(a) provides:

> (a) Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days. The bimonthly periods are:
>
> January 1 - February 28 (29)
> March 1 - April 30
> May 1 - June 30
> July 1 - August 31
> September 1 - October 31
> November 1 - December 31

ISSUES

1. May a citation issued under section 104(a) of the Act properly contain a finding that the violation is significant and substantial?

2. Was the violation which occurred in this case of a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard?

> (a) Do the surrounding facts and circumstances concerning the taking of respirable dust samples preclude a finding of a "significant and substantial" violation?
>
> (b) Does the medical evidence support a finding of a significant and substantial violation under the National Gypsum 2/ test?

3. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Consolidation Coal Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Blacksville No. 1 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

2. Consolidation Coal Company was in violation of the mandatory standard in 30 C.F.R. § 70.100(a) by reason of the fact that it failed to maintain an average concentration of respirable dust in the mine atmosphere to which its continuous miner operator was exposed in January and February 1982 at or below 2.0 milligrams of respirable dust per cubic meter of air.

2/ Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

DISCUSSION

Although the operator raised questions in its evidence and its cross-examination of government witnesses concerning the accuracy and reliability of the dust sampling procedures followed by MSHA, it does not contest the fact of violation.

3. It is appropriate where warranted by the factual circumstances for an inspector to find a significant and substantial violation when he issues a citation under section 104(a).

DISCUSSION

The operator argues that the Mine Act "does not permit the designation 'significant and substantial' to be applied to" a citation issued under section 104(a). The argument is based on the fact that the terms significant and substantial are not contained in section 104(a) but are contained in 104(d). However, in order that a citation be issued under section 104(d), it must be "significant and substantial" and be caused by the operator's unwarrantable failure to comply. If a violation is in fact significant and substantial and not caused by unwarrantable failure, I find nothing in the Act which prohibits a citation from indicating the significant and substantial character of the violation. Section 104(e) which refers to a pattern of significant and substantial violations does not refer to unwarrantable failure, and I conclude that citations issued under section 104(a) may be part of a pattern if they are significant and substantial.

It does not appear that the issue was raised, but I note that each of the citations challenged in Secretary v. Cement Division, National Gypsum Company, supra was issued under section 104(a) of the Act. In discussing the test for significant and substantial, the Commission did not indicate that such a finding was prohibited in a citation issued under 104(a).

4. The violation found in conclusion of law No. 2 was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine health hazard.

DISCUSSION

A. The National Gypsum test

In Secretary v. Cement Division, National Gypsum Company, supra, the Commission seems to have enuciated two tests for determining whether a violation is significant and substantial. At 4 FMSHRC 825, it states that "a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Emphasis added). On page 827 the Commission states

that "a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health." (Emphasis added). The first test focuses on the hazard which the violation "contributes to"; the second on the causal relationship between the violation and a danger to safety or health. Each of the nine citations before the Commission in National Gypsum charged a safety violation. There is no indication in the Commission decision that it considered whether health hazards related to long term exposure would fit its definition (the dissenting opinion, however, did allude to the difficulty of applying the test to health hazards. Id, 834).

B. The Medical Evidence

It is clear that the exposure covered by the dust samples which resulted in the citation herein in itself would neither cause nor significantly contribute to chronic bronchitis (Finding of Fact No. 19) or coal workers pneumoconiosis. (Finding of Fact No. 24). It is also clear that longer exposure to the same dust levels can in a significant number of instances cause or significantly contribute to chronic bronchitis (6 to 12 months. See Finding of Fact No. 19) or to coal workers pneumoconiosis (a working life. See Finding of Fact No. 23). There is no question that chronic bronchitis and coal workers' pneumoconiosis are illnesses "of a reasonably serious nature." There is no question that each unit of exposure time is important in contributing to the disease. I think it would be illogical and unrealistic to hold that a serious disease results from a long series of insignificant and unsubstantial exposures. Dr. Hodous testified that the disease results from "an aggressive accumulation of dust and every drop in the bucket hurts." How much the drop will hurt may depend in part on the status of the bucket when the drop falls. If the bucket is full or nearly full, the drop may cause it to overflow. If a miner has worked 20 or 30 years in an underground coal mine, a 2 month exposure 3/ to excessive dust 4/ may be enough to cause the first signs of coal workers' pneumoconiosis, 5/ or to transform simple pneumoconiosis to a complicated form of the disease and possibly lead to progressive massive fibrosis. If the bucket is empty when the drop falls, in itself it won't mean much. If the miner exposed to excessive dust for a 2-month period is a new miner with healthy lungs, he probably will not be adversely affected, if his exposure stops. But if the exposure continues for 20 years (6 2-month periods each year), that miner too will be at risk to contract black lung. (Tr. 167).

3/ It must be assumed that the samples represent the average dust levels for the 2-month sampling period. So the dust exposure charged in the citation is not 3 days or 5 days but 2 months.

4/ 4.1 mg/m3 is more than twice the allowable maximum dust level. It is a substantial overexposure.

5/ The fact that simple coal workers' pneumoconiosis is in general asymptomatic does not mean that it is not a serious disease. As Dr. Hodous pointed out, lung cancer is asymptomatic in most people for about 5 years.

I conclude that every drop in the bucket, every two month sampling period where excessive dust is present, significantly and substantially contributes to a health hazard--the hazard of contracting chronic bronchitis or coal workers' pneumoconiosis. To the extent that this conclusion is inconsistent with the National Gypsum decision, I am persuaded the inconsistency results from the Commission's failure to consider the impact of the decision on occupational health hazards due to long term exposure. 6/

C. The Legislative History of the Coal Act and the Mine Act

The 1969 Coal Act was prompted by a 1968 mine disaster in Farmington, West Virginia and by the "countless thousands (who) have suffered or died or presently suffer and die from the ravages of coal workers' pneumoconiosis - the dread miners disease caused by the inhalation of excessive amounts of coal dust." House Report No. 91-563, 91st Cong. 1st Sess. (1969) reprinted in LEGISLATIVE HISTORY FEDERAL COAL MINE HEALTH AND SAFETY ACT, 558 (1970). The comprehensive scheme for reducing dust exposure in coal mines in section 201 through 205 of the Coal Act and in compensating miners who have become disabled because of pneumoconiosis and their survivors in sections 401 through 424 of the Coal Act show beyond argument that Congress considered overexposure to coal mine dust to be a very serious national problem. It would be impossible to reconcile this fact with an interpretation of the statute finding such overexposure other than significant and substantial. The 1977 Mine Act repeated the emphasis on reducing respirable dust levels with minor changes. The declaration of purposes of the Act in Section 2 states in subsection (e) that "there is an urgent need to provide more effective means . . . for improving working conditions . . . in mines in order to prevent occupational diseases originating in such mines." One of the means provided in the 1977 Act is the pattern of violations provision in section 104(e). This provision can be made effective to prevent occupational pneumoconiosis only if violations of dust standards can be cited as significant and substantial.

5. The violation was serious. The foregoing discussion demonstrates that the violation was serious.

6. There is no evidence that the violation resulted from the negligence of the operator.

7. The operator's history of prior violations is moderate.

8. The payment of a penalty in this case will not affect the ability of the operator to continue in business.

9. An appropriate penalty for the violation is $150.

6/ See Secretary v. U.S. Steel, _____ FMSHRC _____ (issued January 13, 1983) (Judge Kennedy) and the cases cited therein.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the notice of contest is DENIED. IT IS FURTHER ORDERED that the citation No. 864590 issued on February 16, 1982, and charging a significant and substantial violation of 30 C.F.R. § 70.100 is AFFIRMED.

IT IS FURTHER ORDERED that the operator, Consolidation Coal Company shall within 30 days of the date of this order pay a penalty in the amount of $150 for the violation found herein.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

Janine C. Gismondi, Esq., and Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FMC CORPORATION, Contestant	:	Contest of Citation or Order
v.	:	Docket No. WEST 82-154-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and UNITED MINE WORKERS OF AMERICA, Respondents	:	Citation No. 577554; 3-18-82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 83-10-M(b)
v.	:	A. C. No. 48-00152-05504
FMC CORPORATION, Respondent	:	FMC Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary; John A. Snow, Esq., Salt Lake City, Utah, for FMC Corporation.

Before: Judge Lasher

A hearing on the merits was held in Green River, Wyoming, on November 16 and November 17, 1982. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This matter is comprised of a contest proceeding filed by FMC Corporation (herein FMC) on April 20, 1982, under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq. (herein the Act), and a civil penalty proceeding initiated by the Secretary of Labor on November 16, 1982 (by delivery to me at the hearing), by the filing of a proposal for penalty pursuant to Section 110 of the Act.

The foundational document involved in both proceedings, which were consolidated for hearing and decision by my order at the commencement of the hearing, is a Citation and Order of Withdrawal numbered 577554 which was issued by MSHA Inspector William W. Potter on March 18, 1982. The allegedly violative condition described in the Citation and Order of Withdrawal is that:

> "The swing shift hoistman on #2 hoist has been operating this hoist without a current physician's certificate. This hoistman was last examined and approved on February 2, 1981, this approval expired on February 2, 1982. This hoistman has continued to operate this hoist to this date. This hoistman had another examination on February 15, 1982, and was found not qualified by Dr. Elmer S. McKay. The company continued to let this hoistman perform his duties as a hoistman on #2 hoist."

The Citation and Order of Withdrawal charges FMC with a violation of 30 CFR 57.19-57 which provides:

> "No person shall operate a hoist unless within the preceding twelve months he has had a medical examination by a qualified, licensed physician who shall certify his fitness to perform this duty. Such certification shall be available at the mine."

The general issue involved in this matter is whether a violation of the above-quoted standard occurred as alleged by Inspector Potter. FMC contends that the subject safety standard applies only to hoists which are used to hoist persons as distinguished from hoists which are used to hoist ore. The resolution of this issue necessitates an interpretation of the standard above-quoted as well as the two-paragraph preamble to 30 CFR 57.19 which provides: 1/

> "The hoisting standards in this section apply to those hoists and appurtenances used for hoisting persons. However, where persons may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied.
>
> Emergency hoisting facilities should conform to the extent possible to safety requirements for other hoists and should be adequate to remove the persons from the mine with a minimum of delay."

During the hearing the parties provided stipulations with respect to the nature of the FMC Mine wherein the alleged violation occurred, jurisdictional agreements and stipulations with respect

1/ Section 57.19 is labeled "Man Hoisting".

to four of the six statutory penalty assessment criteria. In addition to Inspector Potter, two other witnesses testified for the Secretary of Labor (herein the Secretary), Ralph Portillo, the hoistman who was the central figure in this litigation, and Albert Battisti, President of Local Union 13214, United Steel Workers Union.

On March 18, 1982, Inspector Potter issued the subject Citation and Order of Withdrawal based on records provided by FMC, particularly a hoistman decertification by Dr. Elmer S. McKay (Exhibit M-1) which stated: "This is to certify that Ralph Portillo has this date 2-5-82 been examined by me and is hereby physically qualified to not perform the duties of a hoistman as required by standard 57.19-57 of the Mine Safety and Health Act." An additional typed notation on the decertification indicated: "Because of this man's hearing loss he should not be a hoistman without a hearing aid. (Please test after he gets a hearing aid and without noise exposure for sixteen (16) hours.)"

Although the McKay decertification of hoistman Portillo was issued on or about February 5, 1982, FMC permitted Mr. Portillo to continue in the exercise of his hoistman duties at shaft #2 at the FMC Mine located at Westavaco, Wyoming, until the Citation and Order of Withdrawal was issued on March 18, 1982.

There are eight shafts at this mine, Numbers 1 and 6 are ventilation shafts, Numbers 5, 7, and 8 are shafts where "men and materials" are hoisted, and shafts Numbers 2 and 4 are used to hoist ore. Shaft Number 3 is in the process of being closed down and has no particular significance in this proceeding. Although shaft Number 4 is used to hoist ore, unlike shaft Number 2 no hoistman is necessary since it is a more modern feat of construction.

The Number 2 shaft is not used for hoisting men and at all times material herein was used solely for hoisting ore except when inspections of the shaft were conducted or repairs on the shaft were conducted. The frequency of the hoist at shaft Number 2 being used to hoist men into and out of the shaft to make repairs or inspections is three or four times annually.

Approximately twenty hoistmen are employed at the FMC Mine; it is not the policy of FMC to substitute one hoistman for another in the sense that it is not its policy to substitute "ore" hoistmen for "man" hoistmen (see testimony of Albert Battisti). FMC, however, maintains its right to exercise the option to substitute hoistmen even though in practice this is rarely done.

The Number 2 shaft which is the only shaft requiring a hoistman where the hoist is used solely for handling ore was not at the times material herein part of FMC's emergency

evacuation plan, although in an emergency all hoists, including the one at shaft #2, presumably would be used for escape purposes.

Mr. Portillo, who is sixty-one years old, was not advised by FMC management, including his immediate supervisor, Foreman Gary Hornsby, that he was not to hoist men (persons). Mr. Portillo during the period of February 5, 1982, through March 18, 1982, in fact did not operate the hoist at shaft #2 or any other shaft to hoist persons.

After receipt of the McKay decertification of Mr. Portillo, FMC management told Gary Hornsby, who was the immediate supervisor of all of FMC's twenty hoistmen on all three shifts that worked at the FMC Mine, that Mr. Portillo was to be used only on the #2 shaft and that he was not to hoist men.

Following the issuance of the Citation and Withdrawal Order, Mr. Portillo was given non-hoistman duties for approximately one week. Thereafter, Mr. Portillo was sent by FMC for further hearing tests at the University of Utah and was fitted with a hearing aid by an audiologist in Salt Lake City after which the FMC Medical Department certified Mr. Portillo as fit for the duties of a hoistman by issuance of a "hoistman certification" stating: "This is to certify that Ralph Portillo has this date 3-26-82 been examined by me and is hereby physically qualified to perform the duties of a hoistman as required by standard 57.19-57 of the Mine Safety and Health Act." A handwritten note at the bottom of the certification stated in addition: "Must wear his hearing aids when working or operating hoist." (Exhibit C-3).

At the time Mr. Portillo was decertified--on or about February 5, 1982--FMC had been using new hearing testing equipment as part of the annual examination given the hoistmen. Nine of the twenty hoistmen were detected to have hearing problems of one kind or another. Because this was unusual, FMC questioned the results of the tests and conducted an investigation into various aspects of the situation. It also reevaluated the range of hearing that was required for the satisfactory performance of hoistman duties and sent at least six of the nine hoistmen at different times for additional hearing tests in the manner that Mr. Portillo was sent for additional testing. As a result of its investigation the equipment and testing procedures were found to be satisfactory and FMC's management concluded that the situation resulted because in past years the hearing deficiencies discovered were not of sufficient severity to be disqualifying.

The last time Mr. Portillo operated a hoist to hoist men was in January of 1982 when he was assigned to operate the hoist at the #7 shaft when the hoistman there was not available

for duty. Mr. Portillo operated the #7 shaft hoist for approximately two days. The #7 shaft hoist can be operated both manually and on automatic, whereas the #2 shaft hoist is an automatic hoist. Mr. Portillo was not using a hearing aid in January of 1982.

The #2 shaft hoist, which also can be operated manually when men are being hoisted, is the hoist at which Mr. Portillo had been assigned for several years prior to 1982. Although there is a "bonnet" over the ore skip on the #2 shaft which is used when a hoist is used to carry men when inspections are conducted and repairs are made, the #2 hoist is not designed to carry men as are other hoists. So-called man hoists are required to have a canopy and to be enclosed.

The #2 shaft hoist is not an "emergency hoisting facility" as that term is used in the second paragraph of the preamble to 30 CFR 57.19-57.

There was no evidence of record establishing special or unique conditions or circumstances in connection with or peculiar to the #2 shaft and/or the hoist at the #2 shaft which would endanger persons.

DISCUSSION

FMC contends that 30 CFR 57.19 applies only to man hoists. I find this contention meritorious. The heading of Section 57.19 is entitled "Man Hoisting". The numerous safety standards which follow the preamble to Section 57.19, i.e. 57-19-1 through 57.19-135, reflect that the drafters of these standards were fully aware of the distinction between man hoists and hoists which are used for handling ore and other materials. It is clear that by using the specific limitation of "man" hoisting in establishing the category of subjects to be covered by these various safety standards that the drafters intended to limit the coverage of these standards to hoists which handled men and not other hoists. Thus the general category "hoisting" would have been used if all hoists were intended to be covered. This view is further reinforced by a consideration of the general subjects covered by part 57 of 30 CFR where the specific category "57.19, Man Hoisting" appears as an exclusive category, and not part of any other subject matter related to hoisting in general.

My colleague, Judge Charles C. Moore, Jr., in a grouping of combined contest proceedings and penalty proceedings, (Docket Nos. WEST 82-72-RM through 79-RM; and WEST 82-134-M, 135-M, 172-M, and 183-M) dealing with the same mine, also found the necessity to recognize the difficulty of interpretation posed by the preamble to Section 57.19. Unless a reasonable construction of the coverage of these hoisting standards is reached then indeed the argument made by FMC in this matter that enforcement

of the standards to ore hoisting would be a denial of due process may well have merit. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of the law. Connally v. General Construction Co., 269 U.S. 385, 391 (1925).

After considerable deliberation I conclude that the saving grace of the preamble to Section 57.19 is its manifest purpose in specifying the coverage, or at least in attempting to specify the coverage of the subsequent standards which follow it relating to man hoisting. In concluding that the 57.19 standards apply only to man hoists and not to ore hoists, it must also be noted that there are two exceptions to this limitation: One, for emergency hoisting facilities, and two, where persons may be endangered by ore hoists.

The Secretary contends that of its three theories of liability in this case the preamble supports two of them. First, that the operation of the hoist at the #2 shaft by an uncertified hoistman is a violation because--within the meaning of the first paragraph of the preamble--persons may be endangered. The factual foundation of this theory is that those subjected to the hazard are men engaging in inspections and making repairs. I find, however, that there is no evidence in the record of any special or separate condition, practice or circumstance which would trigger the operation of this (endangering persons) exception to the general limitation of the hoisting requirements to man hoists. Thus for the medical certification requirement of Section 57.19-57 to become operable it first must be shown that there's some condition or practice or other factor involved in the operation of an ore hoist, such as the shaft #2 hoist, which would create a hazard calling for bringing into operation an appropriate standard among those specific standards which were intended to apply to man hoists only. Accordingly, I conclude that this theory, based upon the first exception of the preamble to the limitation of the standards to man hoists, is not applicable.

The Secretary's second theory that a violation occurred is based upon the second paragraph of the preamble and rests upon the testimony primarily of Albert Battisti, the President of Local Union 13214, to the effect that should an emergency situation occur every shaft might have to be used for escape purposes. However, the record is clear that shaft #2 is not part of the mine operator's emergency evacuation plan and has received no designation or other particular recognition as an emergency hoist. I conclude that it is not an "emergency hoisting facility" which must conform to the extent possible to the safety requirements for man hoists under Section 57.19 and its sub-paragraphs. Even were one to conclude that shaft

#2 is an emergency hoisting facility the language of the pertinent paragraph of the preamble is sufficiently vague to leave it unascertainable whether or not Section 57.19-57 is one of the standards which should be applied to it. The phrase "to the extent possible" carries with it a tenor of a guideline rather than a mandatory standard. 2/

The Secretary's third theory of violation is that the #2 shaft hoistman, Mr. Portillo, was available to be used elsewhere to operate, presumably, man hoists. I find no merit to this contention in view of the fact, as previously noted, the overwhelming evidence was to the effect that Mr. Portillo had not operated a man hoist after he was decertified and that his foreman had been directed not to assign him to operate man hoists.

The third theory of violation presented by the Secretary is one in which the possibility must come to fruition before a violation can be said to have occurred. That is, if Mr. Portillo had been observed operating a man hoist during the period of time from February 5, 1982, through March 25, 1982, then the infraction of the applicable standard could be said to have occurred. The standard is couched in language of prohibition, i.e., "No person shall operate a hoist unless....he has had a medical examination, etc." Thus, the Secretary's argument that Mr. Portillo was available to be used elsewhere is nothing more than a statement that a violation might possibly occur rather than one that a violation did occur.

Having found that the #2 shaft hoist was used "solely for handling ore" within the meaning of that phrase and in the context of the preamble to Section 57.19, and having further found that the #2 shaft hoist was not an emergency hoisting facility and that there was no evidentiary basis for bringing into operation the second sentence of the first paragraph of the preamble, i.e., evidence of endangerment of persons by the #2 shaft hoist and appurtenances, I conclude the safety standard charged to have been violated, 57.19-57, was not operable to the shaft #2 hoistman, Ralph Portillo, on March 18, 1982, and all pertinent times prior thereto. FMC's Notice of Contest is therefore found meritorious.

2/ The Secretary's proposed finding of fact to the effect that had there been an emergency or an absence of one of the hoistmen at shaft #7 Mr. Portillo would have been assigned to operate a man hoist is rejected as entirely speculative. The record is clear that at no time after he had been decertified on or about February 5, 1982, was Mr. Portillo assigned to operate a man hoist, and the record is also clear that Foreman Hornsby, who was the only management representative empowered to assign work to Mr. Portillo, was instructed not to assign Mr. Portillo to hoist men.

ORDER

In Docket WEST 82-154-RM FMC Corporation's Notice of Contest having been found meritorious, Citation and Order of Withdrawal No. 577554 dated March 18, 1982, is vacated.

Docket No. WEST 83-10-M(b), 3/ in which the Secretary of Labor seeks a penalty for the alleged violation charged in Citation and Withdrawal Order numbered 577554, is dismissed.

All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr., Judge

Distribution:

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

John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, 50 South Main St., Suite 1600, Salt Lake City, UT 84144 (Certified Mail)

Harrison Combs, Esq., United Mine Workers of America, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

3/ Special docketing has occurred in this matter and four separate alleged violations which are contained in a related docket, WEST 83-10-M(a), are not dealt with in this proceeding or in this decision.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 7 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. OATVILLE SAND & GRAVEL COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. DENV 79-366-PM

Appearances:

Eliehue C. Brunson, Esq.
Office of the Regional Solicitor, Tedrick A. Housh, Jr.
United States Department of Labor
Kansas City, Missouri 64106
For the Petitioner

Jeff Sturn, Esq.
Lambdin and Kluge
Wichita, Kansas 67201
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 with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing was held in Wichita, Kansas on September 21, 1982.

The Secretary filed a post trial brief.

ISSUES

The issues are whether respondent violated the regulations, and, if so, what penalties are appropriate. An additional issue is whether prior cases involving the same parties relieves respondent from liability in this case.

PETITIONER'S EVIDENCE

David Lilly, an MSHA inspector, issued eight citations against respondent on September 7, 1978. These were as follows:

Citation No.	C.F.R. Title 30 Standard Alleged Violated	Proposed Penalty
181535	56.14-8A	$38
181536	56.12-25	38
181537	56.14-1	38
181538	56.18-12	34
181542	56.12-20	38
181551	56.9-32	34
181552	109A	16
181574	56.9-32	38

(Exhibit P-1-8)

Respondent dredges, screens, and sells its product (Tr. 11). There were two mechanics, as well as the foreman Lorenzo Hubbard, on the property (Tr. 27, 38). At the time of the inspection the dredge was not operating but they were removing sand from the stockpile (Tr. 36). Eisenring, the owner, stated he was in the process of selling the business (Tr. 36, 52).

Citation 181535 1/: A peripheral guard was missing on the side of a bench grinder in the shop area (Tr. 13, P1). The grinder, while not in operation, had been used since there was material on the floor (Tr. 13). A guard protects a person from being struck with pieces of an exploding flywheel (Tr. 13, 14). This could cause serious injuries (Tr. 14).

Citation 181536 2/: The three way plug was missing on the cord of an electric impact wrench. A two way plug eliminates the ground and thereby creates a shock hazard (Tr. 15, P-2). The wrench was in the same area as the grinder (Tr. 15). Eisenring said the wrench didn't belong to him or to his company (Tr. 16).

1/ Each footnote cites the standard in Title 30, Code of Federal Regulations, allegedly violated by respondent.

This citation alleges a violation of § 56.14-8 which provides:

> 56.14-8 Mandatory. Stationary grinding machines other than special bit grinders shall be equipped with:
>
> (a) Peripheral hoods (less than 90° throat openings) capable of withstanding the force of a bursting wheel.

2/ 56.12-25 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.

Citation 181537 3/: In the area of the grinder and wrench a squirrel type fan was connected to a motor by a V belt. The V belt was not guarded. This condition could probably result in an injury (Tr. 16, 17, 18, P-3).

Citation 181538 4/: There were no telephone numbers posted anywhere on the property. There was a telephone in the scale house (Tr. 18-20, P-4). The office was accessible to all employees (Tr. 19-20).

Citation 181542 5/: A person working the electrical control switch would stand on wet ground. There was no insulation mat, wooden platform, or anything to stand on while using the main control switch box. The switch was in daily use. The operator should have been aware of this condition (Tr. 20-22, P-5). Possible burns in the hands and feet are hazards here (Tr. 21).

Citation 181551 6/: An old crane boom, extended partially across the roadway, was elevated at a 45 degree angle. The cables were rusty and weeds had grown in the area (Tr. 22, 23, P-6). Trucks and people pass this area.

Citation 181552 7/: The main office was not posted designating it as the office (Tr. 24, P-7).

3/ 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

4/ 55.18-12 Mandatory. Emergency telephone numbers shall be posted at appropriate telephones.

5/ 56.12-20 Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

6/ 56.9-32 Mandatory. Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use.

7/ Section 109(a) of the Act provides, in part, as follows:

> Sec. 109(a). At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine.

Citation 181574 8/: The bed of a heavy-duty dump truck was raised to its maximum position. There were no stops to prevent the bed from falling if a hydraulic hose broke (Tr. 26, P8). When they observed the inspector approaching, two mechanics inserted a tie to prevent the bed from falling (Tr. 26).

RESPONDENT'S EVIDENCE

Victor B. Eisenring, the owner of Vic's Sand and Gravel, sold Oatville Sand and Gravel under a sale contract dated October 2, 1978 (Tr. 56, 57). At the time of the inspection in September 1978 they were in a cleanup mode (Tr. 57, 58).

Eisenring previously contested the same citations as were involved in the instant case. A hearing was held before Commission Judge George Koutras and these citations were settled for $425 (Tr. 58-69, R1).

DISCUSSION

At the hearing this Judge took official notice of the Commission decision in CENT 79-40-M and CENT 79-41-M (Tr. 67, 68). The decision, by Judge George Koutras, is published at 2 FMSHRC 1522-1528. That case involves as respondents Oatville Sand and Gravel Dredge and Vic's Sand and Gravel Pit. Oatville Sand and Gravel is the respondent in the instant case.

A review of the prior decision indicates that the owner of these companies is mistaken when he asserts that the citations in this case were heard by Judge Koutras. The citations in their numbering as well as in their content are different.

In CENT 79-40-M: fourteen citations are in no way related to the allegations in this case. One citation, alleging a violation of Section 109(a) of the Act, parallels a citation here.

In CENT 79-41-M: four citations involve a lack of backup alarms. No such allegation is involved in this case.

It is true that all of the citations were issued about the same time. But it is equally clear that the doctrine of res judicata does not apply since the subject matter is different.

Respondent did not file a post trial brief but his arguments are of record (Tr. 81-83).

His initial position asserts that MSHA was dilatory in bringing its charges, that Eisenring was at a hearing in 1980, that the dates of violation are the same, and that inspector Lilly was present at the previous hearing.

8/ The citation alleges a violation of 56.9-32, supra, n. 6.

I consider these to be a due process argument. Accordingly, it is in order to review the activities of this case which reflect the following:

1. September 7, 1978: citations issued and served on foreman Hubbard and Victor Eisenring.

2. February 28, 1979: petition for assessment of Civil Penalty filed with the Commission. Certificate of Service to Oatville Sand & Gravel.

3. March 22, 1979: Amended Certificate of Service filed. Copy served on Vic Eisenring.

4. October 3, 1979: Motion for order to show cause filed by Solicitor.

5. October 12, 1979: Order to show cause directed to respondent by Commission Chief Judge.

6. October 29, 1979: Response to order to show cause filed.

7. February 22, 1980: Notice of Jurisdiction entered by Judge Boltz.

8. July 30, 1981: Notice of Hearing setting case for October 9, 1981.

9. August 18, 1981: Order for Prehearing statement issued and amended Notice of hearing.

10. September 22, 1981: Case reassigned by Judge Boltz to Judge Morris.

11. September 24, 1981: Notice of Jurisdiction and amended notice of hearing setting case for October 9, 1981.

12. September 30, 1981: Letter from respondent requesting postponement of hearing.

    Order entered granting postponement.

13. October 5, 1981: Order cancelling hearing of October 27, 1981.

14. March 8, 1982: Notice of hearing setting case for June 17, 1982.

15. March 18, 1982: Hearing rescheduled.

16. May 21, 1982: Hearing set for September 21, 1982.

17. September 21, 1982: Hearing held, Wichita, Kansas.

Respondent has known since December 21, 1978 that the eight citations in this case were pending against him. Constitutional due process does not require any specific form or content for pleadings as long as the parties are given adequate notice. S.S. Kresge Company v. NLRB, 416 F.2d 1225, (6th Cir. 1969), NLRB v. United Aircraft Corporation, 490 F.2d 1105 (2nd Cir. 1973).

Due process has been afforded in this case. Respondent was given written copies of all eight citations at the time of the inspection and was also served with the Secretary's petition which stated each and every allegation being made against it. If respondent wanted a hearing of these citations before Judge Koutras he could have made a request for a consolidation pursuant to Commission Rule 29 C.F.R. 2700.12.

Respondent, in a rhetorical question in closing argument asks whether there were negotiations in Judge Koutras' hearing to dismiss all of the citations. No evidence supports this proposition and it is rejected.

Respondent also asserts the Secretary failed to prove that he was operating the plant. It is contended they were in the process of shutting down the operation at the time of the inspection.

The evidence of both parties establishes the plant was operated by Oatville Sand and Gravel. The inspection took place in September and the sale was not until October 2. Even if the plant was in a shutting down mode it was nevertheless in operation.

No issue of fact is raised concerning the violations themselves. Accordingly, all of the citations herein should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act, 30 U.S.C. 820(i), contains the statutory criteria for assessing civil penalties.

Considering the statutory mandate and in view of the fact that respondent is a small operator, that he abated all of these citations, and that he is no longer in the mining business causes me to conclude that the proposed penalties should be reduced as provided in the order in this case.

The Solicitor filed a detailed brief which has been most helpful in analyzing the record, defining the issues, and in deciding the case. I have reviewed and considered that brief as well as respondent's oral argument entered at the close of the hearing. However, to the extent that the positions of the parties are inconsistent with this decision, they are rejected.

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

ORDER

1. The following citations are affirmed and a civil penalty is assessed as provided after each such citation.

Citation No.	Penalty Assessed
181535	$20
181536	20
181537	20
181538	15
181542	20
181551	15
181552	10
181574	10

2. Respondent is ordered to pay said sum of $130 within 40 days after the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

Eliehue C. Brunson, Esq.
Office of the Solicitor, United States Department of Labor
911 Walnut Street, Room 2106, Kansas City, Missouri 64106

Jeff Sturn, Esq., Lambdin and Kluge
830 North Main, P.O. Box 954
Wichita, Kansas 67201

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 7 1983

SECRETARY OF LABOR, on behalf of WILLIAM E. FITZWATER, III Applicant	:	Complaint of Discrimination and Application for Temporary Reinstatement
v.	:	Docket No: YORK 82-23-D MORG CD 82-23
METTIKI COAL CORPORATION, Respondent	:	Mettiki General Mine

CORRECTION NOTICE

The case cited on page 6, line 12, of the decision issued herein on February 17, 1983, is corrected to substitute the words "Michael Dunmire" for the word "Michel."

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104

W.H. Thompson, Jr. President, Mettiki Coal Corporation, 1800 So. Baltimore Street, Tulsa, OK 74119

David J. Kutchman, Safety Director, Mettiki Coal Corporation, Route 3, Box 124-A, Deer Park, MD 21550

Mr. William E. Fitzwater, III, Star Rt. 1/Box 110-A, Oakland, Md. 21550

Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, 1110 Vermont Avenue, NW., Washington, D.C. 20005

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6210/11/12

MAR 9 1983

JAMES ELDRIDGE, Complainant	:	Complaint of Discrimination
	:	Docket No. KENT 82-41-D
v.	:	
SUNFIRE COAL COMPANY, Respondent	:	

DECISION

Appearances: Tony Oppegard and Stephen Sanders, Esquires, Appalachian Research and Defense Fund of Kentucky, Hazard, Kentucky, for the complainant; J. L. Roark, Esquire, Hazard, Kentucky, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding involves a complaint of discrimination filed pursuant to Section 105(c)(3) of the Federal Mine Safety & Health Act of 1977, after complainant received notice from the Mine Safety & Health Administration that MSHA would not take action on complainant's behalf under Section 105(c)(2) of the Act. Complainant asserts that he was discharged for engaging in activities protected under Section 105(c)(1) of the Act, namely, his refusal to continue working beyond the completion of his regular shift on August 6, 1981, due to mental and physical exhaustion. Complainant challenges the respondent's decision of August 11, 1981, to uphold and finalize his August 6 discharge for misconduct for disobeying direct orders from his immediate supervisors to stay and work beyond his normal work shift. A hearing was convened in Hazard, Kentucky, and the parties appeared and participated fully therein. The parties filed posthearing briefs and proposed findings and conclusions, and the arguments presented therein have been fully considered by me in the course of this decision.

Issues

The critical issued presented in this case is whether the complainant's refusal to work beyond his normal work shift on the day of his discharge was protected activity under the Act, and if so, whether his discharge was justified. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated that Mr. Eldridge had been employed with the respondent from May 2, 1980, until his discharge on August 6, 1981. His hourly wage rate was $11.30, and since his discharge on August 6, employees in similar job classifications received a pay raise of fifty cents per hour, effective March 21, 1982, thereby increasing the hourly wage to $11.80 (Tr. 4).

The parties also stipulated that for the purposes of the hearing and the record made in this case, the terms "pillar mining", "pillar retracting", "retreat mining", "pillar pulling", and "pillar recovery" are synonymous terms and may be used interchangeably (Tr. 4-5).

Testimony and evidence adduced by the complainant

James Eldridge testified that he is 26 years of age, married, has one child, and that he has been a coal miner for eight years. He confirmed that he was not presently employed, but had been employed with the respondent from May 2, 1980, until August 6, 1981, when he was fired from his job as a coal drill operator. He explained that his job as a driller entailed drilling at the coal face in preparation for coal being shot in a conventional section, and that he used a Gallis mobile coal drill. He also testified that he performed other duties besides that of a driller, and these duties included the work of a "shot firer", where he would load and shoot coal with dynamite and electric detonators. He confirmed that at the time of his discharge he was working the second shift at the No. 3 mine from 2:00 p.m. to 10:00 p.m., and that he was working the B-section at a location some 25 to 30 breaks from the mine drift mouth. He and his crew were scheduled for pillar pulling work extracting coal pillars. He explained this mining method by indicating that when they were advancing into the mine, blocks of coal were left for roof support, and when the pillars are pulled, they withdraw and take the coal blocks out (Tr. 5-12).

Mr. Eldridge stated that prior to the day of his discharge he had been engaged in pillar extraction work on the fourth row of pillars, and he believed that such retreat pillar work was more dangerous than the advance work, and this is because one must constantly be on the alert for falling roof. He indicated that on Thursday, August 6, 1981, he worked

a full eight-hour shift performing such work as running the coal drill, shooting coal as a shot firer, helping to set timbers, helping the cutting machine operator with cable, and helping to hang ventilation curtains. He believed that retreat mining work was harder on him mentally and physically than advance mining because he must constantly be on the look out for adverse roof conditions such as timbers and roof bolts taking weight. He testified that he spent all of his eight hour shift pulling pillars, and that at the end of the shift he was too physically and mentally tired and exhausted to keep going. He did not believe he was alert enough to keep working on the night in question (Tr. 13-16).

Mr. Eldridge stated that approximately 35 minutes before the end of his normal shift he spoke with section foreman Eli Smith underground, and Mr. Smith asked him to stay and continue pulling the row of pillars that the crew was working on until they were pulled. Mr. Eldridge stated that he advised Mr. Smith that he was "too tired" to stay on the job and that Mr. Smith said nothing to him at that time. After this conversation, Mr. Eldridge began securing his equipment, and shortly before leaving the section he had a second conversation with Mr. Smith and at that time Mr. Smith advised him that the outside mine supertendent advised him (Smith) to inform the crew that they were to stay on the job finishing the row of pillars and that if anyone came out of the mine, they would no longer have a job (Tr. 21). Mr. Eldridge again informed Mr. Smith that he was too tired to stay on the job, and Mr. Smith did not at that time indicate to him (Eldridge) how long he was expected to stay and work, but simply told him that he was to stay until the pillar pulling job was completed. At that point in time, Mr. Eldridge left the mine (Tr. 22).

Mr. Eldridge stated that after he left the mine, he went to the lamp-house where he encountered Mr. Miller. At that time Mr. Miller had the paychecks and told the crew and Mr. Eldridge that he wanted them to go back into the mine and finish the pillar row, and if they didn't they would no longer have a job. Mr. Eldridge stated that he told Mr. Miller that he was too tired to stay on the job, and Mr. Miller responded that if he did not stay he was not to return to work on Monday. At that point, Mr. Eldridge went home (Tr. 23).

Mr. Eldridge stated that August 6th was a Thursday, that no work was scheduled for Friday, August 7th, since it was a "short week", and that the following Monday he spoke with mine officials Raymond Cochran and Bobby Morris for the purpose of setting up a meeting the next day to discuss the matter further. A meeting was held at the mine office, and present were Johnnie Jones, Eddie Hurley, and Joe Engle, three other miners who were fired at the same time for refusing to stay and work, and representatives of company management (Tr. 26). When Mr. Eldridge asked Mr. Morris whether he was fired, Mr. Morris answered "yes", and when asked "why", Mr. Morris replied "for not staying there and finishing that row of pillars out" (Tr. 27). When Mr. Eldridge told Mr. Morris that he was too mentally and physically exhausted to keep on working that night, Mr. Morris still upheld the discharge (Tr. 27).

Mr. Eldridge testified that he was told by Mr. Cochran that those members of the crew who did stay to work to finish pulling the pillars stayed until approximately 3:00 a.m. (Tr. 29). Complainant's exhibit 2, which a copy of a time card, shows that the remaining crew worked a total of 14 hours on Thursday, but counsel indicated that in fact they only worked 5 hours overtime, but were paid for six hours as a gesture of good will by the company (Tr. 32). Mr. Eldridge testified that at the time he discussed staying on the job with Mr. Smith, he (Eldridge) believed that it would take an extra shift or a shift and half to complete the job, or an extra 8 to 12 hours. He explained that 8 to ten cuts of coal had been removed during his normal work shift, and that there were 12 to 15 cuts left to be removed at the end of his normal work shift (Tr. 33). Mr. Eldridge went on to explain the mining cycle and procedures, and why he believed there were 12 to 15 cuts left, and why it would take a shift and half to finish the work (Tr. 34-36).

Mr. Eldridge explained the work that he had performed on his normal shift while he was shooting and drilling, and he indicated that he considered that he was actually doing "two jobs" (Tr. 41-45). He also indicated that he was setting timbers, and he explained that task as well as the work performed by him in pillar extraction (Tr. 45-52). He also explained the process of replacing line ventilation curtains in the event they were dislodged (Tr. 52). He also expressed an opinion that the roof top in the section "was bad", and that rock falls had occurred on the section in the past. Because of these "frequent" falls, resin bolts were being used to support the roof (Tr. 55). He also indicated that he has had "to run" from the section in the past because of bad top when he heard the roof making "noises like thunder" (Tr. 56).

Mr. Eldridge confirmed that the mine is a nonunion mine and that he has no contractual obligation to work overtime (Tr. 56). He indicated that he would have come to work the next day, on Friday, to finish pulling the pillars, if the company had asked him. Since his discharge, he has held one job for approximately six weeks with the Pygmy Coal Company located at Little Leatherwood in Perry County. Pygmy Coal is know as P.M. Coal Company, and he began working there in January 1982, as a mine foreman earning $400 a week, until he was laid off because of the lack of coal sales. Since that time, he has actively sought employment, and he listed the names of the coal companies where he has sought employment. He attributed his failure to find work to "the way the coal business is right now. They can't sell coal" (Tr. 60-61). He also indicated that he has sought employment outside of the coal industry two or three times a week, but has been unable to find a job, and he also indicated that his family has incurred some medical and dental expenses during his period of unemployment (Tr. 62).

On cross-examination, Mr. Eldridge testified that the drilling machine which he operated on August 6, 1981, is electrically operated and that he sits on the machine in order to operate it by means of pushing and pulling levers and controls. He confirmed that he had previously worked

frequent overtime with the company, and that on several occasions prior to August 6, he has put in as much as close to 70 to 75 hours per week, including overtime (Tr. 65). He acknowledged that while on the job, every employee helps other employees, and that it is "pretty much a team effort" (Tr. 66). He confirmed that as of the time of the instant hearing, he was receiving umemployment benefits, but did not know from whom (Tr. 67).

Mr. Eldridge stated that prior to his discharge on August 6, he did not have a copy of the mine pillar plan (Tr. 67). When confronted with a transcript of him unemployment compensation hearing, he acknowledged that when asked the same question at that hearing he answered that he was aware of the pillar pulling plan, and that he had a sketch of it (Tr. 67). He also conceded that the intent in pulling pillars is to remove all of the coal so that the roof will fall and relieve the tension so as to preclude a danger in the roof falling further back when the pillars are removed in the future (Tr. 70). He also acknowledged that at the time he was asked to stay and finish pulling the pillars that the company "wanted to get the coal out" (Tr. 71). When asked to explain his answer, he replied as follows (Tr. 71):

> JUDGE KOUTRAS: Why was that? Why do you think they wanted to get the coal out that specific night, on Thursday, August 6th.
>
> THE WITNESS: To keep from losing the coal.
>
> JUDGE KOUTRAS: How would they lose the coal?
>
> THE WITNESS: If it fell.
>
> JUDGE KOUTRAS: When would the roof fall -- the next day, and the next day, and the next day?
>
> THE WITNESS: Yess -- whenever.

Mr. Eldridge explained the procedures for drilling holes with a drill, and he confirmed that after he was informed that he could not have a job if he did not stay to finish pulling pillars he took his equipment away from the work area and shut it down (Tr. 73). He also confirmed that he had "heard rumors" immediately before he was fired, or was under the impression, or had heard rumors, that on prior occasions when employees refused to work overtime or were told they would not have a job if they refused to work overtime, that when they came back to work the next succeeding day, they were permitted to return to work (Tr. 73). He confirmed that he did in fact attempt to return to work on the next succeeding work day by showing up at a regularly scheduled hour, but was again told that he was fired (Tr. 74).

Mr. Eldridge identified a copy of a company "Employee Handbook", and he stated that he had a copy before he was discharged. He read certain provisions from the "rules of conduct" part of the handbook

for the record, including the "insubordination" provisions for "refusal to perform assigned work" and "intentionally restricting output". He also read the provisions concerning company policy calling for immediate discharge of the cited rules of conduct, as well as the policy concerning the payment of overtime (Tr. 76).

In response to further questions, Mr. Eldridge indicated that he went back to the mine the Monday after his discharge because he "was taking a shot at getting my job back" (Tr. 77). He conceded that he had in the past stayed and worked a full additional eight-hour shift on overtime when asked to do so by mine management, usually during advance mining, and that he has also volunterreed to work overtime without being asked. He could not say why he was not scheduled to work on the Friday following his discharge, and he reiterated the work he performed pulling pillars during the shift prior to his discharge (Tr. 79-82). He also indicated that he and the section foreman had no discussion over how long it would take to complete all of the pillars, although he believed it would take a shift and a half. He confirmed that three other members of his crew were also fired for not staying over to finish the row of pillars, but he denied that the decision was not a "collective" one and that he made his own decision not to work, and he did so because he was too tired (Tr. 84). He denied having any discussions with the other three men on the crew who opted not to work, but he knows that one man, Johnnie Jones, said that he too was too tired (Tr. 84).

Mr. Eldridge testified further that he had never before refused to work overtime when requested because he was tired or mentally or physically exhausted, and that he had performed similar retreat pillar pulling work in the past on overtime when he was asked, but he then indicated that he had not previously worked more than an hour overtime after he had completed retreat mining (Tr. 85-86).

Mr. Eldridge stated that he believed he was fired for refusing to stay and finish pulling pillars, that he had never previously had any disciplinary problems at the mine, and he has no reason to believe that he was fired for reasons other than refusing to work overtime (Tr. 89-90). He confirmed that he did not complain about being tired during his normal work shift on Thursday, August 6th during 1:45 p.m. to 9:45 p.m., and that he performed his normal duties with no problems (Tr. 91). When asked whether it was true that during the 15 months of his employment, the work week which ended August 6th was the first time he had worked less than 40 hours, and whether he knew that he would not be paid time and a half if he stayed over, Mr. Eldridge replied "I don't know that" (Tr. 94).

Mr. Eldridge conceded that all mining was dangerous and strenuous, and he denied that he was contending that advance mining is perfectly safe, while retreat mining is unsafe. He also indicated that he did not refuse to work simply because pillar mining was harder work. With

regard to the shutting down of his equipment, Mr. Eldridge stated that he did nothing different on the day he was fired than what he did at other times at the end of his normal shift, and that the entire crew left the mine because Mr. Miller stated that he wanted to speak with them (Tr. 106). Mr. Eldridge stated that the fact that he would not be paid overtime had he opted to stay over and work never entered his mind at the time of his refusal to stay (Tr. 107).

Raymond Cochran, testified that he worked for the respondent from November 11, 1977 until January 1982, and that he was the general mine superintendent. He confirmed that he was aware of the fact that Mr. Eldridge was fired by the respondent for his refusal to work the evening of August 6, 1981. He stated that he had a conversation with Mr. Eddie Miller shortly before the shift ended sometime between 10:00 and 11:00 p.m., and that Mr. Miller advised him that there was a "problem" because some of the crew did not want to stay over and work (Tr. 114). Mr. Miller later informed that he had fired Mr. Eldridge and three others for refusing to work (Tr. 115). Mr. Cochran informed him that they were on a four day work week at the time of the discharge, and he also confirmed that a meeting was held the following week, at which time Mr. Eldridge advised company manager Bobby Morris that he had been too exhausted to work anymore. Mr. Cochran indicated that he took the term "tired out" to mean that Mr. Eldridge "physically wasn't able to work" and that "he didn't feel like continuing on and doing more work" (Tr. 116).

Mr. Cochran testified as to his 25 years' experience in underground mining, and he gave his views concerning pillar and advance mining. He indicated that pillar work was more dangerous than advance work because the coal is being taken out, and one must be alert for falling rock and roof. He conceded that any mining is dangerous and difficult, and that the top must also be watched during advance mining. He did not believe it was safe to require miners to work 11 and 12 hours on a pillar section. He also indicated that the mine program called for nine and ten hours of pillar work, but that he got more production in eight hours as he did in nine or ten (Tr. 121). He believed that a miner's efficiency and thinking drops if they work ten to twelve hours, and that one's physical condition is not like it ought to be and that a miner would be in danger (Tr. 122).

Mr. Cochran stated that when he worked for the company he never expected anyone to work a double shift, or to work 13 or 14 hours pulling pillars, because "its too much time. Your too wore out; you're too fatigued." (Tr. 123). Mr. Cochran confirmed that he spoke with Mr. Morris during the meeting and he asked Mr. Morris to put them back to work. He indicated that Mr. Morris told him he couldn't do it because "he would have a break-down in his control over them or something" (Tr. 123). Mr. Morris then upheld their discharge, even though he had the authority to reinstate them.

On cross-examination, Mr. Cochran confirmed that when removing pillars, the object is to get a controlled roof fall, and that this actually improves safety conditions. He also confirmed that he taught the class on pillar pulling at the mine with the safety and engineering department. He conceded that during his instruction classes, he did teach miners to stay over and work two or three hours to pull pillars and to leave them in a safe condition for the next shift before finishing their work shift. However, he denied ever instructing miners that they should stay four or five hours beyond their normal work shift to finish pillars (Tr. 125). In response to further questions concerning his instructions with regard to staying over to pull pillars, he testified as follows (Tr. 125-127):

> Q. See if this is a correct statement of what you just stated. Assuming that the second shift had cut through the pillars, and made the cuts through, and all that was remaining was to take the coal out of the sides of the three center pillars; you're saying that if they were at that point in their work, then they should stay overtime to complete the job?
>
> A. Well, now, I'm not in there, and I don't -- that's what I got that foreman for, to make the decision on how long they stay. Okay -- and how dangerous it is. That's why I call them and talk to them. Now, if he splits those three pillars, he can go on to the house. If he turns around and splits those six other parts of the six pillars, he can go the house. But you've got a ten-foot stump, and each one of those pillars are 40 more feet holding that top in that particular area.
>
> Q. Assuming that there's a four-day weekend coming up, after you get through the point of cutting through all the pillars, would it not be unsafe for the miners coming back four days thereafter, to go back into this same row of pillars and begin working again?
>
> A. If he had left all of those ten-foot square stumps still in that row of pillars, to me, there is no danger. But if he had cut half of those, or more, out before the eight hours was up, then you should try to extract the rest of them in order to get a fall while we're all out and gone.
>
> Q. Is it not true that the amount of overtime which these men actually worked would be until 3:00 o'clock in the morning, considering the fact that they were down, and had to go back outside to get replacements for the four men who were fired, and go back inside the mine, retrieve the equipment which Mr. Eldridge had shut down,

take it back to the work area -- considering those factors, is it not true that the amount of overtime actually worked for these men is pretty much normal? Wouldn't you agree that it's a reasonable amount of overtime?

A. A quarter until ten was quitting time for that section. Thirty minutes later, the next section came outside. And it was around 11:00 o'clock, I'd say, before he got his other four men off of A Section, and went back inside. And from 11:00 until 3:00 is four hours. That's half of a normal day's work.

Q. What I'm asking is, would you not agree that that amount of overtime would be pretty much normal, or routine? It's not excessive?

A. It wouldn't be too excessive if half of that was in down time. Do you understand what "im trying to say? Two or three hours -- I asked them to stay, in class, whatever it took to make it safe -- up to two or three hours. This is the way we discussed it -- all of us together. Anyway, with broken-down equipment, that really isn't too long. But all the equipment didn't break down, I don't imagine, at one time. I don't know what was down.

Q. But you are aware that there was equipment down that night?

A. Yes, sir. I understand there was something down, but I foreget what it was -- a shuttle car or a belt head drive, or something.

Q. Considering that down equipment, this was not an excessive time period, was it? And considering the other difficulties; going out of the mine; this is not an excessive period of overtime, was it?

A. No, sir.

Mr. Cochran reiterated that requiring miners to stay on beyond their normal work shift to work until 3:00 a.m., was not an excessive amount of overtime pulling pillars. In short, he did not believe working four hours beyond a normal work shift is "not too much overtime" (Tr. 129). However, doing straight pillar pulling for 13 or 14 hours without any down time would be a "problem" (Tr. 129). Mr. Cochran confirmed that he was responsible for hiring Mr. Eldridge, and that he knew him the entire 15 months he was employed there. He never had any problems with him, did not consider him to be chronic absentee, and as far as he knew, Mr. Eldridge was an experienced miner and a good worker (Tr. 132).

Mr. Cochran stated that he spoke with the section foreman, Eli Smith, who told him that he saw no need to keep the crew over to pull pillars, and that he (Smith) indicated to him that he tried to communicate this fact to second shift mine foreman Eddie Miller (Tr. 132). Mr. Cochran confirmed that he did not go to the mine when Mr. Eldridge and three crew members were fired, and he did not know whether it was necessary for the crew to stay over and finish the pillars. He left that decision to Mr. Miller (Tr. 134), and he found out a week later from Mr. Smith that he (Smith) did not think it was necessary to keep the crew over to pull pillars (Tr. 135). He explained his role in the discharge of Mr. Eldridge as follows (Tr. 134-136):

> Q. So, at that point in time, you had no reason to believe that there was no necessity for the men to stay over?
>
> A. I didn't know whether it was necessary for them to stay over or not to stay over. I had to trust his decision, because that's what --
>
> Q. You didn't go to the mines?
>
> A. No, sir, I didn't go to the mines.
>
> Q. You didn't talk to Mr. Smith at that time?
>
> A. No, sir. I talked to Mr. Smith the next Monday.
>
> Q. In other words, Mr. Smith had told you the following week that he didn't think it was necessary for the men to stay over?
>
> A. Yes, sir.
>
> Q. Did he tell you that he had communicated that to the mine foreman at the time that --
>
> A. He said he had tried to explain it to the mine foreman.
>
> Q. And the mine foreman didn't want to hear it?
>
> A. Well, evidentally, yes. That's what he was telling me.
>
> Q. You just accepted what the mine foreman told you when you talked to him?
>
> A. After I talked to the mine foreman, and Bobby Morris talked to the mine foreman; then he goes inside; and when I talked to him again, the men are already dismissed. I didn't get to talk to him but once until they were already dismissed.

Q. After you learned about what had happened, did you change your position, or did you change your mind, or did you know enough about it to make any determination, as to whether the mine foreman was right or not in his judgment to keep the men over?

A. Well, he kept them over. And I have to trust his judgment too. And that's what we were paying him for. And I was in contact with him, because of the long weekend; and I wanted to make sure that if there was anything that needed to be done, do it before you come out of there. All right. Then, when I talked to him the first time, he goes back inside to talk to the guys, and convince them to stay and do whatever needed to be done. In the meantime I talked to mine management, and I talked to Bobby, and I talked with the mine foreman who was in charge of the mines, Elmer Jent; and I got hold of them again -- after he'd got back outside, he'd already dismissed the guys. And I told him then, "If you need to stay and do what you have to do, to get you four men off of A Section," in which they came out 30 minutes later.

Q. Did you have any reason to believe that his decision for the men to stay was wrong?

A. No, sir, I had no reason. So, it was do nothing but believe him.

Q. Do you have any idea why the other three men didn't want to work?

A. I don't.

Q. Did that come up at the meeting?

A. They came to the meeting. They never opened their mouth.

Q. They never said anything about why?

A. No, sir. They never said one word until after the meeting was over with. And Johnnie Jones talked to Bobby Morris, a few words, and then he left.

Q. And Mr. Eldridge was the only one at the meeting that said he was too tired to work?

A. The only one, other than Bobby Morris, that spoke, was James Eldridge.

Mr. Cochran confirmed that pillar pulling is done in accordance with an MSHA approved plan, and the plan says nothing about working hours, or the condition of the men. Further, during his tenure as mine superintendent for the respondent he never received any complaints from any miners concerning their working overtime, or that such requirements that they work overtime placed them in any jeopardy (Tr. 139). Mr. Cochran stated that while he never personally fired any employee, he would if he had to, and he explained the circumstances which would warrant a discharge. He also indicated that there are times when men are required to be kept over to finish work, but he usually tried to accomodate anyone that had an excuse for not staying by finding someone else to fill for him, but that if he could't find anyone else and absolutely needed someone to stay, he would fire anyone who refused to stay (Tr. 142).

Mr. Cochran confirmed that the three other miners were fired for refusing to stay and work, but he had no knowledge as to any excuses or reasons they may have had for this refusal. He also confirmed that at no time did any of the miners make any remarks that their refusal to stay was because of any safety reasons, and Mr. Eldridge simply stated that he was too physically tired and exhausted to work (Tr. 143). Mr. Cochran explained the different duties of a cutter, bolter, and shooter, and indicated that whether they all would be exhausted at the same rate would depend on their individual physical condition (Tr. 146).

Mr. Cochran stated that during his training sessions with the miners, he would tell them that should they need to stay over an hour or two to pull pillars, to do it because "it makes it better" for them when they go back in the next day. When asked whether they absolutely had to stay for five hours, he responded "that's fine. Let them stay. No problem there" (Tr. 147). However, he believed that it was dangerous to have anyone pull pillars for 16 hours because he did not "think that any man can stay 16 hours in the coal mines, and be himself"(Tr. 148). However, working 12 hours a day once a week "would be o.k." in his view, but 12 hours a day consistently would not (Tr. 149). He also indicated that each man would have to decide for himself whether this would be safe because of their different physical condition.

When asked about his knowledge of Mr. Eldridge's complaint, Mr. Cochran indicated as follows (Tr. 151-153):

> Q. Do you know what Mr. Eldridge is complaining about in this case?
>
> A. Not really. I know that he and Sunfire has a disagreement, but --
>
> Q. They have a difference of opinion?
>
> A. Yes, a difference of opinion. All I know is that he wasn't able to work that night. And I'm asked to come down and tell what I know about the whole situation.

Q. If I were to tell you that Mr. Eldridge's claim in this case was that he felt that his refusal to work that night was based on his physical -- his claim that he was physically and mentally exhausted from working eight hours, pulling pillars, and that he felt that requiring him to stay might place him in jeopardy, and might place some of his fellow miners in jeopardy, because he felt that he wouldn't be alert enough to be in there, having worked a full day, and he feels that the company is unreasonable in asking him to stay -- what would be your comment on that?

A. Well, if he come to me and told me, and I was his foreman, that he wasn't able to stay, and he didn't feel like working, I'd say, "Well, we'll get you outside in a minute."

Q. What does that mean?

A. That means that I don't want him on my section if he isn't able to work, because he can't do nothing for me. I mean, if he's drilling coal for me, I want my coal drilled. I don't want him dragging around.

Q. When you said, "We'll get you outside," you didn't mean to fire him, did you?

A. No, sir. I'd send him home, and let him get himself recuperated for another day. I wouldn't fire him, no, sir. I sure wouldn't. I wouldn't have fired him, if it had been me. If he'd come to me and told me, and said, "Hey, I've had it. I don't feel like working any more. I'm bushed," I'd say, "Well, let me see if I can get somebody to replace you off of A Section."

Q. Let's say, you couldn't find anybody to replace him?

A. We could make it.

Q. You would make an exception, and as you say, "We can make it, and go on"?

A. We work short-handed pretty often.

Q. And the next day, in addition to Mr. Eldridge, two men come to you and say, "We're exhausted, and we can't work," what do you do there?

A. Well, I'd go looking into the situation; but more to find out why they get so exhausted. * * * *

George Lowers, testified that he is employed as an MSHA underground mine inspector, and indicated that he had worked in the mines for 14 years, nine of which were as an underground miner. He testified as to his experience and training, which includes retreat or pillar mining, and the drafting of pillar pulling plans with mine operators and roof control specialists (Tr. 156-160). Mr. Lowers indicated that he has four mines under his inspection jurisdiction, but that the Sunfire Mine is not one of them (Tr. 162). He explained the differences between advance and retreat mining, and he indicated that during his inspection rounds in a pillar section he observes the physical and mental capabilities of the miners because they "have to be on their toes" and must be "looking after his buddy" (Tr. 165). In his opinion, since the object of retreat mining is to induce a roof fall, he believed that one needs to be more alert (Tr. 166-167).

Mr. Lowers identified a copy of the mine roof control plan which was in effect on August 6, 1981, and indicated that the plan reflects that the main roof is "a very good roof" (exhibit C-7; Tr. 169). The plan also reflects that the "immediate roof" is a combination of "shale and coal rider", and if this type of roof is left up very long, as time progresses it will deteriorate and fall out between the bolts" (Tr. 170). He also explained the differences in the use of resin roof bolts and conventional bolts (Tr. 171-173), and he also explained some of the dangers involved in retreat mining (Tr. 174).

Mr. Lowers examined sketches of the pillars which were split in the area where Mr. Eldridge and the crew were working at the time in question, and he further explained the effect of pulling pillars on the roof support (Exhibits C-8, C-9, Tr. 175-178). When asked whether he believed it is unsafe for miners to work 14 or 16 hours on a pillar section, he replied as follows (Tr. 178):

> Q. In your opinion, given your experience as a coal miner. and supervisor, and an MSHA inspector, do you feel that it is safe for miners to work 14 hours or 16 hours on pillar sections?
>
> A. Sir, the only way I can answer that is, it depends on the individual, the metabolism of each and every person. They know their own limitations. I would like to think that I know mine. I personally would not work 16 hours on a pillar section.
>
> Q. Again, given your experience in the coal mine industry, if you're a supervisor, and a miner comes to you and says, "I'm exhausted. I'm tired. I can't continue any more," what does that mean to you?
>
> A. He should be sent outside.

On cross-examination, Mr. Lowers stated that the longer a roof is allowed to remain standing once it is worked, the greater the danger that it will fall. When asked a hypothetical question concerning the safety of leaving a roof standing for four days after certain pillars had been cut and partially extracted, Mr. Lowers responded as follows (Tr. 181-182):

> A. There's no way that I can answer that question. I've never been in that mine. I've never checked the roof. I don't know what you were anchoring in. There are too many variables there for me to answer that question correctly.
>
> MR. ROARK: Then, Your Honor, based upon Mr. Lowers' statement, I move to strike his entire testimony as not being relevant, and not being founded upon fact, and so forth.
>
> JUDGE KOUTRAS: First of all, he asked you a hypothetical question. Did you understand the question?
>
> THE WITNESS: I believe his point was, is speed of the essence when you're pulling a pillar. Is it making it safe to pull it out as fast as possible, rather than go back in later.
>
> JUDGE KOUTRAS: What's your answer to that one?
>
> THE WITNESS: I'd say yes.
>
> JUDGE KOUTRAS: Now, your hypothetical --
>
> MR. ROARK: Extended further, and went to a period four days later. You're waiting, just letting it sit idle, and then four days later, someone goes back into that same row of pillars.
>
> THE WITNESS: You would be taking more of a chance, yes, sir. The longer it sits there, the more weight that's going to be on it.

In response to further questions, Mr. Lowers stated that during his career as an inspector, he has never had a miner complain to him about fatigue. When asked whether he had ever checked a miner for fatigue, or whether one can tell that he may be fatigued by looking at him, he replied that sometimes miners "cut corners" so that they "can get out in front where he can sit down" (Tr. 185). However, he indicated that most of the mines he inspects work eight hour shifts (Tr. 186).

With regard to the roof control plan, exhibit C-7, he confirmed that it deals with advance work and does not include a pillar pulling

plan, but that such pillar plans are usually incorporated as supplemental plans (Tr. 187-188). He also confirmed that he has never seen a pillar pulling plan which contained provisions concerning miner fatigue, and he knows of no MSHA regulation covering employee fatigue or exhaustion. However, if he found a miner falling down or asleep because he was tired, he would issue an imminent danger order under section 107(a) ordering him out of the mine. He has never done this for any fatigued miner, but did do it once for a miner who was drunk (Tr. 189).

Mr. Lowers confirmed that he has no personal knowledge of the details of Mr. Eldridge's complaint, that he did not participate in the investigation of his case, was not aware that MSHA had investigated the complaint, and indicated that has never been asked by any miners to give an opinion as to whether their claims that they may be tired and do not wish to continue working are valid safety complaints (Tr. 190-191).

Billy Smith, repairman, Johnson Coal Company, testified that on August 6, 1981, he was employed at the same mine as Mr. Eldridge and they worked the same second shift that day. He indicated that he was doing repair work that day and that he worked a 12 hour shift. Before the normal shift ended, he learned from section foreman Eli Smith that the "outside boss or supervisor" had indicated that anyone who came outside after their shift would be fired. He would not have gone outside because he was expected to stay to repair a shuttle car which was down at the end of the shift. The car had a motor break-down, and it went down at approximately 9:00 p.m., but the section still operated with one other car. Once everyone got outside, Mr. Smith said that he heard Mr. Eldridge tell Eli Smith that he "was too tired to make the shift, you know . . . stay late and work over" (Tr. 195). He believed that three split pillars were still left at the end of the shift, but that no side cuts had been taken out of any of them. In his opinion, with one shuttle car out of commission, it would have taken an additional time to take out the remaining coal. When he left the mine after staying over, it was his opinion that there was still 6 or 7 hours of work remaining (Tr. 196).

On cross-examination, Mr. Smith confirmed that he is Eli Smith's brother. He indicated that the shuttle car which had been down during the extra time beyond the regular shift was finally repaired at the end of the overtime shift. He confirmed that it was perfectly clear to him that Eddie Miller told Eli Smith that if the men did not stay to work they were fired, but he was never specifically asked to stay, and the reason for this was that he would have stayed anyway because he had to repair the shuttle car (Tr. 199). He also indicated that Mr. Eldridge had completed his regular work shift, and a repairman actually shut down his machine. The men that were asked to stay and work were simply told to stay "until the pillars were pulled". Those who stayed to work actually quit between 3:00 and 3:30 a.m., but he could not remember whether they were paid an additional hour overtime (Tr. 201).

Mr. Smith stated that at the end of the overtime shift on Thursday, or at 3:00 in the morning on Friday, the pillars had not been timbered

up so that the next row could be pulled. He knows this because he observed the area the following Monday when he returned to the section. Although he saw no one in there working that Monday, he saw where the coal had been moved (Tr. 201).

Mr. Smith confirmed that at prior "pillar-pulling sessions", the men were told that if there was a danger to equipment or if it was necessary to work overtime, they would be expected to stay and finish pulling pillars. However, in his opinion it was not necessary to stay over on August 6th. He confirmed that he had worked overtime many times and was always paid overtime pay for any work over 40 hours, but at the time in question the men would have been paid straight time because they had not put in 40 hours (Tr. 203). As far as he knew, the men who opted not to stay did not get together and decide this as a group (Tr. 204). He explained his reasons for staying overtime as follows (Tr. 205-206):

> Q. So, you put in twelve, twelve and a half hours, working that day?
>
> A. That's right.
>
> Q. How did you feel about that?
>
> A. Well, I was tired, if that's what you're saying -- pretty tired.
>
> Q. Why didn't you ask to leave at the end of your regular shift, and why did you stay?
>
> A. Well, see, there's a difference. A repairman -- if something breaks down, you have to stay. I mean, this is something he does when he takes his job. If something is broke down, he's got to stay and repair it before the next shift comes in, because if he doesn't, those men are going to be knocked out of there too. So, he's got to be there, and see that it's fixed, so the next crew can work.
>
> Q. Have you ever had occasion to refuse to stay to work on equipment?
>
> A. Ever had an occasion?
>
> Q. Have you ever done it?
>
> A. No, I haven't.
>
> Q. And whenever you're asked, you stay?

A. If it's relating to my job, yes.

Q. How do you explain the fact that Mr. Eldridge decided not to stay because he was tired?

A. Well, to begin with, mining is a strenuous job; and every job is not the same. Mr. Eldridge, here, was running the drill, shooting, and helping timber and things -- and I can see his point, myself. I mean, he was tired. And pillar work is dangerous to begin with. All mining is dangerous. When you work eight hours, you're tired. It doesn't matter what you do, you're still tired. But there are jobs that are more strenuous than others.

Q. When you perform your maintenance work underground, where do you do your maintenance work?

A. Usually wherever it breaks down.

Q. You just go wherever the machine is. Is that it?

A. That's right.

John Jones, testified that he is an unemployed coal miner, and that on August 6, 1981, he was employed with Mr. Eldridge at the mine in question, and worked the same shift with him as a cutting machine operator. The shift started at approximately 1:45 p.m. and was scheduled to end at 9:45 p.m., and the crew was working a conventional pillar section. He stated that pillar work entailed "more extra work" than advance work, and that this included the setting of breaker posts and timbers. He identified exhibit C-5 as a sketch of where the timbers would be set on the section on the evening in question, and he indicated that the setting of timbers was a continuous job during the eight hour shift (Tr. 210). He confirmed that pillar pulling makes the roof weaker and rib rolls are encountered, and that is the reason for installing timbers and posts.

Mr. Jones stated that he heard Eli Smith tell Mr. Eldridge that "Eddie wants to stay and get all this coal out" and that Mr. Eldridge told Mr. Smith "Well, I'm too tired". Mr. Smith did not specify the amount of time that he wanted Mr. Eldridge to work overtime, and Mr. Jones believed it would have taken eight to twelve hours to take out the coal (Tr. 212).

Mr. Jones stated that after the men came out of the mine on Thursday at the end of the regular shift, they met Eddie Miller in the lamphouse. He had the crew's paychecks with him, laid them down, and stated to the men "whoever gets checks, the company don't need anymore". Mr. Eldridge told Mr. Miller he was too tired to work anymore and picked his check up.

When Mr. Jones asked whether "this was for everybody", Mr. Miller replied that it was, and Mr. Jones told Mr. Miller "I'll take my chances. Give me my check, too", and then he, Mr. Eldridge, and two other miners went home (Tr. 212). Mr. Jones indicated that he returned to the mine the following Monday for his regular work tour, and that Mr. Eldridge was there. They were told to report to the mine office, but since Mr. Morris had gone, they were asked to return the following Tuesday. When they returned, Mr. Morris told them they were fired and Mr. Eldridge told Mr. Morris that he was "too tired to work any more" (Tr. 214).

Mr. Jones testified that at the end of the regular shift on August 6, he had worked cutting the coal and that all five coal pillars had been punched through, that the coal from the number 1 and number 2 pillars had been cut, loaded out, and cleaned up, but that the three remaining pillars still had the last cut of loose coal which had been shot down still lying on the ground, and it had not been loaded out. No side cuts had been made. He confirmed that the mine top is a "pretty good top", but that the B section where they were working did have some rock falls which occurred "right often" (Tr. 216). Mr. Jones stated further that he did not know he would be fired for not working overtime until he got outside and picked up his check (Tr. 216).

On cross-examination, Mr. Jones identified the pillar pulling plan, exhibit R-2, explained the work that he had performed in cutting the pillars and the fenders, and he indicated that during his shift he took out nine or ten cuts of coal. Although the plan calls for five cuts to split a pillar, he split them with four cuts. He also indicated that at the end of his shift, including the cutting of side fenders, it is possible that he had taken 12 to 14 cuts, plus three cuts which were on the ground to be picked up (Tr. 219-226, exhibits C-9 through C-11). In his opinion, he thought it would have taken an additional shift or a shift and a half to take out all of the coal that remained at the end of his normal shift (Tr. 230).

Mr. Jones confirmed that he had put in 32 hours through Thursday, August 6, and he stated that he did not stay to work because "I got hold of one of the timbers, and it wasn't taking no weight. There wasn't no weight on it. I didn't see any reason for them asking us to stay there and work". In short, he saw no reason why the work couldn't stay until the following Monday, and he explained further at Tr. 232:

> Q. But somebody from mine management; the mine superintendent or somebody, Mr. Miller, made a different evaluation?
>
> A. Well, sir, somebody stayed there and worked until 3:00 o'clock the next morning, and they got five cuts of coal. And I don't know whether they ever got the rest of the coal or not.

Q. Why was it that you didn't stay? Was it because you felt that it wasn't necessary, or you didn't feel like it, or you weren't feeling good, or you felt you'd have to be there too long, or -- I'm trying to understand your reason for not wanting to stay.

A. Well, it was the end of my shift, and there wasn't no danger, I thought, of the top falling in. They wouldn't have lost the coal. And I didn't figure there was any reason to ask us to stay there and work, after we'd done had our shift in.

Respondent's testimony and evidence

Eddie Ray Miller, respondent's mine foreman at its No. 3 Mine, confirmed that he was in charge of the B Section at the time of Mr. Eldridge's discharge. Mr. Miller indicated that he has seven years of mining experience, and has worked as a roof bolter, driller, shuttle car, scoop, and miner operator, and has worked in pillar extraction as both a miner and supervisor. He is a certified mine foreman, and he confirmed that he was at the mine on August 6, 1981, and that at approximately between 7:00 and 7:30 p.m., he spoke with section foreman Eli Smith and Johnny Jones. Mr. Miller indicated that he and Mr. Smith were looking at the pillars, and Mr. Miller remarked "it looks like you're going to need to work overtime", and Mr. Smith replied "I guess we are" (Tr. 316). Mr. Jones was present at that time, and Mr. Miller indicated that they both knew they were to work overtime, and Mr. Smith did not disagree with him (Tr. 317). Mr. Miller then left the underground mine and was called later by Mr. Smith over the mine telephone and he informed him that some of the men were not going to work. Mr. Miller stated that he told Mr. Smith "if they didn't stay and help out, we might not need them anymore" (Tr. 318). Since it was the end of the shift and Mr. Smith informed him that some of the men were coming out of the mine, Mr. Miller instructed him to take the entire crew outside (Tr. 318).

Mr. Miller stated that when the B section crew came out of the mine, he met with them in the lamphouse. He had their paychecks with him, and he informed them that "the ones that take their checks, we won't need them anymore". Mr. Eldridge, Johnny Jones, Joe Engle, and Ed Hurley took their checks and left. There was no discussion at that time about why the men did not want to work overtime, and Mr. Miller stated that if Mr. Eldridge said anything to him about why he did not want to work overtime, he did not hear it (Tr. 319). However, Mr. Jones was cussing and using foul language, and he commented that "the company sucks". Mr. Engle made the comment "Eddie Miller, you'll be sorry for this". Mr. Miller also indicated that "they were hollering as they got in the car", and when asked whether he believed they were acting as a group, he responded "They rode together, and they just stayed together, and just hung together, I guess" (Tr. 320).

Mr. Miller testified that at the time he asked the men to work overtime he believed that it would be necessary to stay about three hours, and the crew who stayed finished working at 3:00 a.m. He confirmed that he paid them an hour and a half extra time as a bonus, and that this was company policy. He confirmed that he fired the four men, including Mr. Eldridge, because of their refusal to work (Tr. 322), and when asked why he believed it was necessary for the men to stay and work overtime, he responded as follows (Tr. 322-323):

> A. Because, if we had left the pillars, it would have been unsafe to go back the following work day. Plus, you would have lost the coal, and maybe -- I couldn't say how much coal could have possibly been lost. And it would have been unsafe to go back in the same row of pillars, definitely.
>
> Q. Why do you feel it would have been unsafe?
>
> A. Because the pillars had already been cut through, and one cut out to the side, and it would just have been unsafe. The top couldn't have stood, I don't think, the following weekend and then went back in the pillar row; the same one.

Mr. Miller confirmed that a three day weekend was coming up, and he stated that at the end of the overtime shift, all of the coal except for one cut was taken out and "we had it all timbered off and ready to go" (Tr. 323). He indicated that breaker posts were installed in between the next row of back pillars, and he marked the areas where breaker posts were installed at the end of the overtime shift by marking four "X" marks on complainant's exhibit C-1 (Tr. 324-327). Mr. Miller stated that he estimated it would take three hours of overtime to finish the pillars because it takes 20 minutes to clean a cut of coal, and by looking at the pillars he estimated that there were seven cuts of coal left to clean up the row of pillars (Tr. 328).

On cross-examination, Mr. Miller stated that after his conversation underground with Mr. Smith, he left the mine approximately 45 minutes before the crew came out. Although Mr. Jones was there, Mr. Miller confirmed that he did not speak directly with him and did not personally tell him that the crew would have to stay overtime. He could not remember whether he spoke to anyone other than Mr. Smith when he was underground (Tr. 331). Mr. Miller conceded that during his previous testimony during a hearing regarding Mr. Jones' unemployment compensation claim, he (Miller) testified that he had spoken with Mr. Jones underground and told him of the need to work overtime (Tr. 334). Mr. Miller also conceded that it is easier and faster to take out pillar fenders and slabs, but he denied he wanted the men to stay so that he "would look good" for taking out as much coal as he could that night (Tr. 336). He confirmed that he paid the crew for six hours, but that they actually worked five, and the extra hour was a bonus. He also indicated that he did not tell the crew he was paying them an extra hour, and they were not aware of it that night. He later said

he paid them an hour and a half extra and Mr. Smith would keep the time (Tr. 340-341). Mr. Smith turned in a total of 14 hours for each man who stayed over, eight hours for their normal work shift, plus an additional five hours of actual overtime (Tr. 341).

Mr. Miller testified as to how the pillars were cut through and the need for staying over and taking out the coal. He confirmed that the cutting machine operator had gotten off center with the cuts, and he explained how pillars are pulled, and he indicated that each time a cut of coal is taken out the pillars take more weight and mining becomes more hazardous (Tr. 341-348).

Mr. Miller confirmed that at the end of the normal work shift for the crew he knew that Mr. Eldridge had been on the job for one full shift. He did not consider drilling and shooting to be the work of "two jobs", and considered them to be one job. He confirmed that a shot firer had to haul the explosives buggy back and forth and that it was normally loaded with 75 pounds of explosives. However, he confirmed that the buggy was on wheels. With regard to the setting of timbers, he confirmed that there are an "abundance" of timber posts used on a pillar section, and he conceded that many times extra timbers are set to insure that the roof is supported adequately (Tr. 352). He confirmed that "a lot of timbers" were installed on the section and that they are continuously knocked or jarred down by equipment while mining is in progress. It is the responsibility of the shot man or driller working at the face to make sure the posts are set back up once they are knocked down (Tr. 355).

Mr. Miller stated that he did not believe that Mr. Eldridge was tired at the end of his normal work shift, because he had no way of knowing. Even though he was not present during the actual work shift, he did not believe that Mr. Eldridge could have shot and drilled more than five or six cuts of coal in his eight hour shift, and eight cuts would have been the most that was cut and loaded (Tr. 357). He also indicated that there was a lot of down time during the shift (Tr. 357). When asked what he would do if a miner tells him he is too tired to go on after his normal shift, Mr. Miller responded as follows (Tr. 358-359):

> Q. And he's doing pillar work which is more dangerous than advance work. He comes up to you and he says, -- or you come up to him and you say, "I want you to work another shift on this pillar section." And he says, "I'm too tired, I can't do it." What would you do with that man?
>
> A. I'd work something out. If he had told me that I would have worked something out so he could leave and go home and rest.
>
> Q. Why.
>
> A. If he tells me that he's absolutely too tired to stay on and work, then he would just be accident prone, I guess.

Q. It would be too dangerous for him to go back in, wouldn't it?

A. Yes, it would.

Q. I want to clarify one other point on your direct examination with Mr. Roark. It's your testimony that in the lighthouse that night you explained to Mr. Eldridge, Mr. Jones, the other men who were there why it was necessary for them to stay and get finish getting that row of pillars?

A. Yes.

Q. What exactly did you tell them?

A. I don't remember the exact words.

Q. I don't mean the exact words, but what, essentially, did you tell them?

A. That we needed to stay and finish these pillars, because if we don't they might get the roof to swimming and then we'd lose the coal that's there, and maybe more. And then if the day shift came in and tried to go on where we'd left, it would be dangerous for them. We know we need to stay and try to get it.

In response to further questions, Mr. Miller stated that when he met with the crew after they came out of the mine, he explained to them that they would not have to work more than two or three hours, but that there was some down time. He and Mr. Eldridge had no conversation at that time, and Mr. Eldridge said nothing about why he did not choose to stay and work overtime. Further, none of the other men said anything either (Tr. 362). Mr. Miller confirmed that he went back to the section the following Monday, but that at no time after the discharge did he ever meet with any of the men who were fired (Tr. 363). Once they picked up their checks "that was the end of it" as far as he was concerned (Tr. 363).

Roger D. Miller confirmed that he was working in the underground B-Section of August 6, 1981, at the tailpiece. He stated that he first learned that the crew would have to stay over about 20 minutes before the end of the shift, and he learned it when foreman Eddie Miller called in on the telephone. Roger Miller indicated that he passed the information to the car driver and asked him to inform Eli Smith that the crew had to stay in and finish the row of pillars. Shortly after this, the crew was called out of the mine and they assembled in the lighthouse. Mr. Miller informed the men that they had to stay over and work and that anyone who picked up their check and left were no longer needed (Tr. 374). Roger Miller recalled someone say "you're chicken", but he could not recall who said it. Since he wanted to keep his job, he decided to stay and work overtime (Tr. 376).

Mr. Miller stated that the mine conditions on the B-section during both the regular and overtime shift on August 6, 1981, were "normal" (Tr. 377). Mr. Miller confirmed that he was present at a company meeting when the pillar plan was discussed with the crew, and they were told that they would be expected to work additional hours if the pillars had not been completed at the end of the regular work shift (Tr. 378-379). He believed that Mr. Raymond Cochran made the statement that "if you got them started, and you take off and leave them without being finished, you've got a whole lot of coal right there that you've lost" (Tr. 379). Mr. Miller indicated that it was his opinion that at the end if the regular shift on August 6, that it would take 3 or 4 hours to finish the pillar (Tr. 379). Mr. Miller confirmed that the overtime shift finished at 3:00 o'clock, and he indicated that he stayed because there was work to do and he stated that "I felt I was lucky to get to go back and keep my job" (Tr. 384). He could not recall whether he was paid straight time, nor could he recall whether he had already put in 40 hours (Tr. 384).

Lester Caldwell, testified that on August 6, 1981, he was employed by the respondent on the B-section day shift and did not work with Mr. Eldridge on the night shift. He confirmed that he was working on the section on Monday, August 10, 1981, during the day shift, and that the row of pillars previously worked by Mr. Eldridge's shift had been timbered off. He explained "timbered off" by stating that "they'd already pulled out of it; pulled out of that row of pillars and set up on another set", and that breaker posts were set (Tr. 386). He confirmed that equipment could not be taken back into the area previously worked because it was blocked off by the breaker posts, and during his shift on Monday, he saw no one go beyond the row of breaker posts (Tr. 387).

On cross-examination, Mr. Caldwell stated that when he went back to the section on Monday, August 10, he was working on a different row of timbers than that worked on by Mr. Eldridge's crew the previous Thursday evening, and that the row of pillars worked on by Mr. Eldridge's crew was still standing on Monday and had not caved in (Tr. 387).

Charles Cody testified that on August 6, 1981, he worked the second shift A-section of the mine but was called to the B-section and asked to stay and work overtime. He believes that he operated a loader, and before the work began he estimated that he would have to stay and work four or five hours (Tr. 389). At the end of the overtime, except for a cut that could not be taken, all of the pillar row was gone and the breaker posts were set before they left the section (Tr. 390). The section looked "about normal for a pillar section" when he was there working on overtime (Tr. 391).

On cross-examination, Mr. Cody confirmed that a week or so before August 6th he was working on a different pillar row and he indicated that mine conditions do change quickly once cuts are taken (Tr. 392). He also confirmed that the roof top on the B-Section had a "four foot rash all the

way back" and that the top was "pretty unsteady" because supports are being taken out (Tr. 393). He also confirmed that the roof "thunders and roars" during pillar work, that he has run and backed up to observed the top when this occurs (Tr. 394). When asked whether he would stay and work if he were tired, Mr. Cody responded as follows (Tr. 394-395):

> Q. Now, if you're working on a pillar section and you were dead tired, and you didn't feel you were alert, you wouldn't want to be on that pillar section, would you?
>
> A. If I was too tired I don't think I would want to be on it.
>
> Q. I suppose it wouldn't be safe. Right?
>
> A. Well, I've worked on them tired, but that was my shift.
>
> Q. What I mean is, if you were too tired to work it wouldn't be safe for you to be working on a pillar section, would it?
>
> A. I don't know, because it would depend on how alert your mind is.
>
> Q. It depends on what?
>
> A. If your mind is alert and your body is tired you'd be safe as long as you listened to your mind.
>
> Q. What I'm trying to say to you is, if you're on the pillar section and your mind's not alert, you're not mentally alert, it wouldn't be safe to be there would it?
>
> A. No.

And, at (Tr. 398-399):

> JUDGE KOUTRAS: How did you feel after your first eight hour shift, in terms of your physical condition?
>
> THE WITNESS: I was in pretty good shape. About normal for a regular shift. I wasn't too awful fited.
>
> JUDGE KOUTRAS: Let's assume that you were tired, kind of exhausted. Would you have stayed?
>
> THE WITNESS: Probably.
>
> JUDGE KOUTRAS: Why would you have stayed?

THE WITNESS: Well, if I was plumb give out, till I didn't think I could handle the shift, I wouldn't have stayed. But if I was just tired, kind of exhausted, and I thought I could still make the shift, I would have stayed.

JUDGE KOUTRAS: Have you ever been in such a state that you -- have you ever decided not to stay, or to leave work?

THE WITNESS: Yes, a few times.

JUDGE KOUTRAS: Because you've been tired?

THE WITNESS: Sometimes I was too tired, yes.

JUDGE KOUTRAS: Do you recall whether on any of those occasions anyone said anything to you about not staying, or what?

THE WITNESS: No. I never have -- I've always stayed if they said they needed us to do something.

JUDGE KOUTRAS: You've never refused to stay?

THE WITNESS: No, usually you've got a choice if you want to stay or not. But if they said, you have to stay, yes, I'd stay.

Rebuttal testimony

Mr. Eldridge was recalled the second day of the hearing and he testified that when he told Mr. Eddie Miller that he was too tired to stay and work overtime he (Eldridge) did not feel that it would be safe for him to continue working until the pillar row was pulled because he did not believe he was alert enough and was too exhausted from his work on the first shift (Tr. 304). Mr. Eldridge also indicated that he rode to work alone and did not car pool with the other men who were fired (Tr. 403). He also confirmed that Eddie Miller did not tell the crew that it would take three or four hours to finish the pillars, nor did he explain why it was necessary to stay and finish them (Tr. 403).

Mr. Eldridge testified that he worked constantly during his shift on August 6, and that the only thing down was a shuttle car at the end of he shift (Tr. 404). He also testified how pillars are normally pulled in the section (Tr. 411-416). At one point in his testimony he stated that the respondent was not following its approved pillar plan (Tr. 416), and at another point stated that during the normal work shift they were following the plan and were in compliance (Tr. 417, 420-421).

P. J. Roberts, respondent's personnel manager and safety director identified exhibit R-1 as an employee's handbook issued to all employees, and he confirmed that the grievance procedures contained therein have never been used because no grievances have ever been filed (Tr. 435). There have been no discharges, although there have been some voluntary "quits", and three days suspensions. Mr. Roberts does not consider Mr. Eldridge's discharge to be harsh, and he confirmed that he was discharged strictly for refusing to work on August 6, 1981 (Tr. 438), and Mr. Eldridge had never been disciplined by the company in the past (Tr. 439).

Johnny Jones, confirmed that Mr. Eldridge drove his own car to work. He reiterated that Eddie Miller said nothing about how long the crew would have to work overtime, nor did he explain why the work was required. Mr. Jones could recall no significant down time during the shift that was worked on August 6th (Tr. 422-444). Mr. Jones confirmed that he made the statement "company sucks", but indicated that he said it while in his car and before driving off, and he was not sure whether anyone heard him (Tr. 455).

Complainant's Arguments

In his post-hearing brief, complainant asserts that mine management was informed on four occasions prior to his discharge that he was too tired or exhausted to continue working until the row of pillars in question were pulled, and that the respondent has presented no testimony or evidence to contradict this fact. Citing MSHA ex rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982), the complainant argues that his statements to mine management that he was "too tired" or "too exhausted" to continue working were sufficiently clear under the circumstances to constitute a safety complaint. Although conceding that he did not claim that he told management that it would be "unsafe" for him to continue working, complainant nonetheless maintains that mine management recognizes that when a miner states that he is too exhausted to continue working, it is not safe for him to do so, and in support of this argument complainant cites the testimony of respondent's former general superintendent and safety director Raymond Cochran who testified that if a miner came to him and told him he was too exhausted to work an extra shift or extra work he would seek a replacement for him and send him home. Complainant also cites some testimony from MSHA Inspector George Lowers who indicated that a miner who tells his supervisor that "I'm exhausted. I'm tired. I can't continue anymore" should be sent outside. Finally, complainant maintains that the most convincing testimony that a miner who says he is too tired to continue working has articulated a safety concern is the testimony of Mr. Eddie Miller, the man who fired him. Citing Mr. Miller's testimony that he (Miller) "would've worked something out so he could leave and go home and rest", complainant concludes that the respondent has no grounds for arguing that his complaints did not alert management to his safety concerns.

Complainant argues that his refusal to continue working until the pillar row was pulled was made in a good faith concern for his safety. Citing MSHA ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803

(1981), complainant concludes that the evidentiary burden to prove the absence of good faith is on the mine operator. In this regard, complainant notes that while respondent's Answer in this case did not allege bad faith on his part, at the hearing the respondent contended that the real reason that he refused to continue working was because he had not accumulated 40 hours of work that particular week and, thus, he would not have been paid time-and-one-half (the overtime rate) for the additional work he was ordered to perform that night. Complainant also points to the statement made by respondent's counsel at the hearing that the theory of its case is that the complainant's claim of exhaustion was a sham (Tr. 94-96).

In support of his arguments that the respondent's proof of bad faith or that his refusal to work was a "sham" went no further than the mere raising of this theory, complainant points to the fact that after he answered on cross-examination that he did not know whether the week of his discharge was the only week during his 15 months employment that he had worked less than 40 hours, and thus would not have been paid time-and-one-half for the additional hours, respondent made absolutely no efforts to prove that was, indeed, the case. Complainant asserts that respondent called no other witnesses regarding this issue, nor did it introduce into evidence the Company time records to attempt to prove its allegation. Under the circumstances, complainant concludes that respondent's attempt to establish bad faith on his part by mere assertion alone must be rejected.

Moreover, complainant asserts that an examination of the applicable employee handbook (Respondent's Exhibit #1) and the testimony of Sunfire's personnel manager, P. J. Roberts, establish that respondent's theory is facially without merit. Respondent's employee handbook on page 5, under the section entitled "Work Days and Work Week", states that "the work week commences at 12:01 A.M. on Thursday". Further, Mr. Roberts admitted on re-direct examination that that section of the handbook is accurate and likewise was applicable at the time of the discharge (Tr. 440-441). Thus, complainant argues that since he was discharged at the end of his regular Thursday shift (Tr. 24, 115), and respondent's work week began on Thursday, he was discharged on the first day of his pay period, not the last day as respondent contends. Had he worked 8-12 additional hours on the night of his discharge, as he believed he would have to do, complainant would have accumulated 16-20 hours on the first day of his pay period. Thus, complainant concludes that this does not indicate that he knew he would not have worked less than 40 hours during that pay period.

Complainant argues further that respondent's proof was similarly deficient with regard to it theory that he was not exhausted at the end of his August 6th shift in that the most that the respondent was established was that complainant's mobile drill was operated by manual levers. Complainant points out that the respondent did not cross-examine him regarding his additional job as a shot firer on the section, nor did respondent attempt to dispute the testimony of the several witnesses who stated that retreat mining is more physically strenuous than advance

mining, more hazardous than advance mining, and more mentally exhausting. Respondent likewise asked him no questions regarding his other duties on August 6th - setting timbers, hanging brattice curtains, and assisting with the cutting machine cable, and called not a single witness to testify that he had not worked continuously that night as he claimed, and it did not question Bill Smith's testimony that Eldridge was, indeed, tired. Complainant cites the testimony of Eddie Miller conceding that he "might have been tired" (Tr. 358), and admitting that he did not personally observe the amount of work that he did on the section on the night in question (Tr. 356). Finally, complainant argues that the respondent did not challenge the testimony of the complainant and Mr. Jones that had the crew continued to work beyond the completion of its regular shift, it would have been cross-cutting pillar fenders (Tr. 215, 414), which complainant and MSHA Inspector Lowers testified is the most hazardous aspect of pillar-pulling (Tr. 175, 304).

In summary, the complainant contends that the respondent has provided no evidence that he acted in bad faith in refusing to work. Citing other Commission decisions where the Judge found bad faith on the part of a miner in connection with other discrimination complaints, complainant points out that in those cases concrete evidence was introduced to substantiate the bad faith allegations. As an example, complainant cites MSHA ex rel. Griffin v. Peabody Coal Co., 4 FMSHRC 204 (1982), where the complainant alleged that he had been discharged for his refusal to turn on the section power unit as ordered by the section foreman because of his belief that excessive dust made the chore unsafe. Contrary evidence was introduced that the complainant, upon receiving the assignment, had passed a remark indicating that he intended to disrupt activities on the section. Evidence was also introduced that after the complainant had received a notice of a 5-day suspension with intent to discharge, he had admitted his wrong-doing and convinced mine management to reduce his penalty to a 3-day suspension. Complainant states that in ruling for the company, the Judge credited the evidence introduced by the company and found that the complainant deliberately attempted to disrupt the section in the hope of obtaining some time off and that his contention regarding a dusty atmosphere was used as a pretext.

A second example cited by the complainant is the case of MSHA ex rel. Bryant v. Clinchfield Coal Co., 4 FMSHRC 1379 (1982), a case in which the complainant alleged that he had been discharged for refusing to set safety jacks due to a weakened physical condition brought on by a stomach and respiratory ailment. The company countered that the complainant's work refusal was an attempt to shirk a distasteful work assignment and that the miner's allegation of physical sickness was pretextual. Substantial testimonial evidence was introduced regarding co-workers observations of the complainant immediately prior to his work refusal, and statements made by the complainant regarding his alleged illness. Evidence was also introduced showing that a stormy relationship had existed between the complainant and the company prior to the discharge, and while the case also involved other issues, the Judge found for the company, in part, because he believed the complainant was faking or, at least, exaggerating his claim of illness and that the actual reason for his work refusal was his resentment of the operator's assignment of an onerous task.

Complainant notes that in Bryant, supra, while the miner admitted that he didn't like setting jacks, and in fact, had a general fear of the job, in the instant case the respondent did not allege that the complainant's refusal to stay over and work was based on his dislike of pillar work, but simply maintained that he did not want to continue working because of the straight time pay rate. Further, complainant points out that while he did state that pillar work is more strenuous, he never stated, nor was it established by any testimony, that he specifically disliked pillar pulling, and when asked if his work refusal was because pillar work was hard, he responded "no" (Tr. 87, 105).

Complainant contends that the record in this case strongly supports the proposition that his work refusal was made in good faith. He points to his testimony, as well as the agreement by the respondent, that he had never before been disciplined or warned or encountered any problems whatsoever with management during his 15 months employment (Tr. 88, 90, 438-439). He also cites the testimony of Raymond Cochran, who hired him and was respondent's superintendent during his entire employment, stating that he was both an experienced and a good worker (Tr. 131-132). In addition, complainant asserts that it is not disputed that he had frequently worked overtime before his discharge (Tr. 65), had volunteered to work overtime before his discharge (Tr. 65), had volunteered to work overtime (Tr. 79), and had never before refused to work overtime (Tr. 88). Complainant concludes that these are not the characteristics of a miner who shirks his duties and attempts to deceive management. He also states that it is undisputed (and the payroll record Exhibit #2 confirms) that he worked an additional hour after the completion of his regular shift earlier during the week of his discharge, and that he explained at hearing that the crew had stayed beyond their normal work hours in order to take the final cross-cuts out of the last (or number 5) pillar in a row (Tr. 85). Absent proof to the contrary, complainant argues that this tends to indicate that he was a conscientious worker. He also notes that if I accept the respondent's assertion that Thursday was the last day of the pay period, this would establish that he had been paid straight time for the extra hour he worked two days before and would contradict the assertion that he refused to work the additional work on Thursday because it would have been the first time he would not have been compensated for extra work at the overtime rate.

In light of the respondent's allegations of bad faith, the complainant poses the question as to why superintendent Cochran did not question his good faith when he stated at the August 11th meeting that he had been too exhausted to continue working on August 6th. Complainant cites my inquiry of Mr. Cochran from the bench during the hearing if he knew what the complainant was complaining about in this case, and Mr. Cochran's response "All I know is he wasn't able to work that night" (Tr. 151). Complainant also cites Mr. Cochran's further statement that he would not have fired the complainant if it had been his decision to make (Tr. 152), and complainant concludes that it is highly unlikely that a mine superintendent who was second in command at the mine would oppose the discharge of a miner for refusing to work if he suspected the miner's reasons for the work refusal were fradulent.

Complainant goes on to argue in his brief that his refusal to continue working until the pillar row in question was pulled due to his fear for his safety was a reasonable one under the circumstances he was confronted with on August 6, 1981, when he refused to continue working. In support of this conclusion he cites the fact that he has established that retreat mining is more hazardous than advance mining, and that had he continued to work beyond the completion of his regular shift, he would have been cross-cutting the pillar fenders, which is the most hazardous aspect of pillar mining. He also cited the record testimony to support his conclusion that he was already exhausted at the completion of his regular work shift, and the lack of any evidence by the respondent to support its claim that his claim of exhaustion was made in bad faith.

Complainant argues that another important consideration in determining whether his refusal to continue working was reasonable is the exact nature of the order given him by respondent's management. Complainant maintains that the record convincingly shows that he was not told to continue working for a specific amount of time, but rather, was ordered to continue working until the row of pillars was pulled or face the loss of his job. Complainant asserts that implicit in this order was that he was being required to continue working no matter how long it took the crew to complete the job, and that this resulted in his having to determine for himself how much additional work remained to be done and how long that work would take. Discounting Mr. Miller's claim that he told the crew in the lamphouse that the extra work "shouldn't take us over two or three hours", complainant points to other testimony, including certain alleged contradictory statements by Mr. Miller, to support the conclusion that the crew was never specifically told how long they were expected to remain to work. Even assuming arguendo that Mr. Miller did make the statement that he believed the extra work would only take two or three hours, complainant asserts that this was an expression of Mr. Miller's opinion and it did not change the work order, nor did it change the fact that the miners on the section did not agree that the work could be completed in that amount of time.

Complainant maintains that the reasonableness of his belief regarding how long it would take to finish pulling the pillar row is supported by the fact that two of his co-workers on the section likewise felt, at the time the order to continue working was given, that the additional work would require another shift to complete. The complainant and Mr. Jones were the miners in the best position to determine how much coal remained to be mined and how long the work would take, as they were directly responsible for cutting, drilling and shooting the coal face. Recognizing the respondent's attempts to establish through the testimony of Mr. Miller that it was unreasonable for the complainant to believe the extra work would have taken more than a couple of hours, the complainant cites the testimony reflecting disagreement as to how many of the remaining fenders would have been cross-cut in completing the pillar-pulling process, but emphasis the fact that the complainant's belief that the additional work to be done would have taken another shift was based on the amount of coal

remaining at the end of the regular shift, and was also based on the practices respondent regularly used in extracting the coal. Because the two additional fenders were regularly cross-cut, complainant maintains that it was reasonable for him to assume that they would be cross-cut again that night.

The complainant notes that the parties are in agreement that the miners who continued to work on August 6th after his discharge labored for an additional 5 hours, or until approximately 3:00 a.m. However, complainant also notes that whether the pillar row was finished during that 5 hour period is debated. Complainant asserts that while Eddie Miller and Charles Cody testified that it was (Tr. 323, 389-390), Bill Smith testified that there was still several hours' worth of work to do when the crew finally left the mine early the next morning (Tr. 196), and Superintendent Cochran testified that he understood all of the coal was not removed that night, and that the Monday morning shift finished the job (Tr. 128-129). This testimony was confirmed by Bill Smith (Tr. 201-202). Johnny Jones likewise testified that he had been told by Elmer Gent, Eddie Miller's immediate supervisor (Tr. 134), that it took the company a shift and a half to finish taking the coal (Tr. 446). However, the complainant maintains that whether or not the pillar row was totally pulled that night is not crucial to the determination of this matter since the fact is that he knew he was being required to work a lengthy overtime period, and the proof shows that a lengthy overtime period was indeed worked.

In summary, the complainant maintains that the circumstances surrounding his work refusal were as follows: he had already worked a full 8 hour shift, during which time he worked continuously performing two jobs; at the end of the shift he was both mentally and physically exhausted; the work he was performing, pillar-pulling, is more hazardous than advance mining and requires a miner to be especially alert; he was not ordered to continue working for a specific amount of time, but rather until the entire pillar row was pulled; he knew the work he was ordered to do would require several additional hours (and, in fact, a lengthy overtime period was worked); and he was too mentally and physically exhausted to perform that work. Clearly, under these circumstances, it was reasonable for him to believe that his safety would be jeopardized by continuing to work until the pillar row was finished.

In further support of his belief that his work refusal was reasonable, complainant cites his own testimony that he did not believe it would be safe for him to continue working (Tr. 304-305), the testimony of Charles Cody, a loading machine helper on another section who was called as a witness by the respondent and confirmed that on occasion he had been so exhausted from working his regular shift that he decided not to work overtime when requested to do so by the company (Tr. 398), Mr. Cody's testimony that if he were "dead tired" and "didn't feel alert" he would not want to be on a pillar section, and the testimony by Mr. Cochran that he would not expect anyone at the mine to work double shifts 13 or 14 hours pulling

pillars because they become fatigued, loose efficiency, and may "become an accident going to happen somewhere" (Tr. 121-123). Recognizing that Mr. Cochran's later testimony in response to bench questions was somewhat inconsistent on these points, complainant nonetheless argues that it supports his conclusion that his safety concern was a reasonable one. Complainant also cited the testimony of Inspector Lowers that each person knows his own limitations, and that he (Lowers) would personally not work 16 hours on a pillar section (Tr. 178, 184).

Complainant concludes his arguments in support of his case by asserting that the respondent's arguments that his work refusal due to exhaustion does not merit the Act's protection because (1) the work refusal did not involve the violation of a mandatory safety standard; and (2) the claim of exhaustion is "too subjective" in nature (Tr. 97-100), are not supported by case law or the legislative history of the Act. Moreover, complainant states that both arguments contradict the intent of the Act, which is to protect the safety and health of miners, and therefore must be rejected.

In further support of his arguments, complainant cites the legislative intent of Congress that the Act be broadly interpreted to afford protection for miner's for safety related work refusals. In response to the respondent's arguments that a claim of exhaustion is "too subjective", complainant points out that while this is true of almost all coal mine safety complaints, in his case common sense dictates that if he is too exhausted to work, to require him to do so presents a hazard both to him and to his co-workers. Complainant notes that he does not claim, nor does he expect me to hold, that a miner's claim of exhaustion must alwasy be deemed protected activity. Nor does he expect me to strictly define when a work refusal due to exhaustion is deserving of the Act's protection. However, on the facts of his case, where he has shown that he was exhausted after having worked continuously for a full shift in a uniquely demanding work environment, was faced with the prospect of several hours additional work, and honestly believed he could not perform that work safely, complainant maintains that it would be inequitable to find that the respondent had the right to force him to make a choice between his safety or his job. Complainant asserts that this is particularly true in light of the fact that the foreman who discharged him admitted that it would be "too dangerous" to require an exhausted miner to continue to work on a pillar section after the miner had already completed a shift's work (Tr. 359). Moreover, complainant argues that it would be anamalous for the Act to protect miners who are discharged for complaining about filthy or inaccessible restroom facilities at a mine - MSHA ex rel. Johnson v. Borden, Inc., 3 FMSHRC 926 (1981); Edwards v. Aaron Mining, Inc., 3 FMSHRC 2630 (1981) - yet not protect miners who cannot safely perform a work assignment due to fatigue.

Regarding respondent's argument that his claim of exhaustion is "too subjective" to be afforded protection, complainant contends that the belief underlying his work refusal was no more subjective than numerous other

beliefs that have been protected by the Commission, and, in fact, was not as dependent on subjective belief as the respondent alleges. In support of this argument, complainant cites MSHA ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), where the complainant refused to continue operating a continuous mining machine which he claimed gave him a headache, made his ears hurt, and made him nervous. While a noise standard, pursuant to the Act does govern permissible "dba" limits, the Commission found that the machine in question had not been in violation of the standard. Nonetheless, Pasula's work refusal due to his subjective head pain was granted protection.

Complainant also cites the case of MSHA ex rel. Pratt v. River Hurricane Coal Co., 3 FMSHRC 2366 (1981), where a miner's refusal to extinguish a lead-acid battery fire in a scoop, based on his subjective belief that the batteries could explode, was deemed protected activity despite the fact that the Judge found that the complainant's good faith fear of a battery explosion was unfounded.

In response to the respondent's arguments at hearing that his claim of exhaustion must be based on "something concrete", and that he must show that he was "confronted with certain facts or circumstances which give rise to an indication that there is a hazard" (Tr. 98, 100), complainant maintains that he was faced with a combination of circumstances which placed his safety in jeopardy, namely -- the number of hours he had already worked, how strenuously he had labored, the type of work he had performed, the type of overtime work he would have been required to perform, and the amount of work that he would have been required to do. Complainant submits that all of these critical factors are capable of objective, ascertainable proof, and that they were subject to examination by the respondent at hearing. However, complainant asserts that the respondent chose to argue its case on the basis of allegations rather than proof, and therefore its claim that his good faith work refusal is too subjective in nature should be rejected.

Complainant cites the testimony of Mr. Cochran at pgs. 121-122 of the trial transcript in further support of his argument that company policy did not intend for miners to work excessively long hours on a pillar section. Complainant points to Mr. Cochran's testimony that when he explained the pillar-pulling plan to miners at company safety meetings prior to beginning work on a pillar section he never said anything about staying 4 or 5 hours overtime.

Complainant submits that his case is not a "mixed motivation" case where respondent's actions against him were motivated both by his protected activity and also by any asserted separate unprotected activity. Complainant asserts that respondent's arguments at hearing that "an inference can be drawn" that he shut his drill down and removed it from the working section at the time of his work refusal (thus causing a "deliterious affect on production"), and that he also "attempted to disrupt the entire work force" should be rejected because the respondent introduced no probative evidence whatsoever to support either of these claims.

Although the complainant admits that he had removed his equipment from the work area and shut it down (Tr. 73), he points out that this took place at the completion of his regular shift when he had finished operating the equipment, and that he did nothing unusual or out of the ordinary with his equipment that night (Tr. 81-82, 105-106). He also points out that his testimony in this regard was confirmed by Bill Smith (Tr. 200), and that Eddie Miller admitted that he had ordered the entire crew out of the mine at the end of the regular shift (Tr. 318). Thus, complainant argues that he had no choice but to shut off his machine.

With respect to any "inference" that the complainant may have conspired with the three other miners to disrupt the work force, complainant asserts that the respondent failed to present any evidence to support this allegation. And, while there was testimony that two of the discharged miners made some disparaging comments to company management or to the others who chose to work, complainant points out that there is absolutely no testimony or evidence that he was a party to this conduct.

In conclusion, the complainant points to the testimony by Raymond Cochran and Eddie Miller that he was discharged for refusal to work (Tr. 140, 142, 322), and no other reasons were mentioned. In view of all of the circumstances presented in this case, complainant maintains that his case is not a mixed motivation case, and that the only conduct in issue is whether his work refusal is protected activity under the Act. He concludes that he was discharged by the respondent on August 6, 1981, and denied reinstatement on August 11, 1981, because of his good faith refusal to work under conditions he reasonably believed threatened his safety.

Respondent's Arguments

In its post-hearing brief, respondent summarizes the testimony of all of the witnesses who testified in this case, and advances the proposition that in resolving this case, one must first determine the credibility of complainant's assertion that he refused overtime work because he was fatigued. Respondent notes that the complainant is a 26 year old man who appears to be in good health and physical condition, and that under these circumstances respondent notes that it is not surprising that he did on various occasions work between seventy (70) and seventy-five (75) hours per week and that he did, on occasion, work two (2) consecutive shifts for a total of sixteen (16) hours continuous mining. Respondent asserts that during the week preceding the week in which he was fired, complainant had only worked forty (40) hours, and that during his final week of employment he worked four (4) days, including the date on which he was discharged. At the time of his termination, he had only worked twenty-eight and one half (28-1/2) hours during that particular week. Thus, respondent concludes that on August 6, 1981, the complainant had both the pjysical and mental ability to, as did his co-workers, work until 3:00 A.M., or, for that matter, complete the second shift.

Respondent states that had the complainant remained and worked a full shift overtime, he still would not have surpassed forty (40) hours during that given week and, accordingly, he would not have been entitled to overtime pay at the rate of one and one half (1-1/2) times regular pay. Respondent suggests that Johnny Jones, by his own testimony, second guessed the company and felt that it would not be unsafe to cease mining in that particular row of pillars and return to them on the next regularly scheduled work day, and that this must have been his primary motive in refusing overtime work.

Respondent argues that an ultimatum such as was given to the four miners who were fired can invoke a strong response and a spirit of rebellion, and that this is especially true when an individual, as did the complainant, believed "rumors" that other miners who had previously refused to work overtime under threat of discharge, were able to retain their jobs. Respondent argues further than in "all likelihood", the four miners fired on the night of August 6, 1981, were acting in concert since their actions are typified by the remarks made by Johnny Jones as he left the mine and that the profanity which he used was an attempt to arouse strong emotions within the other employees and to discourage them from remaining on the job.

Respondent asserts that the complainant knew that requests for overtime work must be honored, and that from his first day of employment he had an employee's handbook which stated that a refusal to perform the assigned work would result in an immediate discharge. Respondent suggests that while in attendance at meetings with Raymond Cochran, complainant must have heard him state that employees would, on occasion, be required to remain and complete a row of pillars.

Although respondent conceded that the complainant had no other problems with mine management, and that the parties are in agreement as to the reason that he was fired, respondent argues that his "work history also plays a part in the analysis of his claim". In support of this assertion, respondent states that although only 26 years of age, complainant has been employed by 6 different employers, the longest period of employment being for 2-1/2 years.

Respondent asserts that its legitimate business interests in requiring its employees to work overtime is made clear by the testimony in this case, and that even the complainant's own witnesses acknowledge the necessity of completing a row of pillars once they are begun. Respondent concludes that when all of the facts are analyzed one readily concludes that the complainant was not so fatigued at the end of his regular shift to work overtime; rather, he did not want to work overtime for staright pay, did not want to be "bossed" by mine management, and had heard of other employees disregarding a similar direct order and being permitted to remain in the respondent's employ. However, having refused to work and being terminated, respondent concludes that the complainant "fell upon this scheme for reacquiring the job abandoned by him".

Respondent argues further that, even assuming that the complainant was in fact too tired to continue with overtime work, the complaint must still fail because such an assertion involves a highly subjective state of facts known only to the complainant. Respondent asserts that the purpose of the Act "did not run to such highly subjective personal situations, but is intended to enlist the miners aid in enforcing the Act and to insure a safe work place within which the miner might function." Respondent concludes that the complainant has failed to show by a preponderance of the evidence that he refused to work the requested overtime hours because he was too tired, and that "it is obvious that this man was motivated by other reasons and only fell upon the guise of fatigue after he had lost his job".

Findings and Conclusions

The critical issue in this case is whether Complainant Eldridge's refusal to work beyond his normal work shift because he was "too tired" is protected by section 105(c) of the Act. Refusal to perform work is protected under section 105(c)(1) 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, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In Pasula the Commission established in general terms the right of a miner to refuse work under the Act, but it did not attempt to define the specific contours of that right. The Fourth Circuit Court of Appeals which reviewed Pasula discussed in detail the right of a miner to refuse work, and agreed that such a right generally exists. The Court stated as follows at 663 F.2d 1216-1217, n. 6:

> Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

In several decisions following Pasula, the Commission further refined "work refusals" by miners based on certain claimed safety hazards. In MSHA ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803, April 3, 1981, the Commission ruled that any work refusal by an employee on safety grounds must be bona fide and made in good faith. "Good faith" is interpreted as an "honest belief that a hazard exists", and acts of deception, fraud, lying, and deliberately causing a hazard are outside the

"good faith" definition enunciated by the Commission. In addition, the Commission held that "good faith also implies an accompanying rule requiring validation of reasonable belief", but that "unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection".

In Robinette, the Commission, in fashioning a test for the application of a "good faith" work refusal, adopted a "reasonable belief" rule, which is explained as follows at 3 FMSHRC 812:

> More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.
>
> * * * * * * * * * * * *
>
> In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well.

In MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126, February 5, 1982, the Commission defined further the scope of the right of a miner to refuse work under the Act. The case concerned two miners who refused to continue working because of certain perceived safety concerns. The company fired the miners for having "walked off their jobs", an action which the company "took as a quit on their part". The Commission held that if the walk off was a protected refusal to work, the termination over it was unlawful; if it was not protected, the termination was legal. In discussing and further refining the refusal to work, the Commission asserted that a statement of a health or safety complaint must be made by the complaining miner, and it adopted the following requirement in this regard, at 4 FMSHRC 133:

> Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances -- such as futility -- may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal. (Emphasis added)

The res judicata question

In its Answer to the discrimination complaint, filed April 5, 1982, respondent stated, inter alia, that "the complainant was discharged from his job for improper actions and misconduct on the job, including, but not limited to, disobeying direct orders from his immediate supervisors". Respondent goes on to state that Mr. Eldridge alleged discrimination only after he was discharged and should be estopped from filing his discrimination complaint with this Commission. Respondent also asserted that a prior state unemployment insurance commission decision of February 4, 1982, which denied Mr. Eldridge's compensation claim is res judicata and constitutes a bar to the present discrimination complaint. Respondent does not elaborate further on this question in its brief, and at the hearing, the parties advised that Mr. Eldridge's appeal of his denial of unemployment benefits is pending in a state court.

Mr. Eldridge's state unemployment compensation claim was denied in a decision rendered on November 5, 1981, by a State of Kentucky referee who heard his case. His appeal of that decision was denied by the State Unemployment Insurance Commission in an Order entered February 4, 1982 (copy attached to the respondent's Answer filed in the instant case). The referee found that Mr. Eldridge had voluntarily quit his employment without good cause attributable to that employment. The appeals commission however rejected the referee's conclusion of law in this regard, and its rationale for doing so is stated as follows in its Order:

> * * * * Whether a separation from employment is a discharge or quitting is determined by which party's actions initiated the separation from the employment. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting. In this case it is an indisputable fact that the employer initiated the separation.
>
> Misconduct has been defined as any act or omission by a worker which demonstrates a willful, wanton or reckless disregard for the legitimate business interests

> of the employer. Insubordination is an act of misconduct. Insubordination consists of the unjustified refusal to comply with a reasonable request or order of a superior. The request that claimant work overtime in an effort to remove all coal possible from the pillars was both feasible and practical. Claimant, an experienced miner, admitted he was aware of the necessity of extracting the coal prior to a long week-end so that if the roof collapsed the coal would not be lost to the employer. He had no physical limitations, thus his refusal to work the overtime necessary to complete the task constituted a deliberate or willful disregard of the employer's legitimate business interests. Accordingly, such action is sufficient to warrant a finding of misconduct.
>
> * * * It is now held the claimant was discharged from his most recent employment for reasons of work connected misconduct.

In the prior state proceeding, it appears that the initial decision denying his claim was based on a finding by the hearing officer that Mr. Eldridge had quit his job. On appeal, the state commission found that this was not the case. It found that Mr. Eldridge had been fired for misconduct (insubordination) for refusing to follow a legitimate management directive to work overtime, denied his claim because of work connected misconduct, and rejected the hearing officer's finding that he had quit his job.

It does not appear from the record here that Mr. Eldridge raised any "safety concerns" before the state unemployment commission referee who heard his initial claim and rendered his decision on November 5, 1981. Nor is there anything to suggest that he raised this issue during his appeal of that decision which was finalized by the state board's order of February 4, 1982. MSHA's denial of his discrimination complaint was communicated to him on December 14, 1981, when he received a letter notifying him of this decision, and his complaint with the Commission was received on January 18, 1982. Although Mr. Eldridge's failure to raise the issue in the state proceeding lends some credence to respondent's assertion that his "safety concerns" were an afterthought, this question must be decided within the parameters of the Pasula and Robinette decisions. The facts on which a state agency denies one unemployment compensation claims are different from those which must be considered under the Act.

If the issues and facts presented in the state proceeding are identical to those presented in cases considered under the Federal statute, the Commission has suggested that the doctrines of res adjucata and collateral estoppel may be available, Frederick G. Bradley v. Belva Coal Company, 4 FMSHRC 982, June 4, 1982, at pgs. 986-991). The Bradley case concerned a state proceeding before the West Virginia Coal Mine Safety Board of Appeals which considered the miner's claims of discrimination under a state coal mine safety law. Even so, the Commission affirmed Judge Broderick's

ruling that no weight should be accorded the state decision of no discrimination, 3 FMSHRC 921, at pg. 921, and 4 FMSHRC 991.

In the instant proceeding, the full transcript of Mr. Eldridge's hearing before the state referee and the referee's full decision are not in evidence. The parties used certain transcript portions and references for impeachment and credibility purposes, and it seems clear to me that the issues regarding Mr. Eldridge's "good faith", his "motivations", and the "reasonableness" of his work refusal must be decided on the basis of the Pasula and Robinette guidelines. Under the circumstances, respondent's assertions of res adjudicata and collateral estoppel are rejected and denied.

The alleged "concerted action" and "interruption of production"

Respondent's proposed finding VII that the four employees fired by the respondent on August 6, 1981, were acting in concert in the refusal to work the additional hours, and that they attempted to discourage, dissuade, and intimidate the remaining employees from returning into the mine is rejected as unsupported by any credible evidence or testimony. Although it may be true that Mr. John Jones may have cursed or made some disparaging remarks about mine management, and that someone may have referred to those miners who opted to go back to work as "chicken", and one man felt intimidated, there is absolutely no evidence that Mr. Eldridge was a party to any of this.

There is no evidence to support the respondent's assertion that the four discharged miners acted in "concert" or engaged in any conspiracy to disrupt or intimidate the work force. It seems to me that if this were in fact the case, the respondent would have presented some credible evidence to support this at the hearing. In addition, since it is logical to assume that "conspiracy" type work stoppages and intimidation of the work force on the part of miners are matters more serious than work refusals, it seems strange to me that the respondent did not discharge the four miners in question for those reasons, rather than for their refusal to work the requested overtime, as it did in this case.

Mr. Miller's speculation that the four discharged miners were acting in concert was based on his observations that "they rode together, and just stayed together, and just hung together". Mr. Eldridge's testimony that he did not car pool with any of the three discharged miners and drove to work alone was not rebutted by the respondent, and although Mr. Eldridge did state in his deposition that one of the discharged miners rode to work with him on the evening of the discharge, he also indicated that he left work alone.

In its proposed finding VIII, the respondent asserts that Mr. Eldridge's refusal to continue working additional overtime hours made it necessary for management to cease all operations in the section, remove the miners to the outside, secure replacements for those who refused to stay, and return the force into the mine, all to the delay and additional expense of respondent and hindrance of the production of coal.

The record in this case reflects that Mr. Eldridge's refusal to work the extra hours came at the end of his regular work shift, and that he advised the section foreman shortly before the shift ended that he was too tired to continue working. When the section foreman said nothing further, Mr. Eldridge began to secure his equipment and again advised the foreman that he was too tired to continue working. Thus, Mr. Eldridge's work refusal came at the end of the work shift. The decision to take the entire crew out of the mine was made by mine management, and Mr. Miller conceded that since it was the end of the shift, and after section foreman Eli Smith advised him that some of the men were coming out of the mine, he instructed the foreman to bring them all out.

The "overtime pay" issue

During the course of the hearing, respondent's counsel suggested that Mr. Eldridge's motivation for refusing to stay over and work the additional hours was based on the fact that he would only be compensated straight time, rather than overtime. Since Mr. Eldridge had only put in approximately 32 hours at the close of his normal shift on Thursday, had he opted to stay and work as requested by mine management, he would only have been compensated with regular pay for the ensuing eight hours (Tr. 94-96).

Respondent's argument that Mr. Eldridge's refusal to stay and work was based on the fact that he knew he would only be compensated for straight time, and not at overtime rates, thus raising an inference that Mr. Eldridge's work refusal was based on monetary considerations. Mr. Eldridge denies that this was the case, and in fact asserted that he had no idea as to how many hours he had worked, and that the matter of compensation never entered his mind.

The evidence establishes that during the period of the discharge, the mine was only operating on a four day week. Although it is true that the respondent's employee handbook states that the "work week" commences at 12:01 a.m. on Thursday, the handbook (exhibit R-1, pg. 5), also states the following:

> Most employees will work regularly scheduled shifts on Monday through Friday. A few employees may work on a regular work week of Tuesday through Saturday rather than Monday through Friday. At times it may be necessary to work other than regularly scheduled hours in which case your supervisor will notify you as much in advance as possible so that you may plan accordingly.

With regard to the payment of overtime pay, pg. 7 of the handbook states:

> Sun Fire will pay time-and-one-half for all hours worked over 40 in one week. * * * If the needs of the company

> dictate, management may be forced to reschedule working hours or require overtime work. We will give you as much advance notice as possible. (Emphasis added)

In response to an interrogatory served on the respondent by complainant's counsel for information as what period of time constituted a "work week" for the company, respondent's counsel simply referred to page 5 of the employee handbook, a copy of which had been given to the complainant. Complainant's further interrogatory as whether the company's "work week" was altered anytime during Mr. Eldridge's employment, including a request for the date(s) of any such change and any "daily sequence" which may have constituted the new "work week", was not answered.

Respondent's handbook references to the work week and pay for overtime are somewhat confusing and lend themselves to different interpretations. While the term "work week" is defined as commencing on a Thursday, the handbook also indicates that work shifts may run from Monday through Friday, and that some employees may be required to work a regular work week of Tuesday through Saturday, rather than Monday through Friday. The provision dealing with overtime pay states that overtime will be paid for all hours worked over 40 in one week. Thus, one may conclude that employees are compensated for overtime work when they work over 40 hours during any of these combinations, and that if an employee's scheduled work runs from Monday through Friday, as was the case here, any hours over 40 during that time frame are compensable as overtime.

Mr. Cochran testified that mine employees were only paid time and one-half pay for hours exceeding forty in number during any given work week (Tr. 138). Billy Smith, one of the miners who stayed, could not recall whether the men who stayed were paid any additional hour overtime pay. He did confirm that many times when he worked overtime, he was paid overtime rates for any work over 40 hours, but that on the evening in question, the men who stayed would have been paid straight time because they had not at that point in time put in 40 hours. Roger Miller, another miner who stayed, could not recall whether he was paid straight time, nor could he recall how many hours he had already put in during the week in question.

At hearing, the parties were in agreement that in general there has been no disputes or controversies between the miners and management over the question of working overtime, and that as far as counsel are concerned this case does not involve any issues concerning "enchantment or disenchantment singularly or collectively" with regard to overtime work (Tr. 104).

Eddie Miller testified that company policy dictated that if an employee stayed and worked an extra hour on overtime, he was given an additional hour (Tr. 322). He also stated that he gave the crew who did stay and work overtime "an hour and a half" (Tr. 321). He later testified that the normal shift ended 9:45 p.m., and that the men who stayed and worked the overtime until 3:00 a.m., an additional five hours, were actually paid for six hours.

When asked whether the men are paid an extra hour for each additional hour of overtime, or whether they would be paid an extra hour for 15 hours of overtime, he responded that they would be paid "maybe two" extra.

Mr. Miller testified that the normal work shift ended at 9:45 p.m. He also indicated that he did not tell the men that they were being paid for an additional extra hour, and they were not aware of it (Tr. 339). He confirmed that the men who stayed beyond the normal eight hour shift were credited for working a total of 14 hours on the day in question (Tr. 341), but he did not say that they were compensated at the overtime pay rate.

After careful review of the testimony and evidence adduced in this case I cannot specifically conclude that the crew who stayed and worked were in fact compensated at the actual overtime rate of pay for the extra time in question. A copy of the weekly time record (exhibit C-2), merely shows the total hours worked for two weeks. Respondent did not call the time keeper, Eli Smith to testify, nor did it produce any evidence as to precisely how much the men were in fact paid for the extra work. However, it would appear from all of the testimony that the men were paid at the straight time rate, with an extra "bonus" of an hour's pay as authorized by Eddie Miller.

I find no credible testimony or evidence to support the inference that Mr. Eldridge's refusal to stay and work the overtime hours was based on his belief that he would only be compensated for straight time. Since the mine was on a "short week", and he had only worked less than 40 hours when asked to stay over, one could also speculate that he would normally want to stay and work the additional hours, thus giving him a total of 40 hours, for his normal work week shift. In addition, the time record reflects that Mr. Eldridge worked a full 40 hour week the week before the discharge. The record also reflects that he was credited with 28 1/2 hours of work through Wednesday, the day before his discharge, and that on Tuesday he worked 9 hours, one of which was on "overtime" when he stayed over at mine management's request. It seems illogical to me that a miner who otherwise earned pay for a full 40 hour week, when faced with a credit of only 28 1/2 hours at the end of his scheduled weekly shift would turn down an opportunity to earn additional hours of pay. Of course, it is altogether possible that in a non-union mine, management could manipulate the work week so as to avoid paying overtime rates, but neither party has advanced any arguments to support this speculation on my part, and they agreed that the question of overtime as such is not an issue.

On the basis of the foregoing findings and conclusions, respondent's assertion that Mr. Eldridge refused to work overtime because he knew he would not be paid at the overtime pay rate is rejected.

Statement of safety complaint

One of the crucial questions in this case is whether requiring a miner who claims he is "too tired" or "physically and mentally exhausted"

to continue working beyond his normal work shift is an unsafe or hazardous practice. Assuming that the answer to this question is in the affirmative, the next question is whether the individual's claims in this regard constituted a safety complaint which has been communicated to mine management. Leaving aside for the moment the question as to whether the facts of this case support Mr. Eldridge's claim that his asserted physical condition constituted a hazardous safety condition, I will first address the question as to whether the record supports a finding that Mr. Eldridge did in fact communicate his asserted safety concern to mine management before the final decision was made to discharge him.

The facts in this case reflect that the mine in question is a non-union mine, and the case does not involve a complaint made by a miner to MSHA. In any event, in a case decided under the 1969 Coal Act, Taylor Adkins and Fred Hunt v. Deskins Branch Coal Company, 2 FMSHRC 2803, October 23, 1980, the Commission ruled that "in a non-union mine without established procedures for reporting complaints, as was the situation here, a miner's notification to any mine official brings the miner within the protection of section 110(b)." Respondent's Employee Handbook, exhibit R-1, does contain information concerning employee grievance procedures. Page 18 of the handbook advises employees to "ask" and not "guess" if they have any doubts regarding safety matters. Page 21 cautions employees that they must understand and abide by company, state, and federal safety rules, and that any questions in this regard are to be discussed with a supervisor. Respondent's position on this issue is that at the time Eddie Miller informed the crew that any miner who opted to pick up his check and leave the mine would no longer be needed by the company, Mr. Eldridge did not advise Mr. Miller that he was "too tired", and that only after coming to the realization that he was out of a job, Mr. Eldridge fell on a "scheme" to get his job back. My evaluation of the testimony and evidence on this question follows below.

Mr. Eldridge testified that approximately 35 minutes before the end of his normal shift he advised his section foreman Eli Smith on at least two occasions that he was too tired to stay and continue pulling the row of pillars that the crew was working on. He told him this when he first learned that outside mine foreman Eddie Miller expected the men to stay and finish the pillar work, and he told him a second time after he had secured his equipment and was told that Mr. Miller wanted the crew out of the mine. Billy Smith, Eli's brother, and Mr. Eldridge's fellow crew-member, confirmed that he heard Mr. Eldridge tell Eli Smith that he was too tired to stay late and work the extra time. John Jones, one of the miners who was also discharged for refusing to stay over and work, testified that he too heard Mr. Eldridge tell Eli Smith that he was too tired to work, and that Mr. Eldridge also told Eddie Miller that he was too tired to work when they were in the lamphouse.

Mr. Eldridge testified further that when he returned to the mine on the Tuesday following his discharge for a meeting with company manager Bobby Morris and mine superintendent Raymond Cochran, he explained to

Mr. Morris that he had been too mentally and physically exhausted to keep on working after the conclusion of hiw work shift the previous Thursday evening, but that Mr. Morris nonetheless upheld his discharge. John Jones, who was also present at the meeting, confirmed that Mr. Eldridge told Mr. Morris that he was too tired to work anymore, and Mr. Cochran confirmed that during the meeting Mr. Eldridge had in fact explained to Mr. Morris that he had been too exhausted to continue working anymore at the end of his shift the previous Thursday evening. Mr. Cochran stated that he interpreted Mr. Eldridge's assertion that he was "too tired" to mean that he was physically unable to continue working. Mr. Cochran also indicated that during the Tuesday meeting he asked Mr. Morris to put the four discharged miners back to work, but that Mr. Morris refused and made some statement that if he did he "would lose control over them". Mr. Cochran also testified that section foreman Eli Smith told him that he saw no need to keep the crew over to pull pillars and that he tried to communicate this fact to Foreman Miller on Thursday. Mr. Cochran also testified that during the Tuesday meeting, Mr. Eldridge was the only one who offered any excuse for refusing to work the requested extra time, but that the other three discharged miners said nothing.

Mr. Eldridge's testimony that he specifically told section foreman Eli Smith that he was too tired to continue working beyond his normal shift, is corroborated by the testimony of John Jones and Billy Smith. Eddie Miller's denials that Mr. Eldridge ever told him that he was too tired to work beyond his normal shift is in direct conflict with the corroborative testimony of John Jones, who confirmed that Mr. Eldridge told Eddie Miller that he was too tired, and that he did so in the lamphouse.

Neither Bobby Morris or Eli Smith testified in this case. Further, while there were other miners present in the lamphouse on Thursday evening when Eddie Miller delivered his ultimatum that those who picked up their checks no longer had a job, respondent presented no testimony from any of them to corroborate Eddie Miller's assertion that Mr. Eldridge said nothing. Although Billy Smith left the mine with the crew when they were ordered out by Eddie Miller, he testified that he was not with the group when Mr. Miller spoke to them (Tr. 198). Roger D. Miller, who was also present in the lamphouse when Mr. Miller spoke to the crew, said nothing about any statements by Mr. Eldridge and no testimony was elicited from him with regard to this question.

In his deposition of May 7, 1982, and in response to questions from respondent's counsel, Mr. Eldridge stated that on August 6, 1981, he told Eli Smith and Eddie Miller that he was too tired to stay and work the requested overtime. He also indicated that August 6th was a regular payday. He also stated that after he picked up his check he left the mine in his own car, and that miner Joe Engle who rode with him to work that day, left with someone else. He confirmed that the next regularly scheduled work day for the mine would have been the following Monday. With regard

to the meeting held after his discharge, Mr. Eldridge stated in his deposition that he and the other discharged miners went to the mine on the following Monday and met with Raymond Cochran, but that Bobby Morris was not there. Mr. Cochran arranged for another meeting for either Tuesday and Wednesday, and at that meeting Mr. Morris was present, along with Mr. Cochran and the other discharged miners. Mr. Eldridge stated further that he told Mr. Morris and Mr. Cochran at that time "I was too mentally and physically exhuasted to continue to work another eight-hour shift that night. I had put in a hard shift and it wouldn't be safe for me or anybody else", and that "they still said they didn't need us".

Eddie Miller denied that Mr. Eldridge ever told him that he had been too tired to continue working beyond his normal shift on Thursday evening. He denied that Mr. Eldridge advised him that he was too tired during the meeting with the men in the lamphouse, and he also denied ever meeting with any of the four discharged miners after they were fired on Thursday. He stated that once they picked up their checks in the lamphouse "that was the end of it" as far as he was concerned. Mr. Miller indicated that if Mr. Eldridge did state that he was "too tired" to continue working, he (Miller) did not hear it. Mr. Miller also indicated that if any miner ever came to him and advised him that he was too tired to stay on and continued pillar work he would "work something out" (Tr. 358). He also indicated that had Mr. Eldridge told him that "I would have worked something out so he could leave and go home and rest" (Tr. 358). He explained this answer by stating further that under these circumstances "if he tells me that he's absolutely too tired to stay and work, then he would just be accident prone, I guess", and that "it would be too dangerous for him to go back in" (Tr. 359).

In response to an Order issued by Chief Judge Merlin on April 2, 1982, complainant submitted a copy of his original discrimination complaint filed with MSHA on October 2, 1981. Mr. Eldridge's signed statement of October 2, 1981, contains the following statements:

> I had already worked an eight-hour shift pulling pillars, and I told management that I was too exhausted to continue working. I was told that if I did not stay until all of the pillars were pulled that I need not return to work on Monday (my next scheduled work shift). I was fired by Eddie Miller, the Mine Foreman, when I refused to continue working. I subsequently met with Bobbie Morris, the Sunfire Manager on Tuesday, August 11th, regarding my discharge. I told Mr. Morris that I had been too mentally and physically exhausted and wouldn't have been alert enough to continue working, but Morris upheld the discharge.

The credibility of the witnesses who testified in this proceeding is most critical in any determination by me as who is telling the truth and who is not. Mr. Miller testified that when he spoke to the men in the lamphouse after he ordered them out of the mine, he told them that it was necessary for them to stay and finish the row of pillars. While

he could not recall his exact words, he stated that he told them that if they did not stay the roof "might get to swimming" and "we'd lose the coal." He also indicated that he told the men that if the coal were left it would be too dangerous when the day shift came in (Tr. 359). Later, when asked by me whether he recalled specifically advising the men in the lamphouse how long he wanted them to stay, he stated that he told them it shouldn't take over two or three hours to finish the pillar row in question (Tr. 361).

Mr. Miller testified on direct examination that when he was underground on Thursday evening approximately 45 minutes before he ordered the crew out of the mine, he spoke with Eli Smith and informed him about the need to keep the crew over to finish the pillars. Although he conceded that Mr. Jones was present in the section, he denied that he spoke with him or with anyone else. Mr. Miller testified that none of the four men who picked up their checks in the lamphouse and refused to stay made any statements to him as to why they refused to remain and go back to work, and he indicated that three of the men car pooled together in the same automobile, and that Mr. Eldridge was one of them (Tr. 363).

However, on cross-examination, Mr. Miller confirmed that when he previously testified at the state unemployment compensation hearing, he testified under oath that at approximately 7:00 p.m., while in the section on Thursday evening, he personally informed John Jones about the need to stay over to finish the pillar work, and that he also spoke with all of the men. When asked to reconcile his inconsistent testimony, Mr. Miller indicated as follows at Tr. 333-335:

> Q. Now, I asked you question fourteen on page 30 -- now you also answered Mr. Hall's question -- Mr. Hall was the hearing officer. You said that 7:00 p.m. you personally informed Mr. Jones that they might need to stay late to finish pulling pillars. You answered uh-huh. I asked if you were on the section at that time. You said, yes, uh-huh. And the next couple of questions don't pertain to anything. I'll just go ahead and read them for continuity. "Are you ordinarily on the section?" and you said "No". And I asked, "Aren't you ordinarily outside?" You said, "On the section where he worked, and the other section; all over the mines; inside and out." And I asked you, "you're saying that on August 6th, that night you worked?" You said, "Yes." "You came in, who did you speak to?" You said, "All of the men." Now you're saying tonight you didn't speak to all of the men?
>
> A. Yes.
>
> Q. You just spoke to Eli Smith, and Johnny Jones happened to be there?

A. Yes. I don't remember whether any of the other men were there at that time or not.

Q. And I asked you, "What specifically did you tell Mr. Jones?" You said, "I told him that we were going to need to work late to finish the pillar row, which I shouldn't have had to tell them anyway; they knew it." And I asked you "What did Mr. Jones say at seven o'clock when you told him?" Answer, "He didn't say anything." "He didn't say a word?" Answer, "No, he didn't say he wasn't going to stay or --" Now at that time you very clearly were trying to tell the Hearing Officer that you had a personal conversation with Mr. Jones, weren't you?

A. No.

Q. I asked you "What specifically did you tell Mr. Jones?" You said, "I told him that we were going to need to work late -- I told him --"

A. I don't get your question.

JUDGE KOUTRAS: Do you remember talking to Mr. Jones on August 6th while you were underground, between seven and nine? Personally talking to Mr. Jones, and telling him that, you're going to have to stay and work?

THE WITNESS: Not personally. Mr. Jones and Eli Smith were there at the time, and I was talking to both of them.

JUDGE KOUTRAS: You were looking right at them?

THE WITNESS: Yes.

JUDGE KOUTRAS: What Mr. Oppegard is asking you is that some time ago when you testified at another hearing you specifically said that you looked Mr. Jones right in the eye and told him personally, you have to work, and Mr. Jones said nothing to you. What Mr. Oppegard is asking you now is, try to reconcile your statement. At that time you said you talked to Mr. Jones, and today you're saying you didn't talk to him. That's what he's trying to --

THE WITNESS: I talked to both of them.

JUDGE KOUTRAS: Did you talk at them or to them or what?

THE WITNESS: To them.

After careful consideration of all of the testimony adduced in this case, I conclude and find that Mr. Eldridge did in fact advise mine management both before and after his discharge that he was too physically and mentally exhausted to continue working on the pillar section beyond his normal work shift. His testimony that he advised section foreman Eli Smith and mine foreman Eddie Miller of this fact before his discharge is corroborated by other witnesses who I find to be credible. Mr. Eldridge's testimony that he also advised company manager Bobby Morris that he was too tired and exhausted is also corroborated by Mr. Cochran who was present at the subsequent Tuesday meeting. Further, Mr. Eldridge has consistently asserted that he advised all of these mine management personnel of the fact that he was too tired to continue on, both in his original complaint and in his pretrial deposition of May 7, 1982.

There is nothing in the record to show whether Mr. Eldridge's discharge was in any written form. There is nothing to indicate that the respondent served any written notice of discharge on any of the miners who were discharged for refusing to work. It would appear that foreman Eddie Miller advised the crew that if they did not work and picked up their checks, they were not needed any more. Company manager Bobby Morris, who I assume either made the initial decision to fire the men, or at least confirmed what Mr. Miller had told them, refused to reinstate them, and he did so after Mr. Eldridge offered his excuse for not staying to work the extra time, and after rejecting Mr. Cochran's suggestion that the men be put back to work. Under all of these circumstances, I conclude and find that Mr. Eldridge's reasons for refusing to work the requested extra time was not only communicated to mine management, but that mine management had ample opportunity to ponder the matter further.

Respondent's proposed finding XII that the complainant "failed to fully discuss his predicament with mine management prior to being discharged" is rejected. On the facts of this case, it seems clear to me that the discharge of Mr. Dickey was rather summary and abrupt, and Eddie Miller testified that when Mr. Eldridge decided to pick up his check in the lamphouse on Thursday evening and leave the mine, the matter was over as far as he was concerned. I have concluded that Mr. Eldridge communicated the fact that he was too tired to continue working to section foreman Eli Smith and mine foreman Eddie Miller before his discharge, and that he also communicated this fact to the then superintendent Cochran and mine manager Bobby Morris after he was informed that his services were no longer needed, all to no avail.

I conclude from the testimony in this case that once mine management decided that the crew was to stay and work until the pillar was mined, and once foreman Eddie Miller advised them that they either worked or were no longer needed, anything further that Mr. Eldridge may have said

would not have changed management's decision, and I do not believe Mr. Miller's assertion that had Mr. Eldridge told him he was too tired, he would have worked something out with him.

Respondent's proposed finding IX that Mr. Eldridge did not, at any time, inform Mr. Miller that he was too tired to work the requested overtime hours is rejected. As discussed in my findings and conclusions on this issue, the preponderance of the evidence in this case is to the contrary, and I take note of the fact that respondent did not call Eli Smith or Bobby Morris to testify in this case. It seems to me that these two individuals would have been most critical witnesses to corroborate the respondent's claims that at no time prior to the discharge was mine management ever advised of Mr. Eldridge's excuse for not staying and working the requested overtime.

The reasonableness of Mr. Eldridge's work refusal

I am most cognizant of mine management's concern over the maintenance of discipline of its work force, and its concern for the setting of any precedent that would permit miners to "willy nilly" dictate to management over matters which are a legitimate business concern. As a matter of fact in a recent decision handed down by the Seventh Circuit in Miller v. FMSHRC, 687 F.2d 194, 196 (1982), the court stated: "We are unwilling to impress on a statute that does not explicitly entitle miners to stop work -- a construction that would make it impossible to maintain discipline in the mines". Considering that statement, I honestly believe that in this case respondent's mine manager Bobby Morris had the same thought in mind when he opted not to change his decision regarding Mr. Eldridge's refusal to work overtime. However, the distinction to be made is that under the Pasula and Robinette line of cases, a miner may, under certain circumstances, stop work and refuse to continue on if his refusal is reasonable and made in good faith.

As indicated eralier, it seems clear from the Pasula, Robinette, and Dunmire and Estle cases, supra, that a miner may refuse to work if he has a good faith, reasonable belief regarding the hazardous nature of the safety condition in question. Good faith means an honest belief that a hazard exists. Robinette, 3 FMSHRC at 810. The miner's honest perception must be a reasonable one under the circumstances, and his belief as to the existence of any perceived hazard need not be supported by objective ascertainable evidence. The reasonableness of the miner's belief as to the existence of any hazard can be established at a minimum through the miner's own testimony as to the condition responded to with the testimony evaluated for its detail, inherent logic and overall credibility. Corroborative physical testimonial or expert evidence may be introduced and the mine operator may respond in kind. Robinette, 3 FMSHRC at 812. Unreasonable, irrational, or completely unfounded work refusals are not within the purview of the statute. Robinette, 3 FMSHRC at 811. Further, the Act's protection may be extended to those who posses the requisite belief even if the evidence ultimately shows the conditions were not as serious or hazardous as believed, Consolidation Coal Company, supra, 663 F.2d at 1219; Dunmire, supra, 4 FMSHRC at 131. The reasonableness of the belief must be judged as of the time it was held.

During the hearing, complainant's counsel suggested that there are at least three factors which should be considered in any determination as to whether Mr. Eldridge's work refusal was reasonable; namely, (1) the amount of work he had done on his shift, (2) the type of work involved, and (3) the length of time he was expected to continue working beyond his normal shift (Tr. 312). Counsel also suggested that each miner's claims in this regard should be made on the basis of each individual's own circumstances, and it seems clear that in the case at hand there is no medical evidence to suggest that Mr. Eldridge's refusal to work was based on any illness or known physical impairment. Respondent, on the other hand, takes the position that a miner's assertion that he is "too tired" is too subjective and should never be permitted.

The facts in this case do not suggest that Mr. Eldridge's safety concerns were directly related to any specific hazardous conditions which existed in the section at the time he was directed to stay and work the overtime in question. In other words, there is no evidence to establish that the roof conditions in the section were such as to constitute specific violations or infractions of any safety standards. Further, as observed by me at the hearing, at Tr. 102-103, Mr. Eldridge's reluctance to work the overtime was not because he found anything unsafe about the prevailing mine conditions or the area where he was expected to continue working, but was based on his own evaluation as to his mental and physical state at the time of the work refusal.

I reject the respondent's arguments that before Mr. Eldridge may prevail, he must first establish a violation of some mandatory health or safety standard, or establish that the mine conditions were so hazardous that to require him to work would place him in jeopardy of life and limb. The question presented is whether Mr. Eldridge's claims that he was so mentally and physicall exhausted at the conclusion of his regular tour of duty reduced him to such a state physically and mentally, that to require him to continue on with the pillar work would place him in jeopardy. If the answer to this question is in the affirmative, then I believe it follows that his refusal to work was not unreasonable, and that his work refusal in these circumstances was a reasonable judgment on his part which is protected from any reprisals by mine management.

The record in this case establishes the fact that Mr. Eldridge had never previously been involved in any management "disputes", had never been disciplined for missing work or failing to do his job, that he was considered to be a good worker, and that he had previously worked long and short hours of overtime when asked, and had never before the incident in question refused management's requests to work overtime. In these circumstances, I agree with his counsel's arguments that these factors are not the characteristics of a miner who shirks his duties. I also agree with respondent's counsel's observations that Mr. Eldridge is a man of 26 years of age who appears to be in good health and physical condition.

The testimony and evidence establishes that at the time of the work refusal, Mr. Eldridge was aware of mine management's concern that the

additional work required to finish the pillar work was needed so that the coal was not lost, and to insure that the area was timbered and rendered safe for the next crew which was scheduled to work the following Monday. Further, I conclude that management's concerns and interests in this regard were legitimate concerns. However, insofar as Mr. Eldridge is concerned, the critical question is whether or not the request to stay was "open ended", and whether the record supports a finding that mine management's request that he stay "until the work was finished", with no indication as to how long it would take, was a reasonable request to accomplish management's objectives.

A pivotal question surrounding the reasonableness of Mr. Eldridge's work refsual, is the amount of time that he believed he was required to stay and finish the pillar work. The fact is that the miners who stayed worked until 3:00 a.m., or approximately five hours of overtime. It is easy for one to speculate after the fact that any given amount of time worked may or may not be reasonable. While it is true that Mr. Eldridge indicated he did not know whether his decision would have been any different had Mr. Miller specifically told him that the overtime work would not last more that three or four hours, the critical question is to decipher the actual circumstances which faced Mr. Eldridge at the time he made his decision that he was "too tired" to continue working.

I am impressed by the testimony of former mine superintendent Cochran who indicated that if it were his decision to make, he would not have fired Mr. Eldridge. Although Mr. Cochran's testimony is somewhat contradictory in that he indicated that the decision to keep the crew over was not unreasonable and that the miners who did stay until 3:00 a.m., did not work an "unreasonable" amount of overtime, his testimony that mine policy did not require or call for a long period of overtime pulling pillars, that section foreman Eli Smith told him that he saw no need to keep the men beyond their normal shift and tried to communicate this to Eddie Miller, and that he (Cochran) tried to talk Bobby Morris out of his decision to fire Mr. Eldridge all remains unrebutted and unimpeached, and I find Mr. Cochran's testimony credible. Although Mr. Cochran is apparently no longer employed with the respondent, there is nothing in the record to suggest any animus on his part toward his former employer or that he colored his testimony in any way.

Respondent's proposed finding II states that "Complainant was informed by his immediate supervisor, approximately thirty-five (35) minutes before the end of his shift of work, that he should remain on the job finishing pulling the row of pillars on which he was working at the end of the regularly scheduled shift. In proposed finding XIV, respondent asserts that at the time Mr. Eldridge was requested to work overtime, "a reasonably prudent miner knew or should have know that an additional period of about three (3) hours would have been necessary to complete the indicated work".

to stay and work overtime until the pillar work was completed. Given this situation, I cannot conclude that Mr. Eldridge's explanation and evaluation of what work remained to be done, particularly when he was underground working on the pillar section in question, was unreasonable. Mr. Miller indicated that when the men who stayed left at 3:00 a.m., a cut of coal was left and was not taken. Further, Lester Caldwell testified that when he went back to the section the following Monday, August 10, the row of pillars worked on by Mr. Eldridge's crew the previous Thursday, August 6, was still standing and had not caved in. Given these circumstances, Mr. Eldridge's assertion as to what work remained to be done at the time of the work refusal is credible.

Of the four men who decided not to stay and work the overtime, Mr. Eldridge was the only one who offered any excuse. Mr. Jones opted "to take his chances" and left after voicing his "displeasure" with mine management. The other two men picked up their pay checks and left without offering any explanation. The facts in this case do not suggest that Mr. Eldridge's asserted fatigue and exhaustion resulted from something that he had prior control over, or that he reported for work in such a state that his exhaustion can be attributable to nonwork related activities. Here, Mr. Eldridge worked and completed a full normal shift, at the conclusion of which he felt too tired and exhausted to continue working overtime until the rest of the pillar work was completed. Mine foreman Eddie Miller, the man who fired Mr. Eldridge, conceded that had Mr. Eldridge informed him that he was too tired to stay and work, he would have worked something out so he could leave the mine and go home and rest. Mr. Miller conceded further that under these circumstances, Mr. Eldridge would be "accident prone", and that "it would be too dangerous for him to go back in" (Tr. 359).

On August 6, 1981, Mr. Eldridge was working on the second shift, and the scheduled work time for that shift began at approximately 2:00 p.m. and ended at 10:00 p.m. Retreat pillar mining was taking place at this time, and Mr. Eldridge testified that during the shift in question, he performed work operating the coal drill, shooting coal as a shot firer, helping the cutting machine operator with his cable, assisted in the hanging of ventilation curtain, and installed roof support timbers. Mr. Eldridge testified that he worked a full shift, and the only "down time" came at the end of the shift when a shuttle car broke down. Equipment repairman Billy Smith corroborated the fact that the car broke down at approximately 9:00 p.m., and that he was expected to stay over and repair it. He also testified that the section continued to operate with another machine.

John Jones confirmed that retreat pillar work entailed the continuous setting of roof support and breaker posts to protect against roof falls and rib rolls. He estimated that by the end of the normal work shift, he had made approximately 12 to 14 cuts of coal with his machine. Charles Cody, a miner who was called in from another section and who did stay to work the requested overtime, testified that if he were "dead tired" after working on a pillar section, he would not want to continue working because he would

John Jones' refusal to stay was based on his assertion that there was no indication that the top would fall over the intervening weekend and he saw no reason for staying. He worked the entire regular shift with Mr. Eldridge, and in Mr. Jones' opinion it would have taken an additional shift or shift and a half to take out all of the remaining coal on the pillar (Tr. 230).

Mine foreman Eddie Miller first testified that when he met with the crew in the lamphouse he informed them that it was necessary for them to stay and finish the row of pillars, and he explained that the company did not want to lose the coal in the event of a roof fall. Later, in response to my questions, Mr. Miller stated that he did inform the men that the additional pillar work would not take over two to three hours. Former mine superintendent Cochran testified that section foreman Eli Smith informed him that he saw no need to keep the crew over for the extra work, and that he tried to communicate this to Eddie Miller.

It seems clear from the record in this case that mine foreman Eddie Miller was aware of the fact that some of the men did not want to stay beyond their normal work shift and that his awareness of this fact was communicated to the then general superintendent Raymond Cochran in terms of "a problem". Mr. Miller then ordered the entire crew out of the mine so that he could speak with them. Up to that point I can find no credible testimony to support a finding that the crew was ever told precisely how long they were expected to stay over and work. Mr. Miller testified that when he went into the mine after the men left there was no loose coal which had been cut that needed to be loaded out. He confirmed that the men who did stay to work left at 3:00 a.m., because the row of pillars had been mined and the breaker posts were set. However, he acknowledged that a cut of coal was left because the roof which had been cut and shot was "popping" and that "we felt that we had it in good shape, and we could go ahead and leave" (Tr. 360). He also indicated that when he was underground sometime between 7:00 and 7:30 p.m. on August 6, he remarked to section foreman Eli Smith that "it looks like we need to work overtime."

Although there is a conflict in the testimony of the witnesses as to precisely what was said in terms of how long management expected the crew to stay and work, careful scrutiny of the entire record and all of the testimony in this case leads me to conclude that management made no real estimate as to how long the additional work would take and simply expected the crew to stay until the work was finished. While it is easy for anyone to speculate and offer an opinion "after the fact", it seems clear to me that at the time of the incident and prior to the work refusal in question no one actually physically inspected the area which remained to be worked to determine precisely how long it would take to finish the pillar work.

I find that the preponderance of the credible testimony establishes that Mr. Miller did not tell Mr. Eldridge that he was required to stay and work any specified amount of time. I find that he was simply directed

not be alert and that this would not be safe. Although he did concede that he was tired at the time he was asked to stay over for the additional work but opted to stay anyway, I am convinced that he did so because he personally felt some obligation to stay.

Former mine superintendent Cochran testified that company policy did not call for miners to work long hours pulling pillars because they would be "wore out" and "too fatigued". He also indicated that had he been advised that Mr. Eldridge was too tired to stay on and work he would have sent him home to rest and would have attempted to get someone else to replace him. MSHA Inspector Lowers testified that based on his experience, if he were a supervisor and a miner told him he was too exhausted to continue working, he would "send him outside".

Apart from its conclusion that a claim of "too tired and exhausted" is too personally subjective to ever be believed, the only testimony presented by the respondent to refute Mr. Eldridge's claims in this regard is that of Eddie Miller. However, close scrutiny of his testimony reflects that he was not underground during the entire work shift in question, and he conceded that the reason he does not believe Mr. Eldridge's claims is that he "had no waying of knowing" whether he was too tired and exhausted to continue working. He then candidly conceded that had Mr. Eldridge informed him that he was too tired and exhausted to continue working he would have sent him home to rest because he would have been accident prone. Thus, I can only conclude from this testimony that Mr. Miller would have accepted Mr. Eldridge's claims of being too tired and exhausted, and his only reason for not doing so in this case is his assertion that Mr. Eldridge said nothing to him.

Eddie Miller testified that Mr. Eldridge had been on the job for one full shift at the time the crew was directed to work overtime. Although he refuted the fact that "drilling and shooting" entailed two distinct jobs, he did not rebut Mr. Eldridge's claims that he did in fact do that work in addition to his other duties. Further, Mr. Miller confirmed that timbers were continuously being knocked down and reinstalled during the mining operation in question, that an "abundance" of timber roof support posts were installed on the pillar section, that many times extra posts are installed to insure the statility of the roof, and he did not rebut the fact that Mr. Eldridge was also engaged in this work in addition to his other duties.

In addition to pointing out that Mr. Eldridge is a young man who had held six jobs, none of which lasted more than 2-1/2 years, the thrust of respondent's defense to Mr. Eldridge's claim that he was too tired and exhausted to continue working beyond his normal work shift is the suggestion that such claims should never be allowed because they are too personally subjective and lend themselves to abuse by miners who simply wish to make their own determination when they will work. Although I agree with the general proposition advanced by the respondent on this

question, on the facts and evidence presented in this case, I cannot conclude that the respondent has rebutted Mr. Eldridge's prima facie showing that at the conclusion of his normal work shift he was too tired and exhausted to continue working on the pillar section until all of the pillar was extracted and the area secured for the next subsequent work shift. Further, I cannot conclude that the respondent has rebutted Mr. Eldridge's prima facie showing that given the circumstances and options facing him at the time of the work refusal, he acted unreasonably and in bad faith. As a matter of fact, as detailed earlier in this decision, the preponderance of the testimony adduced in this case supports Mr. Eldridge's assertion that requiring him to continue working when he was physically and mentally exhausted would have jeopardized his safety, and possibly the safety of other members of the crew who did stay and complete the work.

Considering all of the circumstances surrounding Mr. Eldridge's discharge, there is a strong inference in this case that once the management decision was made to discharge anyone who did not stay to work the required overtime, management simply did not want to "back off" for fear of jeopardizing its disciplinary control over the work force. Since Mr. Eldridge was the only one of the group who advanced an excuse for not wishing to stay, and since management had a further opportunity to consider that excuse when it met with the men the following week after the discharges, one would think that management would consider that the circumstances surrounding Mr. Eldridge's work refusal were different from those concerning the other three miners who were fired. The testimony in this case suggests that at the time management met with the men after they were fired, it should have been evident that Mr. Eldridge's reasons for refusing to work the requested overtime was reasonable "protected activity", while the work refusals of the other miners were not. However, it would appear that management simply did not wish to make any exceptions, regardless of the reasons advanced by Mr. Eldridge for his work refusal. The result of that decision is that what may appear to be a legitimate business management decision to discharge three of the men who refused to work the requested overtime, Mr. Eldridge's discharge was contrary to the anti-discrimination provisions of the Mine Act, as interpreted by the applicable case law.

Conclusion

Given all of the aforementioned circumstances, including my findings and conclusions on the issues discussed above, and based on a preponderance of all of the credible evidence and testimony of record in this case, I conclude and find that Mr. Eldridge has established that at the time he was directed to work the requested overtime to complete the pillar work in question he was physically and mentally exhausted. I further find and conclude that given those circumstances, his refusal to stay and complete the requested work was reasonable, and that his decision in this regard was made in good faith. I further find and conclude that requiring Mr. Eldridge to stay and work under the circumstances here presented constituted a safety hazard to himself as well other members of his crew,

and that his refusal to stay in these circumstances was protected activity under section 105(c) of the Act. Accordingly, I conclude and find that Mr. Eldridge was unlawfully discriminated against and discharged by the respondent for engaging in activity protected under section 105(c) of the Act, and his complaint of discrimination IS SUSTAINED.

Relief and Remedies

As part of his discrimination complaint filed in this case, and incorporated by reference in his post-hearing brief, Mr. Eldridge requests me to give him the following relief and remedies:

(1) Order that he be reinstated to his former position with full backpay plus interest;

(2) Order that he be reinstated by Respondent at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been discriminatorily discharged;

(3) Order that his seniority rights be adjusted to reflect his work time lost due to Respondent's discriminatory discharge;

(4) Order that all references to his illegal discharge by Respondent be expunged from his personnel file;

(5) Order that Respondent reimburse him for all expenses incurred by him in the institution and prosecution of this proceeding;

(6) Order that he be compensated by Respondent for all medical expenses incurred by him and his family since the date of his discharge, which would have been covered by his medical insurance;

(7) Order that he be awarded reasonable attorney's fees; and

(8) Order such other relief as the Court may deem just and proper.

Discussion of Remedies

Section 105(c)(3) of the Act empowers the Commission to remedy discrimination by ---

> * * * granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.
>
> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate

> amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed the person committing such violation.

The general subject of the Mine Act's remedies for discrimination are discussed in detail by the Commission in its Northern Coal Company and Belva Coal Company decisions, 4 FMSHRC 126 and 982 (1982), and the parties' attention is invited to those decisions.

During the hearing in this matter, the parties stipulated as to certain matters concerning Mr. Eldridge's employment status (see pg. 2 of this decision). In addition, Mr. Eldridge testified as to other employments held by him, as well as his efforts to seek employment since his discharge by the respondent on August 6, 1981 (Tr. 60-61). He also alluded generally to certain medical and dental expenses incurred by his family during his period of unemployment (Tr. 62). However, the parties have not had an opportunity to file, nor have they filed, any detailed documentation with respect to the question of the compensation due Mr. Eldridge in the event he prevailed in this case. In this regard, it seems clear to me that pursuant to the terms of section 105(c) of the Act, as well as the case law on this subject, that Mr. Eldridge is entitled to the aforementioned itemized relief which he has requested.

ORDER

1. Respondent IS ORDERED to reinstate Mr. Eldridge to his former position with full backpay plus interest, from August 6, 1981, to the date of his reinstatement, with all of his seniority rights intact as noted in requested relief No. 3 above, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been discharged.

2. Respondent IS ORDERED to compensate Mr. Eldridge for all legitimate medical expenses incurred by him since the date of his discharge, which would have been covered by any employee medical insurance carried by the respondent for his or his family's benefit, reimbursement or coverage of which would have been afforded him had he not been discharged.

3. Respondent IS ORDERED to expunge from Mr. Eldridge's personnel records and files any reference to the discharge of August 6, 1981.

4. Respondent IS ORDERED to compensate Mr. Eldridge for any reasonable personal expenses incurred by him in the institution and prosecution of his discrimination complaint.

5. Respondent IS ORDERED to reimburse Mr. Eldridge for all reasonable attorney's fees incurred by him as a result of his institution and prosecution of his discrimination complaint.

IT IS FURTHER ORDERED that counsel confer with each other with respect to the amount of back pay and other compensation due under the above order, including the amount of any claimed costs and attorney's fees, and any agreements, stipulations, and/or settlements in this regard are to be filed with me in writing within fifteen (15) days of the receipt of this decision. If counsel cannot agree, they are to notify me of this in writing within the 15 day period. In the event of any disagreements, the parties are further directed to state their respective positions on those compensation issues where they cannot agree, and they shall submit their separate proposals, with documentation and supporting arguments in writing within twenty five (25) of the receipt of this decision. For purposes of fixing the compensation due Mr. Eldridge, including the awarding of any attorney fees and other costs, I retain jurisdiction of this matter.

George A. Koutras
Administrative Law Judge

Distribution:

J. L. Roark, Esq., Craft, Barret & Haynes, P.O. Drawer 1017, Hazard, KY 41701 (Certified Mail)

Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 11 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ARCH MINERAL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-479

Appearances:

Katherine Vigil, Esq., Office of
Henry C. Mahlman, Associate Regional Solicitor
United States Department of Labor
Denver, Colorado,
for the Petitioner

Brent L. Motchan, Esq.
Arch Mineral Corporation
St. Louis, Missouri,
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, Arch Mineral Corporation, with violating Title 30, Code of Federal Regulations, Section 77.1710(i), 1/ a regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

1/ The cited regulation provides as follows:

§ 77.1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

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

The parties filed post trial briefs.

ISSUES

The threshold issue is whether the MSHA inspector acquired sufficient information to justify the issuance of the citation.

An additional issue is whether an operator is relieved from liability for a violation of the seat belt regulation when he shows that his policy "required" the use of such seat belts.

STIPULATION

The parties stipulated that this mine produces annually 2,719,890 production tons of coal of respondent's total annual production of 8,719,876 tons. In the prior 24 months no violations of this regulation have been assessed against respondent. Finally, respondent's ability to remain in business will not be impaired by payment of the proposed penalty (Tr. 6, 7).

SECRETARY'S EVIDENCE

John Thompson, a federal coal mine inspector experienced in mining, inspected the Seminoe No. 1 mine on April 21, 1980 (Tr. 19)

Close to the entrance ramp, on a coal bench, a D9 Caterpillar bulldozer appeared in a nearly upset condition. It was tilted at a 35 to 40 per cent angle (Tr. 19, 20, 29, 30). The dozer had been working the coal bench when the outer edge of the bench collapsed (Tr. 20). One 24 inch track was on the bench and one was below it (Tr. 20-22, P 1). The dozer, equipped with an enclosed cab, had roll-over protection (Tr. 30).

Inspector Thompson didn't see the dozer in operation but the engine was warm (Tr. 23). He spoke to the operator who said he hadn't been wearing the seat belt (Tr. 30). The inspector, after viewing the seat belt, concluded the belts weren't being used. They were under the seat, had an appearance of non-use, and had dust and hand prints on them (Tr. 30-31, 43, 44).

The dozer was in an area where equipment gets dusty (Tr. 44).

The roll-over structure protects the dozer operator. The seat belts also prevent the operator from being thrown out of the cab of the 70,000 pound vehicle (Tr. 31).

The inspector was aware of accidents involving similarly equipped vehicles (Tr. 32-35).

RESPONDENT'S EVIDENCE

Steve Edwards and James Baxley, experienced in safety, oversee respondent's compliance with MSHA regulations (Tr. 61-63).

Respondent's written rules provide that "seat belts must be worn in vehicles where roll-over protection is provided (Tr. 64, R 1 on page 6). Respondent's own enforcement procedure includes progressive penalties for violations (Tr. 65). Respondent's safety rules are distributed to workers. This included Ken Braden, the bulldozer operator (Tr. 67, 68, R1, R2).

Respondent's previous miner training for operator Braden was completed July 27, 1979. The training dealt with seat belts as well as their importance and repair (Tr. 69-71). Slides dealt with roll-over accidents (Tr 71).

Braden also received new task training which was completed on April 21, 1980 (Tr. 72-75, R3, R4). The training for a scraper operator, approved by MSHA, covers seat belts (Tr. 74-76, R 4).

Macklin R. Miller, the reclamation foreman, trained Braden (Tr. 78, 95-96).

Company policy is to issue its own citation if a worker receives an MSHA citation (Tr. 99, 100, R6). Braden, due to the policy, received a citation from respondent's safety director James Baxley (Tr. 101, R6). Company citations remain in a worker's file for a year after they are issued. They are then removed (Tr. 100).

Some 18 to 20 supervisors, which would include pit and reclamation foremen, company safety inspectors, and upper level mine management may issue citations (Tr. 103-104).

Baxley asked Braden if he was wearing his seat belt and he replied affirmatively. But when he was asked a second time he said he wasn't wearing the belt or something to that effect (Tr. 106, 107).

DISCUSSION

The evidence, as noted herein, is uncontroverted. The Secretary establishes the events that occurred on the day of the inspection. Respondent counters with its safety program consisting of education, training, and enforcement relating to seat belts.

The threshold issue is whether the inspector may issue a citation alleging a violation of § 77.1710(i) relying on the facts he observed on this particular day.

Section 104(a) of the Act, 30 U.S.C. 814(a), provides the Secretary may issue a citation upon inspection or investigation if "he believes that an operator . . . has violated this Act, or any mandatory health or safety standard . . . ." The legislative history dealing with this portion of the Act does not address this point. Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session, 618. But, in considering the remedial purposes of the Act, I conclude that the belief of the Secretary does not necessarily require the Secretary's representative to observe the operative fact of the violation to issue a citation. In other words, as in this factual setting, he is not required to observe the driver sans seatbelt in the seat on the dozer. It is true that the inspector did not see that occur, but he may rely on other circumstances. To hold otherwise would reduce mine safety to a game akin to hide and seek. The Act does not countenance such a charade.

Here the inspector observed the dozer at a tilt, its motor warm, the seat belt under the seat, the seat belt dusty. He talked to Braden, the operator. The operator admitted he hadn't been wearing the belt (Tr. 30). The totality of these facts are sufficient to establish the belief of the Secretary that a violation occurred.

In support of its position that an inspector must see the actual operative event establishing a violation, respondent cites these cases: Pennsylvania Glass Sand Corporation, 1 FMSHRC 1191 (1979) (Koutras, J); Eastern Associated Coal Corp., MORG 73-336 (1974) and Burgess Mining and Construction Corp., BARB 78-91-P (Cook, J).

At the outset I note that all of the above cases are unreviewed decisions of Commission Judges. They are not binding on other Judges, Commission Rule 29 C.F.R. 2700.73. But a careful reading of such cases indicates they are not factually controlling.

In Pennsylvania Glass Judge Koutras rejected MSHA's position which "appears to be that any time anyone advises an inspector of some past condition or practice outside of the inspector's own personal knowledge or observations, the inspector must issue a citation" (Emphasis added), 1 FMSHRC at 1210. In the instant case the inspector made personal observations as described above. These observations and conversations establish a prima facie case for a violation of the regulation, Cf. Pennsylvania Glass at 1212.

In Eastern Associated Coal Corporation Judge Merlin vacated a withdrawal order for the alleged violation of 30 C.F.R. 75.400-2. That case is not factually relevant.

In Burgess Mining Judge Cook refused to sustain a violation based solely on the hearsay statements of a "truck driver" and a "truck foreman". Judge Cook noted MSHA could have subpoenaed the persons who made the statements or "the inspector could have personally checked the brakes." (Slip op. at 6).

In the cited cases relied on by respondent, the inspector did not observe the violation nor did he acquire any probative circumstantial evidence indicating that a violation existed. In this case, the facts observed by Inspector Thompson justify his belief that a violation occurred. It accordingly follows that the citation was legally issued.

The secondary issue on this case concerns the construction of 30 C.F.R. 77.1710. The central focus of the case now becomes whether the coal operator "required" the use of seat belts rather than whether the dozer operator in fact used the seat belt. Respondent, in its post trial brief, urges that the regulation should be constructed as it was in North American Coal Company, 3 IBMA 93 (1974).

The gist of the cited case is that when the regulation mandates that seat belts "shall be required" an operator is in compliance if it has a safety system designated to assure that all reasonable efforts are employed to insure that miners wear such "required" protective equipment and that such "requirement" is enforced with due diligence.

The Secretary's post trial brief states that a case factually similar to North American is now pending on review before the Commission in Southwestern Illinois Coal Corp., 3 FMSHRC 871 (1981), (Koutras, J). But, the Secretary correctly observes that the Commission's disposition of Southwestern Illinois may or may not affect the instant case. However, this Judge is obliged to follow the doctrine expressed in North American as binding precedent. New Jersey Pulverising Company, 2 FMSHRC 1686 (1980).

The Secretary may have anticipated the foregoing ruling because he states that even by North American standards, no defense has been established. He argues that respondent has shown little more than a general safety program. In short, the Secretary asserts that neither respondent's safety program nor its enforcement procedures constitute the kind of thorough and comprehensive program relied on by the Board in North American. The Secretary characterizes the program in North American as one designed to eliminate a particular hazard through constant reminders to employees. Respondent, he argues, has no such comparable program regularly emphasizing to the employees the need to wear seat belts in certain vehicles (Brief at 6-7).

I disagree. Respondent educates, trains, and enforces.

Concerning education: It's safety handbook is distributed to its workers. The handbook provides, in part, that:

> Seat belts must be worn where
> rollover protection is provided
> (Tr. 64,67, R 1 at page 11)

A sticker entitled "pre-shift examination", (yellow in color and measuring 3 inches by 6 1/2 inches), refers to "seat belt" (Tr. 79, 80, R 4A). This exhibit was furnished with a training packet (Tr. 79).

Concerning training: In 1979 respondent used a personal protection module dealing with the importance of seat belts. Braden attended the session (Tr. 71, 87).

In January 1979 a "safety check list" memorandum was issued to the miners and the name of Ken Braden appears on the exhibit (R5). The three page memorandum states, in part:

> BE SURE TO -
> 1.-
> e) Seatbelts - must use-

An MSHA form indicates Braden received miner training in 1979. He completed the training July 27, 1979 (R2, MSHA form 5000-23).

Braden also received the new task training course from Macklin Miller. He completed the training on April 21, 1980, which happened to be the day of this inspection (Tr. 73, 78, R3, MSHA certificate of training form #5000-23). The MSHA approved training course includes seat belt training (Tr. 75, 76).

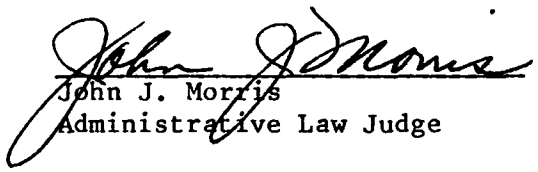
Concerning enforcement: Workers have been disciplined for violating regulations in the company handbook (Tr. 88). It is company policy to issue its own citation when a worker receives an MSHA citation. Braden received a citation at the date and time of the MSHA citation. The MSHA citation indicates it was issued at 1750. This 24 hour clock is equivalent to the time on the company's citation of 5:50 p.m. on the same date (Tr. 99, Citation, R6).

The foregoing uncontroverted evidence places respondent within the doctrine expressed in North American. In sum, respondent has avoided liability under the regulation notwithstanding the fact that a prima facie case for the violation of 30 C.F.R. 77.1710(i) exists.

Based on the foregoing finding of facts and conclusions of law, I enter the following:

ORDER

Citation 828398 and all proposed penalties therefor are vacated.



John J. Morris
Administrative Law Judge

Distribution:

Katherine Vigil, Esq., Office of the Solicitor
United States Department of Labor
1585 Federal Building, 1961 Stout Street
Denver, Colorado 80294

Brent L. Motchan, Esq.
Arch Mineral Corporation
500 N. Broadway, Suite 1800
St. Louis, Missouri 63102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 11 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ARCH MINERAL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-205

Appearances:

Katherine Vigil, Esq., Office of
Henry C. Mahlman, Associate Regional Solicitor
United States Department of Labor
Denver, Colorado
for the Petitioner

Brent L. Motchan, Esq.
Arch Mineral Corporation
St. Louis, Missouri
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, Arch Mineral Company, with

violating Title 30, Code of Federal Regulations, Section 77.1707(b), 1/ a regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq.

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

ISSUES

The issues are whether respondent violated the regulation, and, if so, what penalty is appropriate.

1/ § 77.1707 First aid equipment; location; minimum requirements.

(a) Each operator of a surface coal mine shall maintain a supply of the first aid equipment set forth in paragraph (b) of this section at or near each working place where coal is being mined, at each preparation plant and at shops and other surface installation where ten or more persons are regularly employed.

(b) The first aid equipment required to be maintained under the provisions of paragraph (a) of this section shall include at least the following:

(1) One stretcher;
(2) One broken-back board (if a splint-stretcher combination is used it will satisfy the requirements of both subparagraphs (1) of this paragraph and this subparagraph (2);
(3) Twenty-four triangular bandages (15 if a splint-stretcher combination is used);
(4) Eight 4-inch bandage compresses;
(5) Eight 2-inch bandage compresses;
(6) Twelve 1-inch adhesive compresses;
(7) An approved burn remedy;
(8) Two cloth blankets;
(9) One rubber blanket or equivalent substitute;
(10) Two tourniquets;
(11) One 1-ounce bottle or aromatic spirits of ammonia or 1 dozen ammonia ampules; and,
(12) The necessary complements of arm and leg splints or two each inflatable plastic arm and leg splints.

(c) All first aid supplies required to be maintained under the provisions of paragraphs (a) and (b) of this section shall be stored in suitable, sanitary, dust tight, moisture proof containers and such supplies shall be accessible to the miners.

STIPULATION

The parties stipulated that this mine annually produces 2,719,890 production tons of coal of respondent's total annual production of 8,719,876 tons (Tr. 3). In the prior 24 months no violations have been assessed against respondent involving this regulation. Finally, respondent's ability to remain in business will not be impaired by payment of the proposed penalty (Tr. 3).

SECRETARY'S EVIDENCE

Michael S. Horbatko, a federal coal mine inspector, experienced in mining, conducted an AAA inspection of respondent's Seminoe No. 2 Mine on November 18, 1980 (Tr. 6-9).

The inspector was on the access ramp to the #78 open pit. The pit measures 500 yards in length by 100 yards wide. It is 100 feet deep (Tr. 9, 12). A front end loader was loading coal on a truck from an exposed coal seam (Tr. 14-15).

On the haul road from No. 78 pit back to the mine office, respondent's safety director identified a box as a first aid station (Tr. 10). The box was missing 12 one inch adhesive bandages as well as a rubber blanket. The bandages are used for minor injuries and the blanket protects against shock (Tr. 11, 12).

In addition to the dragline there were haul trucks and a coal drill in the pit (Tr. 15). The dragline is 90 feet above the pit bottom some 200 yards from the aid station (Tr. 16). The inspector found no violations in the first aid kit located on the dragline (Tr. 20).

The area around the first aid station was not a preparation plant or a shop. Further, it was not an installation where 10 or more people were regularly employed (Tr. 22).

RESPONDENT'S EVIDENCE

Doug Hunter, safety director at the No. 2 Seminoe Mine, is a person experienced in mining (Tr. 27-29).

In this pit at the time of the inspection was a 752 B machine, pieces of equipment, a dragline, a tractor, and a 45 R drill (Tr. 29-30).

Respondent maintains a complete first aid station on all draglines as well as on the 752 B machine (Tr. 31). They contain all the supplies listed in § 77.1707(b). The drill has a standard first aid kit for 16 people (Tr. 31). The foremen also carry first aid kits in their pickup trucks (Tr. 31). A fully equipped ambulance is kept at the main office, some eight miles away (Tr. 32, 39).

The safety director replaces the supplies in the first aid kit when he learns of a deficiency by being informed or upon observing it during inspections (Tr. 39).

DISCUSSION

No post trial briefs were filed but the Secretary in his closing argument asserted that the fact of the violation is unrefuted (Tr. 46-47). On the other hand respondent maintains this first aid box was placed at the site for its rescue teams and not to comply with federal regulations (Tr. 47-48).

In Golden R. Coal Company, 2 FMSHRC 446, (1980), Commission Judge Edwin S. Bernstein criticised this standard as one "drafted in an ambiguous and confusing manner", 2 FMSHRC at 448. This same confusing standard remains in effect three years later.

However, it is unnecessary to rule on the ambiguity of the regulation in this case because I credit respondent's evidence that there were complete first aid stations on all of the dragline and the 752 B machines. These first aid stations contain all of the supplies listed in § 77.1707(b) (Tr. 31).

The inspector confirms that he saw first aid equipment on the dragline and there were no violations regarding such equipment (Tr. 20).

In this circumstance respondent was maintaining first aid supplies within the mandate of the regulation.

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

ORDER

Citation 1013751 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Katherine Vigil, Esq., Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street, Denver, Colorado 80294

Brent L. Motchan, Esq., Arch Mineral Corporation
500 North Broadway, Suite 1800
St. Louis, Missouri 63102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-142 A/O No. 33-02308-03050
v.	:	Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

After remand from the Court of Appeals and the Commission, this matter is before me on the parties' waiver of hearing and cross motions for summary decision. 1/ The dispositive issue is narrow. The operator claims that because the Court of Appeals decision was "clearly erroneous" I have jurisdiction and authority to consider de novo the question of law decided adversely to the mining industry in UMW v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied, ____ U.S. ____, October 12, 1982. The Secretary and the Union intervenor contend that "law of the case" principles preclude reconsideration of the question adjudicated by the Court of Appeals. I agree.

Applicable Principle

Law of the case principles are designed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They are based on the desire to protect both the judiciary and the parties "against the burdens of repeated reargument by indefatigable diehards." Wright-Miller-Cooper, Federal Practice and Procedure § 4478.

1/ The chronology of events leading to remand of the matter to the original trial judge, his recusal, and reassignment of the matter to this judge is set forth in the parties briefs and the record after remand.

Although a common label is used, at least four distinct sets of circumstances are embraced in "law of the case principles." Id. The only one with which we are concerned is the duty of a trial tribunal, including an administrative agency, to honor the final decision of a reviewing court on a question of statutory interpretation.

A decision by an appellate court is considered final for purposes of establishing the law of the case if it represents the completion of all steps in the adjudication of the issue by the court short of any steps needed to effect execution or enforcement of the court's decision. Thus, a ruling is final for purposes of applying the law of the case if it is intended to put at rest a question of statutory interpretation. Wright-Miller-Cooper, supra; Restatement of Judgments (Second) § 13 (1982). Consequently, where a federal court of appeals enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but the rule of law which other tribunals owing obedience to it must apply to the same issues in subsequent proceedings in that case. 1B Moore's Federal Practice Par. 0.040(1), 0.404(10).

I

The claim that I have discretion to "start afresh" to determine the issue of statutory construction adjudicated by the court of appeals is clearly incorrect. It is "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 140 (1940).

Even if I disagreed with the court of appeals decision, I am not, as the trial tribunal, at liberty to sit as a reviewing authority on the court's decision or on the wisdom of the Commission's instructions to apply the court's decision in further proceedings in this case. Hayes v. Thompson, 637 F.2d 483, 487 (7th Cir. 1980); Morrow v. Dillard, 580 F.2d 1284, 1289 (5th Cir. 1978); U.S. v. Turtle Mtn. Band of Chippawa Indians, 612 F.2d 517, 520 (Ct. Clms. 1979).

The Supreme Court stated the applicable rule at an early date and has followed it ever since:

> Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must

> carry it into execution, according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. Ex parte Sibbald v. United States, 12 Pet. 488, 492 (1838), 9 L. ed 1167.

Accord: Sanford Fork & Tool Company, 160 U.S. 247, 255 (1895); FCC v. Pottsville Broadcasting Co., supra; Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, 306 (1948); Vendo Co. v. Lektro-Vend Corp., 434 U.S. 424, 427-428 (1978).

In this respect, law of the case doctrine mirrors the doctrine of collateral estoppel. See United States v. Moser, 266 U.S. 236, 242 (1924); Montana v. United States, 440 U.S. 147, 162 (1979). [A fact, question or right distinctly adjudged by an appellate court cannot be disputed in subsequent proceedings even though the determination was reached upon an erroneous view or by an erroneous application of the law.] Compare SEC v. Chenery Corp., 332 U.S. 194, 200-201 (1947); FCC v. Pottsville Broadcasting Co., supra, 309 U.S. 145. [On remand Commission is bound to act on, respect and follow the court's determination of a question of law even though agency retains authority, after correcting the legal error, to reach same result if it can show that result is in accord with the court's prior ruling and its legislative mandate.]

I find there is no dispute as to the meaning or scope of the appellate decision; that it is the law of this case; and that under the orders of remand from both the court and the Commission I am compelled to apply the Court of Appeals holding to further proceedings in this case.

II

This is particularly so since the only basis for the extraordinary relief requested is the time-worn assertion that Congressman Perkins's addendum to the Conference Committee Report is dispositive of the issue of liability for walkaround compensation--an assertion which the Court of Appeals thoroughly considered and unequivocally rejected.

It follows that the trial judge in this proceeding has no discretion to effect a de novo review of the correctness or propriety of the appellate decision or of the order of remand, and that any attempt on his part to do so would be an injudicious usurpation of an authority possessed only by the Supreme Court.

Socco's attempt to redact the instructions which accompanied the orders of remand is hardly reassuring. As the record shows, this matter was not remanded to the trial judge to do with as he pleases. Both orders made clear that this was not a simple remand but a "remand for further proceedings consistent with the court's decision in UMWA v. FMSHRC, 671 F.2d 615." Since Socco did not oppose entry of either order of remand or the accompanying instructions, it hardly has standing at this late date to complain of the terms.

I find farfetched the claim that the Court of Appeals acted in excess of its jurisdiction and authority in remanding the matter with directions to dispose of the case in a manner "not inconsistent with its decision" and adjudication in UMWA v. FMSHRC, supra. The Judicial Code as well as the Mine Safety Law and the general equity powers of the federal court provide ample authority for the court's remand order. 28 U.S.C. § 2106; 30 U.S.C. § 816(a)(1). See Ford Motor Co. v. NLRB, 305 U.S. 364, 372-375 (1939).

Furthermore, section 133(d)(2)(C) of the Act specifically authorizes the Commission to remand a case to the administrative law judge for such "further proceedings as it may direct." The Commission's direction was to dispose of this case in a manner "consistent with the court's order." 4 FMSHRC 856 (1982).

Despite this clear and unequivocal directive, the operator with almost casual insouciance urges the trial judge engage in what is tantamount to an act of civil disobedience. I cannot in all good conscience accept the operator's advocacy of a position so subversive of the judicial process. I firmly decline, therefore, the invitation to emasculate judicial review and flout the deference and respect due the law, the Court and the Commission.

The operator cites no case in which a trial or other inferior tribunal, including an administrative agency, was ever found justified in ignoring the law of the case simply because the agency, without any interim change in the facts or the law, believed the court's adjudication to be erroneous. The leading case to the contrary is City of Cleveland, Ohio v. Federal Power Com'n, 561 F.2d 344, 346 (D.C. Cir. 1977) in which the court held that:

> The decision of a federal appellate court establishes the law binding further action in the litigation by

> another body subject to its authority. The latter is without authority to do anything that is contrary to either the letter or the spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus . . . These principles, so familiar within the heirarchy of the judicial benches, indulge no exception for review of administrative agencies.

Accord: American Trucking Ass'n v. ICC, 669 F.2d 957 (5th Cir. 1982); Yablonski v. UMWA, 454 F.2d 1036, 1038 (D.C. Cir. 1971); Allegheny General Hospital v. NLRB, 608 F.2d 965, 970 (3rd Cir. 1979).

In Northern Helex Co. v. United States, Chief Judge Friedman had occasion to explore in depth the consequences of a trial judge's "blatant disregard" of his obligation to carry out the mandate of an appellate court. He concluded a trial judge who fails or refuses to comply with the clear mandate of an appellate court commits a serious offense against the judicial code. 634 F.2d 557, 560-561 (Ct. Clms. 1980). Thus, the law of the case is not a mere rule of comity or practice. It establishes the substantive law which lower courts and administrative agencies must apply to the same issues in subsequent proceedings in the same case. Morrow v. Dillard, supra, 580 F.2d 1289; City of Cleveland, Ohio v. FPC, supra; Medford v. Gardner, 383 F.2d 748, 758-759 (6th Cir. 1967).

Consequently, once a case has been decided on appeal, the rule adopted is to be applied, right or wrong, absent exceptional circumstances, in the ultimate disposition of the lawsuit. Schwartz v. NMS Industries, Inc., 575 F.2d 553, 554 (5th Cir. 1978). The exceptional circumstances are that (1) the evidence on a subsequent trial is substantially different, (2) controlling authority has since made a contrary decision on the law applicable to the issues previously adjudicated, or (3) the decision was clearly erroneous and its application would work a manifest injustice. White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967); EEOC v. Intern. Longshoremen's Ass'n, 623 F.2d 1054, 1058 (5th Cir. 1980, cert. denied, 451 U.S. 917 (1981).

The operator does not contend that exceptions 1 or 2 apply or that failure to reconsider the question of 103(f) coverage in this proceeding will result in any manifest

injustice. 2/ With respect to the third exception, I find mere doubt that the decision of the Court of Appeals was correct is no basis for concluding that the decision was clearly erroneous. In the absence of a clear, as distinguished from an arguable or debatable, conviction of legal error by the Court itself, law of the case principles preclude reopening an adjudicated question of law merely because of doubt as to the correctness of the original decision. Zdanok v. Glidden Co., 327 F.2d 944, 952-953 (2d Cir.), cert. denied, 377 U.S. 934 (1964); U.S. v. Turtle Mtn. Band of Chippewa Indians, supra, 612 F.2d 521. Consequently, the appellate tribunal itself will decline to reconsider its prior decision in the same case, unless there is a strong showing of clear error such as failure to consider a controlling precedent by the Supreme Court. Morrow v. Dillard, supra, 580 F.2d 1292.

II

The claim that clerical errors in the original citation or the 10 week delay in its issuance are fatal to its validity is without merit.

The operator originally chose to waive an evidentiary hearing and to submit its contest on a motion to dismiss or for summary decision. Until after remand, it never claimed there was any issue of fact that depended upon the fading memories of witnesses. Further, it has failed to disclose what those facts might be. As the operator has conceded this is not a case that involved a complex factual pattern or that required evaluation of the credibility of witnesses or the resolution of direct or tangential conflicts in oral or documentary evidence.

2/ To reconsider in this case would put this operator in a preferred position since the Court of Appeals decision has, pursuant to the Commission's orders of remand, been applied to all other operators similarly situated as a result of the Court's reversal of the Commission's Helen Mining decision, 1 FMSHRC 1796 (1979). Further, in three other proceedings arising subsequent to this one Socco and its affiliated corporations seek to relitigate in other circuits the question decided by the Court of Appeals in this case. Other operators are proceeding along parallel lines in what appears to be massive resistence by the industry to the Court of Appeals decision.

The fact that the operator chose not to challenge the citation until 16 weeks after the penalty was proposed rather than 30 days after issuance is indicative of the fact that its recently alleged concern with delay and "reasonable promptness" is more an argument of expedience than enlightment. I find the operator has failed to show that its right to a fair hearing on the issues it chose to contest was in any way prejudiced by the delay in issuance of the citation.

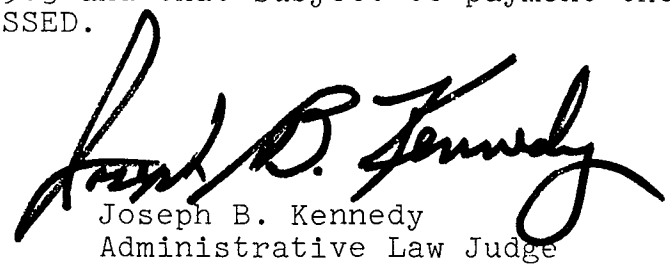
Finally, of course, I note that the legislative history of section 104(a) states that "issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action." H. Rpt. 95-181, 95th Cong., 1st Sess. 30 (1977).

Findings

The premises considered I find the violation charged did, in fact, occur. After considering the statutory criteria in mitigation including the operator's good faith reliance on Congressman Perkins's addendum to the Conference Report, I conclude the amount of the penalty warranted is $150.

Order

Accordingly, it is ORDERED that the citation contested be, and hereby is AFFIRMED. It is FURTHER ORDERED that for the violation found the operator pay a penalty of $150 on or before Friday, April 8, 1983 and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, 1240 E. 9th St., Rm. 881, Cleveland, OH 44199 (Certified Mail)

David M. Cohen, Esq., American Electric Power Service Corp., P.O. Box 700, Lancaster, OH 43140 (Certified Mail)

Mary Lu Jordan, United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

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

Alvin J. McKenna, Esq., Alexander, Ebinger, Fisher, McAlister & Lawrence, 11th Floor, 17 South High St., Columbus, OH 43215 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-142 A/O No. 33-02308-03050
v.	:	Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY,	:	

ERRATA

The following corrections are ordered to be made to the decision issued in this case dated March 14, 1983:

1. Page 4, 3rd paragraph:

   Change "section 133(d)(2)(C)" to "section 113(d)(2)(C)."

2. Page 6:

   Change "II" to "III."

Joseph B. Kennedy
Administrative Law Judge

Issued: March 16, 1983

Distribution:

Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, 1240 E. 9th St., Rm. 881, Cleveland, OH 44199 (Certified Mail)

David M. Cohen, Esq., American Electric Power Service Corp., P.O. Box 700, Lancaster, OH 43140 (Certified Mail)

Mary Lu Jordan, United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

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

Alvin J. McKenna, Esq., Alexander, Ebinger, Fisher, McAlister & Lawrence, 11th Floor, 17 South High St., Columbus, OH 43215 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CHESTER (SAM) JENKINS, Complainant, v. HECLA-DAY MINES CORPORATION, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-323-DM MINE: Republic Unit

DECISION

Appearances:

Rochelle Kleinberg, Esq., Office of the Solicitor
United States Department of Labor
8003 Federal Building, Seattle, Washington 98174
For the Complainant

Bruce A. Menk, Esq., Hall & Evans
2900 Energy Center
717 Seventeenth Street, Denver, Colorado 80202
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

On July 6, 1981, the Secretary of Labor, Mine Safety and Health Administration (hereinafter "the Secretary"), brought this action on behalf of Chester (Sam) Jenkins (hereinafter "Jenkins"), pursuant to section 105(c)(2) 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, the Secretary alleges that respondent Hecla-Day Mines, Inc., (formerly Day Mines, Inc., Republic Unit Mine and hereinafter "Day Mines"), unlawfully discriminated against Jenkins on or about January 12, 1981 through February 4, 1981 by suspending him from work for two days and failing to return him to his former worksite in violation of the Act. The Secretary alleges that Jenkins was engaged in activities relating to health and safety protected

by section 105(c)(1) of the Act at the time the Day Mines discriminated against him. 1/

The Secretary's complaint seeks relief on behalf of Jenkins as follows: a finding of discrimination, an order: (1) directing Day Mines to pay Jenkins employment benefits plus interest for the period of time he was suspended from work, (2) reinstatement of Jenkins to his former worksite or to an equivalent one, (3) directing Day Mines to clear his employment record of any unfavorable references to his suspension, (4) directing Day Mines to pay Jenkins's costs in pursuing this action, and (5) that an appropriate civil penalty be assessed against Day Mines for its alleged unlawful interference with Jenkins exercise of rights protected by section 105(c) of the Act. On July 27, 1981, Day Mines filed an answer to the complaint admitting jurisdiction of the Federal Mine Safety and Health Review Commission and that Jenkins was a miner as defined in section 3(g) of the Act but denying all allegations of the Secretary that Jenkins was discriminated against while engaged in activities protected under the Act. Pursuant to notice, a hearing on the merits was held in Spokane, Washington following which both parties were afforded the opportunity to submit post-hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

FINDINGS OF FACT

1. The Republic Unit mine, of Hecla-Day Mines, Inc., is a gold and silver mine located near Republic, Washington.

2. Chester (Sam) Jenkins has been employed by Day Mines at its Republic Unit Mine as a contract miner from approximately the middle of 1979 up through the date of the hearing in this case. Prior to January 1, 1981, there were no complaints as to the nature, ability, or performance of work done by Jenkins for Day Mines.

3. Contract miners employed at the Republic Unit Mine work in pairs mining assigned stopes. Stopes are excavations from which ore has been

---

1/ Section 105(c)(1) reads in pertinent parts as follows:

No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

mined in a series of steps. 2/ After a mining cycle involving drilling, blasting, and removal of rock is completed, miners are transferred to another area while the mined out stope is "backfilled" with sand.

4. In March 1980, Jenkins started working in stope 4114 and had completed two mining cycles by December 11, 1980. On December 12, 1980, Jenkins and his partner Don Vilardi were assigned to work in stope 4222.

5. Contract miners were paid $9.70 per hour plus an additional amount of pay based upon the cubic feet of rock they mined from their designated stope. Stope 4114 was considered by management to be a large stope whereas stope 4222 is somewhat smaller. The miners are paid a higher unit price for work performed in the smaller stopes than that paid for work in the larger stopes (Tr. 107).

6. On December 24, 1980, a miner died as a result of an accident at the Republic Unit Mine. On the following day and as a result of this fatality, Jenkins wrote a four page letter addressed to Keith J. Droste, general manager, and W.M. Calhoun, President of Day Mines, describing several safety complaints Jenkins had including misconduct on the part of some fellow miners. A post script was added to this letter signed by four other miners agreeing with what Jenkins said in his letter (Exhibit P-1).

7. On December 29, 1980, the first working day following the fatality, a safety meeting for the miners was called by management of Day Mines at which meeting Jenkins raised several of the same complaints regarding safety that he had included in his letter dated December 25, 1980. Following this meeting Jenkins mailed his letter to the mine management (Tr. 38).

8. On December 30, 1980, Jenkins put a notice on the mine bulletin board requesting nominations for a mine safety committee. The nomination notice was removed from the board shortly thereafter (Tr. 112).

9. On January 2, 1981, Jenkins circulated a petition among fellow miners describing an occurrence on December 24, 1980 when the power to the main hoist in the mine was turned off for three hours creating what Jenkins considered a safety problem. During the safety meeting on December 29, 1980, Jenkins had brought up this situation and indicated in this petition that he believed management thought he was the only person concerned. He was asking that other miners sign the petition to show their concern and to have management establish a policy regarding turning power off to the main hoist. Forty-four miners signed the petition (Exhibit P-2). On January 7, 1981, the so called "power off" petition was delivered by Jenkins to William Hamilton, mine superintendent (Tr. 41).

10. On January 5, 1981, Droste sent a letter to Jenkins acknowledging

---

2/ Dictionary of Mining, Mineral, and Related Terms, 1968 Edition, Bureau of Mines, U.S. Department of Interior.

receipt on January 2, 1981, of Jenkins December 25, 1980 letter and promising an investigation and written response to the observations and accusations contained therein (Exhibit R-1).

11. On January 7, 1981, Jenkins and Dan Vilardi were escorted to the mine office by William Gianukakis, shift foreman, and asked by Ron Short, unit manager, if Jenkins and Vilardi objected to having the letter of December 25, 1980 posted on the mine bulletin board. Neither Jenkins or Vilardi objected and Short put the letter on the bulletin board (Tr. 42). After the letter was posted, Jenkins was threatened with bodily harm by Jack Davis, a fellow miner. David Hamilton, also a miner, accused Jenkins of being an agitator and a trouble maker (Tr. 42, 43). The following day, a threat was made to Jenkins's son Sam while he was at school (Tr. 46).

12. On January 8, 1981, following the threats against Jenkins and his son, Jenkins did not go to work at the mine but instead consulted with an attorney. The attorney advised Jenkins to go to the sheriff's office and file a complaint which he did. On this same day, Jenkins's wife telephoned Calhoun and Droste at Day Mines and informed them of the threats against her husband and son (Tr. 44, 45 and 46).

13. On January 9, 1981, Jenkins stayed off work for a second day and met with Daniel Klinchesselink, a mine inspector for Mine Safety and Health Administration (MSHA), in Spokane, Washington, and discussed what had occurred at Day Mines and what protection Jenkins could expect (Tr. 47). Also, on this date, Jenkins received a telephone call from Ron Short informing Jenkins that if he returned to work, Short could guarantee his safety while on company property (Tr. 47). Jenkins returned to work on the following day, January 10, 1981.

14. On January 11, 1981, a meeting of miners was held at Cassell (Duke) Koepke's residence. Jenkins raised safety concerns regarding the Day Mines. No member of Day Mines management was in attendance but shift boss William Gianukakis's wife was there.

15. On January 14, 1981, Jenkins received a letter from Droste responding to his letter of December 25, 1980 and discussing each matter Jenkins had raised therein (Exhibit R-2).

16. Jenkins was absent from work from January 15 through January 25, 1981 to attend the funeral for his father (Tr. 51).

17. On January 23, 1981, the sand fill operation was completed in Stope 4114 and John Holder and Tom Rice were assigned to mine this stope (Exhibit R-7).

18. On January 14, 1981, a letter was sent to Tom C. Lukins of MSHA indicating that Jenkins and Cassell (Duke) Koepke were elected to be representatives of the miners for the production shift at Day Mines. The letter was signed by Koepke, Jim Lindsey and Jim Monteyo (Exhibit P-3). Jenkins had prepared the letter requesting Koepke sign it. On January 29, 1981, a copy of this letter was sent to Droste and Short of Day Mines (Tr. 65). A formal meeting of miners had not been held to elect representatives prior to the drafting and mailing of the above letters.

19. On January 31, 1981, Vilardi transferred out of stope 4222 and Terry Koepke was assigned to be Jenkins's new partner. Jenkins and Koepke continued to work in stope 4222 until February 17, 1981, when the mining cycle was completed (Exhibit R-7).

20. On February 2, 1981, a safety meeting of miners was conducted by Tom Bradley, shift boss for Day Mines, at which meeting various safety matters were discussed. In response to a request by Bradley for suggestions of any other safety problems, Jenkins was the only miner who spoke up and pointed out additional safety matters (Exhibit P-9 and Tr. 300).

21. On February 3, 1981, two petitions were circulated among the miners at Day Mines indicating the signatories were tired of Jenkins and Cassell (Duke) Koepke agitating and their disruptive accusations and that they did not wish to work with them. A third petition stated that Jenkins and Koepke did not and had never represented the miners at Day Mines Republic Unit. The petition against Jenkins had 43 signatures on it and the similar petition against Koepke had 28 signatures. The petition regarding Jenkins and Koepke not being miners's representatives contained 52 signatures. These three petitions were then delivered to the management of Day Mines (Exhibit P-4 and Tr. 66, 164).

22. On February 4, 1981, Jenkins was sent by his shift boss to the mine office where he was informed by Ron Short that he was to be suspended for an indefinite period of time because of the complaints about his disruptive behavior contained in the petition received from fellow miners and stating that they did not want to work with him. On the following day, Jenkins received a letter from Short advising him that his suspension was to be without pay. On February 5, 1981, Jenkins met again with Short and discussed his problems with fellow miners. Jenkins signed an agreement to the effect that he would improve his relationship with other employees by refraining from any dialogue concerning complaints or problems except as are absolutely necessary or emergency matters. Jenkins was then allowed to return to work having suffered a two day suspension without pay (Exhibit P-5 and Tr. 75). Cassell (Duke) Koepke, who had a similar petition circulated by the miners against him, was not suspended from work.

23. On February 27, 1981, Holden and Rice transferred from stope 4114 (Exhibit R-7).

24. From February 1981 up through the date of the hearing, a Miner's Rights Guide Book was allowed to remain on the mine bulletin board with pages pinned open to the part that refers to a fine that may be imposed against a miner for making false statements. The section was underlined and the name "Sam" had been written above a picture showing a miner sitting on a rock with an arrow pointing from the underlined section to the miner. Also, handcuffs had been drawn across the picture. Jenkins is known by the name of "Sam". The location of the bulletin board where the book was posted is in an area visited by members of Day Mines management (Tr. 93).

25. On July 6, 1981, the Secretary filed the discrimination complaint on behalf of Jenkins against Day Mines.

26. From July 22, 1981 through August 14, 1981, Jenkins was the victim of numerous acts of harassment and vandalism at the mine by unknown persons. These acts consisted of human waste in his boots, drill oil poured over his lunch box, threatening messages on toilet paper placed in his storage basket, and water and urine put in his boots along with other foreign substances in his clothing. A clay doll was placed near the time-card box and a suggestion box placed in the area with a sign asking for suggestions of ways to get rid of "Sam". Jenkins brought these acts of harassment to William Hamilton's attention and was told by Hamilton that Jenkins brought this upon himself. On July 23, 1981, Ron Short posted a memorandum on the mine bulletin board regarding the acts of vandalism and threatening discipline up to and including discharge of anyone caught or implicated therein (Exhibit R-4). Short also instructed shift foremen to have meetings with miners to advise them that they would be disciplined for such acts (Tr. 254).

ISSUE

Did Day Mines discriminate against Jenkins in violation of Section 105(c)(1) of the Act, while Jenkins was engaged in a protected activity?

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F. 2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination, bears a burden of production and persuasion to show (1) that he engaged in protected activity and (2) that the adverse action was motivated in any part by the protected activity. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-18. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Robinette, 3 FMSHRC at 817-18 n. 20. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend by proving that (1) it was also motivated by the miners unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. Pasula, 2 FMSHRC at 2799-2800. The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 n. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. The ultimate burden of persuasion does not shift from the complainant in either kind of case. Robinette, 3 FMSHRC at 818 n. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in Mt. Health City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977).

In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), the Commission affirmed their Pasula-Robinette test, and explained the proper criteria for analyzing an operator's business justification for an adverse action:

> 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 ..., 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). 3 FMSHRC at 2516-17. Thus, the Commission first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, they held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.
>
> By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the Commission intends that its Judges, in carefully analyzing such defenses, should not substitute his business judgment or

> sense of "industrial justice" for that of the operator. As the Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

Having restated the principles that govern this case, it is necessary to consider these principles as they apply to the facts before me.

First, Jenkins has the burden of proof to establish, by a preponderance of the evidence, that: (1) he was engaged in a protected activity and (2) that adverse action taken against him by Day Mines was motivated in any part by this protected activity. Jenkins alleges that he was engaged in the protected activity of raising safety complaints on December 25, 1980, and January 2, 7, 11, and February 2, 1981 (Pet's Br. p. 5).

Second, Jenkins alleges that there were three separate instances of adverse action by Day Mines taken against him as a result of his protected activities involving safety complaints. The first involved the posting on the mine bulletin board by a member of management Jenkins's letter of December 25, 1980 which had the effect of identifying Jenkins as a troublemaker. Second, was the failure of Day Mines to reassign Jenkins to stope 4114 after January 23, 1981. Third, was the suspension of Jenkins for a two day period without pay commencing on February 4, 1981 (Pet's Br. p. 5, 6, 7 and 8). Day Mines denies that the actions taken in the above instances were in any way motivated by Jenkins's protected activity and argues that each action alleged as adverse was instead motivated by the operator's business judgment which was neither incredible or implausible (Resp's Brief p. 19).

I Did the posting of Jenkin's letter of December 25, 1980 constitute an adverse action by Day Mines?

The threshold issue to be determined is whether the miner had engaged in a protected activity as defined in the Act. In this case, Day Mines specifically concedes in its brief that Jenkins did in fact engage in certain protected activities during the time period from December 25, 1980 through February 4, 1981 (Resp's Brief p. 7).

The second element of a prima facie case as it applies to this specific allegation is whether the posting of Jenkins's letter of December 25, 1980 by Day Mines was an adverse action against Jenkins and was motivated in any part by his protected activity. Jenkins alleges that the purpose behind mine management posting the letter on the bulletin board where other miners could read it was to identify him as a troublemaker. In support of his position, Jenkins points to the testimony of fellow miners John Holden and Cassell (Duke) Koepke wherein they stated that the type of reaction that occurred to the letter by the other miners would not surprise anyone (Tr. 134, 172).

The evidence of record shows that Jenkins was involved in several activities involving safety matters prior to the posting of his letter on January 7, 1981. The first involved Jenkins writing and mailing the four page letter following the fatality at the mine on December 24, 1979. This letter recited Jenkins's concerns regarding several safety matters including turning the power off to the main hoist for three hours without advising the miners, the drinking of alcohol by some of the miners and members of management, riding the skip in an unsafe manner, and inadequate miner training. Jenkins had raised some of the same safety concerns at a mine meeting held on December 29, 1980 and posted a letter on the mine bulletin board to solicit nominations for members for a mine safety committee. This notice was quickly removed from the bulletin board and caused William Hamilton, mine superintendent, to be upset. Jenkins then circulated a petition among the miners regarding concern over the power being shut off in the main shaft and secured the signatures of 44 miners. This petition was presented to William Hamilton on January 7, 1981 at 3:00 p.m. which is the start of the swing shift (Tr. 41). At the end of this swing shift, William Gianukakis, shift boss, met Jenkins and his partner Danny Vilardi and asked them to accompany him to the mine office where they were met by Ronald Short, unit manager. Jenkins testified that Short appeared agitated, distraught, and distressed and held Jenkins's letter in one hand and a stapler in the other and stated that he believed everyone should have a chance to read the letter because it concerned them. Short asked both Jenkins and Vilardi several times if they had any objection to his posting the letter on the bulletin board. Jenkins and Vilardi did not object to this. Jenkins testified that following the posting of the letter, he was threatened while in the shower with bodily harm by Jack Davis, a fellow miner, if Jenkins "pointed his finger at him or any of his friends" (Tr. 42). Also, David Hamilton was "yelling and screaming that I was an agitator and a troublemaker" (Tr. 43). On the following day, Jenkins's son Sam was threatened while at school.

Jenkins argues that the purpose behind Day Mines posting his letter was to identify him as a troublemaker and any other explanation was pretextual. Day Mines denies this and argues that there was a credible business justification for such an act. It cannot be denied that posting this letter was a catalysis for the harassment and threats suffered by Jenkins from fellow miners that occurred afterwards. However, the issue here is whether this amounted to discrimination against Jenkins by Day Mines as defined in the Act.

Day Mines argues in their post-hearing brief that the evidence fails to support any showing of discrimination by them against Jenkins in posting this letter. They allege that the letter was not entirely a private matter before its posting as it had been shown to and signed by at least four other miners employed at the Republic Unit. Also, it was mailed to management at the corporate headquarters and to the local MSHA office. Further, they argue that Short asked Jenkins and Vilardi several times if they objected to the letter being posted and no objection was raised. The main thrust of Day Mines's argument to the allegation of discrimination is that Day Mines had a credible business justification for posting the

letter. In support thereof they submit that Short testified he believed that by posting the letter he would find out whether there was some truth to the accusations (Tr. 214).

In review, it has been conceded by Day Mines that safety complaints by Jenkins amounted to a protected activity under the Act. Also, Ron Short's posting Jenkins's letter of December 25th was, at least in part, motivated by this protected activity. However, Day Mines denies that this was an act of discrimination against Jenkins but argues that there was a credible business justification for posting the letter. Having set out the facts and arguments of the parties, it is necessary to apply the principles that govern those issues as set forth by the Commission in Pasula-Robinette-Chacon, supra. The first test is whether the proffered business justification is plainly incredible or implausible. Webster's New Collegiate Dictionary, 1973 Edition, defines incredible as "too extraordinary and improbable to be believed" and implausible as "provoking disbelief".

In light of the above, I reject Jenkins's argument that Ron Short's explanation for posting the letter is, on the face of it, incredible. Considering the tragic event that occurred on December 24, 1980 and the serious accusations against fellow miners and mine management, by Jenkins in his letter of December 25, 1980, some type of reaction by both of the accused parties could have been expected. Short testified as to the circumstances leading up to the posting of the letter as follows:

> Well, in reading the letter, of course, it brought out a lot of questions to my mind. Being in my position, I am aware that not everyone is going to talk to me with the freedom that they would someone else and so I thought that there may be a chance that the things that Sam had mentioned in his letter, there may be some truth to parts of it. I didn't actually believe that there was, but I felt that I had to find out if these allegations were true. I felt that by posting the letter that I would find out one or two things: either there was some truth to it and a group of miners, either who signed the letter or who also agreed with Sam and did not sign the letter, would come forth to me on posting the letter and say, "yeah, this is true," or I would get a negative response in the sense that no one would come forward and that this would also indicate to me that there was no truth to what he was saying (Tr. 214-215).

In light of all of these circumstances, I do not find that Short's explanation is either so weak or implausible, or so out of normal practice as to be a mere pretext seized upon to cloak a discriminatory motive. The credible evidence in this regard clearly demonstrates that the letter was not that private prior to its posting, as it had been read by several of Jenkins's fellow miners and a post-script was added thereto signed by four

of them. Also, some of the complaints about safety had been raised by Jenkins at an earlier meeting of miners. Also, the letter had been mailed by Jenkins to the mine management and to MSHA. These acts by Jenkins indicate an attempt on his part to publish his views as to what he considered was wrong at the Republic Unit of Day Mines. Further, Short asked both Jenkins and Vilardi several times if they objected to the letter being posted and was advised that they did not. As stated by the Commission in Bradley v. Belva Coal Co., 4 FMSHRC 982, (June 1982):

> "Our function is not to pass on the wisdom or fairness of such asserted business justification, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." (emphasis added).

It would appear that posting the letter was the act that triggered a quick and threatening response against Jenkins, but the evidence does not support the contention by Jenkins that posting the letter was intended to be a discriminatory act against him and such allegation is rejected.

II Was the failure to return Jenkins to stope 4114 an adverse action?

The evidence shows that Jenkins started working for Day Mines in approximately the middle of 1979. From November 1979 through March 1980, Jenkins was assigned to work as a contract miner with four different miners as partners principally in stope 3031 completing five mining cycles. From March 24, 1980 through December 11, 1980, Jenkins and his partner Vilardi completed two mining cycles in stope 4114 and two in stope 3058 while the sand fill operations were being performed in stope 4114. On December 12, 1980, Vilardi and Jenkins were assigned to stope 4222 where Jenkins continued working until February 17, 1981, when that mining cycle was completed. The sand fill operation was finished in stope 4114 on January 23, 1981 and miners Holden and Rice were assigned to mine it. Vilardi had transferred out of stope 4222 on February 1, 1981 and Terry Koepke had taken his place (Exhibit R-7).

Jenkins argues in his brief that the alleged adverse action occurred after January 23, 1981 when stope 4114 became available for further mining and he and Vilardi were not assigned to go back to it. Jenkins argues that stope 4114 is considered to be one of the larger and more productive stopes in the Republic Unit mine. He contends that those miners assigned to the larger stopes have the potential to earn more in wages than is possible to earn in the smaller stopes. Jenkins states that both he and Vilardi were told by members of management that they would be returning to stope 4114 after the sand fill operation was completed. Jenkins argues that it had been the usual practice in the past at this mine to return the same mining crew to the stope they had previously worked in when the sand fill operation was completed.

Day Mines denies this and argues that stope assignments given to Jenkins during the period of time after January 23, 1981 was not an adverse action on their part. Day Mines argues that Jenkins's assignments were made in accordance with the then existing policy at the mine, that is,

generally by the availability of crews. Also, they contend that by reason of miners receiving higher unit pay in smaller stopes, that Jenkins's actual earnings for the year 1981, were not adversely affected.

The same principles to prove a prima facie case of discrimination in Pasula-Robinette, supra, discussed earlier herein, apply to this issue. As to the first element, again Day Mines concedes in its brief that Jenkins was engaged in certain protected activities during the period of time from December 25, 1980 through February 4, 1981. The second element, and the specific issue here, is whether Day Mines took an adverse action against Jenkins after January 23, 1981 in not assigning him back to stope 4114 when it became available, and if so, was such adverse action motivated in any part by Jenkins's protected activities?

The most credible evidence supports Day Mines's contention that there was not an existing policy at the Republic Unit mine which expressly guaranteed permanent stope assignments. Ron Short testified that when a stope becomes available, after the sand filling operation is completed, if the miners who previously mined this stope are available and not presently in an assigned operating stope, and had done a good job before, they would be reassigned to that same stope. However, Short stated, it was not the operator's policy to substitute miners during the mining cycle as this would be unfair to the originally assigned crew. Further, crew availability was an essential element to stope assignments.

William Gianukakis, shift foreman at Republic Unit mine, testified that he had been a miner at this particular mine for over 20 years and shifter during the last two years having responsibility for crew assignments. He concurred with Short's testimony as to how stope assignments were made and stated that this had been the same policy for as long as he had worked there. Tom Bradley, the other shifter responsible for crew assignments, agreed with both Gianukakis's and Short's testimony on crew assignments. He stated that the understanding with Jenkins and Vilardi was that they would be reassigned to stope 4114 if they were finished with 4222 when 4114 became available. However, it took longer than expected to finish the mining cycle in 4222, partly because Jenkins was gone for a week during that time. Bradley admitted that at times a stope will stand idle for a period of time, if everyone is working elsewhere. However, when stope 4114 became available, Jenkins and Vilardi were not finished in 4222 and other miners were waiting to go into a stope. About a conversation with Jenkins in January 1981 regarding his complaint of not being sent back to 4114, Bradley testified as follows:

> I told him basically that since he wasn't done with 4222, we weren't going to pull him out in the middle of a mining cycle to put him in 4114 when we had other miners that were waiting to go into a stope. I didn't feel it would be fair to put John Holden and Tom Rice in 4222 on cleanup where you didn't make any money and then put Danny and Sam in 4114 where they'd make the money (Tr. 295).

John Holden testified that the usual practice was to reassign miners to their former stopes. Also, Holden stated that larger stopes earned the miners more money than the smaller ones. Holden signed a statement to the effect that he would have felt discriminated against if Jenkins had been put in stope 4114 and he had been assigned to 4222 to finish it (Exhibit P-9). However, at the hearing, Holden claimed he was coerced into signing it. Cassell Koepke testified that nine out of ten times miners will be reassigned to their former stopes. Terry Koepke testified that usually miners are returned to the stopes they formerly worked in but that it is not always the situation. Dan Vilardi admitted on cross-examination that one of the reasons that the mining cycle was not completed as soon as had been expected in stope 4222 was due to Jenkins being absent for a week to attend his father's funeral and that he didn't expect Holden and Rice to be pulled out of 4114 before they had finished working that stope.

From the conflicting testimony of miners regarding stope assignments, I find that the policy as described by Short was most credible. A review of Exhibit P-7 consisting of 41 pages of stope assignments, sand fill completion dates, and crew assignments prepared by Ron Short from the operator's records support the argument of Day Mines that crews are not assigned to permanent stopes and that availability of stopes and crews are both factors in making this decision.

I have considered Jenkins's argument that the failure to return him to his former stope assignment must be examined in the light of direct and circumstantial evidence surrounding the incident, and particularly in view of the tests enumerated in Phelps Dodge, supra (Pet's Brief, page 7); that is, the effect that Jenkins's safety complaints had on the operator's decision in this matter. These tests assume that such action was an adverse action, which I find is not substantiated. Even assuming that the stope assignment was partly based upon animus of the operator over Jenkins's safety complaints, the argument would nevertheless fail on its merits in light of Day Mines defense and argument that the evidence shows a business justification for such action which is not pretextual and neither incredible or implausible. Chacon v. Phelps Dodge Corp., supra.

I find that the weight of the evidence supports Day Mines contention that their actions in this instance were motivated by the time schedules as to the availability of miners and stopes and the requirements for continued production in the mine. Stope 4114 became available for mining on January 23, 1981 and Jenkins was not finished in 4222 until February 17, 1981 which would cause measurable loss of production if the stope was to remain idle during that time.

I am not persuaded by Jenkins's argument that his having been assigned for the two previous mining cycles in 4114 was evidence that this was to be his permanent stope. That he had been given some assurance that he would return to this stope was conditional on his finishing the mining cycle in 4222 which was delayed by his absences. Considering all of these facts together, Day Mines explanation is not incredible or implausible, and I find, not discriminatory.

III Was the two day suspension of Jenkins an adverse action motivated by his protected activity?

The evidence shows that Day Mines suspended Jenkins without pay for two days commencing February 4, 1981 and ending February 6, 1981 after Jenkins signed a statement agreeing to improve his relationship with the other miners (Finding No. 22). This action was taken by the operator after management was presented a petition signed by 43 miners stating that they were tired of Jenkins's agitating and disruptive accusations and that they did not wish to work with him (Exhibit, p. 4)

The act of suspending Jenkins for two days was the culmination of various events recited earlier herein, such as, the December 25th letter, his efforts to elect miners's representatives, and safety complaints made by petition and at safety meetings. Again, Day Mines has admitted that certain activities Jenkins engaged in during this period of time prior to his suspension were protected activities under the Act. In light of the foregoing, I conclude that the two day suspension was, at least in part, motivated by these protected activities. The evidence also shows there was animus on the part of Day Mines's management towards Jenkins because of these activities which caused tension amongst the miners, was disruptive to the operation of the mine, and reflected badly upon the supervisors. From all of these circumstances, I conclude that Jenkins has established, by a preponderance of the evidence, a prima facie case under the test set forth by the Commission in Pasula-Robinette, supra.

Day Mines in its brief, denies that Jenkins has met his burden of proof in establishing a discriminatory motivation by its act of suspending him for two days. However, if it is found that Jenkins has proven a prima facie case as to this issue, Day Mines argues that it has shown a business justification for such action. Here again, the evidence of record as it applies to this issue, must be viewed in the light of the criteria set forth by the Commission in Chacon, supra, for analyzing an operator's business justification for its adverse action. That is, was the business justification so weak, so implausible, or so out of line with normal business practices to be merely a pretext to hide the operator's discriminatory motive.

Day Mines argues that the suspension of Jenkins was an extremely reasonable measure motivated by concerns over production in the mine, the safety of the miners, Jenkins's personal safety, and concerns regarding Jenkins's personal satisfaction with continued employment (Resp's Brief, page 15). Adversely, Jenkins argues that the disparate treatment between Jenkins and Koepke (who also had a petition presented against him by the miners) belies that there is a credible justification for suspending Jenkins (Pet's Brief, p. 11).

After a careful review of all of the evidence and on the basis of the Commission's directives regarding this issue, I conclude that Day Mines's business justification for suspending Jenkins for two days was not pretextual and the reasons for doing so were both credible and plausible enough to prompt management to take this adverse action. The suspension incident must be viewed in light of the existing mood of the miners at this time. Threats of bodily harm by fellow miners had been made against Jenkins and his son a month earlier which Jenkins believed were serious enough to be reported to the sheriff's office. Jenkins was off work for two days at this time and came back after Short guaranteed his safety while on the mine property. Even though Jenkins was absent for two weeks during the month prior to his suspension, apparently the tension among the miners did not subside. Ron Short testified that the circumstances that led to the decision to suspend Jenkins were the verbal complaints from the miners, considerable tension underground reported by the mines supervisors, and finally the petition by miners. Short stated that these conditions were affecting production and that he was concerned about the safety of the miners underground. Also, he did not feel Jenkins was helping correct the situation for he was insisting on talking to miners who did not wish to discuss these matters with him and forcing himself on them (Tr. 245).

Again, it is not necessary to pass upon the wisdom or fairness of the decision by Short to suspend Jenkins but rather to determine whether it was credible, and would motivate the operator to take such action. Belva Coal Co., supra. I find that the explanation by Short of his reason for suspending Jenkins is plausible. Obviously, conditions at the mine were worsening and some type of action was necessary to correct the situation. The petition containing the names of 43 miners from a total of approximately 65 underground miners indicating they did not want to continue to work with Jenkins supports the action taken by mine management. The two day suspension and a written promise by Jenkins to try to improve his relationship with the miners seems reasonable under the circumstances.

As to the alleged disparity on the part of Day Mines in not also suspending Koepke, Short testified that he had not had verbal complaints against Koepke by other miners as he had against Jenkins and he didn't believe the miners were against Koepke as much as against Jenkins (Tr. 248). This is supported by the record in this case. Only 28 miners signed the petition against Koepke. Also, there is a lack of evidence to show that Koepke was in any way a leader in safety complaints although it is shown that he had joined Jenkins in various activities in this regards. However, under the circumstances it appears that the fact that Koepke was not suspended does not prove that the business justification by Short was pretextual.

Evidence was presented in this case that Jenkins was a victim of harassment and vandalism by fellow miners at the Republic Unit mine following the filing of the complaint of discrimination on July 6, 1981.

The Secretary in its brief on behalf of Jenkins has not alleged that this was part of the adverse actions taken by Day Mines against Jenkins but instead restricted its argument to the three issues previously identified. However, I believethat this matter deserves to be addressed for it was discussed in both parties's briefs. I find that the evidence fails to show that Day Mines was involved directly or indirectly in any of the acts of vandalism or harassment that was inflicted on Jenkins following the filing of his complaint of discrimination.

The evidence shows that upon notification of these acts of vandalism, Short took direct action by writing a memorandum to the miners which was posted on the mine bulletin board that vandalism was against company policy and would not be tolerated. Further, the memorandum stated that anyone caught or implicated in this would be disciplined up to and including discharge (Exhibit R-4). Shift bosses were directed to have a meeting with their crews and inform them of what was stated in the memorandum.

CONCLUSION

I find that complainant, Chester (Sam) Jenkins has failed to establish a case of discriminatory conduct on the part of the respondent, Day Mines in regards to their posting Jenkins letter of December 25, 1980, failing to return Jenkins to Stope 4114 when it became available for mining, suspending Jenkins for two days without pay, and acts of harassment and vandalism against Jenkins after he filed his complaint of discrimination.

ORDER

The complaint is dismissed.

Virgil E. Vail
Administrative Law Judge

Distribution:

Rochelle Kleinberg, Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Building
Seattle, Washington 98174

Bruce A. Menk, Esq.
Hall & Evans
2900 Energy Center
717 Seventeenth Street
Denver, Colorado 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 16 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 82-89
	:	A.C. No. 11-00599-03084
v.	:	
	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING COMPANY, A Subsidiary of Material Service Corp., Respondent	:	

DECISION

Appearances: Mark A. Holbert, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

This is a civil penalty proceeding in which Respondent is charged with a violation of 30 C.F.R. § 50.20(a) because of its failure to report to MSHA an occupational injury occurring to one of its employees. The case has been submitted on a written stipulation of facts, and both parties have filed memoranda in support of their respective positions. Based on the entire record and considering the contentions of the parties, I make the following decision:

FINDINGS OF FACT

1. Respondent is the operator of a coal mine in Jefferson County, Illinois, known as the Orient No. 6 Mine.

2. The operation of said mine affects interstate commerce and produces products which enter interstate commerce.

3. There are approximately 497 employees at the subject mine and its annual production is 980,116 tons of coal. The production of all Respondent's mines is approximately 6,559,662 tons of coal annually.

4. During the 24 months prior to the issuance of the citation involved herein, 330 violations were assessed at the subject mine.

5. The imposition of a penalty in this case would not impair Respondent's ability to continue in business.

6. On February 18, 1982, Fred Albers, a miner at the subject mine reported to work at approximately 11:00 p.m. The regular starting time for his shift was 12:01 a.m., February 19, 1982.

7. After arriving at the mine site on February 18, 1982, while putting on his work boots in Respondent's wash house, Albers experienced pain in his back.

8. He was admitted to the Pinckneyville Community Hospital, Pinckneyville, Illinois, on February 19, 1982. The diagnosis was acute lumbosacral strain. He remained in the hospital and was treated with physiotherapy and medication until discharged on February 24, 1982.

9. Albers returned to his regular work on March 10, 1982.

10. The back pain which Albers experienced was not caused by "any external source, blow, contact, impact, stress, or accident."

11. Respondent did not report the occurrence of the event described in Findings of Fact No. 7 and 8, on MSHA Form 7000-1, within 10 working days of its occurrence.

12. On March 25, 1982, a citation was issued to Respondent alleging a violation of 30 C.F.R. § 50.20(a) for its failure to complete and mail to MSHA Form 7000-1 for the occupational injury occurring on February 18, 1982, and involving Fred Albers.

13. The condition was abated and the citation terminated on March 25, 1982, when Form 7000-1 was completed and mailed to MSHA reporting and describing the incident described in Findings of Fact No. 7 and 8.

REGULATORY PROVISIONS

30 C.F.R. § 50.2(e) provides:

(e) "Occupational injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

30 C.F.R. § 50.20(a) provides:

§ 50.20 Preparation and submission of MSHA Form 7000-1--Mine Accident, Injury, and Illness Report.

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in § 50.10 occurs, which does not involve an occupational injury sections A, B, and items 5 through 11 of section C of Form 7000-1 shall be completed and mailed to MSHA in accordance with the instructions in § 50.20-1 and criteria contained in §§ 50.20-4 through 50.20-6.

ISSUE

Whether the incident of February 18, 1982, involving miner Fred Albers, described in Findings of Fact 7 and 8 was an occupational injury and reportable under 30 C.F.R. § 50.20(a)?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., in the operation of Orient No. 6 Mine and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The incident of February 18, 1982, involving miner Fred Albers, described in Findings of Fact 7 and 8 was an occupational injury as that term is defined in 30 C.F.R. § 50.2(e).

DISCUSSION

The definition of occupational injury in the regulation has three factors: (1) it is an injury to a miner; (2) it occurs at a mine; and (3) medical treatment is administered or death, loss or consciousness or disability results from the injury. The facts stipulated to here clearly show that the injury (lumbosacral strain) (1) was sustained by a miner (2) at a mine and (3) resulted in medical treatment and disability.

Although the facts clearly fit the definition and the definition is controlling, the conclusion is also supported by a consideration of an analogous field of law--workers compensation. An "injury by accident" is shown under most state workers' compensation laws if an employees' usual duties cause a pathological condition such as a back strain. 1B LARSON, THE LAW OF WORKMENS COMPENSATION § 38.00 (1982). In the recent case of Memorial Medical Center v. Industrial Cowin, 72 Ill. 2d 275, 381 N.E. 2d 289 (1978), the Illinois Supreme Court upheld a compensation award to an employee who sustained a back injury when bending to clean a door. See also Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968) (the Longshoremen & Harbor Workers Compensation Act). With respect to the question of the occupational nature of the injury, under workers compensation laws, an employee having fixed hours and place of work is in the course of his employment going to and from work while on the employer's premises. 1 LARSON, supra, § 15.11. Certainly changing into work clothes on the premises of the employer is in the course of employment.

3. Since the incident described in Findings of Fact 7 and 8 was an occupational injury, Respondent was required to report it under 30 C.F.R. § 50.20(a) and failure to do so was a violation of the standard.

4. The violation was not shown to be serious.

5. Respondent should have been aware of the violation, since it was aware of the injury. Therefore, the injury was the result of Respondent's negligence.

6. An appropriate penalty for the violation, considering the criteria in § 110(i) of the Act is $100.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $100, within 30 days of the date of this order, for the violation found herein.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Mark A. Holbert, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604

Harry M. Coven, Esq., Gould & Ratner, 300 West Washington Street, Suite 1500, Chicago, IL 60606

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 22 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 82-89
	:	A.C. No. 11-00599-03084
v.	:	
	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING COMPANY, A Subsidiary of Material Service Corp., Respondent	:	

CORRECTION TO DECISION
ISSUED MARCH 16, 1983

On page 5 of the Decision issued March 16, 1983, Conclusion of Law No. 5 should read as follows:

5. Respondent should have been aware of the violation, since it was aware of the injury. Therefore, the violation was the result of Respondent's negligence.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Mark A. Holbert, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604

Harry M. Coven, Esq., Gould & Ratner, 300 West Washington Street, Suite 1500, Chicago, IL 60606

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

MAR 16 1983

LANSALOT A. OLGUIN, Complainant	:	Complaint of Discrimination
	:	Docket No. WEST 82-125-DM
v.	:	
	:	Pinto Valley Mine
CITIES SERVICE COMPANY, INSPIRATION CONSOLIDATED COPPER COMPANY, Respondents	:	

DECISION

Appearances: David F. Gomez, Esquire, Phoenix, Arizona, for the complainant; E. W. Hack, Esquire, Tulsa, Oklahoma, for the respondent Cities Service Company; Jon E. Pettibone, Esquire, Phoenix, Arizona, for the respondent Inspiration Consolidate Copper Company.

Before: Judge Koutras

Statement of the Proceedings

This is a discrimination proceeding initiated by the complainant against the respondents pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, charging the respondents with unlawful discrimination. Mr. Olguin alleged that the respondents retaliated against him by terminating and refusing to hire him because of certain safety complaints he made to MSHA.

Respondents filed answers to the complaint denying the allegations of discrimination, and after extensive pretrial discovery, and several pretrial interlocutory rulings and an appeal, the matter was scheduled for a hearing on the merits on Phoenix, Arizona, March 2, 1983. The hearing was continued and cancelled after the parties advised me that they had reached a settlement, and by motions filed with me on March 10 and 14, 1983, the parties now move for approval of the settlement and dismissal of the case.

Discussion

The joint motion for approval of the settlement in this case is executed by counsel for all parties, including the complainant Lansalot A. Olguin by and through his attorney. The settlement proposals reflect that Mr. Olguin has entered into separate settlement agreements with each of the named respondents, and the parties state that the settlement is intended to settle and dispose of any and all claims arising out of Mr. Olguin's discrimination cases filed in the captioned dockets. Upon approval of the settlement, the parties jointly move for a dismissal of this matter.

The terms of the settlement agreements executed by the parties are included with the motions, and they are a matter of record. The parties state that in order to put this matter to rest and to avoid additional litigation time and expense, and upon approval of the settlement proposal, the named respondents will each pay to the complainant the sum of $1,000 in full settlement of their respective disputes.

Conclusion

After full consideration of all of the pleadings filed by the parties in this matter, including the terms of the settlement, I conclude and find that the settlement disposition is a reasonable resolution of the disputes and that approval of same is in the public interest.

ORDER

In view of the foregoing, the motion for approval of the settlement IS GRANTED, the settlement IS APPROVED, and upon full compliance with the terms thereof, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

E. W. Hack, Esq., Cities Service Co., Box 300, Tulsa, OK 74102 (Certified Mail)

David Gomez, Esq., 2001 North 3rd St., Suite 100, Phoenix, AZ 85001-1475 (Certified Mail)

Jon E. Pettibone, Esq., Lewis and Roca, 1st Interstate Bank Plaza, 100 W. Washington St., Phoenix, AZ 85003-1899 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 16 1983

KANAWHA COAL COMPANY, Contestant	:	Contest of Order
v.	:	Docket No. WEVA 82-58-R Order No. 906148; 10/19/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Madison No. 1-A Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 82-177 A.C. No. 46-04945-03029V
v.	:	Madison No. 1-A Mine
KANAWHA COAL COMPANY, Respondent	:	

DECISION

Appearances: Harold S. Albertson, Jr., Esq., Hall, Albertson & Jones, Charleston, West Virginia, appeared for Kanawha Coal Company;
Agnes M. Johnson-Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, appeared for the Secretary of Labor.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

An order of withdrawal was issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 on October 19, 1981. The order alleges a violation of 30 C.F.R. § 75.200 in that the roof control plan was not being followed at the No. 1 Pillar, 003 section of the subject mine. The order was modified on October 28, 1981, to a 104(d)(1) citation after a review of MSHA records disclosed that a clean inspection had taken place since the last unwarrantable failure citation had been issued to the subject mine. MSHA thereafter filed a petition for a civil penalty for the violation alleged in the citation. The two cases were consolidated for the purposes of hearing and decision.

Pursuant to notice, the case was heard on the merits on November 16, 1982, in Charleston, West Virginia. Henry James Keith and Billy R. Browning, Federal coal mine inspectors, testified on behalf of the Secretary. Richard J. Smith and Mark Allen Workman testified on behalf of the operator. Both parties have filed posthearing briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

1. At all times pertinent to this decision, Kanawha Coal Company (the operator) was the owner and operator of the Madison No. 1-A Mine in Boone County, West Virginia.

2. The subject mine produces goods which enter interstate commerce and its operation affects interstate commerce.

3. There is no evidence in the record concerning the size of the business of the operator nor as to its history of prior violations.

4. The imposition of penalties in this case will not affect the operator's ability to continue in business.

5. On October 19, 1981, Federal Mine Inspector Henry Keith issued a withdrawal order in which he charged that

> "The roof control plan was not being complied with at the No. 1 Pillar 003 Section in that adequate roof supports had not been installed to narrow the roadway to the required 16 feet width and additional turn post had not been installed into the pillar that had to be extracted."

6. On October 19, 1981, when Inspector Keith entered the subject mine, the 003 Section was engaged in retreat mining, extracting pillars with a continuous miner.

7. The roof control plan in effect at the subject mine on October 19, 1981, provided (Drawing No. 4, page 20) that two pillars were to be mined together in the following sequence: cuts 1, 3 and 5 to be taken from the center of Pillar No. 1; cuts 2 and 4 from the center of Pillar No. 2; cuts 6 thru 11 from the left side of Pillar No. 1; cuts 12 through 17 from the right side of Pillar No. 1, cut 18 from the center of Pillar No. 2; cuts 19 through 24 from the left side of Pillar No. 2 and cuts 25 through 30 from the right side of Pillar No. 2. The cuts from the center were 20 feet wide and from the sides 10 feet wide. Two "fenders" (4'x4' triangles) were to be left in each pillar.

8. The plan required that 2 rows of breaker posts be installed between Pillar 1 and 2 at the inby end of the pillars; that 2 rows of breaker posts be installed outby the left side of Pillar No. 1; that turn posts and roadway posts be installed to the right of the breaker posts, limiting the roadway between the pillar being mined and the next pillar outby and extending one full pillar outby the pillar being mined. These posts must be set before the first cut. Before the second cut (from pillar No. 2), breaker, turn, and roadway posts must be set outby pillar No. 2.

9. In its retreat mining on section 003 in the subject mine, the operator always cuts in sequence from left to right.

DISCUSSION

On this issue, the testimony of Inspector Keith differs from that of the operator's witnesses, Smith and Workman. Since the latter were more familiar with the mining sequence followed in the subject mine, I am accepting their testimony on the question.

10. At the time Inspector Keith arrived at the area of No. 1 pillar, it had been entirely mined except for the last two cuts (numbers 16 & 17 on the roof control plan). Two cuts (Numbers 2 & 4) had been removed from pillar No. 2. Pillars 3 and 4 (to the right of pillar 2) had not been mined.

DISCUSSION

In making these findings, I am again accepting the testimony of Mr. Smith and Mr. Workman which differed from that of Inspector Keith. This follows from and is consistent with findings of fact No. 9.

11. Breaker posts, turn posts and roadway posts had been set outby Pillar No. 1 prior to the first cut being taken. The roadway posts limited the roadway between Pillar No. 1 and the next pillar outby to 16 feet. These posts were standing at the time Inspector Keith arrived at the face area.

DISCUSSION

On this critical issue the testimony is in conflict. I accept the testimony of the witnesses for Respondent because it is consistent with their prior testimony which I accept above. I believe the inspector was possibly confused, as Respondent suggests, because he travelled to the face between pillars 2 and 3, and apparently thought pillar 2 was pillar 1, and that the operator had begun mining pillar 3 on a right to left sequence without setting the required turn and roadway posts.

12. While Inspector Keith and Mr. Smith were sitting outby Pillar No. 2, they heard a noise from behind the line curtain outby the pillar. They proceeded through the curtain and found that the section foreman Burton had been struck by a roof fall while setting wing posts between Pillar 1 and Pillar 2. The inspector and Mr. Smith assisted in getting Mr. Burton to the outside and did not return to the section that shift. The injury to the foreman was not related to any alleged violation of the roof control plan. The order was issued after the inspector left the section. Mr. Smith mistakenly believed that it referred to pillar No. 3 and did not discuss it with the inspector.

13. If the condition cited by the inspector had existed (I have found it did not) it would be of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

REGULATORY PROVISION

30 C.F.R. § 75.200 provides:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

ISSUES

1. Did the operator violate the provisions of its approved roof control plan on October 19, 1981, by failing to provide adequate roof supports at the No. 1 pillar, 003 Section to narrow the roadway to 16 feet and by failing to install turn posts into the pillar being extracted?

2. If the answer to issue 1 is affirmative, was the violations significant and substantial?

3. If the answer to issue 1 is affirmative, was the violation due to the operator's unwarrantable failure to comply with the standard?

4. If the answer to issue 1 is affirmative, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Kanawha Coal Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of its Madison No. 1A Mine at all times pertinent herto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. MSHA failed to establish that a violation of 30 C.F.R. § 75.200 took place on October 19, 1981. Specifically, the evidence does not establish that the approved roof control plan was not being complied with at the No. 1 pillar, 003 section of the subject mine, in that adequate roof supports were not installed to narrow the roadway to 16 feet and turn posts were not installed into the pillar that was being mined.

DISCUSSION

As both posthearing briefs point out, the issue in this case is largely one of credibility. In general, I am accepting the testimony of Respondent over the sharply contradictory testimony of MSHA for the following reasons: The testimony of Respondent's safety director is supported by a union miner who has no direct interest in the outcome of this litigation. The inspector was clearly in error with respect to the procedure followed by Respondent in recovering pillars (it always proceeded from left to right). Respondent's witnesses were clearly more knowledgeable

concerning the conditions on the section. Finally, I believe the inspector may have been distracted because of the roof fall and injury (which were not related to the alleged violation) and did not accurately recall the conditions on the section when he wrote the order.

3. Since no mandatory safety standard was violated, the citation must be vacated and no penalty imposed.

ORDER

Based upon the above findings of fact and conclusions of law IT IS ORDERED that the contest of the order/citation is GRANTED; the order/citation is VACATED; the petition for the assessment of a civil penalty is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Harold S. Albertson, Jr., Esq., Hall, Albertson and Jones, P.O. Box 1989, Charleston, WV 25327

Agnes M. Johnson-Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

MAR 23 1983

JAMES W. DICKEY, Complainant	:	Complainant of Discrimination
	:	Docket No. PENN 82-179-D
v.	:	
	:	Cumberland C Mine
UNITED STATES STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Kenneth J. Yablonski, Esquire, Washington, Pennsylvania, for the complainant; Louise Q. Symons, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Complainant claims that he was unlawfully discriminated against and discharged from his job by the respondent for engaging in activity protected under section 105(c)(1) of the Act. Respondent filed a timely answer denying any discrimination and asserting that the complainant was discharged for just cause. A hearing was convened in Washington, Pennsylvania, and the parties appeared and participated therein. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issue Presented

The principal issue presented in this case is whether the Complainant's discharge was prompted by protected activity under the Act. Additional issues raised are discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1) (2) and (3).

3. Commission Rules, 20 CFR 2700.1, et seq.

Introduction

Mr. Dickey's discrimination complaint was filed with the Commission on April 5, 1982, and it was filed after he had been notified by MSHA on March 15, 1982, that its investigation of his complaint disclosed no violation of section 105(c) of the Act. Briefly stated, the background concerning his discrimination complaint against the respondent follow below.

The complainant James Dickey is a 35 year old miner who was hired by the respondent in August 1977, after working some seven years with the Bethlehem Mines Corporation, where he worked as a continuous miner operator, and also served as an elected UMWA safety committeeman. During his employment with the respondent, he worked as roof bolter, continuous miner operator, and shortly before his discharge he was working in the preparation plant. In addition, during his tenure with the respondent, he either directly or indirectly filed several safety complaints and grievances questioning certain safety practices or otherwise challenging certain safety practices or decisions on the part of mine management. Some of his complaints and personal grievances were directed against mine management personnel, and as a result of these encounters with management, Mr. Dickey claims he was singled out and fired over an incident involving himself and his common law wife, Donna Yoder, which occurred at the mine on September 18, 1981. In support of this conclusion, Mr. Dickey claims that the incident with Donna Yoder was used as a pretext by the respondent to make good on certain management threats and promises to fire him made by one Sam Pulice, the mine foreman. Mr. Dickey claims further that because of his intense interest in safety matters, his "safety activism" (even though he was not a member of the safety committee while employed by the respondent), and his numberous complaints and grievances, management considered him to be a "troublemaker" and fired him at the first opportunity.

The incident which precipitated Mr. Dickey's discharge took place at the preparation plant shortly after the start of the scheduled 12:01 a.m. shift on September 18, 1981. Donna Yoder also worked at the mine, and on that evening, she and Mr. Dickey were both scheduled to work. However, Donna Yoder had asked to see plant foreman Doug Held to discuss her personal problems with Mr. Dickey, and while Donna Yoder was in Mr. Held's office speaking with him, Mr. Dickey arrived on the scene and he and Donna Yoder became embroiled in a heated discussion over their relationship. The "discussion" escalated into an exchange of cursing and threats between Donna Yoder and Mr. Dickey, and Mr. Held attempting to keep the two separated while trying to get Mr. Dickey to leave the scene and return to work. This proved futile, and after Donna Yoder left his office, with Mr. Dickey in "hot pursuit", Mr. Held followed them out and encountered them on a stairway landing where he discovered Mr. Dickey "pinning" Donna Yoder against the stair railing trying to restrain her from leaving. Later, after separating the two, and after Mr. Dickey had left the mine, Donna Yoder stated that Mr. Dickey had struck her at some point in time during their encounter that evening.

On the day following the incident with Donna Yoder Mr. Dickey was notified that the respondent had suspended him with intent to discharge him for his "threatening and abusive conduct" toward Donna Yoder, which respondent claims resulted in injuries to Donna Yoder during the claimed assault on her by Mr. Dickey. The discharge was arbitrated and upheld under the union contract. Mr. Dickey then filed a complaint with MSHA, and after MSHA declined to pursue the matter further, the instant discrimination complaint was filed with this Commission.

Respondent's defense is that Mr. Dickey's discharge was prompted because of his violation of a company "shop rule" which prohibits the use of threatening and abusive conduct by one employee on another employee. Respondent denies that Mr. Dickey was "singled out" for "special treatment" because of his prior safety complaints, grievances, and encounters with mine management, and maintains that he would have been discharged because of his conduct involving Donna Yoder whether or not he filed safety complaints. Respondent denies that Mr. Dickey suffered disparate treatment that his discharge was in any way motivated by protected activities, and points to the fact that an independent arbitrator judged Mr. Dickey's actions of September 18, 1981 alone to justify his discharge.

Complainant's Testimony and Evidence

Mr. Dickey testified that he began work at United States Steel's Cumberland Mine in August 1977, and when first hired he worked as a roof bolter. He then worked as a continuous miner operator from October to June 1981, at which time he bid on an "outside" job as a coal sampler in the preparation plant, and started that job on July 1st. While employed at the mine he was never a safety committeeman, but stated that he "was very active on safety matters", and confirmed that he was a committeeman during his past employment at the Bethelehem Mine's Marianna Mine in 1977 (Tr. 14-17). He explained his interests in safety as follows (Tr. 17-18):

> A. Well, I have always been a strong person as far as safety issues were concerned, and I was a past committeeman at Marianna. I learned a lot about safety and I came to realize that production and safety had to go hand in hand in any mining industry because without one, you couldn't have the other.
>
> I became very interested in safety, and I was approached on daily occasions by other men of my local at the Cumberland Mine who knew that I had safety experience and that I was familiar with the various laws and situations concerning safety; and they asked my opinions on different issues, and I gave it to them.

Mr. Dickey identified exhibit C-1 as a May 23, 1979 safety grievance concerning an unsafe slope belt. The belt had several missing rollers which caused the slope car cable to cut into the ties and cement. He and several others miners reported the condition to the safety committeeman, and when mine management took the position that there was nothing wrong with the cable, Mr. Dickey exercised his safety rights and refused to ride the slope car into the mine. MSHA was called in and the respondent was cited for the condition, and the crew was paid for the shift (Tr. 23-25).

Mr. Dickey identified exhibit C-2 as an October 4, 1979, safety report he and another miner filed concerning the slope belt emergency evacuation system. Mr. Dickey's complaint concerned his refusal to ride the belt out of the mine in other than emergency situations. He refused to ride the belt when the slope car was out of service, and when mine management refused to pay him for staying in the mine he filed one grievance for his pay and another one seeking to clarify the emergency use of the belt in question (Tr. 26-31).

Mr. Dickey testified as to safety dispute on February 1, 1979, concerning the lack of adequate communications on the slope car. He indicated that communications had to be maintained between the car and the hoist operator, and on the day in question the system was not working. He and other crew members exercised their safety rights and refused to ride the car until the problem could be taken care of. Mr. Dickey stated that he suggested the use of walkie talkies, but that this was rejected by mine management. He also stated that mine superintendent Sam Pulice accused him of being the "ring leader" in complaining, and also told him he "was creating a lot of waves that shouldn't be created" (Tr. 37). Mr. Dickey stated that the communications on the slope car were restored during the day shift and he went into the mine and went to work (Tr. 36; exhibit C-3).

Mr. Dickey identified exhibit C-4, as a report of an incident which occurred on November 30, 1979, and which resulted in a charge of insubordination being filed against him. Mr. Dickey stated that he was operating a continuous miner loading coal onto shuttle cars when he saw someone walking up to and along side his miner. He flashed his cap lamp at him and Mr. Dickey shut off the machine. The person was section foreman Kenny Foreman, and he spoke with Mr. Dickey about some work which needed to be done. Mr. Foreman was between the machine and the rib, and Mr. Dickey refused to start his machine until Mr. Foreman removed himself from a position of danger between the machine and the rib. Mr. Foreman would not move, and Mr. Foreman informed him that if he didn't start his machine and begin loading he would charge him (Dickey) with insubordination.

Mr. Dickey stated that when Mr. Foreman refused to remove himself to a safe position, Mr. Dickey informed him that he was involing his safety rights and would refuse to operate the machine as long as Mr. Foreman

insisted on staying between the rib and the machine. Mr. Dickey requested other work, and Mr. Foreman then spoke with shift foreman Crocker, and Mr. Dickey was instructed to see mine superintendent Sam Pulice. Mr. Pulice summoned him to his office and accused him of refusing to operate the miner. Mr. Pulice then sent him home, and Mr. Dickey filed a grievance and indicated that he was paid for the time he was off work, and that the incident was supposed to be removed from his record (Tr. 48).

Mr. Dickey identified exhibit C-5 as a report concerning an incident which occurred on approximately March 17 or 18, 1980, concerning a cable on his continuous mining machine. Upon an inspection of the machine he discovered a spliced cable which he considered to be damaged. When a mechanic opened up the splice, he found it had been mashed and simply taped over. The mechanic gave Mr. Dickey the defective piece of cable which he cut out, and the next morning he took it to maintenance foreman Lee Gurley, and after discussing it with him realized that he had missed the slope car into the mine. He then took the next car in, but upon arrival underground, was instructed to go back outside. He was sent home for missing the first car, but filed a grievance and stated that he was paid for the day he was sent home (Tr. 51-54).

Mr. Dickey stated that shortly after the slope car incident there was another incident in September 1980 involving a great deal of dust on the section while he and his crew were loading coal. The dust was coming up the track entry and the crew stopped work and went to the dinner hole while the section boss was attempting to find out the source of the dust and clear up the situation. Since most of the crew had stopped work, Mr. Dickey, his helper, and two shuttle car operators shut down their equipment and joined the rest of the crew in the dinner hole.

Mr. Dickey stated that when he was told the crew would have to continue working in the dust, he requested his individual safety rights and refused to work, and he was informed that the rest of the crew had done the same thing. Since the shift was over, the men left the section and went home. The next morning, foreman Dan Fraley informed Mr. Dickey that Mr. Pulice wanted to know "if Dickey was the guy that started this and had the guys leave the crew." Mr. Fraley stated to Mr. Dickey that he informed Mr. Pulice that Mr. Dickey did not instigate the stoppage and each miner decided on his own not to work in the dust.

Mr. Dickey stated that as a result of the aforementioned dust incident, he was called to Mr. Pulice's office, and Mr. Pulice accused him of taking the crew off the section (Tr. 60). However, Mr. Dickey was not reprimanded or given time off because of this incident (Tr. 61). However, Mr. Dickey stated that Mr. Pulice told him that he was fed up with him, accused him of being an instigator, and told him that if he kept up with "these so-called safety issues", he would not have a job (Tr. 62).

Mr. Dickey identified exhibit C-6 as a grievance incident which occurred on approximately October 1, 1980, a week or so after the dust incident. Mr. Dickey discovered a taped spliced cable that connected the mining machine cutting motor to the miner distribution box. The machine was taken out of service and shut down, and Mr. Dickey was sent to another section after invoking his safety rights and refusing to operate the machine. Shortly after being assigned work cleaning the return, Mr. Dickey stated that he and three others were sent home. They were told that Mr. Pulice or Gene Barno had ordered them sent home. As a result of this, they filed a grievance and were subsequently paid. (Tr. 67-70).

Mr. Dickey testified as to a grievance filed in October 1980, over an incident concerning the procedure for cutting through an underground gas well. In the past the crew was kept outside of the mine and put to work while the cutting was taking place. On this occasion, the crew was sent home and they filed a grievance. Mr. Pulice called a meeting with the crew over the grievance, and at the meeting he cursed Mr. Dickey and Mr. Dickey stated that "he told me that he was going to fire me the first chance he got" (Tr. 71-73).

Mr. Dickey identified exhibit C-7 as the grievance he filed against Mr. Pulice for cursing him, and although he indicated that he also filed a separate safety grievance for being sent home he could not locate a copy of it (Tr. 73-74).

Mr. Dickey stated that the grievance filed against Mr. Pulice was filed on October 27, 1980, and in February 1981 it had proceeded to step three of the grievance process. Mr. Pulice at first denied cursing him, but when reminded that Mr. Dickey had many witnesses who heard him, Mr. Pulice admitted it, cussed him again and again threatened to fire him (Tr. 79). Mr. Dickey stated that this took place at the third step grievance meeting, but that Mr. Pulice apologized to him and Mr. Dickey accepted it, and that ended the grievance (Tr. 79-81).

Mr. Dickey testified that on approximately June 12, 1981, he was called to the mine office after finishing his work. Safety committeeman Goody advised him at that time that Mr. Pulice was going to fire him for purportedly creating some kind of an unsafe condition. Mr. Dickey spoke with Union district safety inspector Tom Rabbitt, who also was at the mine at this time, and Mr. Rabbitt advised him that mine management would try to fire him over the alleged incident. After Mr. Dickey advised Mr. Rabbitt that he did not work on the evening of the alleged incident, and when Mr. Rabbitt advised Mr. Pulice of this fact, the entire matter was dropped and nothing happened (Tr. 82-85). Following this incident, Mr. Dickey successfully bid on an outside job in the preparation plant (Tr. 86).

Mr. Dickey testified that he bid on a surface job because he was concerned that mine management would find a way to fire him because underground superintendent Cook and Sam Pulice continually accused him

of "creating a lot of problems". In addition, Mr. Dickey stated that his section foreman, William Homastat, advised him that Sam Pulice told him that he would fire Mr. Dickey the first chance he got (Tr. 88).

Mr. Dickey stated that on June or July 1, 1981, he began work in the preparation plant and his foreman was Dale Norris. Mr. Dickey stated that he met with Mr. Norris and Mr. Norris stated that he had "heard a lot of stories" about his "safety activities" and stated "I understand that you are going to be a real problem for me" (Tr. 89). Mr. Dickey stated that he advised Mr. Norris that he never tried to create any problems, but that he would insist that safe working conditions be maintained (Tr. 90). During his work in the preparation plant, Mr. Dickey stated that he filed no formal safety grievances, but did discuss a dirty belt and a belt malfunction with his supervisors, but the conditions were taken care of (Tr. 90-91).

Mr. Dickey confirmed that he and Donna Yoder lived together in a "common law" relationship as man and wife since 1975, or for seven and a half years, and that her two children by a previous marriage lived with them. The relationship ended on September 22, 1981. Donna Yoder was also employed at the mine as a utility person, and prior to the incident of September 18, 1981, they were having some problems (Tr. 92-95).

Mr. Dickey testified that on September 22, 1981, he reported for work but was upset over his problems with Donna Yoder. He decided to "report off" on sick leave. He want to plant foreman Doug Held's office to advise him that he was taking sick leave and when he arrived at his office he found Miss Yoder there speaking with Mr. Held. Mr. Held advised Mr. Dickey that he was busy and closed his door. Mr. Dickey opened the door and he and Miss Yoder began swearing at each other (Tr. 99). Miss Yoder asked for his car keys, and when he refused to give them to her, she left the room and started down the stairs. He ran after her and they were cursing at each other. She was screaming at him, and they became entangled on the stairwell and he grabbed the hand rail and pressed against her in an effort to calm her down. At this point, Mr. Held appeared at the top of the stairs, and Miss Yoder told him that he (Dickey) struck her. Dickey and Yoder continued cursing each other, and Mr. Held asked Mr. Dickey to leave since he had reported off, and Mr. Held ordered him off the property. Mr. Dickey accused Mr. Held of interferring in his family life, took off his hat and threw it on the floor, and then left (Tr. 100-106).

Mr. Dickey confirmed that following the incident at the mine, he and Miss Yoder ended their relationship and Mr. Dickey "moved out". Miss Yoder filed no criminal charges against him as a result of the incident (Tr. 106).

Exhibit C-9 is a copy of U.S. Steel's employee "shop rules", and Mr. Dickey conceded that these are the employee rules of conduct applicable to all employees, and that everyone is given a copy and told to read them (Tr. 109). He confirmed that he was supposed to have violated rule #4, but believes that he was discharged for his safety activities (Tr. 110).

Mr. Dickey testified that other employees were guilty of violating company shop rules but were not suspended or discharged. He identified exhibit C-10 as a grievance filed by employee Randall Dugan against Sam Pulice after he was cursed and threatened by Mr. Pulice. Mr. Pulice was not disciplined, and the company's position was that he was a "company official" and the rules did not apply to him (Tr. 111-112).

Mr. Dickey testified as to a fight which occurred in 1979 between employee Les Reiser and acting section foreman Rich Borzani. They were not suspended or discharged, but foreman Cook spoke to them and they apoligized to each other (Tr. 113).

Mr. Dickey testified to an incident in 1979 where foreman Denzell Desmond struck shuttle car operator David Rowe, and Mr. Desmond was not suspended or discharged. Mr. Cook purportedly stated that had Mr. Rowe punched back he would have been discharged (Tr. 114).

Mr. stated that section Foreman Kenny Foreman violated the shop rule by failing to observe safety regulations when he insisted on standing between the miner machine and the rib, but he was not disciplined (Tr. 115). Mr. Dickey also testified in 1979, employee Tom Pollock was caught falsifying a doctor's slip and was suspended for one to three days (Tr. 116).

Mr. Dickey testified that he filed a complaint against assistant mine foreman Bernie Steve when Mr. Steve directed him and his helper to pull some ventilation back to a point which would be in violation of Federal or state law, but the company did not discipline Mr. Steve for this (Tr. 117).

Mr. Dickey testified that employee Donny Boyle was caught sleeping in the mine in 1980 and was suspended for a few days (Tr. 117). Employee Mike Mechanic falsified a doctor slip to cover an absence, and was suspended for one or three days (Tr. 117). Employee Timmy Ross was caught with matches in the mine and was suspended for one day (Tr. 118). Employee Dale Williams was on company property drunk when he was supposed to be working, and on another occasion was caught pouring whiskey out of a bottle into a cup and drinking it in the bathhouse. When the company found out that the whiskey bottle belonged to preparation plant superintendent Dale Norris, the matter was dropped (Tr. 118-119).

Mr. Dickey testified that employee Lisa Zern violated shop rules on four or five separate occasions, and was suspended one time for five days (Ex. C-11, Tr. 119). He also testified that employee Jane Christopher and another girl who worked on the belt line filed grievances against a foreman whose nickname is "Snuffy" because he was constantly cursing at them and harrassing them. The grievances were filed after Mr. Cook took no action against the foreman, and the girls were reassigned to another crew (Tr. 120).

Mr. Dickey was cross-examined as to each of his asserted safety and personal complaints and grievances, and was also questioned concerning his contentions that other mine employees has violated certain shop

rules but were either not suspended or discharged or received less severe discipline than he did (Tr. 131-152; 158-167; 168-179; 241-257).

Mr. Dickey confirmed that under the mine labor agreement he was subject to discipline for claiming his individual safety rights in bad faith, but denied that he was acting in bad faith or was disciplined for filing the grievance of December 7, 1979 (Tr. 159).

In response to questions from U.S. Steel's counsel as to whether Mr. Dockey considered Mr. Pulice to be "volatile", Mr. Dickey responded as follows (Tr. 179-183):

> Q. You had a run-in with Sam Pulice?
>
> A. Yes, ma'am.
>
> Q. Would you characterize Mr. Pulice as volatile?
>
> A. I don't understand what you mean.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Does he a have a tendency to lose his temper, blow his cool, so to speak?
>
> BY MS. SYMONS:
>
> Q. Would you call him hot tempered?
>
> A. He was with me.
>
> Q. Do you know if he was hot tempered with anyone else?
>
> A. I'd say he was once in a while on different issues, if he thought that he was right on it, I imagine, yes, ma'am. I can't really tell you, you know, the man's personality. All I know is that he came after me a good bit.
>
> Q. Do you know if he yelled at anyone else?
>
> A. If he yelled at anyone else, ma'am?
>
> Q. Yes.
>
> A. Yes, ma'am. Yes, ma'am.
>
> Q. Do you recognize something called mine talk or shop talk at Cumberland Mine?
>
> A. Yes, ma'am.
>
> Q. Isn't it true that almost everyone at Cumberland Mine uses that kind of language on occasions?
>
> A. It depends on what you are saying by that kind of language, ma'am.

Q. What I will categorize as four-letter words.

A. To use a four-letter word, ma'am, in mine talk, is sometimes nothing, unless they are directed towards a person for a certain thing.

Q. Well, is it true that sometimes at Cumberland Mine, you used four-letter words?

A. You mean just in a manner of speaking?

Q. Yes.

A. Never addressing towards anyone that I can recall, no.

Q. You accused Mr. Pulice of occasionally using four-letter words, isn't that true?

A. I have accused him of using more than four-letter words, ma'am.

Q. How do you categorize them then?

A. Well, I don't, ma'am. I don't classify son-of-a-bitch as a four-letter word.

ADMINISTRATIVE LAW JUDGE KOUTRAS: By the same token, that particular expression, if you get your finger caught in a pinch point, is a little different than cussing some employee down, isn't that what we are talking about here?

MS. SYMONS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Because if you disciplined everybody in the mines who used four-letter words, there wouldn't be any mining going on.

MS. SYMONS: I think that is my point.

ADMINISTRATIVE LAW JUDGE KOUTRAS: But the context in which the question is asked and his answer is yes, he probably uses four-letter words like anybody else, but never directly to any one person as a personal insult is what I think he is trying to say.

THE WITNESS: Yes, sir.

Mr. Dickey reiterated that he bid on the preparation plant job to get away from Sam Pulice (Tr. 191). However, he conceded that as mine foreman, Mr. Pulice would also be in charge of the preparation plant, but that he would not have to see him everyday or walk by his office as he did when he was assigned underground (Tr. 196).

Mr. Dickey stated that Mr. Pulice reported to mine superintendents Dale Norris and Walter Cook. Mr. Norris was the preparation plant superintendent and that Mr. Cook was the underground mine superintendent (Tr. 198). Mr. Dickey believed that Mr. Pulice's authority as mine foreman also extended to the preparation plant (Tr. 199).

Thomas J. Rabbitt, Safety Inspector, UMWA, District 4, confirmed that he was acquainted with Mr. Dickey and described him as being concerned with his and other's safety rights, and that he would not hesitate to complain about safety. Mr. Rabbitt also confirmed that he gave him copies of exhibits C-2 and C-3 when he came to his office to request them (Tr. 278-282).

Mr. Rabbitt confirmed the incident concerning an allegation against Mr. Dickey that he may have caused a safety violation and that the matter was dropped after he (Rabbitt) told Mr. Pulice that Mr. Dickey was not working in the mine at the time of the incident in question (Tr. 285).

On cross-examination, Mr. Rabbitt confirmed that Mr. Dickey and others did file a grievance concerning the slope car incident of October 4, 1979 (Tr. 286). He also confirmed that Mr. Dickey was involved in talks with management over the suggested walkie-talkie (Tr. 291). Mr. Dickey stated that Mr. Pulice would "blow off steam just like everybody does" when he got mad, but he doesn't know Mr. Pulice, nor has he ever been present when he may have yelled at Mr. Dickey (Tr. 294). He also has never been told by any union members at the mine that Mr. Pulice ever yelled, screamed, or used foul language to them (Tr. 295).

Mr. Rabbitt stated that he did not feel that Mr. Dickey's discharge was justified, but that if he actually physically assaulted Donna Yoder, then the company would have just cause to discharge him under the union-management conduct rules (Tr. 298).

Jane Christopher, testified that she has been employed at the mine since December 1978. She testified that on several occasions she and another female miner, Helen Kozloski, were harrassed practically daily by Foreman Ed Yanik who stood beside them and swore at them. They complained to Mr. Pulice and Mr. Cook but no action was ever taken against Mr. Yanik (Tr. 316-318).

On cross-examination, Ms. Christopher stated that she filed a regular grievance to be removed from Mr. Yanik's crew sometime in April 1980, but that after the grievance was filed she was taken off of his crew (Tr. 320).

Ms. Christopher testified that she knew Mr. Pulice, characterized him as "hot tempered", and confirmed that she has heard him use profanity or obscentities at the time that she complained to him about the language Mr. Yanik was using (Tr. 325).

Gerald E. Swift, Executive Board member, UMWA District No. 4, confirmed that he has been involved in grievances brought against mine bosses for cursing at employees at the mine. However, the grievances were withdrawn because of questions raised as to whether there was actual cursing and because the contract does not provide for the union to tell mine management how to discipline its salaried personnel (Tr. 329).

On cross-examination, Mr. Swift confirmed that two miners filed a grievance against a supervisor for cursing them but that it was withdrawn because he could not process it under the contract (Tr. 332). He identified exhibit C-7 as the grievance filed by Mr. Dickey against Mr. Pulice, and he indicated that grievances of this kind where the employee is seeking an apology are usually resolved or settled at the third stage (Tr. 334).

Mr. Swift confirmed that two employees, Dave Smith and Ralph Korzum, were discharged for insubordination and using obscene language towards a supervisor, but when they filed cross complaints against the supervisor for using the same type of language against them, management took the position that there was nothing to be gained by going to arbitration because under the contract the union couldn't force management to discipline salaried managers (Tr. 339). Mr. Swift also confirmed that employee Chris Watson was discharged for falsifying a doctor's slip (Tr. 337).

Danny Litton testified that he is employed at the mine in question and that on some occasions he worked on the same crew with Mr. Dickey as a "fill in". He confirmed that Mr. Dickey was concerned about safety and that he and other miners on occasion consulted with Mr. Dickey about safety problems. He stated that Mr. Dickey was not afraid to stand up for safety issues (Tr. 350), and he confirmed that he had overheard a conversation between Mr. Dickey and Mr. Sam Pulice in the mine office during an incident concerning the cutting through of a gas well, and his testimony in regard to this incident is as follows (Tr. 352-353):

> Q. What was it you heard Pulice say to Dickey?
>
> A. Well, Sam Pulice looked at him between me and said some swear words and pointed his finger and said he'd fire him if it was the last thing he ever done.
>
> Q. Would you tell us how that happened to occur, that you heard this?
>
> A. Well, they called the whole crew, told us that they were going into the office or something; and that's all we knew. So me and a couple of my

friends went into the office to see what was going on, you know, because it might concern the rest of us, too; so we just, you know, we went in and then I just kind of stayed in the back and listened to him talk.

Q. Do you recall what the incident was that they were called in about?

A. I believe it was about the gas well at the time.

Q. Was there a grievance filed over the gas well?

A. Yes.

Q. You say you heard Pulice using some pretty choice language directed at Dickey?

A. Yes.

Q. Did he accuse Dickey of being the instigator of this thing?

A. He said something to that effect.

Q. Then somewhere along the line, you also heard him say to Dickey that I will fire you if it's the last thing I do?

A. Yes; he did say that.

Mr. Litton stated that he particpated in the grievance filed over the miner cable (exhibit C-6), and he indicated that he has never had any "encounters" with Mr. Pulice and had chosen "to stay away from him whenever I could" (Tr. 358).

Bruce G. Diges, testified that he is employed at the mine and that he worked with Mr. Dickey when he was there for about a year as Mr. Dickey's miner helper. He described Mr. Dickey as being "very safety conscious", and would always check out his machine (Tr. 362).

Mr. Diges confirmed that grievances were filed over the miner cable and gas well, and that as a result of these incidents Mr. Dickey was threatened by mine management (Tr. 364). He stated that at the grievance meetings in the mine office Mr. Pulice advised his crew that he "was going to break us up", that "he will fire us if he can", and that he proceeded to argue with Mr. Dickey and they were cursing back and forth (Tr. 365). Mr. Diges also indicated that Mr. Pulice indicated to him that he should sever his relationship with Mr. Dickey, and that if he didn't "I would be fired" (Tr. 369).

Mr. Diges testified further that "Sam Pulice was a rat. He was very hot tempered; very easy to fly off the handle" (Tr. 376). He had never known Mr. Dickey to "fly off the handle" on safety issues (Tr. 377).

Mr. Diges confirmed that he had received a couple of absentee notices from management, and he confirmed that when Mr. Pulice and Mr. Dickey were arguing over the grievances which were filed, Mr. Dickey did not curse back (Tr. 380).

Walter E. Cook, Jr., testified that he has been the underground mine superintendent at the Cumberland Mine since approximately 1977, and that he knew Mr. Dickey as a safety oriented person who was always involved if there were any "safety confrontations" on his shift. He considered Mr. Dickey to be "right up there" with some of his good continuous miner operators. Although he and Mr. Dickey occasionally exchange words, he did not consider Mr. Dickey to be a "hot head" in his daily operations (Tr. 384).

Mr. Cook stated that most of the time Mr. Dickey was astute and knowledgeable on safety matters, and he conceded that most of the safety issues brought to his attention were important issues (Tr. 384). Although he disagreed with Mr. Dickey's complaints over the slope car communications, he did not believe that Mr. Dickey was trying to "blow it out of proportion" or that he was "agitating for the sake of agitating" (Tr. 385-386).

Mr. Cook stated that he was not involved in the decision to discharge Mr. Dickey, and that the decision in this regard was made by outside superintendent Dale Norris, general superintendent J. W. Boyle, and he indicated that "our Pittsburgh Corporate Office would have been consulted in this matter" (Tr. 387). He confirmed that he learned of Mr. Dickey's discharge "after the fact" (Tr. 389).

Mr. Cook indicated that he was aware of the grievance filed by employee Randall Dugan against Mr. Pulice because of Mr. Pulice's alleged abusive language to Mr. Dugan, and he confirmed that he gave Mr. Pulice a verbal reprimand, but he could not recall telling Mr. Dugan about this reprimand (Tr. 394). Mr. Cook could not recall any fighting incident between employees Les Reiser and Rich Borzani, or any incident between employees Denzell Desmond and David Rowe (Tr. 395). He did recall the incident concerning Mr. Dickey and foreman Kenny Foreman, and he confirmed that he verbally reprimanded Mr. Foreman over the matter, but gave no official notice of this to anyone (Tr. 396). He also confirmed that the record of Mr. Dickey's one-day suspension in the matter should have been removed from his personnel file (Tr. 397), and he did not know why it was still in his file (Tr. 400; exhibit C-12). He also identified exhibit C-13 as a written reprimand to Mr. Dickey for being absent from work, and he could not explain why the copy does not show that it was ever delivered to Mr. Dickey, even though this is required (exhibit C-13; Tr. 401).

Mr. Cook confirmed that he lifted the one-day suspension given to Mr. Dickey over the incident with Kenny Foreman, and he did so because "I don't think the foreman did act in the proper fashion in suspending Mr. Dickey, and I didn't think I had a cause to argue under the contract and I settled that case from that standpoint" (Tr. 409). Mr. Cook confirmed that he knew about the disciplinary action against employee Dennis Boyle which resulted in a 3-day suspension for sleeping on the job, and he indicated that Mr. Boyle was suspended with intent to discharge, but was given the opportunity to resign rather than being discharged (Tr. 411). He also indicated that he was not familiar with the outcome of any disciplinary action against Dale Williams for drinking on company property, nor could he confirm that Dale Norris was disciplined for having whiskey on company property (Tr. 412-413). He also confirmed that he was aware of the three-day suspension given employee Tim Ross for having matches in his dinner bucket, and while management contemplated discharging Mr. Ross, the union intervened, and based on all of the facts of his case, it was decided to suspend him for three-days instead of discharging him (Tr. 417).

Mr. Cook also confirmed that he was aware of the disciplinary case against Lisa Zern for an "absentee problem", but he indicated that he was not familiar with all of the details of her case, and while he recalled that she may have resigned, he could not state that she was not discharged (Tr. 424). Mr. Cook indicated that since his supervisory personnel are not under the UMWA/BCOA contract he can discipline them "in a little different fashion than I can a bargaining unit employee" (Tr. 431). He confirmed that he spoke with Ed Yanik about cursing and harrassing Jane Christopher, but did not suspend or fire him and simply "talked to to him" (Tr. 431). He also confirmed that he did not discipline Mr. Pulice over the incident where he cursed Mr. Dickey, and he stated that "I don't have too many people who are as rambunctious as Mr. Pulice" (Tr. 434). He also stated that Mr. Pulice did not receive a bonus and that one of the reasons for this was the cursing incident with Mr. Dickey (Tr. 435), but he conceded that Mr. Pulice's personnel file did not reflect this fact and that no one knew about it (Tr. 436). He confirmed that he has suspended foremen for safety infractions, and stated that foremen would "receive some discipline" for harrassing employees. When asked about any action against Mr. Pulice, Mr. Cook testified as follows (Tr. 439-441):

> Q. What happened to Sam Pulice insofar as Jim Dickey was concerned?
>
> A. I look at that really as being in Sam's nature. I don't look at that as being threatening and abusive per se.
>
> Q. C7 involved a situation with the cussing and threatening of James Dickey by Sam Pulice, right?
>
> A. Yes.

Q. Without my reading all of that into the record, are you telling me that you didn't, because it happened to be Sam Pulice, that you didn't consider this to be a very serious situation?

A. That's basically right, yes, sir.

Q. In other words, if you are Sam Pulice, you are allowed to do this sort of things?

A. Yes, sir; and there was some question as to exactly, in the step three, if that was exactly the way the words were stated.

Q. Didn't he in fact, and doesn't the grievance indicate, that the grievance was withdrawn because he apologized to Dickey and he admitted that he had said these things?

A. To the best of my knowledge, there was a step three meeting, and in the step three meeting, Jim was asking for an apology. I don't know that Sam actually said, I apologize. I know they went round and round. I can't recollect the exact words.

Q. Well, I show you C7 again. It's signed by Mr. Passera and Mr. Antonelli, and doesn't it say he apologized to Jim Dickey on the back of step three?

A. Apologized to Jim Dickey on the back, yes.

Q. Wasn't that the settlement?

A. Must be, sir. Like I said, I can't recall the exact wording that Sam used with Mr. Dickey.

Q. Notwithstanding all that, that is not nearly as important or as serious as Mr. Dickey getting into the altercation with his common-law wife, Donna Yoder, was it?

A. No. sir, it wasn't.

Q. This injury that Mr. Yoder received never resulted in any Workmen's Compensation claim being filed against U.S. Steel?

A. I can't answer that; not to my knowledge.

Q. As far as you know, it never cost U.S. Steel a dime, did it?

A. I don't know. I don't handle the Preparation Plant, so I am not sure if there was any time lost on it.

On cross-examination, Mr. Cook identified a copy of exhibit C-7 as respondent's file copy concerning Mr. Dickey's grievance against Mr. Pulice and he confirmed that it contains no notations concerning any apology made by Mr. Pulice over the incident (Tr. 442). Mr. Cook confirmed that he is the mine superintendent for the underground operation, and that he reports to J. W. Boyle, the general mine superintendent. He confirmed that the "outside" superintendent who is also in charge of the preparation plant, is equal in rank to him. He also confirmed that Sam Pulice worked for him as the general mine foreman in charge of the underground mine, but that he had no authority to fire anyone. Mr. Pulice and the general foreman of the preparation held comparable supervisory positions (Tr. 448-450). Mr. Cook stated that during the time Mr. Pulice worked for him he often received complaints that he was "very verbal". However, he indicated that he did not believe that Mr. Pulice discriminated against Mr. Dickey by the language he used because "sam used that language toward everyone, including myself on occasions", and that he (Cook) did not take him seriously (Tr. 455).

Mr. Cook confirmed that Sam Pulice had no input into the decision to fire Mr. Dickey, and he based his conclusion on the fact that "since Mr. Pulice worked for me and I wasn't involved, I am sure that he wasn't involved" (Tr. 457). He conceded, however, that the possibility exists that Mr. Pulice could have contacted those responsible for Mr. Dickey's discharge, but found this "rather unlikely" (Tr. 458).

In response to further questions, Mr. Cook stated that Mr. Pulice resigned his job in January 1982, for "personal reasons", and that he had worked at the mine since 1977. When asked to explain why at least two miners, including Mr. Dickey, went out of their way to avoid Mr. Pulice, Mr. Cook responded "That was basically the way he did business. I don't condone it; don't get me wrong. I have talked to him quite numberously about, you know, his handling of people." (Tr. 462). When asked to explain the circumstances surrounding Mr. Pulice's resignation, Mr. Cook testified as follows (Tr. 462-463):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: How long has he been in a management position at U.S. Steel?
>
> THE WITNESS: He was in a position probably two years; eighteen months to two years.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Prior to his resignation?
>
> THE WITNESS: Yes.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Did any of that have anything to do with the personal reasons for his resigning?
>
> THE WITNESS: It had part of it, part of it to do with the problem.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did management kind of give him a nudge or was it all of the sudden, his decision to voluntarily resign for personal reasons?

THE WITNESS: He wasn't given an ultimatum, if you want to put it that way. If you want to put it in that fashion no, sir. He made the election to resign himself.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did someone talk to him?

THE WITNESS: Talk to him to try to get him to stay, yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did somebody talk to him, trying to nudge him out?

THE WITNESS: No, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did his resignation have anything to do with the filing of this Complaint?

THE WITNESS: No, sir; it did not.

Mario L. Antonelli, Executive Board Member, UMWA District #4, testified that he knew Mr. Dickey to be "always concerned for safety", and he confirmed that he was involved in several grievances filed by Mr. Dickey against mine management (Tr. 475). He confirmed that Mr. Pulice apologized for the language used against Mr. Dickey, and that this in effect settled the grievance (Tr. 478). He also confirmed that Mr. Pulice admitted stating during the grievance that if he had a chance he would fire Mr. Dickey (Tr. 480). He also confirmed that at the grievance meeting concerning Mr. Dickey's complaint, Mr. Pulice was "hot headed" (Tr. 480).

David B. Rowe, testified that he is employed at the mine in question, and he confirmed that he was involved in an incident where he was "grabbed" by the neck and "smacked" by a supervisor who believed he was part of a practical joke to "grease" the supervisor. He explained that miners sometimes put grease over a man who is new on the job or who is there for his last day, and the supervisor thought that he was going to do this to him. Mr. Rowe did not report the incident, and other miners told him that he (Rowe) would have been fired had he retaliated and struck the supervisor (Tr. 493).

On cross-examination, Mr. Rowe conceded that "greasing" a supervisor is "horseplay", and he admitted that other miners had selected him (Rowe) to do the "greasing" (Tr. 494). He also confirmed that during the two years or so that he worked for the supervisor in question, they had no problems (Tr. 500).

Testimony and Evidence Adduced by the Respondent

Douglas Held, Preparation Plant Operating Foreman, testified that Mr. Dickey worked for him four days before his discharge. He testified that while he could recognize Mr. Pulice, he did not know him personally and had no contacts with him. He confirmed that Mr. Dickey was a good worker during the four days that he worked for him, and that he had no problems with him prior to his discharge on September 18, 1981 (Tr. 516-519).

Mr. Held testified that on Friday, September 18, 1981, he arrived at the mine shortly after twelve midnight and went to the central control room of the preparation Plant. Donna Yoder called him over the mine phone and asked to speak with him. She came to his office, and since she indicated she wanted to speak with him in private, he closed his office door. Miss Yoder began telling him about her problems with Mr. Dickey, and at that point Mr. Dickey opened the door and "wanted to know what the hell was going on". Mr. Held responded "Jim, it's none of your business; leave the room" (Tr. 520). He left, but then returned, and he and Miss Yoder exchanged words, began cursing each other, and argued over keys to a car and the trailer where they both lived. Mr. Held stated that he requested Mr. Diekcy to return to work, but Mr. Dickey replied "I don't have to do a 'F'ing thing you tell me because I quit", and when Mr. Held again advised him to return to work and that he shouldn't quit over such an incident, Mr. Dickey repeated his statement (Tr. 522).

Mr. Held stated further that after his exchange with Mr. Dickey, Miss Yoder left the room and Mr. Dickey followed her out. Mr. Held left the room to call superintendent Dale Norris and as he went down the stairway he found that Mr. Dickey had pinned Miss Yoder against the stair railing with her back against the rail. He split them up and directed her to go to the utility room. She went to the room and Mr. Dickey followed her in and Mr. Held asked the four men who were there to try and keep the two separated while he went to phone Mr. Norris. After speaking with Mr. Norris he again asked Mr. Dickey to go back to work, and Mr. Dickey informed him again that he had quit. Mr. Norris then asked him to leave the property, and as he left the room he threw his hat back towards him and he left (Tr. 526-527). Later, he learned that Miss Yoder wanted to leave work early and she told him that Mr. Dickey had struck her, that her back and jaw were sore and that she had lost a contact lens. Miss Yoder filled out an "early-out" slip at approximately 3:00 a.m., and left the property (Tr. 530).

Mr. Held testified that after Miss Yoder left the property, he called Mr. Dickey on the phone and advised him that "it was a real ridiculous thing to lose your job over", and he asked him to report to the office at 7:30 a.m., that morning so that he could discuss the matter with him and Miss Yoder. Mr. Held stated that Mr. Dickey told him he "didn't have to do a damn thing I told him and hung up" (Tr. 531). Mr. Dickey did not come to the office, but he called him (Held) at 7:00 a.m., and Mr. Held again asked him to come to the office so that he could help him

get his job back and Mr. Dickey informed him that "I reported off" (Tr. 531). Miss Yoder came in at 7:30 a.m., but Mr. Held did not speak with her, but she did speak with Mr. Norris (Tr. 532).

Mr. Held stated that the incident in question did not affect mine production, but that the employees who were in the utility room used an hour of nonproductive time (Tr. 534). Mr. Held confirmed that he had only known Mr. Dickey for the four days he worked for him and he knew nothing about his being a "safety activist" (Tr. 535).

On cross-examination, Mr. Held confirmed that he did not make the decision to discharge Mr. Dickey. He stated that since Mr. Dickey informed him that he had quit, there was no decision to make (Tr. 536). He also indicated that Nr. Norris was involved in the decision to suspend Mr. Dickey with intent to discharge him (Tr.536). Mr. Held also indicated that he prior to the incident in question, he had no knowledge that Miss Yoder and Mr. Dickey were living together, and that she informed him the evening of the incident that she "wanted to throw his clothes out", and he surmized from this conversation that they were living together (Tr. 538). He also confirmed that Miss Yoder told him that she and Mr. Dickey had lived together for some time and were having marital problems, that they had some trouble that evening, and that "she was fed up with it and she wanted to get out" (Tr. 538). He also confirmed that Mr. Dicket was agitated and upset that evening, and that when he entered his office the second time he asked Mr. Held whether he and Miss Yoder were discussing their problems and Mr. Held conceded that it appeared to him that the two were having "a lovers or marital quarrel" (Tr. 541). He also confirmed that Miss Yoder and Mr. Dickey were both cursing each other, and were making accusations to each other (Tr. 542).

Mr. Held stated that he did not know whether Miss Yoder filed any workmen's compensation claims for her injuries, but he confirmed that she lost no work time as a result of any injuries (Tr. 543). He also confirmed that Miss Yoder required no medical attention, and that he did not suggest she see a doctor (Tr. 544). Mr. Held also indicated that while Miss Yoder was emotional, he observed nothing about her condition that would lead him to believe that she was in serious pain or needed medical attention (Tr. 545). Mr. Held also indicated that because of Mr. Dickey's "attitude", he was concerned that "anyone who got in his way was going to get knocked down the stairs", but that this did not happen (Tr. 547). He also confirmed that all of Mr. Dickey's activities that evening were directed at Miss Yoder, and to his knowledge Mr. Dickey did not threaten anyone else and that the preparation plant did not shut down over this incident (Tr. 548).

Mr. Held stated that while he did not participate in the decision to discharge Mr. Dickey, he did participate in the company investigation of the incident and told Mr. Norris and general plant foreman Parfitt about the incident. Mr. Held was not at the arbitration hearing, nor was he present when management made the decision to suspend Mr. Dickey with intent to discharge him (Tr. 549). He made no recommendations in the matter, but he acknowledged that he told Mr. Parfitt and Mr. Norris that Miss Yoder

reported that Mr. Dickey had struck her, and he also informed them that Miss Yoder's comments concerning her desire to end the relationship with Mr. Dickey. Mr. Held confirmed that he considered the incident to be between "two employees", and said nothing about any "marital quarrel" (Tr. 551).

Mr. Held confirmed that Mr. Dickey appeared upset when he first appeared at his office, but that the incident on the stairway happened after he and Miss Yoder were quarreling and cursing each other. He also confirmed that he made no recommendations to discipline Mr. Dickey or Miss Yoder over the incident that evening (Tr. 558).

In response to further questions, Mr. Held stated that he made no recommendations concerning Mr. Dickey because Mr. Dickey told him he had quit. When asked why the respondent fired him if he had quit, Mr. Held responded "because the following morning, he did not quit. He called me at 7:00 a.m., and said, I told him to report back to the mine, and he said why, I reported off" (Tr. 563). Mr. Held confirmed that Mr. Dickey had not "reported off", worked only one hour the evening of September 18th, and his pay was docked for the seven hours he did not work when he left the property (Tr. 565). When asked why he docked Mr. Dickey if he had quit his job, Mr. Held then stated "Well, I'd have to say I don't really remember about docking him. I don't even know what became of his time that night". He also indicated that Mr. Dickey did not report for his next scheduled work shift because he was suspended (Tr. 569-570). Mr. Held confirmed that he had not met Miss Yoder prior to the incident of September 18th, and that he did not personally observe Mr. Dickey strike her other than "just restraining her" (Tr. 573).

James F. McNeeley, preparation plant maintenance foreman, stated that prior to the incident of September 18th, he did not know Mr. Dickey, had no contact with him, had never met him, and Mr. Dickey never worked for him. He confirmed that Mr. Dickey told Mr. Held that he had quit and did not have to do what Mr. Held told him. He also confirmed that when he observed Miss Yoder in the utility room he saw blood on her teeth, she appeared to have been crying, and he could see a slight puffiness on her lower left lip. When Mr. Held told Mr. Dickey to leave the property, Mr. Dickey "pushed his way past Mr. Held", and two other employees held Mr. Dickey on each arm while Mr. Held was trying to get him to leave. He observed Mr. Dickey throw his hat on his way out of the room, and after he left Mr. McNeeley instructed the two employees who were holding Mr. Dickey to patrol the parking lot to insure that Mr. Dickey had left the property, and they confirmed that he had in fact left (Tr. 579).

On cross-examination, Mr. McNeeley confirmed that he made no recommendations concerning the discharge of Mr. Dickey, but did give a statement during the investigation. He was not present during the 24/48 discharge meeting, did not hear Miss Yoder curse Mr. Dickey, and simply informed fellow employee Ms. Groves to "try to clean her up and calm her down" because Miss Yoder was upset (Tr. 580).

Dale W. Norris, testified that he is presently employed as manager of preparation for the Kerr-McGee Coal Corporation, Harrisburg, Illinois, that he has held this position since February 2, 1982, and that he previously worked at the Cumberland Mine as the outside superintendent. Part of his responsibility was the preparation plant, but he had no responsibility for the underground mine since that was under Walter Cook's jurisdiction (Tr. 591). Mr. Norris stated that Mr. Pulice never worked for him and did not tell him how to direct his work force. He confirmed that Mr. Dugan worked for him (Norris), and he confirmed that Mr. Dugan filed a grievance against Mr. Pulice (exhibit C-10), and that Mr. Pulice had lost his temper over the slope car incident and that "Mr. Cook, was, needless to say, a little bent out of shape" over the incident (Tr. 593). The grievance was withdrawn and he confirmed that Mr. Pulice apologized to Mr. Dugan (Tr. 595).

Mr. Norris identified his general foreman as Paul Parfitt, and he indicated that Mr. Parfitt had no authority to fire anyone. He explained the procedure for discharging an employee as follows (Tr. 596):

> Q. If you want to fire someone at U.S. Steel, what are the steps that have to be taken?
>
> A. Before we make any discharge, the first thing that we have to do is, of course, if Paul were handling the initial part of the case like he was in this incident, he has to notify me. I then talk to Mr. Boyle, who was and at this time still is general superintendent at Cumberland. We then bring in our local labor relations man, who at that time was Robert Hoover. Then we jointly contact Pittsburgh Labor relations, as well as Pittsburgh operations. In other words, we go to the corporate office of the coal group, and then a decision is jointly reached after that discussion and issued.

When asked what he knew about Mr. Dickey before he came to work for him, Mr. Norris stated as follows (Tr. 597):

> A. I was aware of his past activities and reputation as a somewhat rowdy individual; and I had in fact talked to both Mr. Pulice and Mr. Cook about that, and I felt that I would be remiss not to find out what sort of person he was from these people that managed him before I was receiving --
>
> Q. What did they tell you of his safety activities?
>
> A. They told me that he was in fact very safety conscious and that he wouldn't be a problem.

With regard to any knowledge on his part concerning the relationship between Mr. Dickey and Donna Yoder, Mr. Norris acknowledged that "we had heard about their sort of relationship", and that they were split up and assigned to different crews. However, they were later assigned to the same crew at their request for reasons of travel, et cetera, and we condescended and let that happen" (Tr. 598).

Mr. Norris conceded that Mr. Dickey was doing a good job as a sampler when he was reassigned to the preparation plant. He explained the procedures for "reporting off" work by an employee once he reports for work, and he indicated that it was not uncommon for employees to report for work in their work clothes, and then "report off". After it became a problem, supervisors were instructed to require an employee to sign an "early quit slip" when they reported off (Tr. 600).

Mr. Norris stated that he was not at the mine during the incident of September 18, 1981, but found out about it the next morning from his general foreman, Paul Parfitt. Mr. Norris then contacted Mr. Boyle and Mr. Hoover, and then spoke with Mr. Held to find out what had happened. Mr. Held informed him that Mr. Dickey had been asked to report to the mine at 7:30 a.m., and when he did not appear, he (Norris) called Mr. Dickey at home, and Mr. Dickey informed him that he had no way to get to the mine. Donna Yoder was there and she explained the events of the evening before to him while they were in his office. Donna Yoder told him that Mr. Dickey had struck her and that he had lost her contact lens. Mr. Parfitt was present during this conversation, and Mr. Norris confirmed that he had taken notes of the conversation with Donna Yoder (exhibit R-6). He also confirmed that he again met with Donna Yoder the next day, Saturday, September 19, and that Mr. Hoover and Mr. Vernon Baker, a UMWA committeeman assigned to the preparation plant were also present. Donna Yoder went over the notes of the previous days' conversation, and she confirmed that they were essentially accurate (Tr. 605).

Mr. Norris testified that after the second meeting with Donna Yoder, he met with Douglas Held, Mr. McNeely, Paul Parfitt, employee relations superintendent Bob Hoover, and J.W. Boyle to discuss the entire episode. In addition, he contacted the respondent's labor management relations manager Ernie Helms, and Mr. Helms recommended or "advised" that Mr. Dickey be discharged (Tr. 606, 609). Since a thorough investigation had to be made in a discharge case, it was decided to suspend Mr. Dickey with intent to discharge him, rather than to immediately discharge him (Tr. 606). Since the incident with Ms. Yoder was a "pretty grave offense", Mr. Norris concurred in the decision to suspend Mr. Dickey with intent to discharge, and this was a "joint-type decision" (Tr. 608). The people who were part of the "joint" or "group" decision regarding Mr. Dickey were identified by Mr. Norris as "himself, Mr. Boyle, our local labor relations, as well as labor relations in Pittsburgh". He stated that Ernie Helms only "advised" that Mr. Dickey should be "discharged after a thorough investigation", and that "we concurred" (Tr. 609).

Mr. Norris acknowledged that he knew that Mr. Dickey and Ms. Yoder were living together and that they lived in the same town that he lived in.

He "did not believe" that any consideration was given to the fact that they lived together when the decision to discharge Mr. Dickey was made, and he stated that had they been strangers, the same decision would have been reached (Tr. 610). When asked what effect Mr. Dickey's safety activities had on the decision by the group to discharge Mr. Dickey, Mr. Norris responded as follows (Tr. 610-611):

> Q. Have you had any safety complaints from Jim Dickey?
>
> A. No, I hadn't.
>
> Q. Had his supervisor reported to you that he had made any safety complaints in the Preparation Plant?
>
> A. Not that I was aware of. Our policy was if possible, when a safety complaint was made by an employee, we checked it out, took care of it.
>
> Q. Did Mr. Dickey's prior record have anything to do with the decision to suspend with intent to discharge?
>
> A. Well, it's my opinion and in the past it has been true, Mr. Dickey had not been the first person we had ever received that had any sort of prior reputation that I was aware of. We felt in a lot of cases that people were not particularly happy in the mine. They actually wanted to work outside, and as a result, we had seen really no problem with people prior to that that had come outside; so I tried to the best of my capability to keep that as a fresh start.
>
> Q. So what effect did his prior record have in this decision to suspend him?
>
> A. It was not taken into account as far as I know.
>
> Q. Was there any mention made during that discussion of September 18th, about his problems underground?
>
> A. No, ma'am.
>
> Q. Was there any mention made of safety activities?
>
> A. No, ma'am.

Mr. Norris confirmed that an investigation of the incident was conducted on Saturday morning, September 19, 1981, and he identified the individuals who were interviewed. Present during the interviews

were Mr. Hoover and Mr. Baker, and he identified the statements taken from the employees (Exhibits R-7 through R-13). He confirmed that the statements were reviewed with Mr. Dickey's union representative during the 24/48 hour labor-management conference concerning the proposed discharge, and the statements were also used during the arbitration hearing (Tr. 617). Mr. Norris also confirmed that the reason for taking the statements was to support management's decision as to the ultimate discipline to be given to Mr. Dickey, and he stated that the union took an active part in the investigation, including witnessing the taking of the statements from each of the employees who gave one, and he identified one of the union representatives who was present as Vernon Baker (Tr. 623).

Mr. Norris explained that after an employee is suspended with intent to discharge, management has five days to decide whether to go ahead with the discharge, or to impose a lesser penalty such as a suspension. He confirmed that the fact that Ms. Yoder suffered injuries "was all important" to any decision, and he "believed" that the suspension with intent to discharge Mr. Dickey would have been made even if Ms. Yoder had not been physically injured (Tr. 629). He further elaborated as follows (Tr. 629-630):

> Q. Did it make any difference to your decision on September 18th, to issue the suspension with intent to discharge as to whether or not her injuries resulted from Mr. Dickey striking her or a slip and fall or anything of that nature?
>
> A. I would say they had some bearing in the case, but it wasn't the overall important thing in the investigation.
>
> Q. Once you got Mr. Berdar's statement that he was an eye witness to the blow, what effect did that have on the ultimate decision to change the suspension to a discharge?
>
> A. It was taken into consideration with the balance of the other statements that we had received during the investigative period on the 19th.

Mr. Norris testified that the decision to discharge Mr. Dickey was made after the investigation and 24/48 hour meeting which took place on Monday, September 21, 1981, and that this was the first time that he heard Mr. Dickey's side of the incident which had occurred the previous Thursday. Mr. Norris confirmed that at the 24/48 meeting, Mr. Dickey did not allege that management was using the incident as a pretense to "get him" for having filed past safety complaints, that Mr. Dickey never mentioned those complaints, nor did he ever mention anything about discriminatory discipline (Tr. 641).

Mr. Norris testified that the decision to escalate the suspension to a discharge was made in "caucus" after the 24/48 meeting and after a review of all of the information gathered by management during its investigation. Mr. Norris confirmed that during the interim between the incident of September 18 and the 24/48 meeting, he discussed the circumstances surrounding Mr. Dickey's discharge with Wally Cook, but that he did not seek Mr. Cook's advice, and Mr. Cook offered none. Further, Mr. Dickey's safety activities were not discussed with Mr. Cook. Although he also discussed the matter with Sam Pulice, Mr. Norris denied that they discussed Mr. Dickey's discharge, and while he was also "pretty sure" that Mr. Pulice was aware that Mr. Dickey was being discharged, Mr. Pulice did not mention Mr. Dickey's safety activities to him (Tr. 643). Mr. Norris also conceded that it was "common knowledge" among labor and management that a decision whether to discharge Mr. Dickey was in process (Tr. 643).

Mr. Norris denied that Mr. Dickey's discharge by management was "a set up", stated that "I would hardly subject one of my foreman to what Mr. Held had to go through", and indicated that he was aware of no reason why Mr. Dickey would not still be employed at the mine had the incident of September 18, with Ms. Yoder not happened (Tr. 644).

On cross-examination, Mr. Norris confirmed that Dale Williams was accused of drinking whiskey which belonged to him (Norris) on the job, and that he was suspended with intent to discharge. Mr. Norris stated that he recommended that Mr. Williams be discharged, and that he (Norris) "would take my own lumps". While Mr. Williams was not discharged, he agreed to abide by a "last chance" mine policy, and he was in fact discharged several weeks later (Tr. 645). Although Mr. Norris did not actually sign a "last chance" agreement, Mr. Norris indicated that he was basically under such an agreement because the whiskey found on mine property was his (Tr. 646).

Mr. Norris stated that he knew Sam Pulice and Walter Cook very well, and believed that he would have heard about the incident concerning Mr. Pulice's threatening to fire Mr. Dickey. He also confirmed that he was aware of the fact that Mr. Pulice and Mr. Dickey had "multiple run-ins". He also confirmed that he was aware of the fact that "Mr. Dickey was safety conscious and I was told by Mr. Cook that it was not a problem" (Tr. 649). He also confirmed that it was "common knowledge that Dickey was a hard nose on safety and that kind of thing and filed a number of grievances relative to safety and so forth" (Tr. 648). He also confirmed that it was "common knowledge" among the work force when a supervisor has to apologize to an employee for cursing him (Tr. 649). When asked whether a supervisor would be happy over such an occurrence, Mr. Norris responded "if they handle themselves so poorly that they put themselves in that position, that's what they should -- that's absolutely what they should do" (Tr. 650).

Mr. Norris testified that he was ignorant of the incident concerning David Rowe's assertion that he had been struck by a supervisor, and knew

nothing about it. He also indicated that he was not aware of a purported fight between Les Reiser and Rich Borzani, and stated that he did not know Mr. Borzani (Tr. 650). Although foreman Kenny Foreman did not work for him, Mr. Norris confirmed that he was aware of Mr. Dickey's safety grievance against Mr. Foreman, and in fact stated that he sat in on the grievance hearing (Tr. 651). Mr. Norris denied any knowledge of the incident concerning Timmy Ross having matches in the mine, and stated that he did not know Mr. Ross (Tr. 652).

Mr. Norris stated that the fact that Mr. Dickey had been a good worker was taken into consideration when the decision to discharge him was made, but he considered the incident with Ms. Yoder to be a very serious matter, and while acknowledging that it took place on a stairway landing, it could just as well have happened around moving machinery, thereby raising a possibility of more serious injuries to Ms. Yoder had she fallen into said equipment. He confirmed that he had nothing to do with the decision resolving his "whiskey incident", and acknowledged that no consideration was given to the possibility of giving Mr. Dickey a "last chance agreement". He also confirmed that Mr. Dickey's prior work record, includesa past incident of insubordination, were not considered during the decisional process to fire him, and that no one looked at his personnel file (Tr. 656-658; 675). Mr. Norris confirmed that the sole basis for Mr. Dickey's discharge was for his "threatening and abusive conduct towards Donna Yoder" (Tr. 667-668), and he believed that this was just cause for discharge under the union-labor contract (Tr. 668). He confirmed that Mr. Helms is the respondent's labor-management representative for respondent's coal operations, located in Pittsburgh, and if any grievances related to safety are filed on a standard UMWA form used for that purpose, Mr. Helms would be aware of them. He conceded that Mr. Helms might be informed of any such grievance decisions after the third step, but pointed out that he handles five districts as part of his job (Tr. 670).

Mr. Norris identified J.W. Boyle as the general superintendent for Cumberland Coal's operations, and while he had never communicated any of Mr. Dickey's safety encounters with Sam Pulice to Mr. Boyle, Mr. Norris "assumed" that Mr. Boyle "is aware of what goes on in his mine" (Tr. 671).

Mr. Norris identified Bob Hoover as Mr. Helm's "counterpart on the local level", confirmed that Mr. Hoover works for Mr. Boyle, and when asked whether Mr. Hoover would have been aware of Mr. Dickey's safety complaints, grievances, and encounters with Sam Pulice, he responded "I would think so" (Tr. 672). Mr. Norris denied that while he could not speak for Mr. Boyle, Mr. Hoover, or Mr. Helms, Mr. Dickey's safety activities and encounters with Sam Pulice were personally never considered by him in the decision to discharge Mr. Dickey, and he indicated that the subject was never mentioned during the discussion with this group of individuals (Tr. 672).

Mr. Norris indicated that he had been involved in four or five suspensionswith intent to discharge actions while he was at the mine,

and when asked whether it was a practice to first check an employee's background in those instances, before discharging them, he replied (Tr. 673-674):

> Q. Isn't it a part of your practice when determining whether or not you should discharge a man to look at his record, find out whether he is a good guy, bad guy?
>
> A. It's all dependent on what sort of offense is involved.
>
> Q. Well, let me ask you this. Wouldn't you think that it would have been helpful to know whether Mr. Dickey was a chronic absentee, whether he was caught drinking on the job, whether he was an unsafe worker, whether he was insubordinate to foremen and so forth, wouldn't that have helped you in making your decision to make a discharge determination?
>
> A. It would have neither helped nor hindered in a decision.
>
> Q. Why not?
>
> A. Because that is a matter of safety and abusive behavior towards an employee. How can you let somebody's past record impact an action that they took like this. I don't understand that.
>
> Q. Don't you think the person's past record is important in determining whether you want him around anymore or not?
>
> A. I think he should have considered his past record before he was involved in this instance.

Mr. Norris indicated that while it was entirely possible that he did discuss Mr. Dickey with Sam Pulice, he had no specific recollection as to any specific incident which may have been discussed, except the grievance case concerning Mr. Foreman. As for any conversations with Wally Cook, Mr. Norris stated that it was "routine" for he and Mr. Cook to discuss "different situations and what not that we were handling; and that was going on about the mine" (Tr. 678). Regarding Mr. Dickey's prior reputation, Mr. Norris stated as follows (Tr. 678-681):

> Q. I believe you testified that when Dickey came to work for you, you knew he was a rowdy or something of that nature.
>
> A. I had heard that, yes.

Q. How was he described as a rowdy? What is a rowdy as you knew it to be?

A. I just heard that he was a little radical; and that can imply anything, and I knew -- The reason I know about all the safety grievances now is I sat and listened to them yesterday; but up to that point in time, the only incident I was aware of yesterday was the incident with Kenny Foreman.

Q. Let's get back to your original description of rowdy. Now you said radical. What is your understanding of him being a radical?

A. That he could be trouble.

Q. What kind of trouble could he be?

A. Just general pain in the back trouble.

Q. Over what?

A. Just anything; just trouble.

Q. You mean that is the label Dickey had, that he was just a trouble maker over everything?

A. I didn't say that. I said that I was informed that he could be trouble.

Q. Who informed you that he could be trouble?

A. I believe that when I found out who was getting the job, I probably talked to Mr. Cook; but you have to remember what I also said is that Mr. Cook said that Jim was a good man.

Q. I understand; he said that three times, sir, and I understand the purpose in saying that, but what I want to get at is this business of Wally Cook telling you that this guy was a radical or a rowdy and he was trouble.

A. I said he could be.

Q. I'd like to know as best you recall because you recall some things pretty specifically here; I'd like you to recall as best you can what Wally Cook told you with reference to this man being a rowdy or a radical or general trouble.

A. I think I just did tell you to the best that I can recall.

Q. What was it?

A. I was informed that he could be trouble. It was not pinned down as to why; that he could just be a pain in the back.

Q. That was Wally Cook's opinion of him?

A. Like I said before, he also said that he was a good man on the job.

Q. Did he describe to you that he could be trouble where safety was concerned?

A. All he said was that he could be trouble.

Q. I may be wrong on this, so you correct me if I am wrong, but it's my recollection that in your original testimony, that you said that Wally Cook told you that he had a reputation for being tough on safety or what have you.

A. That is not what I said. I said that Wally Cook told me that he was safety conscious. That was not all he told me. If you remember, I also said that was no trouble. It was after the fact that he said that he could be trouble, just a general pain in the back; and the comment, I don't know to me, he stated to me the safety part of it was not the problem; that the guy could just generally be a pain.

And, at pgs. 688-689:

Q. Did Mr. Pulice ever tell you that he wanted to get Mr. Dickey?

A. He never told me he wanted to get Dickey; not me personally.

Q. Did Mr. Pulice ever ask you to help him get Mr. Dickey?

A. No.

Q. Could you explain what you mean when you said it's your job to find out about people before they come to work for you and what do you do with that information once you have it.

A. Well, it's like this, you know. Before you would even hire anybody, you would interview them to find out, you know, what sort of personality traits they have; how they handle themselves; what past occurrences might have been in their previous employment, things like that; and to me, it's no different.

> The only difference is that when a person is coming out of the mine on a bid situation, you can't accept or reject him because of that. It's a power bid, so you do try to find out, you know, what is this guy like, what is she like, any problems here that you know of.
>
> Q. What do you do with this information once you have it?
>
> A. Keep it in my own memory. It's not entered into any personnel file; it's just for my own edification.

Mr. Norris stated that he could recall no thought being given to suspending Mr. Dickey rather than discharging him, and he indicated that each offense which could lead to disciplinary action against an employee must be looked at on its own facts (Tr. 681-685). Mr. Norris confirmed that Sam Pulice did not work for him, and he indicated that during the time Mr. Dickey filed many of his grievances Mr. Boyle was not the mine superintendent (Tr. 687). He also stated that Mr. Pulice "had a reputation of just walking in and saying, gees, I'd like to fire you", but that he personally had no authority to fire anyone (Tr. 697). He described Mr. Pulice as "a character", and indicated that he (Norris) "wouldn't put up with that sort of behavior from my foremen" (Tr. 698).

Mr. Norris confirmed that he had no knowledge of the extent of Mr. Dickey's involvement in safety grievances until the instant hearing (Tr. 703). He confirmed that Mr. Helms would have been aware of the grievances, if in fact grievances were held (Tr. 704). He also confirmed that he (Norris) was involved in the "Dugan grievance", and that since Mr. Dugan was his employee, Mr. Norris had to hear the case. He also confirmed that Mr. Pulice agreed that he had said what Mr. Dugan accused him of, but that since Mr. Dugan was insubordinate, he withdrew his grievance at step two (Tr. 705).

Mr. Norris stated that he did not consider that Mr. Dickey had quit his job because when he spoke with him the morning after the incident, Mr. Dickey informed him that he had "reported off work" (Tr. 732). Further, he had no written resignation from Mr. Dickey, and stated that he did not know that he was actually not paid for the day or that he was absent without his supervisor's approval (Tr. 732).

Discussion

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

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

In several decisions following Pasula, the Commission discussed, refined, and gave further consideration to questions concerning the burdens of proof in discrimination cases, "mixed-motivation discharges", and "work refusal" by a miner based on an asserted safety hazard. See: MSHA, ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981). MSHA ex rel. Johnny N. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981).

In Robinette, the Commission held that a miner may refuse and cease work if he acted in good faith and reasonably believed that the performance of the work would expose him to a hazard. Robinette complained about being taken off a job as a miner's helper and being reassigned as a conveyor belt feeder operator. Robinette ceased to operate and shut down the belt after his cap lamp cord was rendered inoperative and he could not see. Robinette and his section foreman exchanged heated words over the incident and Robinette uttered several cuss words. Robinette's prior work record included prior warnings for unsatisfactory job performance and insubordination, and his section foreman was not too enchanted with his work. The section foreman testified that "anytime Robinette had to do something he did not like, he usually messed it up".

Judge Broderick treated the Robinette case as a "mixed motivation" discharge case. Although finding that Robinette's work was "less than satisfactory" and that he was "obviously belligerent and uncooperative" with his section foreman as a result of his change in job classification, Judge Broderick concluded that the "effective" cause of Robinette's discharge was his protected work refusal, and he rejected the operator's contentions that the primary motives for the discharge were insubordination and inferior work.

In Chacon, the Commission affirmed the Pasula-Robinette test, and, at 3 FMSHRC 2516-17 explained the following criteria for analyzing an operator's business justification for taking an adverse action against an employee:

> 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 wo 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 . . ., 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).

Thus, in Chacon, the Commission approved a restrained analysis of a mine operator's proffered business justification for discharging a miner to determine whether it amounts to a pretext. The Commission then held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action. In a further

refinement of the "limited" or "restrained" analysis of an operator's "business justification" for taking an adverse action against a miner, the Commission stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

Absent any direct evidence that a mine operator's adverse action against a miner was motivated in any part by his protected activity, the Commission, in the Chacon case, suggested four criteria to be utilized in analyzing the operator's motivation, and these are as follows:

1. Knowledge of the protected activity.

2. Hostility toward protected activity.

3. Coincidence in time between the protected activity and the adverse action.

4. Disparate treatment of the complainant.

Complainant's post-hearing arguments

After arguing that he has established that he filed safety related complaints and grievances, Mr. Dickey concludes that he earned the ire of the respondent for being a safety activist, that the respondent through its agents was highly irritated with him for his safety activity, and that his discharge was motivated in part by management's displeasure with these safety activities. Mr. Dickey argues further that all of his safety activities were reasonable and good faith acts designed to protect himself and his coworkers from being exposed to unsafe hazards.

Mr. Dickey asserts that the record in this case supports a conclusion that the respondent's improper reaction to his protected activities is "glaringly obvious and pervasive", and when one considers the respondent's reactions to his activities, he concludes that they indicate more than "some feeling of resentment". He claims that the respondent's reactions to his activities were clearly intended to chill him and others from engaging in protected activity. Mr. Dickey asserts that in each instance when he exercised his protected rights, respondent attempted to punish him.

In support of his argument that respondent attempted to punish him when he exercised his right to complain, Mr. Dickey first mentions the slope car incident when management attempted to dock his pay (Exhibit C-1). He then mentions the October 1979 incident when he refused to ride an unsafe belt for routine exit from the mine (Exhibit C-2), and asserts that "they tried to dock his pay". He goes on to cite his complaint about unsafe communications on the slope car and management's alleged characterization of him as a "ring leader" and accusations that he was causing a "wild-cat strike" (Exhibit C-3). He then cites an incident when he assertedly attempted to protect the safety of a foreman and was called insubordinate and had his pay docked and was verbally abused (Exhibit C-4; Tr. 46-48).

Mr. Dickey cites additional incidents of alleged "retribution" against him, including a day when he claims management tried to send him home without pay when he was late entering the mine because of a discussion over a damaged electric cable (Exhibit C-5), verbal abuses and threats to fire him made by superiors over certain alleged hazardous dust conditions, attempts by management to dock the pay of Mr. Dickey's crew after his immediate supervisor shut down a dangerous machine and gave the men alternative work (Tr. 60, 62; Exhibit C-6), and attempts by management to discriminate against Mr. Dickey's entire crew over the gas well incident which resulted in a grievance by the crew, and in particular, management's focus on Mr. Dickey for verbal abuse and threats (Tr. 71, 73).

Mr. Dickey asserts further that the incident of June 12, 1981, when he was called to the mine foreman's office for assertedly creating an alleged unsafe mine condition, only to be exonerated when it was discovered that he was not at work that day, is indicative of the kind of treatment afforded him by the respondent because of his safety activities. Mr. Dickey goes on to argue that it was impossible for the respondent to have forgotten and forgiven him for his "past transgressions against them from February 1979 until the summer of 1981", and that the clear and unequivical language of mine foreman Sam Pulice, in October 1980, when he announced in front of the entire crew that he would fire him at the first opportunity (Tr. 73), left no doubt about the respondent's attitude towards him.

Mr. Dickey notes that it is interesting to note that there is no record evidence to indicate that the respondent ever told Mr. Pulice to discontinue his threats nor did they warn him not to carry them out. Additionally, he argues that knowledge of the respondent's attitude toward him was not limited to Sam Pulice, Mr. Cook and Mr. Pasera, and he cites his testimony that section foreman, William Homastat, in June 1981 told him that Sam Pulice had told the foreman that he was going to have him fired the first chance he got (Tr. 88). Mr. Dickey concludes that it is impossible to believe that all of this animosity did not play "any part" in his discharge. Of equal importance, states Mr. Dickey, is the "incredible explanation" of the respondent that they never even looked at his personnel file before taking discharge action, and he concludes that the evidence clearly establishes that he has met his burden and proven that his discharge was motivated in part by his protected activity.

In response to the respondent's affirmative defense, Mr. Dickey first points out that the charges against him are limited to his alleged abusive and threatening conduct towards Ms. Yoder, and that respondent's counsel's suggestions at the hearing that respondent also discharged him for assertedly abusing a supervisor (Douglas Held) should be rejected. As for his conduct involving Ms. Yoder, Mr. Dickey admits that he lost his temper, admits to arguing and cursing, and admits to becoming entangled with her. However, he denies striking her and suggests that

since he and Ms. Yoder had a common-law relationship, the very nature of this relationship makes is somewhat different that the usual confrontation between two employees.

Mr. Dickey argues that there is no direct evidence offered by the respondent to prove that he physically abused Ms. Yoder, and he points out that the respondent did not subpoena Ms. Yoder or any other witnesses to prove it. He also argues that the "statements" offered by the respondent to establish that he struck Ms. Yoder should not be accepted as proof of that fact, and should be rejected as hearsay. Even if they are accepted, he asserts further that they are contradictory and non-clusive as to any physically abusive conduct on his part towards Ms. Yoder, and that Mr. Yoder denied that he struck her.

Mr. Dickey asserts that since he has proven by a preponderance of the evidence that he engaged in protected activity, and that part of the respondent's motive for his discharge was this protected activity, respondent's affirmative defense in support of its discharge action must be judged by its past treatment of other violators of the shop rules. At pages 19 through 21 of his brief, Mr. Dickey cites the testimony of respondent's chief witness, Dale Norris, and concludes that it "is fraught with inconsistencies and evasions and is, therefore, not credible". Further, Mr. Dickey asserts that the failure by the individuals who made the decision to discharge him to look at his personnel file indicates a predetermined decision to fire him at the first opportunity, and in support of this contention he cites the advice given by respondent's labor relations representative in Pittsburgh to Mr. Norris "to discharge Mr. Dickey after a thorough investigation" (Tr. 609).

At pages 23 through 25 of his brief, Mr. Dickey cites a number of incidents concerning violations of company shop rules by other wage employees, as well as supervisors, all of which he claims resulted in no punishment being meted out, or punishments less than discharge. Mr. Dickey points out that his safety activity began in February 1979, that his last safety incident was June 1981, that the mine was on strike from March 1981 until June 1981, and that his discharge came just three months later. Under these circumstances, he argues that there was no great lapse of time between his safety activity and his discharge, and he concludes that it is inconceivable that anyone can believe that his discharge was totally divorced from his safety activities.

Respondent's posthearing arguments

Citing the Pasula case, respondent points out that the burden of proof is on Mr. Dickey to establish a prima facie case that he was discharged for engaging in protected activity. Respondent maintains that Mr. Dickey's own testimony contradicts his assertion that he was discharged for engaging in protected activity in that (1) he filed safety grievances and prevailed in them; (2) he obviously was not afraid of retaliatory conduct

by mine management since he pursued safety grievances as long as he worked underground; (3) others who joined him in filing grievances are still employed by the respondent; and (4) he knew when he bid on his last job in the preparation plant that he was moving out of the area and jurisdiction of foreman Sam Pulice, his asserted nemesis.

Respondent argues that after the incident of September 18, 1981, Mr. Dickey did not take up the offer of his foreman to come to the mine to discuss the matter and see whether it could be resolved short of discharge, and that his refusal to do so was based on his conviction that he would not be discharged (Tr. 232). Respondent points out that Mr. Dickey had only worked for Mr. Held for four days prior to the incident in question, and that Mr. Held had no knowledge of his prior employment history, and considered him to be a good worker. Respondent suggests that Mr. Dickey's assertion that he did not believe he would be fired "is a strange assertion by a man who supposedly was worried by Sam Pulice's threats to discharge him". Respondent concludes that Mr. Dickey was not seriously worried about Mr. Pulice because he knew that Mr. Pulice did not have the authority to fire anyone.

Respondent argues further that even assuming Mr. Dickey can establish a prima facie case, it can rebut this by showing that he would have been discharged for threatening and abusive conduct toward a fellow employee regardless of whether he filed safety complaints. In support of this argument, respondent points to the face that the four management officials who participated in the decision to discharge Mr. Dickey did not consider his prior record because they believed the incident of September 18, 1981, sufficient grounds for discharge, and that the notice to suspend him, and the subsequent grievance, all focus on that one incident. Respondent suggests that if Mr. Dickey really believed his discharge was because of his problems with foreman Pulice, he did not timely raise this allegation, took no steps to mention it during the arbitration, and waited until the arbitrator ruled against him to file a complaint with this Commission on Jaunary 20, 1982.

Respondent concedes that Dale Norris, the preparation plant superintendent, was aware of Mr. Dickey's prior activities through conversations with Walter Cook, the underground superintendent, but emphasizes that Mr. Norris found him to be a good worker and had no problems with him. Respondent also concedes that Bob Hoover, employee relations superintendent, was aware of Mr. Dickey's prior history because he handled company grievances, that Ernie Helms, respondent's labor relations manager in the Pittsburgh office, handles grievances from all miners employed by the respondent, but that it is hardly likely that Mr. Dickey made any particular impression on him. As for J. W. Boyle, the general superintendent, respondent points out that he had only been at the mine since March of 1981 and "probably had more important things to do that rehash old gossip." Respondent concludes that it has established that protected activities were not part of the decision to discharge Mr. Dickey

and that its testimony clearly shows that the factors considered by management were that an employee suffered physical injury, and it was pure chance that the altercation happened where a supervisor was in a position to prevent further injury, and that it was just as likely had Ms. Yoder gone to work without requesting to speak to Mr. Douglas Held, the altercation would have happened near moving machinery with a likelihood of greater injury.

Respondent maintains that the use of threatening and abusive conduct by one employee on another employee resulting in physical injuries is a serious matter in the workplace, and that in and of itself, such conduct is considered grounds for discharge pursuant to Rule 4 of the mine rules of conduct, and Mr. Dickey is not the only employee of the mine who has been terminated for threatening and abusive conduct (Tr. 337). In further support of its argument, respondent cites the testimony of superintendent Walter Cook that the factors used to judge whether conduct is considered threatening and abusive are "the voice tone and flexion, mannerisms with hands, arm gesture, the underlying dispute and the actual words used" (Tr. 455-456). Respondent also cites the testimony of UMWA District 4 Safety Inspector Rabbitt, who indicated that if Mr. Dickey assaulted Ms. Yoder, the respondent had just cause to fire him (Tr. 298).

In response to Mr. Dickey's arguments that he was treated disproportionately to the offense, respondent points out that although the union contract allows an employee to argue that he was treated differently than others similarly situated, the complainant did not raise this defense during the arbitration. Regarding the two incidents were Mr. Dickey claims that foremen struck wage employees and were not disciplined, respondent answers that he failed to establish that anyone in mine management was aware of the incidents. Although Mr. Dickey claimed that Walter Cook told Mr. Reiser and Mr. Borgani to apologize after an altercation (Tr. 113), respondent points out that Mr. Cook had no recollection of the incident (Tr. 394), and assumed that because of the physical disparity between the two men he would have heard of any altercation (Tr. 451). Further, respondent points to the fact that Mr. Borgani is still employed at the mine, "obviously is a friend" of Mr. Dickey's, but that Mr. Dickey never subpoenaed him to testify at the hearing (Tr. 243, 246).

Regarding an alleged incident between David Rowe and Denzell Desmond as testified to by Mr. Dickey (Tr. 114), respondent points out that Mr. Cook was not aware of the incident and that Mr. Rowe testified that he told no one in management of the incident and had heard "locker room gossip" that Mr. Cook would have fired both him and Mr. Desmond if the incident had escalated (Tr. 491, 493). With regard to Mr. Dickey's attempts to equate an assault on a fellow employee with absenteeism, forging doctor's slips, and sleeping on the job, respondent argues that common sense dictates that an incident involving a physical injury to an employee would be treated differently than one involving only economic injury.

In response to Mr. Dickey's arguments that allowances should be made for his behavior because the woman involved was his common law wife, respondent states that following this to its logical conclusion, had management "shrugged the matter off", and had Mr. Dickey proceeded to continue his assualt on Ms. Yoder, respondent would have exposed itself to liability, compensation, and grievances by Ms. Yoder.

Respondent maintains that the circumstances of this case shows no animus toward Mr. Dickey. In support of this claim, the respondent points to the fact that when Mr. Dickey and Ms. Yoder wanted to work the same shift, the company accommodated them to the extent possible (Tr. 194). When he brought safety items to the attention of management in the preparation plant, the conditions were quickly remedied (Tr. 90-91). He was not given a particularly onerous job (Tr. 598), and admits that his problem with Ms. Yoder began outside the work environment (Tr. 95). In response to Mr. Dickey's assertion that Mr. Douglas Held agitated the situation because he tried to physically separate him and Ms. Yoder, respondent maintains that this was done to prevent Ms. Yoder from suffering injuries, and that Mr. Held was obviously not out to get Mr. Dickey for he made every effort to solve the problem short of discharge.

Finally, respondent maintains that the one person who Mr. Dickey accuses of being out to get him, Sam Pulice, was obviously not capable of carrying out his threats to discharge him during the two years he worked underground. Aside from the question of establishing a motive for Mr. Pulice to arrange the firing of an employee who no longer worked for him and therefore was not causing him any trouble, respondent points to the fact that the incident of September 18, 1981, occurred when Mr. Pulice was not at work and that the original decision to suspend Mr. Dickey with intent to discharge was made so quickly that Mr. Pulice could not have had any input. Respondent maintains that Mr. Dickey's attempts to forge a chain of circumstantial evidence to bridge the gap between his problems with Mr. Pulice underground and his termination at the preparation plant must fail, and he has failed to carry his burden of proof in establishing that he suffered disparate treatment or that his firing was motivated by protected activities.

Findings and Conclusions

Mr. Dickey's safety complaints

It is clear that Mr. Dickey has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act these complaints are protected activities which may not be the motivation by mine management in any adverse personnel action against him. Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC

803 (April 1981). In order to establish a prima facie case Mr. Dickey must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Further, his safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

In this case, there is no evidence that Mr. Dickey ever personally filed any safety complaints with MSHA or any State mining enforcement agency. Further, while Mr. Dickey may have served as a member of the mine safety committee at his previous place of employment, during his employment with the respondent he apparently lost his bid for election to the mine safety committee and had no official connection with that committee at the Cumberland Mine. However, he has established that during his employment with the respondent he did file safety grievances and complaints, and while he may not have been the direct moving party who initiated each of those complaints or grievances, his participation in those complaints and grievances was such as to lead one to conclude that he participated in them.

Mr. Dickey was first employed by the respondent in August 1977, and his safety complaints and grievances took place during the period of approximately May 1979 through June 1981, and were confined to his period of employment underground. In his deposition of June 16, 1982, Mr. Dickey confirmed that during the time he was assigned to the surface preparation plant, June 1981 to the date of his discharge, while there were some problems with dirty belts and screens, management always took care of these matters and he filed no safety complaints (deposition, pg. 27). The record in this case reflects that his complaints and grievances began in May 1979, when several miners, including Mr. Dickey, had some differences over the safe operation of a slope car, and the miners refused to ride the car out of the mine. The grievance included a claim for pay by the agrieved miners, and while the respondent was apparently cited by MSHA for the condition of the cable on the slope car, the grievance was settled after the miners were compensated for their lost work time (exhibit C-1). Subsequent safety grievances concerned the use of an emergency evacuation belt system, and an asserted lack of an adequate communications system on the slope car, and these were filed by the mine safety committee on October 4, 1979, and February 1, 1979 (exhibits C-2 and C-3). The grievance concerning the emergency belt included a claim by the miners, including Mr. Dickey, for compensation for lost wages.

Other safety grievances in which Mr. Dickey was involved include a September 1980, incident concerning an asserted unusual amount of coal dust exposure on the section where Mr. Dickey and his crew were working, and an incident in October 1980, concerning the procedure for cutting through an underground gas well (exhibit C-6). These grievances apparently included miner claims for compensation for time lost because of these incidents, and disputes over whether or not miners were given other work, and the grievances appear to have been settled by the payment of compensation to the miners.

Safety grievances in which Mr. Dickey was directly involved as the moving party concerned an incident where he refused to operate a continuous mining machine while his section foreman was standing within his line of travel, and an incident where he missed a man trip into the mine during the start of his work shift because he had stopped by a maintenance foreman's office to show him a defective cable splice which had been removed from his machine the day before. Mr. Dickey was sent home over both incidents, and his grievances included claims for compensation. He prevailed on each of these claims and was subsequently compensated for the time lost. A third grievance stemming from the asserted defective cable splice concerned Mr. Dickey's reassignment to other work and then being sent home. He apparently prevailed in his claim for lost wages over that incident.

Mr. Dickey's grievance against Sam Pulice for cursing him was filed on October 27, 1980, (exhibit C-7), and the record reflects that after going through the grievance step 2, it was withdrawn on February 3, 1981, at setp 3 after Mr. Pulice apologized to Mr. Dickey.

In view of the foregoing, it seems abundantly clear from the record that Mr. Dickey did file safety grievances and complaints with the respondent, and that mine management was aware of them. At least two of the grievances and complaints personally involved general mine foreman Sam Pulice and section foreman Kenny Foreman. Walter Cook, the underground mine superintendent, acting as management's reviewing official for some of the grievances, initially denied several of Mr. Dickey's grievances. Further, in its post-hearing brief respondent concedes that preparation plant superintendent Dale Norris and employee relations superintendent Bob Hoover were aware of Mr. Dickey's grievances and complaints.

Mr. Dickey's discharge

The September 18, 1981, notification to Mr. Dickey that he was suspended with intent to discharge, effective that same day, exhibit C-8, specifically charged him with the following violation of Mine & Shop Conduct Rule #4:

> On September 18, 1981, Midnight Shift, your abusive & threatening conduct towards a fellow employee of the Company resulted in her multiple injuries.

The general language of the Mine and Shop Conduct Rules, exhibit C-9, cautions all mine employees to "avoid conduct which violates reasonable standards of an employer-employee relationship", and included among the 10 classes of such "conduct" is Rule #4 which states:

> Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive or threatening language or conduct towards subordinates, fellow employees, or officials of the Company.

Shop Rule #8 prohibits "fighting", but Mr. Dickey was not charged with an infraction of this rule. Although the September 18, 1981, incident in question raised the question of Mr. Dickey's refusing to comply with Mr. Norris' directive to leave his office and return to work, and also gave rise to a possible charge of "abusive conduct" towards Mr. Norris, respondent opted not to include these matters as part of the charge initially levied at Mr. Dickey to support his suspension and subsequent discharge, and counsel's attempts to expand the charges during the course of the hearing is rejected.

Mr. Dickey's assertion that assistant plant foreman Douglas Held's actions at the time of the incident with Ms. Yoder somehow contributed to Mr. Dickey's "blow up" and subsequent discharge is rejected. Mr. Held was conducting a private conversation in his own office with Ms. Yoder at her request. The testimony in this case establishes that Mr. Dickey intruded into that conversation and conference by barging into Mr. Held's office uninvited, and demanding to know "what the hell is going on here". Mr. Dickey refused to heed Mr. Held's request to return to work, and his insistence on pursuing the confrontation with Ms. Yoder precipitated the incident in question and was the direct result of his actions, not Mr. Held's. As a matter of fact, based on the testimony presented here, including the fact that Mr. Dickey had to be physically restrained and ultimately escorted off the premises, I am of the view that Mr. Held exercised remarkable restraint in the circumstances. Further, when Mr. Held subsequently contacted Mr. Dickey by telephone in an effort to have him come to the mine the next morning to discuss the matter further, Mr. Dickey insisted that he had "reported off", did not have to do "a damn thing" Mr. Held told him, and hung up on him.

Management's alleged hostility to Mr. Dickey's safety complaints

Mr. Dickey's post-hearing arguments suggest that "mine management's attitude" towards him because of his safety activities manifested itself in the "treatment" accorded him by Mine Foreman Sam Pulice, Mine Superintendent Walter Cook, and a supervisor identified as R. T. Passera. As indicated earlier, Mr. Pulice and Mr. Passera did not testify in this case. Absent an opportunity to hear their testimony and observe their demeanor on the witness stand, I am constrained to make my findings on the basis of the available testimony and evidence of record on this question. Based on the unrebuted testimony and evidence adduced by Mr. Dickey, while I may find and conclude that Mr. Pulice was hostile towards Mr. Dickey, I find nothing in the record to support such a finding and conclusion concerning Mr. Cook or Mr. Passera, and my reasons in this regard follow.

I take note of the fact that the respondent has presented no evidence to establish that Mr. Dickey's safety complaints and grievances were made in bad faith or that they were made to harass mine management. As a matter of fact, respondent has never advanced this as an argument, and Mr. Cook took Mr. Dickey's safety complaints as serious and not frivolous. Further

during the grievance filed by Mr. Dickey against Mr. Pulice, it was Mr. Cook and Mr. Passera who insisted that Mr. Pulice apologize to Mr. Dickey and the grievance was terminated on that basis. Mr. Dickey seems to read something "sinister" into Mr. Cook and Mr. Passera's motivations or "attitudes" which I simply cannot find supported by any credible testimony or evidence of record. While it may be true that Mr. Cook may not have publicly chastised Mr. Pulice over his outbursts during the grievance hearing, and particularly with regard to his alleged statements at the third stage grievance that he would "fire him (Dickey) tomorrow if I get the chance", Mr. Dickey testified that Mr. Cook interrupted Mr. Pulice, took him out of the room, and returned shortly thereafter with an apology (Tr. 79).

I reject Mr. Dickey's broad and general assertion that in each instance where he filed a grievance, mine management attempted to punish him. There are two sides to a safety complaint or grievance, and the fact that a miner chooses to file such an action does not in and of itself indicate that he is right. Further, simply because mine management chooses to exercise its right to answer the complaint and to run its mine and supervise the work force in a manner in which it believes it has a right to do does not necessarily mean that management is trying "to chill the rights of the miner". For example, one of the grievances filed by Mr. Dickey involved his missing the man trip into the mine at the beginning of a work shift. His explanation is that he missed the trip because he decided to stop off at the maintenance office fo discuss a cable splice with the maintenance foreman. Mine management obviously expected him to ride the trip in and to go to work, and I do not consider his being sent home or disciplined for missing the trip as "punishment", notwithstanding the fact that Mr. Dickey may have prevailed on his grievance on this issue.

In support of his post-hearing argument that mine management became "infuriated" and refused to pay Mr. Dickey and his crew for the extra time they were forced to remain in the mine when they refused to ride the emergency slope belt out, Mr. Dickey refers to exhibit C-2. That exhibit is a copy of UMWA Safety Inspector Rabbitt's report of the incident. That report shows that a grievance was filed claiming two hours and 15 minutes double time compensation, and a requested clarification as to when the belt could be used. It also shows that 80 other employees either walked out of the mine or rode the belt, and Mr. Rabbitt's opinion was that the men who opted to stay in the mine were only entitled to compensation for an hour and fifteen minutes. This is hardly evidence of management's being "infuriated" or acting out of retribution. As a matter of fact, miner representative Rabbitt's assessment of the claimed compensation is contrary to the miners who filed the grievance.

The fact that mine superintendent Cook chose not to implement Mr. Dickey's suggestion that hand-held walkie talkies be used as a means of communications on the slope car and rejected this suggestion does not establish any animus towards Mr. Dickey by Mr. Cook, and Mr. Dickey's

conclusion that Mr. Cook rejected his suggestion simply because he (Dickey) made it is simply Mr. Dickey's conclusion, and his transcript reference to pg. 37 simply does not support his assertion. Mr. Cook's testimony concerning this incident simply shows that he disagreed with Mr. Dickey's assessment for the necessity of walkie talkies, and since it was his (Cook's) decision to make, he rejected it. Further, the record shows that the communications problem was ultimately corrected, and I cannot read into the grievance which was filed over the incident a conclusion that mine management had "a heavy-handed reaction" to that incident. As a matter of fact, Mr. Cook testified that he did not believe that Mr. Dickey "agitated" this incident or attempted to "blow it out of proportion".

Mr. Dickey's post-hearing arguments concerning management's reaction over the slope car incident simply makes references to "exhibit C-3", which is a copy of the "findings and recommendations" of UMWA District #4 Safety Inspector Thomas J. Rabbitt. Mr. Rabbitt was called as a witness by Mr. Dickey, and he simply confirmed the fact that a grievance had been filed. He gave no testimony concerning this incident and I have given no weight to the hearsay conclusions and statements made in his report. The fact that mine management believed that the refusal of the crew to ride the slope car was an illegal work stoppage for which the men should not be paid stands as management's "opinion" and "position" on that issue, and I cannot conclude that it was a "heavy handed" attempt to retaliate against Mr. Dickey or the other members of the crew.

Mr. Dickey argues that as a result of his safety activities, Mine Foreman Sam Pulice became hostile, verbally abused him, threatened to fire him at the first opportunity, and otherwise made life miserable for him. So much so, that Mr. Dickey claims he was scared to walk by Mr. Pulice's office, and eventually prompted him to bid on a surface job in the preparation plant to get away from Mr. Pulice. Mr. Dickey has produced credible testimony and evidence to support his contentions that Mr. Pulice did in fact harass and threaten him with discharge over his safety complaints and grievances. In addition to the verbal abuse which led to a grievance against Mr. Pulice, the incident concerning Mr. Dickey's refusal to run his machine for fear of running over his section foreman, the incident concerning Mr. Pulice's unfounded accusation that Mr. Dickey may have been involved in a safety infraction, and the incidents concerning work stoppages over a gas well and dusty mine conditions, all of which resulted in Mr. Pulice berating and intimidating Mr. Dickey, make it clear to me that Mr. Pulice was not too enchanted with Mr. Dickey and was hostile towards him because of his safety activities. Given all of these circumstances, I conclude and find that Sam Pulice was openly hostile towards Mr. Dickey, and that this hostility resulted from Mr. Dickey's protected safety activities.

Insofar as Mr. Pulice's role in Mr. Dickey's discharge is concerned, respondent has established through credible testimony that notwithstanding Mr. Pulice's threats to fire Mr. Dickey, Mr. Pulice had no such authority and did not in fact personally discharge Mr. Dickey. Further, there is no <u>direct</u> evidence to establish that Mr. Pulice made any input into the

management decision to discharge Mr. Dickey, nor is there any direct evidence to establish any nexus between Mr. Pulice's open hostility and displeasure with Mr. Dickey over his safety activities and his discharge.

On the facts of this case, had Mr. Pulice actually discharged Mr. Dickey, recommended that he be discharged, or participated in the management decision to discharge Mr. Dickey, Mr. Dickey would have a strong prima facie argument that his discharge was motivated in part by Mr. Pulice's hostility and displeasure over his protected safety activities. In such a situation, since Mr. Pulice is part of mine management, any illegal discharge made in retaliation for Mr. Dickey's exercise of his protected safety rights would be imputed to the respondent, and it would be held accountable for Mr. Pulice's actions if it could not establish by a preponderance of the evidence that the discharge was motivated by unprotected activities and that management would have discharged Mr. Dickey in any event for those unprotected activities alone. On the other hand, if I conclude that Mr. Pulice had no connection with the decision to discharge Mr. Dickey, the question still remains as to whether the management members who did make that decision were motivated in part by Mr. Dickey's safety activities, or whether he would have been discharged anyway over the Yoder incident. Mr. Dickey maintains that the management decision to discharge him was made because management wished to rid themselves of a "safety thorn" in their side, and that respondent's assertion that his safety activities played no role in the discharge decision is simply incredible. Findings on these issues are discussed later in this decision.

The asserted disparate treatment of Mr. Dickey

One of the critical elements of Mr. Dickey's case is the argument that mine management treated other employees different from him when disciplining them for infractions of the shop rules. Mr. Dickey concludes that the evidence and testimony presented in this case establishes beyond any doubt that he was dealt with more harshly than others. As indicated earlier, the "shop rules" are set forth in a one page exhibit C-9. Aside from the exhibit itself, the rules contain no explanations as to the mechanics of their application, the relative severity of each enumerated infraction, and there is no further explanation of the terms "discipline or discharge".

As previously noted, at pages 23 through 25 of his brief, Mr. Dickey itemizes and summarizes a number of examples of what he believes to be disparate treatment of other employees for infractions of the shop rules. In each of the cited instances, Mr. Dickey claims that mine management either meted out less severe punishment, or no punishment at all, for more serious offenses than what he was charged with.

As one example of disparate treatment, Mr. Dickey states that Sam Pulice cursed him and employee Randall Dugan, but that Mr. Pulice was never disciplined for these violations of the shop rule. The fact

is that Mr. Pulice was the subject of grievances filed by Mr. Dickey and Mr. Dugan. Mr. Dickey's grievance was dropped at stage #3 after Mr. Pulice apologized, and Mr. Norris confirmed that Mr. Dugan's grievance was also withdrawn after Mr. Pulice apologized to him. Management's position in both instances was that Mr. Pulice had not violated the labor-management agreement, and both grievances were settled after the apologies were made. The fact that mine management did not see fit to discipline Mr. Pulice further was its decision, and as explained by Mr. Cook, he did not take Mr. Pulice seriously, and Mr. Norris obviously believed that the apology to Mr. Dugan was punishment enough, and he also considered the fact that Mr. Dugan had been charged with insubordination. Mr. Cook did confirm that Mr. Pulice did not receive a scheduled bonus, and cited his cursing of Mr. Dickey as the reason for this. He also confirmed that he had suspended foremen for safety infractions.

Other instances of supervisors cursing wage employees were brought out by the testimony of UMWA representative Swift and miner Jan Christopher. Grievances were filed by the employees allegedly cursed, but they were withdrawn after the union apparently accepted mine management's position that the contract did not provide for mine management disciplining its own salaried management personnel. The record here strongly suggests that the "typical" case concerning supervisors cursing wage employees was either settled at the third stage of the grievance by the supervisor apologizing, the employees being assigned to other supervisors, or the matter was dropped by the union because it could not dictate to management how it should discipline its managers and supervisors.

Another example of alleged disparate treatment cited by Mr. Dickey concern employees charged with absenteeism and abuse of sick leave, including falsifying doctor's excuses. Mr. Dickey takes the position that since none of these employees were discharged for these offenses, which he characterized as more serious than his confrontation with Ms. Yoder, management obviously had it in for him. However, the fact is that in each instance of absenteeism cited by Mr. Dickey, the employee was in fact disciplined and suspended without pay for the infraction. In the case of Lisa Zern, she was suspended on several occasions for absenteeism, and Mr. Cook testified that the last incident resulted in a five-day suspension with intent to discharge her, but that under the union contract he could not make out a case for discharge, but that she subsequently resigned while under charges for other offenses. Union representative Swife confirmed that employee Chris Watson was discharged for falsifying a doctor's excuse.

Copies of previous personnel actions taken against Mr. Dickey for infractions of the shop rules dealing with absenteeism and insubordination while he was employed at the Cumberland Mine, reflect that Mr. Dickey had also received verbal reprimands, warnings and suspensions, and in each case he was advised that "future violations similar in nature may result in more severe discipline", (exhibit C-12 and exhibit C-13), and the

notifications to him for these infractions are signed by section foreman Kenneth Foreman and mine superintendent Walter Cook. The notices were issued on December 5 and 31, 1979, and they include references to previous infractions concerning absenteeism, "excessive early quite", and insubordination during various periods in 1978 and 1979.

Other examples of alleged disparate treatment cited by Mr. Dickey concern incidents of fights involving miner Les Risor and face boss Rich Borzani, and an incident where section boss Denzell Desmond allegedly struck contract employee David Rowe. Mr. Dickey claims that no discipline was meted out for these alleged encounters. Superintendent Cook testified that he had no knowledge of those incidents, and absent any credible evidence that the incidents were ever reported to mine management, and that mine management was aware of them, I fail to understand how Mr. Dickey expects management to address the problem. Hearsay statements that these incidents were matters of "common knowledge" is insufficient to impute any knowledge of these events to management.

Mr. Rowe testified that the supervisor who allegedly "smacked" him and "grabbed him by the neck" did so after learning that Mr. Rowe had been designated by his fellow miners to "grease" the supervisor as some sort of "horseplay ritual" or "practical joke". Mr. Rowe admitted that this was the case, and he conceded that he did not report the incident and that he and the supervisor in question had never had any problems. In my view, the Rowe-Desmond incident cited by Mr. Dickey as an example of a supervisor "fighting" with a rank and file miner is taken totally out of context. Since Mr. Rowe was a willing participant in the prank to "grease" the supervisor, any attempts to carry out his mission was undertaken at the risk of the supervisor resisting. In short, given these circumstances, if the supervisor "smacked" Mr. Rowe, I believe Mr. Rowe had it coming.

Mr. Dickey characterizes Mr. Cook's apparent lack of zeal in publicly disciplining his supervisory personnel to be "incredible". He also takes issue with Mr. Cook's testimony that the personnel records of supervisory personnel are not noted when they are disciplined, and that any discipline given to supervisors is done privately. Mr. Cook's position is that supervisory personnel do not come under the UMWA/BCOA contract provisions, and that it is management's prerogative to determine when and how supervisors are to be disciplined. UMWA District #4 Executive Board Member Swift's testimony strongly suggests to me that he is in agreement with Mr. Cook on this issue, and in the grievances in which he was involved he conceded that the union did not take them to arbitration because they could not force management to discipline its management salaried employees under the contract.

Part of Mr. Dickey's argument concerning disparate treatment is based on the premise that management's failure to treat its management employees the same as wage and contract employees in disciplinary matters

is patently arbitrary and illegal. The fact is that management has seen fit to run its affairs in this manner, and whether its decisions made in a given case involving supervisory or other personnel may be just or fair is beside the point. Absent a showing that management has violated any rule of law, the manner in which it chooses to run its business affairs is not a subject for judicial scrutiny by this Commission, Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2 MSHC (BNA) 1505 (1981), appeal filed, No. 81-2300 (D.C. Cir. December 11, 1981).

As for Mr. Dickey's arguments that other employees were dealt with less severely than him for more serious offenses, I simply cannot reach that conclusion from the record in this case. As indicated above in my discussion and findings concerning the disciplining of employees for infractions of the shop rules, management's decision in each of those instances was obviously made on a case-by-case basis and on the basis of the the then prevailing facts. Lisa Zern resigned after repeated infractions of the absentee rule; Chris Watson was discharged for falsifying doctor's leave slips; and Mr. Dickey admits and concedes that other employees were suspended and disciplined for various infractions of the shop rules. Mr. Dickey would have me substitute my judgment for mine management in each of those instances. This I decline to do.

Management's motivation for the discharge

Respondent maintains that the decision to discharge Mr. Dickey was premised on the fact that management had reasonable cause to believe through its investigation of the altercation with Ms. Yoder that Mr. Dickey had physically assaulted her by striking her with his fist, and that this assault resulted in physical injuries to Ms. Yoder. UMWA District #4 Safety Inspector Rabbitt testified that assuming Mr. Dickey had actually physically assaulted Ms. Yoder, respondent would be justified in discharging him (Tr. 298).

At the hearing in this case, the parties went to great lengths to establish whether or not Mr. Dickey actually struck Ms. Yoder, and the testimony is in conflict. Mr. Dickey denied that he struck Ms. Yoder with his fist, and claimed that she suffered her injuries during their "entanglement" on the stairway as he chased after her, and suggested that it was possible that her injuries occurred when a hard hat may have fallen off during their struggle and hit her, or that his head may have bumped into her check (Tr. 741). He also testified that when Douglas Held interceded at the stairway, Ms. Yoder told Mr. Held that he (Dickey) had hit her (Tr. 103). Ms. Yoder did not testify in the instant case, and Mr. Dickey called no witnesses who may have been present during his altercation with Ms. Yoder.

The only witnesses called by the respondent with regard to the altercation in question were Mr. Held and Mr. McNeeley. Mr. Held testified that he personally did not observe Mr. Dickey strike Ms. Yoder, but he confirmed that when he encountered them on the stairway Mr. Dickey had her pinned against the stairway railing with her back bent over the

railing. He also confirmed that Ms. Yoder told him that Mr. Dickey had struck her, that her back and jaw were sore, that she lost a contact lens during the altercation, and that she wanted to go home. She filled out an "early quit" slip and left the mine at approximately 3:00 a.m. Mr. Held confirmed that Ms. Yoder required no medical attention, did not appear to be in serious pain, and while she was emotionally upset over the incident, he did not suggest that she a doctor. He also confirmed that she lost no subsequent time from work over the incident.

Mr. NcNeeley testified that he observed Ms. Yoder after she was taken to the preparation plant utility room and saw blood on her teeth, observed a slight puffiness on her left lower lip, and she appeared to have been crying. He instructed one of her fellow miners to take her to the ladies room to "clean her up and try to calm her down" because she appeared to be upset.

At the hearing, respondent's counsel produced copies of statements taken during respondent's investigation of the incident in question (exhibits R-6 through R-13). The statements were taken the day after the incident by Mr. Norris and Mr. Hoover, and they include statements by Ms. Yoder and other mine employees who witnessed the events the previous morning. None of the statements are sworn or signed, no verbatim transcripts were made, and they are simply summaries of the statements made by the witnesses to management's representatves who were making the inquiry. Further, none of the individuals who made the statements in question were called to testify in the instant case. Under all of these circumstances, while management saw fit to use these statements as the basis for its discharge action taken against Mr. Dickey, I have given them no weight insofar as establishing that Mr. Dickey had in fact struck Ms. Yoder. However, the fact I have rejected them as credible proof of the actual assault on Ms. Yoder by Mr. Dickey does not necessarily give rise to any conclusions that management's use of those statements in its decision to discharge Mr. Dickey was unreasonable or illegal.

The question of whether there is sufficient evidence to establish that Mr. Dickey actually struck Ms. Yoder is really not that critical. In this regard, the testimony by Mr. Held and Mr. McNeeley as to Ms. Yoder's physical appearance shortly after the encounter with Mr. Dickey on the stairway, and her statements to Mr. Held at the time of the event, give rise to a strong inference that Mr. Dickey struck her. However, Mr. Dickey is not charged with assaulting or striking Ms. Yoder. The respondent charged him with "abusive and threatening conduct" resulting in "her multiple injuries".

On the basis of the evidence and testimony of record before me, I conclude and find that the respondent has established its charge against Mr. Dickey by a preponderance of the credible evidence. The fact that the respondent presented no eye-witness testimony, or conclusively proved that Mr. Dickey actually struck Ms. Yoder with his fist, does not detract from the fact that his abusive and threatening conduct towards

Ms. Yoder was the proximate cause of her injuries. In short, the fact that I cannot conclude that there is sufficient evidence of record before me to make a finding that Mr. Dickey actually struck Ms. Yoder with his clenched fist with intent to do her bodily harm, does not mean that mine management was wrong or unreasonable in drawing that conclusion when it decided to discharge Mr. Dickey.

Mr. Norris, who at the time of the hearing in this case was no longer employed by the respondent, testified as to the results of his investigation into the incident. His investigation includes a statement by plant attendant Mike Berdar that he witnessed Mr. Dickey strike Ms. Yoder in the face with his fist and hard hat and that she screamed. Other statements to Mr. Norris indicated that Ms. Yoder told him that Mr. Dickey had struck her, and others confirmed that they personally observed her puffy and bloody lip, and observed blood on the ground. Mr. Norris also testified that Ms. Yoder was called as a Union witness at the arbitration hearing, that the Union represented Mr. Dickey, and that Ms. Yoder testified at that grievance hearing that "she was highly anxious during that period and she wasn't exactly sure at that point in time what occurred, whether she had slipped and fallen or had been struck by Mr. Dickey or what exactly had occurred" (Tr. 639).

When Mr. Norris was asked whether Ms. Yoder characterized Mr. Berdar's assertion made during the investigation or 24/48 hour meeting that he witnessed Mr. Dickey strike her as "a bunch of baloney" or "hogwash", he responded that he did not remember such remarks on her part. He then said that it was possible that she said it, but that if she did, "that was not the way she said it" (Tr. 658). He also stated that he did not recall all of the details of the 24/48 hour meeting, but confirmed that Ms. Yoder said she had "no recollection or she couldn't honestly say she had been struck by Mr. Dickey", and when asked whether Ms. Yoder had actually seen Mr. Berdar's prior statement, Mr. Norris responded that "she heard the statement at the 24/48 hour meeting" (Tr. 659).

Upon refreshing his recollection from some notes from the 24/48 hour meeting, Mr. Norris testified as follows during a bench colloquy (Tr. 664-666):

> BY MR. YABLONSKI:
>
> Q. Mr. Swift asked you, he was the company representative, he asked Yoder, do you think Dickey did anything intentionally to cause you bodily harm, and then she said not intentionally.
>
> A. That's correct.
>
> Q. He then asked Yoder, when you talked with D. Norris in the meeting, were you upset. She said she was upset, humiliated, and had not slept after she got a chance to think it over, over the weekend. She didn't really know if he had hit her, fell into her, or what.

A. That is what she said according to those notes.

ADMINISTRATIVE LAW JUDGE KOUTRAS:

So at the 24/48 hour meeting, Ms. Yoder's testimony was that she wasn't too clear on what happened two days before, and after sleeping it off, she felt that, no, I don't think he hit me. Isn't that the way you would analyze it?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS:

And Mr. Yablonski's next question faced with that information would be, why did you decide to go ahead and fire Mr. Dickey. Didn't you believe Ms. Yoder? I don't want to take over your cross, Mr. Yablonski.

MR. YABLONSKI: You asked the question, Judge. Let him answer it.

THE WITNESS: There was a preponderance of evidence other than Ms. Yoder's statement.

ADMINISTRATIVE LAW JUDGE KOUTRAS:

In other words, you just chose not to believe Ms. Yoder, and that what she was really doing when she recants it was because she just didn't want to see Mr. Dickey lose his job?

THE WITNESS: I didn't chose to believe or disbelieve.

And, at Tr. 667-668:

BY MR. YABLONSKI:

Q. You say that Mr. Helms is the one that recommended that Mr. Dickey be discharged to the group?

A. That was his counsel to us, that based on the evidence and what we had learned in the 24/48, that we would let the suspension convert to a discharge.

Q. Just to clear up one thing, when you made the decision to proceed with the discharge, you chose to discharge Mr. Dickey for threatening and abusive conduct towards Donna Yoder, right?

A. Right.

Q. That was the sole basis of your discharge?

A. That's correct.

Q. At that time, you had heard everything that was to hear, I guess?

A. Correct.

Mr. Dickey attacks the credibility of Mr. Norris, and at page 21 of his brief asserts that his testimony "is fraught with inconsistencies and evasions" and so "clearly incredible relative to the discharge action", Mr. Dickey notes that Mr. Norris admitted that: he was aware that Dickey was a rowdy (597), he did not consider the common-law relationship between the parties (610), he did not consider Mr. Dickey's prior record (611), he was aware of Dickey's run-ins with management (647), he didn't care about Dickey's prior good record (656), he knew Donna Yoder repudiated her previous charges (657), Cook had told him Dickey was a radical (679), and the injury to Yoder was so slight that she didn't need medical attention (676).

Mr. Norris no longer works for the respondent, and he confirmed that since February 1982, he has been employed with Kerr-McGee in Illinois. He confirmed that when Mr. Dickey first came to work for him at the preparation plant on June 21, 1981, he was aware of his reputation as "a rowdy", and that Mr. Pulice and Mr. Cook informed him of this after he (Norris) had inquired. Mr. Norris also confirmed that Mr. Pulice and Mr. Cook also told him that Mr. Dickey was "safety conscious and would not be a problem" (Tr. 597). Mr. Norris also confirmed that while Mr. Dickey worked for him Mr. Dickey made no safety complaints, and he was not aware of any safety complaints made by Mr. Dickey to any supervisors while he worked at the preparation plant (Tr. 710).

It is true that Mr. Norris knew that Ms. Yoder and Mr. Dickey lived together, since he lived in the same home town. It is also true that he did not consider their relationship in the decision to discharge Mr. Dickey. While it is true that Mr. Norris responded "that's correct", and confirmed that he had knowledge that Ms. Yoder had repudiated her statement that Mr. Dickey had struck her, he went on to explain his answer and to point out that Ms. Yoder said she was not sure of what happened. Further, contrary to Mr. Dickey's characterizations of Mr. Norris' testimony at transcript pg. 676, Mr. Norris did not testify that Ms. Yoder's injury "was so slight" that she did not need medical attention. Mr. Norris testified that Ms. Yoder did not repudiate the fact that she did in fact receive injuries (Tr. 675). He then confirmed that he was informed that no doctor was called.

With regard to Mr. Dickey's past record, while it is true that Mr. Norris confirmed that he did not look at his personnel file at the time the decision was made to discharge Mr. Dickey, the record does not support

the conclusion that he "did not care about his prior good record". Mr. Norris' testimony is that he was aware that Mr. Dickey was considered a good worker, but since Mr. Dickey had not worked for him underground he was not aware of any reputation that he may have had as "one of the better continuous miner operators". While Mr. Norris did respond "that's correct" when asked to confirm that he "didn't care" how good Mr. Dickey's record was, taken in context, the same response could have made if he were asked about Mr. Dickey's "bad record". As previously noted, exhibits C-12 and C-13 are copies of previous notifications to Mr. Dickey concerning his violation of the shop rules concerning absenteeism, contain notations of previous similar infractions, as well as notations concerning "early quits" and "insubordination", for which Mr. Dickey apparently received warnings and suspensions.

Respondent concedes that Mr. Dickey's prior record did not influence the decision by management to discharge him because the "committee" that made that decision did not look at his personnel file. Respondent's position is that the group decision to fire Mr. Dickey was based solely on the incident of September 18, 1981, and respondent argues that this incident, standing alone was, sufficiently grave and serious to warrant Mr. Dickey's discharge, and that he would have been discharged regardless of his prior record, good or bad. On the other hand, Mr. Dickey takes the position that the failure of the group who decided to fire him to consider his past record clearly indicates that they had some predisposition to fire him and were simply waiting for an excuse to do so.

Mr. Dickey suggests that the decision to discharge him was cast in concrete, and he implies that management's investigation was simply a sham to support its preordained decision to fire him for his safety activities. In support of this conclusion, Mr. Dickey cites the testimony of Mr. Norris to the effect that Mr. Helms advised him to "discharge Mr. Dickey after a thorough investigation" (Tr. 609).

Mr. Norris testified that the initial decision to suspend Mr. Dickey with intent to discharge, rather than to discharge him outright, was in keeping with normal procedure in discharge cases so that a thorough investigation could be made. Since he considered the incident in question to be a "grave offense" and a "severe infraction", the decision was made to suspend Mr. Dickey with the intent to discharge, and the investigation of the incident began immediately. Mr. Norris then identified his notes concerning Ms. Yoder's August 19, 1981, statement taken during the investigation, exhibit R-6, and he also confirmed that after taking her statement, he met with Mr. Held, Mr. NcNeeley, Paul Parfitt, Bob Hoover, and J. W. Boyle to "discuss the whole situation". He also confirmed that he was in contact with labor relations manager Ernie Helms, from the respondent's corporate Pittsburgh headquarters, and that his recommendation to the group was that Mr. Dickey be discharged (Tr. 606). However, Mr. Norris also confirmed that his statement interview with Ms. Yoder was prepared before he conducted the other interviews with the crew who witnessed the incident the previous morning (Tr. 606).

After careful scrutiny of all of Mr. Norris's testimony concerning management's investigation, I find nothing to support the contention that it was somehow "rigged" against Mr. Dickey. As a matter of fact, one of the individuals who was present during the employee interviews, and who also gave a statement adverse to Mr. Dickey, was Vernon Baker, a UMWA local union officer. Further, the record establishes that Mr. Dickey was given at least two opportunities to come to the mine and give his side of the story. The first opportunity was when Mr. Held called him and Mr. Dickey hung up on him. The second opportunity presented itself when Mr. Norris called him and Mr. Dickey advised him that he had no way of getting to the mine.

While I have found that Mr. Pulice was hostile towards Mr. Dickey because of his safety grievances and complaints, respondent has established through credible testimony that, notwithstanding Mr. Pulice's threats to fire Mr. Dickey, Mr. Pulice had no such authority, and there is no direct evidence that Mr. Pulice ever initiated or recommended that Mr. Dickey be discharged. Further, Mr. Held's testimony is that he was not a part of the group management decision to discharge Mr. Dickey, and Mr. Dickey has presented no evidence to dispute that fact.

In his post-hearing brief, Mr. Dickey points out that his last "safety incident" occurred in June 1981, and that his discharge came just three months later. His conclusion is that this is hardly enough evidence to support a finding of lack of coincidental timing between the protected activity and his discharge, or that his safety activities were so far in the past that it was forgotten by the mine management personnel who made the decision to discharge him. However, Mr. Norris testified that Mr. Dickey came to work for him on June 21, 1981, and as the outside mine superintendent, Mr. Norris also supervised the preparation plant where Mr. Dickey was assigned. Therefore, from June 21, 1981 to the date of his discharge, Mr. Dickey's supervisors would have been Mr. Norris and Mr. Held. Neither Mr. Pulice nor Mr. Cook reported to, or worked for, Mr. Norris and their supervisory authority over Mr. Dickey ceased when he successfully bid on the surface job in the preparation plant and reported there on or about June 21, 1981. Mr. Norris' supervisor was J. W. Boyle.

With regard to any hostility on the part of Mr. Held, he testified that Mr. Dickey had only worked for him for four days prior to his discharge, and that he considered him a good worker and had no problems with him. Mr. Held also testified that he did not know Mr. Pulice personally and had no contacts with him. I find Mr. Held to be a credible and straightforward witness and cannot conclude that he was hostile towards Mr. Dickey because of any safety activities. However, since Mr. Held was "in the middle" of the Yoder-Dickey altercation of September 18, 1981, any "hostility" on his part would stem from that incident. Given the circumstances of that incident, I believe that any "adverse impression" of Mr. Dickey by Mr. Held would be justified. In any event, I cannot conclude that Mr. Held had any impact or input on management's decision to discharge Mr. Dickey because of any protected activity on his part.

With regard to Mr. Cook, Mr. Dickey testified that he continually accused him of "creating a lot of problems". However, neither Mr. Dickey nor anyone else testified that Mr. Cook ever overtly or directly threatened to discharge Mr. Dickey over his safety activities. Although Mr. Dickey testified that he bid on the surface job in the preparation plant because of his fear that Mr. Pulice and Mr. Cook would find a way to fire him, on cross-examination, he stated his belief that Mr. Pulice was also in charge of the preparation plant, and that he (Dickey) would not have to walk by his office every day if he were in the preparation plant. Further, Mr. Dickey conceded that he and Ms. Yoder often worked on and asked to be assigned to the same shift, both underground and in the preparation plant, (Tr. 193-194), and Mr. Norris confirmed that Mr. Dickey and Ms. Yoder asked to work on the same shift in the preparation plant because of travel and other reasons, and management "condescended and let that occur" (Tr. 598).

In light of the foregoing circumstances, I believe it is just as likely as not that Mr. Dickey's bid for a surface job in the preparation plant was made for personal reasons to accomodate him and Ms. Yoder. Mr. Norris testified that the job of sampler, which Mr. Dickey bid on and held at the time of his discharge, was the lowest paying UMWA job. Since Ms. Yoder's transfer to a surface job in the preparation plant occurred at the same time as Mr. Dickey's (Tr. 597), there is just as strong an inference that Mr. Dickey bid on that job to be with Ms. Yoder, rather than to escape from of Mr. Pulice or Mr. Cook. Since Mr. Dickey did not impress me as the type of individual who could be intimidated over his safety activities, and since there is no evidence to establish that Mr. Pulice or Mr. Cook ever attempted to initiate discharge action against Mr. Dickey, I doubt very much that Mr. Dickey would bid on a low paying union job solely because of Mr. Pulice's conduct.

While one may question Mr. Cook's level of tolerance with regard to Mr. Pulice's conduct towards his subordinates, and Mr. Pulice's lack of sensitivity and apparent lack of managerial judgment in berating and cursing his subordinates, Mr. Cook stated that he constantly counseled Mr. Pulice about his shortcomings and his obvious lack of discretion in dealing with his subordinates. The fact that management did not see fit to fire Mr. Pulice does not in my view necessarily mean that management condoned his actions. The record here shows that it was Mr. Cook who apparently denied Mr. Pulice a bonus because of his behavior, and it was Mr. Cook who interceded at a grievance and obviously directed him to apologize to Mr. Dickey for cursing him. Although Mr. Cook denied that Mr. Dickey's complaint in this case had any direct connection with Mr. Pulice's resignation, and while he indicated that he tried to talk Mr. Pulice out of resigning, he conceded that Mr. Pulice's manner of handling his personnel played a role in his resignation.

Mr. Cook conceded that he and Mr. Dickey occasionally exchanged words over safety matters and that whenever any safety confrontations occurred on Mr. Dickey's shift, Mr. Dickey was always involved in them. Mr. Cook also conceded that it was possible that Mr. Pulice could have contacted those persons responsible for the decision to discharge Mr. Dickey, but he found this highly unlikely. As for his own role in the discharge, aside

from stating that he had no input in that decision, he testified that he found out about it after Mr. Dickey had been discharged. However, Mr. Cook asserted that he considered Mr. Dickey to be a competent and good worker, that he was safety conscious and took safety matters serious, and Mr. Cook did not believe that Mr. Dickey's safety complaints or grievances were frivilous or made to "hassle management".

Mr. Norris testified that during the interim between management's investigation and the 24/48 hour meeting, namely, September 19 and 21, 1981, he did discuss the facts or circumstances surrounding Mr. Dickey's discharge with Mr. Cook, but he denied that he sought Mr. Cook's advice or that Mr. Cook gave him any. He also denied that he and Mr. Cook discussed Mr. Dickey's safety activities (Tr. 642). When asked whether he had similar conversations with Mr. Pulice during this period of time, he denied that he and Mr. Pulice discussed Mr. Dickey's discharge, but admitted that he had conversations with Mr. Pulice "but we didn't talk about discharging Dickey at that point in time" (Tr. 643).

Later in his testimony, when asked whether he had earlier testified that he never discussed Mr. Dickey with Mr. Pulice at any time, Mr. Norris responded as follows (Tr. 676):

> A. No. It was my testimony that I had been brought up to date on things that occurred around the mine by Mr. Pulice and Mr. Cook is what I testified to earlier; and its entirely possible that he had discussed Dickey.
>
> Q. Do you recall what Sam Pulice may have told you about Jim Dickey?
>
> A. I don't recall any particular incident except the case that I actually sat it on, step three.
>
> Q. Did he have nice things to say about Dickey or not so nice things to say about Dickey?
>
> A. I don't know.
>
> Q. Well, did he tell you about having to apologize to Dickey and how he felt about that?
>
> A. I think I said once before that I didn't know about that, whether he did or didn't.
>
> Q. So your recollection is that you vaguely may have remembered conversations about Dickey with Sam Pulice, but you don't remember what they consisted of?
>
> A. That's right.
>
> Q. What about with Wally Cook?

A. With Wally Cook, again, as I said earlier, it was our routine to discuss different situations and what not that we were handling; and that was going on about the mine.

Mr. Norris' testimony is in direct conflict with Mr. Cook's assertion that it was "highly unlikely" that Mr. Pulice contacted anyone involved in the decision to discharge Mr. Dickey prior to the making of that decision. As for Mr. Cook's assertion that he had no "input" into the decision to discharge Mr. Dickey, the fact is that Mr. Norris confirmed that he did in fact discuss the facts and circumstances surrounding the discharge with Mr. Cook. In response to a question as to whether he told Mr. Pulice that management was in the process of discharging Mr. Dickey at the time of their conversation, Mr. Norris responded as follows (Tr. 643):

A. There is common knowledge on the management side, as well as the union side; and I am pretty sure that he had been aware that Mr. Dickey was being discharged.

Mr. Norris' testimony that he was sure that Mr. Pulice was aware of the fact that management was disposed to discharge Mr. Dickey gives rise to a strong inference that Mr. Cook was also aware of that fact at the time of his discussions with Mr. Norris, and contradicts Mr. Cook's assertion that he found out about it after the fact.

Mr. Norris confirmed that the decision to "upgrade" Mr. Dickey's suspension to a discharge was made after management's investigation was completed, and after the conclusion of the 24/48 hour grievance hearing held on Monday, September 21, 1981. Mr. Norris confirmed that Mr. Dickey was represented by a UMWA representative at that hearing, and he confirmed that at the conclusion of that hearing, the management group who made the decision to discharge Mr. Dickey "caucused" to review the information received at that hearing, that a "recommendation" was made to convert the suspension to a discharge, and that the "local staff" at the mine concurred in this "recommendation". The group then went back into the meeting and "indicated that we would not bring back Mr. Dickey and that the intent to discharge stood" (Tr. 642). Mr. Norris identified the person who made the "recommendation" to the group that Mr. Dickey be discharged as Mr. Helms, and Mr. Norris stated that Mr. Helms advised the group "that based on the evidence and what we had learned in the 24/48, that we should let the suspension convert to a discharge" (Tr. 667).

Later, in response to bench questions, Mr. Norris explained the decisional process to discharge Mr. Dickey as follows (Tr.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Who made the decision to discharge and at what stage; the three of you?

THE WITNESS: Yes. There was, well, four, I guess. It's a joint decision, you know. It's like checks and balances.

ADMINISTRATIVE LAW JUDGE KOUTRAS: I got the impression that three people, like three men on an ad hoc committee looked at all the reports, had all the information that the union put on the table at the 24/48 hour meeting, and three of you decide to make a recommendation as to discharge and Mr. Helms is the guy who said, fine, I concur. Is that the way it happened?

THE WITNESS: He concurred, yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Helms, he got the file placed on the desk after three people made the recommendation?

THE WITNESS: After the fact. We went over the facts of the case over the phone at that point in time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: With Mr. Hemls?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: He is down in Pittsburgh?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Helms probably said, what, something to the effect that it soulds like you got a good case; go ahead and can the guy?

THE WITNESS: I believe that he said to discharge.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did Mr. Helms have the prior privilege of looking at any of the papers, any statements?

THE WITNESS: I really don't know, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Is this kind of a rush, rush; you go to the 24/48 hour; you come up with a position and you jockey back and forth and management people are talking and union people are talking; you say we got to do something; you run out and call down to corporate headquarters, Pittsburgh, give them the facts over the phone. He says sounds good to me, go for discharge. Is that essentially how it happened?

THE WITNESS: That's part of it, yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: So Mr. Helms has more or less bought the recommendation of the three people that were right immersed in this whole controversy?

THE WITNESS: Right.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You and Mr. Hoover conducted the investigation; you and Mr. Hoover and Mr. Boyle had an input into the recommendation; and Mr. Helms simply said, sounds good to me. Is that essentially what happened?

THE WITNESS: Right; but again, he could not override; but at least put that decision on hold and involve somebody from Pittsburgh operations as well.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why would he want to do that? Is there a delegation here, wouldn't you think? What is Mr. Helm's position now; does he have authority over the mines or he will pretty much take whatever punishment comes to him from managers, wouldn't he?

THE WITNESS: I would assume he is a check and balance man.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What reason would he have to say listen, I think you three fellows, I don't think your recommendation holds water and I caution you not to do it.

THE WITNESS: He could think the case was unprepared or that the evidence that you have was not substantial enough.

ADMINISTRATIVE LAW JUDGE KOUTRAS: But he obviously didn't think that in this case?

THE WITNESS: That's correct.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why didn't he; that is what I am driving at. You must have made a pretty good presentation to him over the telephone.

THE WITNESS: No. I think we had good evidence and it was a serious offense.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You convinced him of that, is that correct?

THE WITNESS: I don't know that I convinced him; I informed him that was my position.

ADMINISTRATIVE LAW JUDGE KOUTRAS: So in effect, what you are telling me then, the decision to discharge Mr. Dickey ultimately was not the decision of one man; it was a group decision between you, Mr. Hoover, Mr. Boyle, and Mr. Helms collectively?

THE WITNESS: I would say that's correct.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Who would you say of all these people had a greater impact and input on the decision of the four of you?

THE WITNESS: I don't know. I believe it's a check and balance.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Is it a closed ballot? You do not vote on it by ballot?

THE WITNESS: No.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Was anybody for suspension of Mr. Dickey rather than discharge?

THE WITNESS: No; not that I recall. I don't remember, but I don't think so.

The thrust of Mr. Dickey's case is the assertion that the management decision to discharge him was made not because of his encounter with Ms. Yoder, but was made because he had become a "safety thorn" in management's side because of his complaints and grievances. In this regard, while I have concluded that Mr. Pulice was hostile to Mr. Dickey because of his safety grievances and complaints, I cannot conclude that Mr. Dickey has established any open hostility because of his safety activities on the part of those management individuals who actually made the decision that he should be discharged. Of the four individuals who made that decision, Mr. Norris was the only one called as a witness in this case. Since Mr. Boyle, Mr. Hoover, and Mr. Helms did not testify, I have no way of assessing their demeanor or credibility. Mr. Pulice did not testify, and he is no longer employed by the respondent, having resigned for "personal reasons".

Mr. Norris left his employment with the respondent in February 1982, and is currently employed with another company in Illinois, and he was not an employee of the respondent when he testified in this case. Apart from Mr. Dickey's grievance concerning section foreman Kenny Foreman, Mr. Norris' testified that he had no personal knowledge of the extent of Mr. Dickey's underground mine safety activities prior to his transfer to the surface preparation plant. Mr. Norris conceded that he did make an inquiry about Mr. Dickey after he bid on the surface job, and that Mr. Cook characterized Mr. Dickey was a "rowdy" or "radical", and that he could be a "general pain in the back problem" (Tr. 676). Mr. Norris explained that he made the inquiry simply to learn the type of person who would be coming to work for him, and that he had no choice but to accept Mr. Dickey because of his union bid for the job. However, Mr. Norris also indicated that Mr. Cook also told him that Mr. Dickey was safety conscious and a "good man", and there is no evidence that during his employment tenure under Mr. Norris' jurisdiction Mr. Dickey filed safety complaints or grievances or otherwise caused Mr. Norris any problems.

Mr. Norris testified that at the time Mr. Dickey was first assigned to him on June 21, 1981, he had no initial conversations with him (Tr. 597). He confirmed that Mr. Dickey's immediate supervisor, plant engineer Rudy Dulik, reported that Mr. Dickey was doing a good job as a dust sampler, and he confirmed that in a subsequent conversation with Mr. Dickey he (Norris) told him that he was doing a good job (Tr. 599). However, on cross-examination, Mr. Norris admitted that he was aware of Mr. Dickey's "multiple run-ins" with Mr. Pulice, but was not clear as to what may have caused them. He also admitted it was "common mine knowledge" that Mr. Dickey was a "a hard nose on safety" and had "filed a number of grievances relative to safety", and that he was aware of these facts (Tr. 648-649). In response to a question from me, Mr. Norris stated that he "didn't know all the background" of Mr. Dickey's grievances until the hearing in this case (Tr. 703).

Although I find Mr. Norris' testimony concerning his knowledge of Mr. Dickey's prior safety grievances at the time he contributed to the decision to discharge him to be somewhat contradictory, I cannot discount all of his testimony in this case. After viewing him on the stand during his testimony, while some of his testimony was inconsistent, I cannot conclude that he was hostile to Mr. Dickey because of his prior safety activities, nor can I conclude that during the period June 21 to the date of his discharge, Mr. Norris did anything to discourage Mr. Dickey's involvement in safety matters, or otherwise harassed or intimidated him.

The record in this case establishes that a number of miners who filed safety complaints and grievances similar to Mr. Dickey are still employed by the respondent. Danny Litton was part of the grievance filed over the miner cable (exhibit C-6), and he is still employed at the mine. Jane Christopher filed grievances against a foreman for alleged acts of harassment and cursing, and while no action was apparently taken against the foreman, Ms. Christopher was taken off his crew (Tr. 320), and is still employed at the mine. Bruce Diges testified that Mr. Pulice threatened to fire him if he didn't "sever his relationship" with Mr. Dickey. Mr. Diges confirmed that he had received several "absentee notices" from management, but he is still employed at the mine. Mr. Dugan, who worked under Mr. Norris' jurisdiction, filed a grievance against Mr. Pulice because he cursed him, and Mr. Dugan is apparently still employed at the mine. Given these circumstances, I reject Mr. Dickey's assertion that his discharge has had a "chilling effect" on the work force and that miners are afraid to exercise their rights. The record in this case simply does not support that conclusion, and based on the testimony of record in this case, I cannot conclude that the miners who are employed at the Cumberland Mine are passive and inactive when it comes to the exercise of their rights to file grievances and complaints.

It seems clear to me under Pasula and its progeny, once a showing has been made that a mine operator's disciplinary decision was tainted or motivated "at least in part" by a miner's protected activity, the burden then shifts to the miner operator to show that while this may be true, mine management was also motivated by the miner's unprotected activity,

and that management would have taken the adverse action against the miner in any event for the unprotected activity alone. The Commission, in Chacon, supra, held that a mine operator has carried its burden in establishing its motive for an adverse action if it can establish that such action was "not plainly incredible or implausible".

Mr. Dickey has established by a preponderance of all of the credible testimony and evidence in this case that he did in fact file a number of safety complaints and grievances against mine management personnel during his underground employment at the mine. He has also established that these complaints and grievances resulted in hostility and animosity against him by mine foreman Sam Pulice, and that Mr. Pulice's conduct towards Mr. Dickey was a direct result of Mr. Dickey's safety complaints and grievances. Although Mr. Pulice had no authority to carry out his threats to fire Mr. Dickey, I believe it is reasonable to infer from the record in this case that Mr. Cook was not completely oblivious to the fact that Mr. Dickey was a source of irritation to Mr. Pulice because of his safety activities. It is also reasonable to infer that, notwithstanding Mr. Cook's assertions that Mr. Dickey was a good worker and safety conscious, Mr. Cook did not totally erase Mr. Dickey's safety activities from his mind during the investigation conducted by management immediately prior to his discharge.

While I find Mr. Cook and Mr. Norris to be generally credible witnesses, their contradictory and somewhat equivocal testimony concerning certain conversations and contacts between them, as well as Mr. Pulice, during the interim between the incident of September 18, 1981 and the 24/48 meeting held on September 21, 1981, give rise to a strong inference that Mr. Cook and Mr. Pulice made known to Mr. Norris all of Mr. Dickey's prior safety activities and grievances, and that Mr. Norris, as one of the group who decided to discharge Mr. Dickey, was not totally divorced from these past events at the critical time that decision was being considered. Further, while Mr. Boyle, Mr. Helms, and Mr. Hoover did not testify in this proceeding, I believe the testimony by those who did establishes that these individuals were also aware of Mr. Dickey's past safety grievance and complaint history at the time of management's discharge deliberations.

Given the foregoing findings and conclusions, although the timing of his discharge did not come directly after or fairly close to his last safety complaint, and even though I have found a lack of disparate treatment on management's part in discharging him, the record in this case, taken as a whole, does establish a strong inference that the management decision to discharge Mr. Dickey was motivated in part by his past safety grievances and complaints. However, the critical question here is whether the respondent has nonetheless established a credible justification for the discharge, and if so, whether its decision to discharge Mr. Dickey would have been made in any event regardless of his protected activity.

With regard to Mr. Dickey's arguments and inferences that management's failure to look at his personnel file before making the decision to fire him supports a conclusion that management was predisposed to fire him,

respondent's responsive and persuasive argument that management believed it had sufficient reasons and cause to support the discharge is just as believeable and not patently implausible. As a matter of fact, Mr. Dickey's counsel conceded as much during the following bench colloquy during the hearing at Tr. 631-634:

> ADMINISTRATIVE LAW JUDGE KOUTRAS: That is a little bit along what I commented on earlier, Mr. Yablonski. It seems to me that your theory is, if your theory prevails, I mean, if United States really wanted to get rid of a trouble maker like you say they believed Mr. Dickey was, it seems to me they'd have a locked case. They wouldn't do such a slipshod job, quite frankly, on the letter of charging him, and they would have been specific in there; assaulted a supervisor, insubordination in that he refused to leave the premises, you were forced to call a guard, and they would have this down here, A through Z, and by God, they'd have a locked case against Mr. Dickey, but in no way in the world do we have that, but here we have got quite frankly a letter, a statement of charges that leaves very much to the imagination; and that is it.
>
> One of the critical questions in this case is whether I am bound by that, or whether I am going to let her come on after the fact and try to show how the real reason for discharge was insubordination, throwing the hat at Mr. Held, physically putting his hands on him and all that business. That is all hindsight as far as I am concerned. It cuts both ways here.
>
> MR. YABLONSKI: I understand it cuts both ways, Judge, but I suspect and I have seen enough of these arbitrations to know, that they took what they thought was their best to get this guy. They didn't think they needed anymore than that and they went with what they had.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: You mean in arbitration?
>
> MR. YABLONSKI: That's right; in their initial charge against him.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: What that is, I am saying, so that if that is what happened, how can you now argue that they had some devious motive as a safety activist?
>
> MR. YABLONSKI: I think this was the basic motivation, everything they did. Sure, they were waiting for this guy to do this and then they grabbed him. They went with whatever they felt they needed and that is what they chose.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That is an unusual argument, Mr. Yablonski. The problem is, all these arguments are made well after the fact.

MR. YABLONSKI: But the fact of the matter is, Judge, they'd have a serious problem even proving what they charged. We haven't seen an eye witness yet as to this thing. Donna Yoder has never been here to testify as to what heppened.

ADMINISTRATIVE LAW KOUTRAS: Where is she? Can't you subpoena her? You have got the burden here; the initial burden.

MR. YABLONSKI: Let me proceed with my cross-examination on this, and then we will see if we need Donna Yoder.

After careful and considered scrutiny of the entire record in this case, I conclude and find that the respondent's decision to discharge Mr. Dickey, as made by the management personnel designated and charged with making that decision, was made because of his altercation with Ms. Yoder on September 18, 1981, and were it not for that incident, Mr. Dickey would not have been discharged and would still be in the respondent's employ. I reject Mr. Dickey's argument that because of his asserted Common Law relationship with Ms. Yoder at the time the incident took place on mine property, management should have treated the incident as something different from the usual confrontation between two employees. The fact is that at the time of the altercation, Mr. Dickey and Ms. Yoder were mine employees, and the fact that mine management treated them as such and disregarded or refused to consider their relationship for purposes of making an adverse disciplinary decision under the applicable mine shop rules does not establish that management acted arbitrarily or exceeded its legitimate interests in disciplining its own work force.

As indicated earlier in my findings and conclusions concerning the altercation of September 18, 1981, the information available to the mine management decision makers at the time of its investigation, including the information developed during the 24/48 meeting at which Mr. Dickey was represented, supports the charges lodged against him. In addition, Mr. Norris' testimony that management considered the incident to be a most serious and aggravated offense because it did in fact result in injuries to Ms. Yoder at the work site and could have happened around moving machinery, thus exposing Mr. Yoder to the potential for more serious injuries, cannot be totally discounted. I conclude and find that respondent had ample justification for taking the adverse personnel action that it did take in this case.

I conclude and find that the respondent has established that it would have discharged Mr. Dickey for his unprotected activity alone, that is, his altercation with Ms. Yoder, and this conclusion and finding is made by me

after careful consideration and review of the record taken as a whole, including all of the testimony and evidence adduced by the parties at the hearing in this case. In short, I believe that the respondent has carried its burden as enunciated by the Pasula line of cases, as well as the more recent Commission decisions on this subject; Bradley v. Belva Coal Company, supra; MSHA ex rel. Johnny N. Chacon v. Phelps Dodge Corp., supra; Lloyd Brazell v. Island Creek Coal Company, 4 FMSHRC 1455 (1982).

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the record in this proceeding does not establish by a preponderance of any reliable, credible, or probative evidence that the respondent discriminated against the complainant because of any protected safety activities on his part. Under the circumstances, the complaint IS DISMISSED, and the relief requested IS DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

Louise Q. Symons, Esq., U.S. Steel Corp., 600 Grant St., Pittsburgh, PA 15230 (Certified Mail)

Kenneth J. Yablonski, Esq., Yablonski, King, Costello & Leckie, 505 Washington Trust Bldg., Washington, PA 15301 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. BARB 79-56-PM A.C. No. 08-00729-05001
v.	:	
BELCHER MINE, INC., Respondent	:	Belcher Mine

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Warren C. Hunt, President, Belcher Mine, Inc., Aripeka, Florida, for Respondent.

Before: Judge Gary Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," for alleged violations of regulatory standards. The general issue before me is whether Belcher Mine, Inc., has violated the cited regulatory standards and, if so, the amount of civil penalty to be assessed for the violations. A bench decision was rendered following hearings on these issues. That decision, which I now affirm, is set forth below with only nonsubstantive modifications.

I am prepared to render a bench decision at this time. In light of the Secretary's request for withdrawal of Citation No. 93605 and my acceptance of that request to withdraw, Citation No. 93605 is of course vacated. In addition, for the reasons already given, and I incorporate those reasons into this bench decision, Citation No. 93802 is also vacated. 1/

1/ The citation was vacated at hearing in the following ruling from the bench:

> The particular standard cited, 30 CFR § 56.12-32, provides as follows: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs." The thrust of the standard is to

That leaves us with six citations to consider. Four of those citations are not disputed in the sense that the operator concedes that there was a violation. In those cases, he contests only the amount of penalty proposed. The remaining citations are contested both as to the fact of the violation and the amount of penalty.

Under section 110(i) of the Federal Mine Safety and Health Act of 1977, certain criteria are to be considered by me in determining the amount of any penalty assessed. Those criteria are as follows: the operator's history of previous violations. In this case, I note that there is no prior history of violations. The appropriateness of the penalty to the size of the business of the operator charged. I note in this case that the operator had 20 employees at the relevant time and therefore was a small business. The third criteria is whether the operator was negligent. I will consider that element separately with respect to each of the citations in this case. The fourth is the effect of the proposed penalty on the operator's ability to continue in business. There has been no allegation in this case that any penalty that I might impose would adversely affect the operator's ability to continue in business. Fifth, the gravity of the violation. I will also consider this element separately with respect to each of the citations. Finally, the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

I am also considering in assessing penalties in this case, the fact that the Mine Safety and Health Administration has since the date of these violations modified its policy for initial inspections to what it calls "C A V" visits. The policy, which according to the evidence has been in effect for about a year and a half, allows the operator to have one advisory inspection wherein no penalties will be assessed. In this case, the inspection on March 16, 1978, leading to the citations herein, was the first inspection following the enactment of the 1977 Act.

Fn. 1 cont'd.

the requirement that when you have a junction box, you will keep its inspection and cover plates in place at all times. The standard cannot, in my opinion, be construed, as the solicitor suggests, to require the existence of junction boxes themselves. No such inference can be drawn from the plain meaning of the standard. If MSHA wants to require junction boxes and deems the existence of junction boxes to be that important, then a standard should be precisely drawn to cover that particular problem. This does not mean to say that a violation might not have existed under a different standard, but the standard cited, in my opinion, is inapplicable. Citation No. 93802 is accordingly vacated.

Let me now proceed then to the specific citations. With respect to Citation No. 93601, the alleged violation was that a supervisory employee on the second shift was not trained in first aid. The standard cited, 30 CFR § 56.18-10, requires as follows:

> Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

I do not find that the standard cited was violated in this case. The standard only requires that selected supervisors be trained in first aid. The evidence as presented by the government does not support a finding that selected supervisors had not been trained in first aid. The only violation cited was that a supervisory employee on the second shift was not trained in first aid. No such requirement is found in the standard and therefore I find no violation. Citation No. 93601 is accordingly vacated. It is in fact to the credit of the mine operator, however, that he did have someone trained in first aid on the second shift, and apparently many times only that one person was working on that second shift.

The violation alleged in Citation No. 93602 is that the drive belt on the feeder motor on the portable crusher was not guarded. The standard cited is 30 CFR § 56.14-1. This was one of the citations that the operator argued did not charge a violation. The standard reads as follows:

> Gears, sprockets, chains, drive heads, tail, and take-up pulleys, couplings, flywheels, shafts, saw blades, fan inlets, and similar exposed moving machine parts which may be contacted by persons and which may cause injuries to persons shall be guarded.

The credible and substantially undisputed testimony of MSHA Inspector Russell Morris was that indeed the drive belts on the portable crusher (as depicted in Exhibit R-1 and Court Exhibit No. 1) did create two pinch points that were within reach of an individual who would be walking or working about on the walkway of the crusher. The undisputed testimony of Inspector Morris was that an individual who might have been passing those exposed drive pulleys and belts (for example, to inspect a hot bearing or to check on vibration in the equipment) beyond the location of the drive pulleys could expose his hand, thereby creating a further possibility of broken bones or loss of fingers or a hand. The inspector testified that the pulleys were located some three to four feet from the walkway at a height which would make the exposure not unlikely.

The seriousness of the violation is attenuated somewhat, however, in that the inspector thought that it was improbable and only a "slight chance" that a man could get his hand caught in the pulley pinch points. He observed, however, that such injuries have in fact occurred in similar circumstances. I accept Inspector Morris' assessment of negligence. The condition was one, in my opinion, that should have been known because of the reasonably close proximity of the exposed pulley to the walkway. I note that abatement was completed within the time specified in the citation. Under all the circumstances, I assess a penalty of $25 for that violation.

The next citation under consideration is Citation No. 93603. It also charges a violation of the standard at 30 CFR § 56.14-1. Drive pulleys were also exposed on the other side of the crusher and two pinch points were located within three to four feet of the walkway. An employee could pass within two feet of those pinch points, exposing hands or fingers and causing broken bones or the loss of the hand or fingers.

The inspector opined that the hazard here was also "improbable" since it was unlikely that employees would be in the vicinity of these pinch points. I accept the inspector's opinion that the operator should have known of these violations since they were in plain view. I therefore find the operator negligent. The same penalty of $25 should be imposed here. Obviously, I am also finding that there were violations with respect to these two citations because of the danger of exposure to moving machine parts, namely, a drive pulley.

Citation No. 93604 charges a violation of the regulation at 30 CFR § 56.11-2. That standard requires that crossovers, elevated walkways, and elevated ramps and stairways be of substantial construction, provided with handrails, and maintained in good condition. In this case, it was charged that a handrail on the outer side of the walkway of the crusher was broken in two places. The uncontradicted testimony of the inspector is that the upper handrail located about belt height would give way approximately six inches. I note, however, that there was also a midrail located about two feet above the walkway that was in sound condition. I also note the testimony of the inspector that, in his opinion, injuries were improbable because the rail would expand only about six inches, that a person would not likely fall through the rail, and that it was therefore unlikely to cause injury. I also accept the testimony of the inspector that the negligence of the operator was very low, since this condition was not very obvious. Under the circumstances, I would assess a penalty fo $10 for that violation.

Citation No. 93606 charges a violation of the regulation at 30 CFR § 56.9-87. That standard requires that heavy duty mobile equipment be provided with certain audible warning devices. When the operator of such equipment has an obstructed view to the rear, the standard requires

that the equipment must have an automatic reverse signal alarm which is audible above the surrounding noise level or an observer must be present to signal when it is safe to back up.

The undisputed testimony in this case is that the 966 C Caterpillar front end loader, No. 339, had a defective automatic reverse signal alarm when cited on the 16th day of March 1978. It is undisputed that it was customary for truck drivers to be walking in the vicinity of that operating front end loader, thereby being exposed to the hazard of the equipment backing into them with possible fatal injuries. The testimony is somewhat attenuated, however, by the fact that the inspector did not precisely recall where the front end loader was working and could not testify as to seeing any people actually walking in the vicinity of that loader. His testimony was based strictly upon experience and opinion that truck drivers have a tendency to walk around where their trucks are being loaded.

I accept the inspector's testimony concerning negligence and I believe that the operator should have known of the faulty condition. Equipment operators are indeed required by regulation to check equipment before operation, and since the machine operator could have heard the alarm working or, conversely, could have been aware that the signal alarm was not working and had a duty to report that to his supervisory personnel I believe that there was some negligence involved in this particular violation. I note, however, again, that abatement was made within the time specified. Under the circumstances, I feel that a penalty of $10 is appropriate.

The last citation at issue is Citation No. 93801. That charges a violation of the standard at 30 CFR § 56.12-30. That standard states as follows:

> When a potentially dangerous condition is found, it shall be corrected before equipment or wiring is energized.

The undisputed testimony is that the stationary half of the plug on what is known as the "S-O cord" extending to the product conveyor motor located on the B Mine portable crusher control box was broken off, and indeed that is the condition that is cited. There is accordingly no dispute that the violation did occur. In determining the appropriate penalty, I also consider that the inspector admitted that it would be unlikely that an employee or individual would be exposed to the hazard. However, should an individual be exposed to that hazard, the extent of the hazard was quite serious and indeed the individual could be subjected to shock or electrocution by exposure to up to 277 volts.

The testimony of the inspector concerning negligence was somewhat ambivalent. On one hand, he testified that the condition was readily observable, but on the other hand he testified that it would be readily

observable to someone performing a very close inspection of the area cited. Since the operator has an obligation to make a thorough inspection of the equipment before operating it, I conclude that some degree of negligence existed. The violation should be assessed at $25.

Order

Citations No. 93601, 93605, and 93802 are vacated. The following penalties are to be paid by Belcher Mine, Inc., within 30 days of the date of this decision:

Citation No. 93602 - $25, Citation No. 93603 - $25, Citation No. 93604 - $10, Citation No. 93605 - $10, Citation No. 93801 - $25.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Mr. Warren C. Hunt, President, Belcher Mine, Inc., P.O. Box 86, Aripeka, FL 33502

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 82-3
	:	A.C. No. 11-02236-03081
v.	:	
	:	Crown No. 2 Mine
FREEMAN UNITED COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., and Richard J. Fiore, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks civil penalties for two alleged violations of mandatory safety standards for which citations were issued during an inspection on July 29, 1981. Each citation contained a finding that the violation was significant and substantial. Respondent challenges with respect to each citation the fact of violation and the significant and substantial finding. The latter finding is not necessarily at issue in a civil penalty proceeding, but both parties have introduced evidence and advanced argument concerning the issue, and, following the precedent of Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981) (also a penalty proceeding), I will decide the issue.

Pursuant to notice, the case was heard on the merits in St. Louis, Missouri on October 26, 1982. John D. Stritzel, a federal coal mine inspector, and Rick Reed testified for the Petitioner. David Lee Webb and Paul Budzak testified for Respondent. Both parties have filed posthearing briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT APPLICABLE TO BOTH CITATIONS

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine located in Macoupin County, Illinois, known as the Crown No. 2 Mine.

2. The operation of the subject mine affects interstate commerce.

3. The subject mine produces approximately 6,000 tons of coal daily. It employs approximately 90 miners on the surface and 465 miners underground on three shifts. I find that Respondent is a large operator.

4. During the period from January 1, 1980 to July 28, 1981, the operator had a history of approximately 243 paid violations, approximately 25 of which were ventilation violations. Government's Exhibit No. 6 covers the period from January 1, 1980 to August 25, 1982, the latter date being more than 1 year after the citations in question were issued. For that reason, it is of limited relevance. I find that Respondent's history of prior violations was moderate.

5. There is no evidence that penalties assessed for the alleged violations will affect Respondent's ability to continue in business. Therefore, I find that they will not.

FINDINGS OF FACT APPLICABLE TO CITATION NO. 1114857

6. On July 29, 1981, Federal Coal Mine Inspector John D. Stritzel conducted a regular inspection of the subject mine. He was accompanied by David L. Webb, assistant to the mine superintendent, and Rick Reed, a miner and union walkaround representative. They proceeded to the face of the 4th southwest section which was at Room 24. The rooms were approximately 20 feet wide, and 6 to 8 feet high.

7. Inspector Stritzel issued Citation No. 1114857 at about 9:30 a.m., on July 29, 1981, charging a violation of 30 C.F.R. § 75.316 because there was no ventilation to the working face in the section in question.

8. The MSHA-approved ventilation plan in effect at the subject mine on the date of the above inspection provided (Exhibit No. M-3, page III, para. E, subpara. (a)): "Exhaust fan tubing or exhaust line curtain '*Used only in case of auxiliary fan failure.' (inby end maintained within 10' of face). Both must have minimum mean entry velocity of 60 FPM."

9. At the time of the inspection referred to above, the continuous miner was cutting coal from Room 24 and it was being removed by

shuttle car. The miner was taking a right-sided cut and had penetrated 8 to 10 feet into the face.

10. At the time of the inspection, the fan was being moved from the No. 4 entry between Room 21 and 22 and the tubing had been removed from the face area of Room 24.

11. At the time of the inspection, there was little or no air going to the working face. The miner operator was sitting about 5 feet outby the inby rib and was in fresh air. The air movement at the face was substantially less than 60 feet per minute. The continuous miner and the shuttle car did not act as a line curtain in ventilating the face area. I find that the miner was positioned at approximately a 90 degree angle to the face cutting coal straight on. On this issue I am accepting the testimony of Inspector Stritzel, which is supported by the testimony of Mr. Reed, as against the contradictory testimony of Mr. Webb.

12. At the time of the inspection the atmosphere in the face area where the continuous miner was operating was dusty and there was little or no air movement. The room was well rockdusted.

13. The methane monitor on the continuous miner was operating properly at the time of the inspection. There were no permissibility violations on the continuous miner.

14. The subject mine was classified as a gassy mine because it had been found to liberate excessive quantities of methane and was on a 10-day spot inspection program under section 103(i) of the Mine Safety Act.

15. Checks for methane on July 29, 1981, did not reveal any methane accumulations in the face area of the fourth southwest section of the subject mine.

16. The alleged violation was abated and the citation terminated by the repositioning of the fan in the last open crosscut between Room 23 and 24, with three or four sections of tubing on the fan extending to within 10 feet of the face. Thereafter, an air reading was taken which showed the air velocity was 64 feet per minute.

FINDINGS OF FACT APPLICABLE TO CITATION NO. 1114859

17. After the abatement described in finding 16, the inspector, Mr. Webb and Mr. Reed proceeded to the last open crosscut between Rooms 21 and 22. The inspector attempted to take an air reading with his anomometer but was unable to do so. He then took an air reading by using a chemical smoke cloud test which showed a volume of 7,654.5 cubic feet of air per minute.

18. Inspector Stritzel issued a citation for a violation of 30 C.F.R. § 75.301 because the minimum quantity of air reaching the last open crosscut was less than 9,000 cubic feet per minute.

19. I find that the air reaching the last open crosscut between Rooms 21 and 22 in the 4th southwest section of the subject mine was approximately 7,654.5 cubic feet per minute when the inspector performed the test described in finding 17. I reject the testimony which attempted to challenge the accuracy of the test.

20. At the time the citation was issued the continuous miner was not operating. There were seven miners working on the section.

21. The alleged violation was abated and the citation terminated by reerecting a curtain which had been partially knocked down and tightening other curtains separating the intake from the return air. Following this, an air reading was taken which showed 10,800 cubic feet of air per minute reaching the last open crosscut.

REGULATIONS

30 C.F.R. § 75.316 provides:

§ 75.316 Ventilation system and methane and dust control plan.

[STATUTORY PROVISIONS]

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.

30 C.F.R. § 75.301 provides:

§ 75.301 Air quality, quantity, and velocity.

[STATUTORY PROVISIONS]

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities

of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

CONCLUSIONS OF LAW

1. Freeman United Coal Mining Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Crown No. 2 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. On July 29, 1981, Respondent violated the mandatory standard in 30 C.F.R. § 75.316 because it had little or no ventilation in the working face at Room 24, 4th southwest section of the subject mine, in contravention of the approved roof control plan for the subject mine.

DISCUSSION

There can no longer be any doubt that the provisions of an approved ventilation plan are enforceable under the Mine Act and that a violation of a requirement in such a plan is a violation of the Act. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Secretary v. Mid-Continent Coal and Coke Company, 3 FMSHRC 2502 (1981).

Respondent does not seriously dispute the allegation in the citation that exhaust fan tubing or an exhaust line curtain were not maintained within 10 feet of the face. It is clear that the fan and tubing had been removed from the face area before the room was mined out in order to get a jump on production in the new face area. The contention that the continuous miner and the shuttle car acted as substitute line curtain is almost frivolous and I reject it.

3. The violation described in Conclusion No. 2 was serious. It was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard.

DISCUSSION

The failure to provide air to the working face poses a two fold hazard: the possibility of a methane explosion and the buildup of coal dust. The latter can propagate an explosion and can contribute to lung disease in miners working in the area. Although at the time the citation was issued, the miner operator and helper were in fresh air, as cutting continued they would not be. No provision was made to supply air to the face. Even though methane was not detected on the day the citation was issued, it is a constant threat in a gassy mine. It is of the utmost importance that air be kept on the face area while coal is being mined. Under the test laid down by the Commission in Secretary v. Cement Division, National Gypsum Company, supra, there is a reasonable likelihood of a methane or dust explosion if there is no face ventilation. In the event of such an explosion, serious injuries or fatalities would result.

4. The violation described in Conclusion No. 2 was due to the gross negligence or deliberate flouting of the standard by the operator.

DISCUSSION

The operator moved the fan and tubing from the face area before the coal cutting was completed. It is obvious that the operator was aware of the fact that the continuous miner was still cutting coal in Room 24. Production was placed ahead of safety to the miners.

5. An appropriate penalty for the violation of 30 C.F.R. § 75.316 is $500 considering the criteria in section 110(i) of the Act.

6. On July 29, 1981, Respondent violated the mandatory standard in 30 C.F.R. § 75.301 in that it failed to provide a minimum of 9,000 cubic feet per minute of air at the last open crosscut between Rooms 21 and 22 in the 4th southwest section of the subject mine.

DISCUSSION

Respondent raised issues concerning the accuracy of the smoke test which the MSHA inspector conducted which resulted in his finding of 7,645.5 cubic feet of air per minute. It argues that the area tested was not perfectly regular, that the procedures followed by the inspector could have been improved upon, and that a stop

watch rather than a regular watch should have been used. It is significant, however, that Respondent, which had the opportunity to do so, did not itself take a smoke test. The inspector's reading - approximately 85 percent of the minimum air reading - is of course subject to a margin of error in either direction. I conclude that the test was validly taken and the results showed a violation.

7. The violation described in Conclusion No. 6 was moderately serious. It was of such nature as could signficantly and substantially contribute to the cause and effect of a coal mine safety or health hazard.

DISCUSSION

The violation found here is not as serious as that found in Conclusion No. 2. However, the same hazards are posed by this violation as by the prior one: the possibility of a methane or dust explosion and the presence of respirable dust in the atmosphere. The reduced air in the last open crosscut contributes significantly and substantially to those hazards. It results in a reasonable likelihood of serious injury.

8. The violation described in Conclusion No. 6 was due to the negligence of the operator.

DISCUSSION

The reduction in air in the last open crosscut was due to loose and torn curtains. These conditions are obvious and should have been known to the operator.

9. An appropriate penalty for the violation of 30 C.F.R. § 75.301 is $150 considering the criteria in section 110(i) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent, within 30 days of the date of this decision pay the sum of $650 for the two violations found herein to have occurred.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Rafael Alvarez, Esq., and Richard J. Fiore, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60606

Harry M. Coven, Esq., Gould & Ratner, 300 West Washington Street, Suite 1500, Chicago, IL 60606

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 28 1983

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: LAKE 82-90
Petitioner	:	A/O No: 33-01068-03166 A
	:	
	:	Sunnyhill No. 9 South
v.	:	
	:	
BILL GARRIS,	:	
Respondent	:	

DECISION

Appearances: Inga Watkins Sinclair, Esq. Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia, for Petitioner
Michael O. McKown, Esq., P.O. Box 235, St. Louis, MO for Respondent

Before: Judge Moore

At approximately 8 a.m. on June 19, 1980, the victim, Mr. Walter Strohl was crushed between the bed of his supply truck and a concrete loading dock. He died shortly thereafter.

No one saw the accident occur and the victim did not live long enough to tell anyone what happened. MSHA's version of how the accident happened is admittedly speculation based upon circumstantial evidence. When the would-be rescuers found the victim they were understandably more intent on saving him than on noticing the surrounding conditions. They did notice a three-thousand pound pallet of Mandoseal resting partially on the truck and partially on the loading dock. The rescuers moved the truck forward slightly to release the victim and then blocked the truck against further movement. Those witnesses who noted the position of the cable on the winch said that it was wound up on the spool, and thus not hooked to the Mandoseal pallet. There was no evidence presented which would indicate that the winch had previously been hooked to the Mandoseal pallet and somewhow become unhooked. Therefore, Mr. Bill Garris' theory that the winch pulled the truck into the victim seems highly unlikely.

Mr. Strohl's normal method of loading Mandoseal at the pole barn loading dock was to back the truck up flush with the dock, place a metal bar behind the Mandoseal pallet, attach cables to the aforesaid bar and attach the other ends of the cables to his winch cable. He would then

operate the winch and pull the Mandoseal on to the truck bed. No one knows what procedure the victim followed on the day of the accident but the bar that he usually put behind the Mandoseal pallet was found between the pallet and the concrete loading dock as though he had somehow pulled it under the pallet and he could not have done that by hand; so there was speculation that he had hooked the truck directly to the Mandoseal pallet and pulled the Mandoseal to the edge of the loading dock. Actually, the Mandoseal pallet which was 4' x 4' was almost halfway off of the loading dock after the accident. How much of the weight was resting on the truckbed is unknown. When the would-be rescuers arrived at the accident site the truckbed was about 4" from the loading dock and the victim was squeezed in this 4". He was facing the loading dock.

MSHA speculates in its accident report that the victim started the the loading operation in his normal manner with the truckbed flush against the loading dock. When the load was almost halfway on the truckbed, for some reason, probably because the winching gear had become fouled, he moved the truck away from the dock for a distance of not more than twentyfour inches. While it is not spelled out clearly I assume MSHA reached this conclusion because it thought the Mandoseal pallet would have toppled if the truckbed had been moved completely out from under it. The accident report then speculates that for some reason the victim went in between the truckbed and the loading dock probably to try and remedy the fouled gear. Then the report concludes "the accident occured because the supply truck drifted backwards due to the parking brake being inoperative."

The accident report was received in evidence at the trial. 1/. The version of the accident contained in the accident report does not account for the fact that the winch was wound up or for the fact that when Mr. Van moved the truck so the victim could be removed, he found the parking brake handle in the off position. The condition of the parking brakes could hardly be a factor if they were not used. Under the theory, which was not advanced at the trial, that the victim did not use the parking brakes because he thought they were ineffective, one is faced with the proposition that if the victim wanted the truck to remain stationary, why did he not put it in gear since the engine was off or put chocks, which he had available, under the wheels?

There is conflicting testimony as to when the truck was first moved to a different location and when the brakes were tested. The inspectors say the brakes were tested on June 20 by having someone engage the parking brake handle and then the inspector looked at the brake housing and could see that it was not holding. The truck was then pulled forward and it rolled back. The inspectors say that the truck was not moved until noon of the 20th. The Respondent and Mr. Diose both testified that the truck was moved on June 19 to the maintenance area and that the parking brakes were tested by putting the truck in gear and engaging the

1/ The other items obtained during pretrial discovery were neither offered in evidence or used for impeachment purposes.

parking brakes to see if they would hold the truck while it was in gear. The testimony was that the parking brake would hold on a slight grade but would not hold against the power of the engine. Mr. Diose said that the brakes held enough to bog the engine. It was the contention of the government that if the truck was moved on the 19th it was in violation of a 103(k) order that had been issued right after the accident. That order was in my opinion of questionable validity. (See Secretary of Labor vs. Eastern Associated Coal Company, 2 FMSHRC 2467 (September 2, 1980). But I can see no advantage to Mr. Garris in the fact that the truck was moved on the 19th instead of the 20th. There is no reason that I can think of why he and Mr. Diose would make up such a story. Nor can I see any advantage to the inspector's side of the case in having the truck moved on the 20th rather than on the 19th. I think memories differ and that no perjury was involved.

Mr. Diose thought the area where the accident occurred was so level that a truck should not roll there. He moved his car into the same area, put it in neutral with the brakes off to see if it would roll. It did not. What the inspectors should have done in my opinion was to put the truck in the position where they thought it was prior to the accident and then test to see how much force it took to get the truck rolling, both in its empty condition and with the Mandoseal resting on part of the truckbed. It would seem that if almost half the weight of the Mandoseal had been resting on the truck it would have made the truck very difficult to move. I also wish they had determined the location of the metal bar that the victim customarily used to operate the winch and I wish they had determined the position of the winch control. These facts would shed light on whether the victim used the winch prior to the accident. If he had used the winch prior to the accident it does not make sense that he would wind the winch all the way back up so that the cable hook was in front of the truckbed because he obviously would need it to get the rest of the Mandoseal on the truck.

Mr. Garris testified that he was told by the victim about 30 days prior to the accident that the truck had been driven with the parking brake on. Mr. Garris said that thereafter he checked the parking brake every week and that Company records so indicate. On the last check he made, he said the parking brakes were weak but they would hold. As stated earlier, he and Mr. Diose both stated they had tested the brakes after the accident. Mr. Garris said he drove the truck and his testimony will be discussed later. I find that Mr. Diose tested the brakes and found they would hold enough to make the engine bog down but that they would not hold completely against the engine. Mr. Garris had ordered parts to repair the brakes but the wrong parts had been sent and the right ones had not come in at the time of the accident. But inasmuch as the only evidence concerning the victim's use of the parking brake was that on the day of the accident he did not engage it, I can not make a finding that the condition of the brakes had anything to do with the

fatality. As stated before, if the victim wanted the truck to remain stationary he would have used the parking brake, and probably left the truck in gear. There were no tests or engineering studies made to determine from the position of the Mandoseal what, if any, part of its three thousand pound weight was resting on the truckbed. The truckbed was one inch lower than the dock and unless the pallet was flexible (again no evidence) it would be possible to have almost half of the pallet hanging over the edge of the dock without putting any weight on the truckbed. In that almost balanced condition it would take a very small force to partially topple the Mandoseal so that some of its weight would be resting upon the truckbed.

A version of the accident that was not put forth at the trial by the accident investigating team, but by the inspector who issued the citation, would account for the Mandoseal being partially on the truck and also account for the winch not having been used. I am adding some of my own speculations to this theory. Under this version the victim would for some reason pull the Mandoseal out towards the edge of the dock with the truck and miscalculate so as to pull it to where almost half of it was hanging over the edge of the dock. After observing how far he had pulled the Mandoseal and realizing that a spill was imminent he tried to back the truck under the Mandoseal. If the pallet is sufficiently rigid, it should be possible to back the truck under the pallet. If it happened this way, then, during the actual crushing of the victim, sufficient force must have been applied to the Mandoseal to topple it because in the various photographs of the scene, the Mandoseal does appear to be resting on the truckbed. This version does not account for why the truck moved (unless the victim got out of the truck while the truck was still moving toward the dock or used a prybar to move it), but it does account for how almost half of the Mandoseal got on to the truckbed without the use of the winch. Also, in attempting to free the towing rig the victim may have toppled the Mandoseal and it may have hit some portion of the truck making the truck move backwards before the Mandoseal came to rest on the truckbed. It is certainly easier to conceive of the truck rolling before the Mandoseal came to rest on its bed.

The possibility that the victim was trying to move the truck under the Mandoseal with a crowbar was not given consideration by any of the witnesses. Of course it is all speculation as to how the accident might have occurred. I think the latter version is more likely than MSHA's version or the one put forth by Mr. Garris but regardless of what actually happened, I can find no nexus between the fatal accident and the condition of the parking brake.

Respondent Bill Garris did not manifest an ability to make himself understood, at least by me, during the trial. He constantly answered questions before they had been finished and this made it very difficult to know whether his answer was to the question as asked or some question that he thought was going to be asked. He contradicted himself constantly

either because he was unable to make himself clear or because he was unable to understand the questions. For example, when questioned about testing the brakes in front of the shop he said he tested them by putting them on an incline and that the brakes would hold. "But it wouldn't hold the brake--it would--it would drift back on the steeper incline in gear." (Tr. 172). When asked if the parking brake would keep the truck from moving he stated "it would--it would hold it, but you had to put it in gear. It would move in gear--no problem. It would hold--it would hold the truck in neutral is what I'm saying." (Tr. 173). Referring to the 20th of the month Mr. Garris stated that the inspectors conducted the test on the steep slope in front of the shop. The following appears at 186 of the transcript.

Q. And what were the results when they tested it?

A. Like I said a minute ago, it wouldn't--it would not hold.

JUDGE MOORE: It was the same as when you tested it?

WITNESS: That's right.

JUDGE MOORE: It wouldn't hold but it wouldn't--

WITNESS: In fact, I tested it for him. I drove the truck.

After testifying that he had moved the truck on June 19th and that he had not been present when the (k) order was issued on June 19th but that he had been present on June 20th when the citation alleging faulty brakes (it was an order but referred to in the testimony as a citation) was issued, he was asked if he had read the citation (Tr. 194) and the following ensued:

A. "I just drove it to the shop. I was mainly interested in trying to get the brake fixed

Q. After the citation was issued.

A. After the--yeah, the order was wrote up.

Q. The citation for bad brakes.

A. Yeah.

He is in effect testifying under oath that he moved the truck on June 19 right after he had received the order on June 20th. I can not decipher his testimony and I am therefore discounting most of it.

The first government witness was Inspector Tipple. From reading his entire direct testimony it would appear that the accident investigation took place on June 20th and that the only thing that happened on June 19th the day of the fatal accident, was the issuance of a 103(k) order

by Inspector Tackett who happened to be at the mine at the time of the accident. The other inspectors, Homko and Beck, say that the investigation started on June 19th and concluded on June 20th. For some reason that they tried to explain, but did not explain to my satisfaction, they issued no citations or orders on June 19th. They waited until the next day for a surface inspector Mr.Tipple to come and issue the necessary order even though they had full authority to do so.

The test conducted by Mr. Tipple is not supported by sufficient evidence. He told someone to engage the emergency brake; then he looked at the braking mechanism and observed while the truck rolled backwards. He does not know whether the brake was in fact engaged or whether the one in the truck understood the instruction to engage the brake. For that test to be sufficient someone would have to testify that he either engaged the parking brake or saw someone else engage the parking brake. As it stands it proves little. Mr. Diose on the other hand tested the brakes on level ground by pulling through them with the engine. He stated that there was enough brake left to bog the engine. There was not enough to prevent the truck from moving with the engine, however.

There are all degrees of braking efficiency. Any time a brake is applied some lining is worn off and when a brake is driven through (driven with the engine with the parking brake engaged) it wears more lining. This lining had been driven through to the extent that the operator could smell burning brake lining. Obviously somewhere along the line between brand-new brakes and linings and brakes that will not hold at all, there comes a point where failure to repair the brakes immediately would be a "knowing" violation. I think the government had the burden of showing that the brake had gotten to that point in order to prevail. I find that the government has not carried its burden of proof that Respondent was guilty of a knowing violation.

I find in favor of the Respondent and the case is accordingly DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution: By Certified Mail

Inga Watkins Sinclair, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Michael O. KcKown, Esq., P.O.B. 235, St. Louis, MO 63166

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1983

CONSOLIDATION COAL COMPANY, Successor to Pocahontas Fuel Company,	:	
	:	DOCKET NO: HOPE 75-680
v.	:	IBMA 75-39, 75-40
SECRETARY OF LABOR, et al	:	
and	:	
UNITED MINE WORKERS OF AMERICA, on behalf of Howard Mullins	:	

ORDER OF DISMISSAL

The above case has been settled to the satisfaction of all parties by the payment of $500 to Mr. Mullins. The operator's motion to withdraw its Application for Review filed under the 1969 Act is GRANTED and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

Fredk. W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Timothy M. Biddle, Esq., Crowell & Moring, 1100 Connecticut Ave., NW., Washington, D.C. 20036

Steven B. Jacobson, Esq., DeCastro, West & Chodrow, Inc., 10960 Wilshire Boulevard, Los Angeles, CA 90024

Harrison B. Combs, Esq., United Mine Workers of America, 900 15th Street, NW., Washington, D.C. 20005

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1983

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-114-M
Petitioner	:	A/O No. 42-01150-05017
	:	
v.	:	Lucky Strike Mine
	:	
PLATEAU RESOURCES LIMITED,	:	
Respondent	:	

DECISION

This matter is before me on the Secretary's motion to withdraw Citation 584335 and the parties' waiver of hearing and cross motions for summary decision with respect to Citation 584333. The latter came on for oral argument on the parties' stipulation of material facts not in dispute in Salt Lake City, Utah on March 23, 1983.

Citation 548335

This citation charged a violation of 30 C.F.R. 57.6-103 which provides:

> Areas in which charged holes are awaiting firing shall be guarded or barricaded and posted or flagged.

The citation was issued because an area in which charged holes were awaiting firing "was not guarded or barricaded from unauthorized entry." The only warning of the existence of charged holes was the presence of an empty explosives' sack which had been hung on a wire hanging from the left rib. The Secretary's motion to withdraw is predicated on the view that the standard does not require both a physical barrier and visual warning but only one or the other and that the sack constituted a sufficient visual warning.

I do not agree. The existence of charged holes is an extra-hazardous condition that clearly warranted greater precautions than hanging an empty sack from a wire on the left rib. Such an equivocal "warning" could easily be overlooked or misunderstood.

In my view, the standard was designed to require that anyone approaching the area be confronted with both a physical barrier and

an unmistakeable visual warning of the existence of an explosives hazard. The mere hanging of an explosives' sack that may or may not have been readily observable or legible provided an inadequate warning of the hazard against which the standard was directed.

Accordingly, it is ORDERED that the motion to withdraw and dismiss be, and hereby is, DENIED. It is FURTHER ORDERED that the operator pay the amount of the penalty proposed, $32.00, on or before Friday, April 15, 1983, unless prior thereto the operator requests an evidentiary hearing.

Citation 584333

This citation was issued for a claimed violation of 30 C.F.R. 57.6-50. This provides that in the cargo space of a conveyance containing explosives, detonating cord or detonators, no other materials shall be placed except safety fuses or properly secured, nonsparking equipment that is to be used in the handling of the explosives, detonating cord or detonators.

The stipulated facts show the citation issued because the rear compartment space of a drill buggy was found to contain (1) an uncovered powder box containing 3-1/2 boxes of explosives powder, (2) a covered plywood box that was full of detonators, (3) a metal jackleg with a pneumatic air drill on the end that weighed 70 to 100 pounds, (4) a pneumatic machine oiler of metal construction and weighing from 5 to 8 pounds, (5) solid metal drill steels 4' to 6' long and 1" in diameter, (6) molded metal strips with clamps for holding ventilation tubing in place, (7) rolls of 3/4" pneumatic hoses with metal wing nuts, and (8) metal drill bits approximately 1-3/4" by 1-1/2" long. Lying beside the box of detonators was a metal tool box containing metal chains and oil.

None of the extraneous equipment or material was "properly secured, nonsparking equipment used expressly in the handling of such explosives, detonating cord or detonators." (Stipulation, Para. 9.)

The dispositive issue is whether the term "cargo space" embraces the entire open space in the rear compartment of the drill buggy. The operator argues that it does not and that the term should be defined so as to include only the two boxes in which the explosives and the detonators were placed.

I do not agree. As the transcript shows, the Secretary persuasively pointed out that this and related standards in Part 57.6 are designed to keep the carriage, storage and placement of explosives and detonators separate from extraneous materials which might provide the source for an ignition of the detonators and fire of the explosives. With this understanding of the hazard against which the standard is directed, I have no difficulty in accepting the plain meaning of the term "cargo space" as embracing the entire rear cargo compartment of the drill buggy.

For these reasons, I find the Secretary's motion should be granted and the operator's denied.

I further find that the violation charged did, in fact, occur; that it posed a significant and substantial risk of death or a disabling injury and that it resulted from the operator's negligent failure to understand that safety demands some sacrifice in efficiency. Finally, after giving due weight to the operator's prompt abatement, its size and history of prior violations, as stipulated to by the parties, I conclude that the amount of the penalty warranted is that proposed by the Secretary, namely, $98.00. Let me add, however, that this mine does not have a good safety record, that I consider the penalty assessed minimal, and that in the event of a future violation of this or any of the related explosives standards a much heavier penalty may be warranted.

Accordingly, it is ORDERED that the operator pay the penalty assessed, $98.00, on or before April 15, 1983.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Phyllis Kirk Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Bldg., 1961 Stout Street, Denver, CO 80294 (Certified Mail)

James A. Holtkamp, Esq., Van Cott, Bagley, Cornwall & McCarthy, 50 South Main, Suite 1600, Salt Lake City, UT 84144 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 82-106
v.	:	A. C. No. 46-03839-03013V
FORD COAL COMPANY, Respondent	:	No. 2 Surface Mine

DECISION

Appearances: Matthew Rieder, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Susan Cannon-Ryan, Denny & Caldwell, Charleston, West Virginia, for Respondent

Before: Judge Lasher

A hearing on the merits was held in Charleston, West Virginia, on December 15-16, 1982, at which both parties were represented by counsel. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered by counsel during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This proceeding was initiated by the filing of a petition for assessment of civil penalty by the Secretary of Labor on December 28, 1981, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a), (1977).

This proceeding involves three alleged violations which were initiated by the issuance of a citation and two withdrawal orders alleging violations of 30 CFR 77.1605(b). The Secretary initially sought a penalty of $400 each for the three violations.

Citation No. 886455

This part of my decision is confined to Citation No. 886455 which was issued on August 24, 1981.

Citation No. 886455 describes the violative condition as follows: "The 769 Caterpillar haulage truck (CO No. 2217) was not equipped with adequate brakes in that the diaphragm was

ruptured in the air brake chamber which provided air pressure for the left and right front brakes, this truck was being operated on a steep elevated roadway of about 19 per cent grade, going down to a valley fill at the mine worksite."

The citation was issued at 0900 hours and was terminated at 1300 hours on the same day. The regulation allegedly violated, 30 CFR 77.1605(b), is part of a series of regulations pertaining to "Loading and haulage equipment; installation" and it provides: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

The Respondent contends that the key word in the regulation is "adequate" and that even though the front brakes were shown to be defective to an unspecified degree, the primary braking system on the 769(b) Caterpillar truck in question were the rear brakes and the rear brakes constituted an adequate braking system for the truck within the meaning of the regulation. The Secretary on the other hand contends that the brakes were inadequate.

Inspector James E. Haynes, a surface mining inspector for the Mine Safety and Health Administration (MSHA) issued Citation No. 886455 during an inspection of the Respondent's No. 2 mine.

The Respondent, Ford Coal Company, a West Virginia enterprise, has two surface mines and at the No. 2 mine involved here the annual tonnage is 108,747 tons and the payroll consists of 24 employees. The "controlling entity" of Respondent is an individual, L. W. Hamilton, and his annual production as an operator is 681,719 tons from the two mines of Ford Coal Company and other entities which he controls.

In proximity to the time the citation was issued there was one working shift at the Respondent's No. 2 mine and the Respondent had in use four trucks similar in type to the one involved in this proceeding (769 Caterpillar) and two Euclid trucks and employed six drivers to operate the same. One of the functions of the truck in question-and presumably the other four Caterpillar trucks-was to carry overburden which had been removed from an area called the upper Kittaning coal seam, to a place called the lower Kittaning coal pit where a fill was under construction. In the process of doing so, the trucks would negotiate an elevated haulage roadway constructed of compacted rock approximately 1,250 feet in length and 50 feet wide except for a 200-foot stretch toward the bottom of the haulageway where its width was approximately 30 feet wide. (See testimony of Respondent's dozer operator, Gerald Spencer).

The percent of grade along the haulageway, which runs along the side of a hill for most of its distance, is approximately 19 percent near the top and at the bottom and ranges from 12 percent to 19 percent in the middle. The distance in vertical drop from the top of the Kittaning coal seam to the bottom is 160 feet which as previously noted is negotiated by the haulageway's distance of 1,250 feet. Along the left side of the haulageway are berms which range from three to five feet in height and are approximately ten to twelve feet in width at the base. About halfway down the haulageway is a dropoff which actually runs to the left of the haulageway approximately 800 feet and which at its maximum height is 55 feet.

The front brakes of the 769(b) truck in question are "air-over-oil" actuated expander tube type and they have a brake lining surface of 496 square inches. The rear brakes are Caterpillar oil-cooled, air-over-oil actuated disc brakes which provide both surface and retarder braking and which have a braking surface of 7,869 square inches. In addition the truck has a parking brake and an emergency brake which is air-over-oil actuated, and which has independent air reservoirs for both the front and rear brakes which, if air pressure drops below 80 pounds per square inch, sounds a horn to warn the operator. If air pressure drops to 45 pounds per square inch, the emergency brakes automatically apply to stop the truck. (Exhibit R-1, Page 2).

The truck's surface brakes include all four wheels. The rear brakes which are disc brakes, according to the Caterpillar Company's specification guide (Exhibit R-1), resist fading even with repeated braking. If pressure drops below 60 PSI in the surface retarder system, a buzzer and red light warn the operator of the truck. The rear disc brakes are designed to absorb high torque loads at the wheels, reducing stress on the power train. The adjustment free discs and each rear brake are fade resistant because the oil which surrounds them is continuously cooled by a water-to-oil heat exchanger. The rear brakes have two master cylinders, one for each wheel, while the front brakes have one master cylinder (Exhibit R-1, Page 3; testimony of Linwood Young). The front brakes can be deactivated by a "front wheel brake control lever" on the righthand side of the dashboard of the truck (shown in Exhibit R-2 at Page 7), the purpose of which will be shown more clearly subsequently herein.

The truck which weighs 60,760 pounds has a capacity of 35 tons (Exhibit R-1, Pages 1 and 5) and is designed to go down grades steeper than 20 percent. (Testimony of Linwood Young; See also brake performance chart, Exhibit R-1, Page 6). Thus, although the grade of the haulageway in question is steep, the truck is designed to handle steeper grades.

Because of its width, there is room on the haulageway for trucks going in different directions to pass each other.

On August 24, 1981, and at the time observed by Inspector Haynes, the diaphragm was ruptured in the air brake chamber which provided air pressure for the left and right front brakes. The degree to which this condition reduced braking power of the front brakes is conjectural. 1/

The surface of the haulageway is wet approximately 50 percent of the time (testimony of Frederick Miller), and when the surface is wet a majority of the truck drivers transporting overburden over the haulageway would drive the Caterpillar trucks with the front brakes switched off, the reason being that when the road is slippery applying the front brakes could create the situation where the front wheels would lock up and cause the rear axle to swing around (testimony of Frederick Miller). 2/

The dispositive question involved in this proceeding is whether the brakes on the truck were "inadequate," or as stated in the precise language of the regulation itself, whether this piece of mobile equipment 3/ was "equipped with adequate brakes."

Various subissues not having direct relevance to this issue were litigated at some length during this proceeding presumably for purposes of lessening the credibility of witnesses and the weight to be attached to various aspects of their testimony, and also for the purpose of creating a factual background from which inferences could be drawn. However, in the final analysis, the critical question in this case comes down to a determination of what facts are to govern the "adaequacy" issue. One of the difficulties is that the regulation itself provides no clear guidance as to what is to be considered "adequate brakes." Such a regulation necessarily must be articulated in somewhat general terms in order to cover the myriad of equipment used in the mining industry. In considering what constitutes adequate brakes at least some of the factors which must be considered are the overall braking system of a given vehicle, the uses to which it is to be put, and the conditions under

1/ Inspector Haynes in his testimony indicated that because the front brake chamber was ruptured there were no foot brakes. There is, however, no evidence that the front brakes were inoperable and the testimony of Frederick Miller, the mine superintendent at the No. 2 mine, to the effect that while there was an air leak in the front brakes "they were not inoperable" is credited.

2/ I infer from Miller's testimony that loss of control of the truck could occur on the haulageway's grade by applying the brakes to the front wheels.

3/ The parties stipulated that the 769(b) truck in question was "mobile equipment" within the meaning of the regulation.

which it is to be used--all of which should be considered in the background of the experiences and common understanding of the particular facet of the industry in question. No specific factual standard for determination of what "adequate brakes" would mean insofar as the truck in question is concerned was delineated by the Secretary, nor has such standard been delineated to my knowledge by the Secretary either through administrative action, promulgation of other regulations, or in other ways. Thus, the standard by which "inadequacy" is to be measured is absent from the Secretary's proof, if indeed there is such an ascertainable standard. 4/

The clear language of the regulation establishes a requirement only that mobile equipment shall be equipped with adequate brakes. Such a regulation as this without specific standards does not provide constitutionally sufficient warning to a mine operator unless interpreted to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. See United States v. Petrillo, 332 U.S. 1, 91 L.Ed. 1877 (1947). Unless the mine operator has actual knowledge that a condition or practice is hazardous, the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against some hazard. Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHA, 512 F.2d 1148 (1st Cir., 1975).

In the instant proceeding there was evidence with respect to the common understanding and experience of those working in the industry from Respondent's witness Linwood Young, an employee of Walker Machinery (an equipment supplier of Respondent

4/ The Secretary did introduce evidence in the form of an opinion expressed by Inspector Haynes which was apparently based completely on the hearsay opinion of a mechanic with whom he discussed the matter the day before the hearing commenced. This opinion stated by the Inspector was that the truck, because of the defect in the front brakes, "would lose 30 to 35 percent of its stopping ability." One is left to speculate, however, whether the mechanic's opinion of this loss was based on an assumption that all of the front braking power was lost--which I, again, note was apparently the Inspector's belief--or based on the assumption that there was some degree of loss which was unspecified resulting from the ruptured diaphragm.

I am unable to accept this opinion of the Inspector which was nothing more than his expression of the opinion of another who was not present for cross-examination, whose qualifications to render such an opinion were not delineated, and the bases for whose opinion on this critical question are unknown since they were not expressed.

Likewise, the opinion of Robert Dearfield, the second witness who testified for the Secretary in this proceeding, that after the truck was "fixed" subsequent to issuance of the citation he "could stop it in almost half the distance" was overwhelmed by the evidence presented by Respondent, the acceptance of which is reflected in my general fact findings here and above.

and a representative of Caterpillar), to the effect that field tests had been performed on the Caterpillar truck in the early 1970's with the 769 truck carrying a gross test weight of approximately 131,000 pounds (similar to a truck carrying a 70,000 pound load) travelling at a speed of 20 miles per hour and rated in terms of stopping ability with both the rear and front brakes on and with only the rear brakes on. Tested with the front brakes deactivated the stopping distance was 74 feet, whereas with the front and rear brakes both operating the stopping distance was 54 feet. According to Mr. Young, whose testimony I credit and which was not rebutted by the Secretary, OSHA guidelines mandate a performance acceptability of 143 feet stopping distance. Thus, even with the front brakes off such tests indicate that the 769(b) truck has approximately a 100 percent margin of safety. In addition, other clear unrebutted testimony in this case indicates that the primary, if not overall, braking payload on the 769(b) truck is carried in the rear braking system. This is also reflected in the truck's specifications by the disparity between the braking surfaces of the rear brake (7,869 square inches) and the front brake (496 square inches), the fact that there is actually a cut-off switch on the dashboard to deactivate the front braking system, and the very credible evidence in the record that approximately 50 percent of the time it might be preferable practice to drive the truck--when the surface of the haulage way is wet--with the front braking system deactivated.

Can it be said that the defect in the front braking system caused this truck to be without "adequate" brakes? I find that on the basis of the evidence of record that the answer to this question is no, particularly when it appears that for a significant percentage of the time it is the preferable practice to operate without the front brakes and that a majority of the drivers do so. 5/

Accordingly, I find that the condition of the truck in question at the time it was cited by Inspector Haynes on August 24, 1981, was such that it was provided with adequate brakes within the meaning of the pertinent regulation. Since I find no merit in the Secretary's petition with regard to this citation, Citation No. 886455 is vacated.

5/ As Respondent points out (1) it was charged, (2) this proceeding was processed, and (3) this matter was litigated on the basis of an allegation of violation of 30 CFR 77.1605(b). While it is possible that a violation of 30 CFR 77.1606(c) occurred, that was not litigated or established by evidence which I can accept in this proceeding. This latter regulation (77.1606(c)) provides "equipment defects affecting safety shall be corrected before the equipment is used."

Withdrawal Order No. 886456

The proposed settlement involving Withdrawal Order No. 886456 dated August 24, 1981, was approved at the hearing. The Petitioner's motion at the hearing to modify this Section 104(d)(1) Withdrawal Order to a simple Section 104(a) citation with the "significant and substantial" allegation contained on the face of the order deleted was granted. See Secretary v. Consolidation Coal Company, 4 FMSHRC 1791 (October 29, 1982). The parties agreed that an appropriate penalty for the citation is $50 since it appeared that the hazard contemplated was less than originally believed, thus diminishing the penalty assessment factor of seriousness.

In view of the modification and resultant reduction in the gravity of the violation, the settlement is approved.

Withdrawal Order No. 886459

The Secretary's motion to withdraw the penalty assessment petition insofar as it related to Withdrawal Order No. 886459 was granted at the hearing and the Order was vacated.

ORDER

(1) Citation No. 886455 is VACATED.

(2) With respect to Order of Withdrawal No. 886456, Respondent, within 30 days from the date hereof, shall pay the Secretary of Labor a penalty in the sum of $50.00.

(3) Withdrawal Order No. 886459 is VACATED.

(4) All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr., Judge

Distribution:

Matthew Rieder, Esq., Office of the Solicitor, U. S. Department of Labor, 3535 Market St., Rm. 14480, Philadelphia, PA 19104 (Certified Mail)

Susan Cannon-Ryan, Esq., Denny & Caldwell, 1110 Kanawha Valley Bldg., Charleston, WV 25301 (Certified Mail)

T. W. Tolley, Safety Director, Ford Coal Company, P. O. Box 175, Hansford, WV 25103