MARCH 1985

Commission Decisions

Administrative Law Judge Decisions

MARCH

The Commission directed the following case for review during the month of March:

Chapman Merrell v. Peabody Coal Company, Docket No. KENT 84-250-D. (Interlocutory Review of Judge Broderick's December 7, 1984 Order.)

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

United States Steel Mining Company, Inc. v. Secretary of Labor, MSHA, Docket No. WEVA 84-335-R. (Judge Melick, January 30, 1985)

Local Union 8454, District 17, United Mine Workers of America v. Pine Tree Coal Company and Buffalo Mining Company, Docket No. WEVA 84-65-C. (Judge Broderick, February 15, 1985)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 28, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 83-178-R
LITTLE SANDY COAL SALES, INC.	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). Edgar Everman, the owner of Little Sandy Coal Sales, Inc. ("Little Sandy"), is proceeding without the assistance of counsel. We granted Mr. Everman's petition for review of a decision by a Commission administrative law judge. 5 FMSHRC 1793 (October 1983)(ALJ). For the reasons stated below, we remand this case for further proceedings.

On March 10, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the Little Sandy surface facility in Grayson, Kentucky. The inspector issued the company twelve citations for conditions alleged to be in violation of mandatory safety and health standards. Mr. Everman objected to the issuance of the citations on the ground that Little Sandy was not a "mine" subject to Mine Act coverage. For purposes of litigating this threshold question, MSHA selected one of these citations and on March 18, 1983, issued a "no area affected" withdrawal order for failure to abate the cited violation. 1/ Subsequently, on April 6, 1983, Mr. Everman filed a notice of contest asserting that Little Sandy was a "retail coal yard" not subject to the Mine Act. The Secretary filed an answer to the notice of contest alleging that Little Sandy was a "mine" within the meaning of the Act.

1/ The citation charged Little Sandy with a violation of 30 C.F.R. § 71.500, a mandatory health standard for surface coal mining operations. Section 71.500 requires operators to provide approved sanitary toilet facilities. The Secretary has indicated that the abatement period for the outstanding unabated citations and order has been extended until after the coverage issue is resolved.

On April 15, 1983, the judge assigned to this case issued a pre-trial order stating that the "only issue appears to be whether Little Sandy ... is a mine within the meaning of the ... Act...." The judge directed the parties to advise him as to whether they could agree to a stipulation of facts relevant to determination of that issue. In response to the judge's pre-trial order, counsel for the Secretary of Labor submitted the following description, agreed to by the parties, of the Little Sandy operation:

> This operation is comprised of a scale, scale house, parts and lubricant storage trailer, and a coal processing apparatus consisting of a raw coal hopper, raw coal feeder and belt, a crusher with load out belt and a screening unit thereto. The coal produced therefrom takes approximately three forms:
>
> 1. Crusher coal
> 2. Stoker
> 3. Fine coal or "carbon"
>
> The whole plant is situated on a site of approximately 1¼ acres. The stockpiles area is approximately 3/4 acre in size with the processing apparatus being about 100 feet long, and it is powered by 440v commercial power as well as diesel power for driving the crusher.

On August 10, 1983, the judge issued a notice of hearing informing the parties that the hearing on the merits was scheduled for September 8, 1983, at 10:00 a.m. On August 15, 1983, the judge issued a supplemental notice stating that the hearing would be held in Pikeville, Kentucky, at the previously announced time. On September 7, 1983, the judge arrived in Pikeville for the hearing and received a telephone call from his secretary in his Falls Church, Virginia office. The secretary informed him that Mr. Everman had telephoned to say that he could not attend the hearing due to an illness. Mr. Everman had left with the judge's secretary his home and business numbers, and had indicated that he would be home after 4:00 p.m. that day.

On September 8, 1983, the judge convened the hearing at 10:00 a.m., and waited until 10:20 a.m. for Mr. Everman to appear. The judge then telephoned his secretary and asked that she call Mr. Everman. She called Mr. Everman's office and was told that he was not there but was expected. She also called Mr. Everman's home but received no answer. The judge returned to the hearing and announced that he was not holding Mr. Everman in default, but ruled that by his absence Mr. Everman had waived his right to cross-examine the government's witnesses. 5 FMSHRC at 1793-94; Tr. 2. The judge also stated that in the event Mr. Everman produced a doctor's certificate indicating that he was too sick to attend the hearing and testify, the judge would permit Mr. Everman to submit a statement with regard to his position in the case. Id. The judge then proceeded with the hearing and heard the Secretary's evidence.

When the judge returned to his office, he received a telephone call from Mr. Everman, who apologized for not attending the hearing. The judge told Mr. Everman that if he would send him a doctor's certificate, the judge would allow Mr. Everman to submit further evidence but would not reopen the hearing to allow Mr. Everman to cross-examine the government witness who had testified at the hearing. On September 26, 1983, Mr. Everman submitted a post-hearing brief, attached to which was a doctor's note stating, "Mr. Everman was unable to attend due to illness."

In his decision, the judge recited the events leading up to Mr. Everman's absence from the hearing. 5 FMSHRC at 1793. The judge adhered to his ruling at the hearing that "Mr. Everman [was not] in total default but ... by failure to appear he ... waived his right to cross-examine the government witnes[s]." 5 FMSHRC at 1794. The judge further indicated that the note from Mr. Everman's doctor was inadequate to justify his failure to appear. Id. The judge did consider, however, the arguments in Mr. Everman's post-hearing brief concerning whether Little Sandy is subject to Mine Act coverage.

With regard to the coverage issue, the judge summarized Little Sandy's contentions, especially its claim that its surface facility closely resembled the operation held by the Commission not to be a "mine" under the Mine Act in Oliver M. Elam, Jr., Company, 4 FMSHRC 5 (January 1982). The judge rejected Little Sandy's position that Elam was controlling, and distinguished that case from the present proceeding on several grounds. 5 FMSHRC at 1794-95. The judge cited the Commission's decision in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), as dispositive of the coverage issue and concluded that the Little Sandy facility was a "mine" within the scope of the Act. 5 FMSHRC at 1795.

On review, Little Sandy, in part, maintains that under the circumstances the judge erred in not permitting it to participate in the hearing by presenting evidence and cross-examining the Secretary's witness in a continued or reopened hearing. We find merit to this objection.

Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b), provides:

> A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

The rights embodied in Rule 60(b) are integral to the basic due process accorded a party in litigation under the Mine Act. Of course, we are mindful that there is no absolute constitutional requirement of confrontation in a federal administrative proceeding. See, e.g., Central Freight Lines, Inc. v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982). Indeed, our Rule 60(b) is modeled on section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), and both provisions confer on

parties the right to conduct only such cross-examination "as may be required for a full and true disclosure of the facts." Due process in an administrative forum "calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976). See also Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 1707, 1711 (July 1981). Nevertheless, the importance of cross-examination is sufficiently basic that we are not prepared to approve its outright denial in proceedings before our judges for less than compelling reasons.

We recognize that the judge and the Secretary suffered inconvenience (and the government sustained expense) as a result of Mr. Everman's failure to appear on schedule. Mr. Everman, however, informed the judge that he would be unable to attend due to illness. Mr. Everman provided the judge's secretary with telephone numbers at which he could be reached that day, in addition to indicating the time at which he would be home. On this record, we discern in these actions a good-faith effort by Mr. Everman to contact the judge and to minimize the inconvenience his absence would cause. It does not appear that the judge attempted to contact Mr. Everman on September 7, 1983, after he had received this message through his secretary. It was only the next morning, after commencement of the hearing, that the judge had his secretary call Mr. Everman's home and office numbers in an effort to reach him. Having been unsuccessful in contacting Mr. Everman, the judge determined that by his absence Mr. Everman had waived his right to cross-examine the Secretary's witnesses. Following the hearing, Mr. Everman telephoned the judge and apologized for his absence. He also complied with the judge's request to provide a signed doctor's note to the effect that he had been unable to attend the hearing due to an illness. Although the doctor's note could have provided more detail, nothing on this record indicates that Mr. Everman's claim of illness was not bona fide.

We also must assign weight to the fact that this proceeding was intended to be a test case to determine whether Little Sandy's facility is covered by the Mine Act. On review, Mr. Everman argues, in essence, that other facilities in Kentucky, allegedly similar to his own, are not regulated by MSHA and that he wishes to explore this line of inquiry through cross-examination and the calling of other witnesses. The Secretary has not argued that a continued or reopened hearing would have prejudiced his case. In these circumstances, Little Sandy should be given an appropriate opportunity to develop a complete record to support its position that it is not covered by the Mine Act.

Accordingly, we vacate the judge's decision and remand this matter for proceedings consistent with this decision. Little Sandy is to be allowed to cross-examine the Secretary's witness and to submit additional evidence on the issue of Mine Act coverage involved in this case. 2/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 28, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 82-190-D
on behalf of PHILLIP CAMERON	:	
v.	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This case involves a complaint of discrimination filed by the Secretary of Labor with this independent Commission pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). The complaint alleged that Consolidation Coal Company ("Consol") violated section 105(c) of the Mine Act when it disciplined Phillip Cameron following his refusal to perform his work assignment. Cameron believed that to carry out the assignment would endanger a miner working with him, although he foresaw no danger to himself. A Commission administrative law judge dismissed the discrimination complaint, concluding that the Mine Act does not extend a protected right to a miner to refuse to perform work when the danger perceived is to the safety of another miner. 4 FMSHRC 2205 (December 1982)(ALJ).

We granted petitions for discretionary review filed by the Secretary of Labor and the United Mine Workers of America ("UMWA"), and heard oral argument. For the reasons that follow, we reverse and remand for further proceedings.

At the time of the events at issue, Phillip Cameron was a haulage motorman at Consol's underground Ireland coal mine. Cameron operated a 27-ton locomotive or "motor" that pulled a train or "trip" of loaded coal cars. Cameron transported the loaded trip from a belt head on a siding in his section, onto and along the main haulageway, to the main dumping point for the mine. Until the time of the events at issue, it had been the procedure in Cameron's section to use a safety switch to prevent loaded cars from rolling back into the mine in the event of an uncoupling. The safety switch would derail uncoupled cars, sending them into the rib or wall of the mine, thereby avoiding a more dangerous "runaway" situation. Cameron was working with another miner, Elmer Aston, who was temporarily assigned to haulage.' Aston's responsibilities

included helping to gather the empty cars at the dump and composing a new trip of full cars at the siding. He rode with Cameron on the locomotive and was receiving on-the-job training as a motorman.

On Saturday, October 31, 1981, Cameron and Aston were informed by Edward Gibson, their section foreman, that the haulage procedure had been changed. The new procedure involved adding a "trailing motor" to the trips. In the event of an uncoupling from the lead motor, instead of relying on the safety switch to prevent runaways, the trailing motor was to apply its brakes to stop the cars. Gibson explained that a 10-ton trailing motor was to be used. Cameron and Aston told Gibson that they thought a 10-ton motor was too small to control a detached trip. They requested permission to use a larger trailing motor until they had a chance to discuss the matter with the UMWA safety committee at the mine. The mine was not at full production that day and a 50-ton motor was available. Foreman Gibson permitted the 50-ton motor to be used as the trailing motor, but informed Cameron and Aston that the larger motor would not be available on the following Monday, and that a 10-ton trailing motor would be used thereafter.

That night Cameron called David Shreves, a UMWA International safety representative, to inquire about the directed use of a 10-ton trailing motor. According to Cameron, Shreves agreed that a 10-ton motor was inadequate to control disconnected coal cars and indicated that if a problem arose on the job, Cameron should contact the local UMWA safety committee.

At the start of their shift on the following Monday, Cameron and Aston were told by Gibson to use the 10-ton trailing motor. Both men expressed concern for the safety of the procedure, requested that the UMWA safety committee be consulted and refused to perform their assignments. 1/ Although as lead motorman Cameron's safety was not threatened by the new procedure, he expressed fear for Aston's safety in the event of an uncoupling. 2/ Foreman Gibson sent the men to the shift foreman, Richard Fleming. Attempts by Fleming to persuade the men to use the 10-ton motor were unsuccessful. Mine Superintendent Robert Omear was contacted and he instructed Fleming to prepare a test to demonstrate the safety of the procedure. In the interim, Cameron and Aston performed alternate work.

Tests of the 10-ton motor's braking ability were then conducted in Cameron's section. Cameron, Aston, the UMWA safety committee, and various management officials were present. Cameron and Aston designated the track location they believed to have the steepest grade. The first test was intended to determine if the 10-ton motor could hold a loaded trip on this incline. The trip was stopped on the incline, the brake was set on the trailing 10-ton motor, and the brake on the lead motor was released. The 10-ton trailing motor held. The second test involved

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1/ While there is some inconsistency in the testimony concerning whether Cameron refused to work or merely requested consultation with the safety committee, the judge found that Cameron refused to perform his assigned work. This finding is not challenged on review and the record supports this conclusion.

2/ Cameron also expressed concern that when a more senior motorman returned from sick leave, he (Cameron) would be riding the trailing locomotive. In this regard, the judge found that Cameron's fears for his own safety were "too remote and speculative" to support the work refusal at issue. Neither the Secretary nor the UMWA take issue with the judge's finding concerning Cameron's personal safety.

letting the loaded trip drift backwards 10 feet before the trailing motor's brakes were applied. The 10-ton motor stopped the trip. Cameron, Aston, and the safety committee were concerned that the tests were inadequate and they remained dissatisfied with the safety of the procedure. Nevertheless, they thereafter used the 10-ton trailing motor without subsequent work refusals.

Because of their continued concerns, however, on Thursday, November 5th, a further test was performed for state and federal mine inspectors. In this test the loaded trip, with the lead locomotive attached, was allowed to coast backwards 100 feet before the 10-ton trailing motor's brakes were applied. The trip stopped within 150 to 200 feet of the point at which braking had commenced. The inspectors were satisfied with the ability of the 10-ton trailing motor to act as a brake. Although Cameron, Aston, and the UMWA safety committee remained unconvinced, Cameron and Aston continued to perform their assigned duties.

On Friday, November 6, Cameron was given a five-day suspension as a result of his refusal on the preceding Monday to perform his assigned duties. (Through a contractual arbitration process, Cameron's suspension was later reduced by one day). Aston was not disciplined. 3/

The administrative law judge found that Cameron had engaged in a work refusal and that he was disciplined by Consol because of this refusal. The judge further found that Cameron's belief about the safety hazard posed to Aston was held in good faith and was reasonable. The judge concluded, however, that the Mine Act does not extend protection for a work refusal to situations where a miner himself is not threatened by continued performance of work, but there is a perceived risk to another miner. Finding that Cameron therefore did not engage in activity protected by the Mine Act, the judge dismissed Cameron's discrimination complaint.

We disagree with the judge's holding concerning the scope of the right to refuse work under the Mine Act. As discussed below, we hold that, in certain limited circumstances, the Mine Act extends protection to a miner who refuses to perform an assigned task because such performance would endanger the safety or health of another miner.

Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicants for employment in any coal or other mine subject to this Act ... because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

3/ The operator's reason for not disciplining Aston was because at the time of the work refusal he was inexperienced and "visibly frightened." Cameron had worked at the mine since 1969.

30 U.S.C. § 815(c)(1)(emphasis added). The Secretary and the UMWA point to this statutory language as support for their view that the Mine Act protects a miner's refusal to perform work that endangers another miner. Consol asserts that the emphasized text is not even applicable to this case:

> The pronoun "himself" refers to the miner or applicant for employment. The pronoun "other" relates to the representative of miners. Obviously, an individual exercises his own rights, and a representative exercises the rights of those he represents -- in other words, the rights of others.

Reply Brief at 10.

Although we agree with Consol that a "representative" exercises the rights of others, there is nothing inherent in the construction of section 105(c)(1) that limits the ability to exercise statutory rights "on behalf of others" exclusively to representatives of miners. Rather, the phrase logically can be read to have grammatical and substantive application to all three categories of protected persons referred to in section 105(c). Furthermore, in common usage the phrase "on behalf of" is not limited in meaning to actions taken in a representative capacity. Actions on behalf of others also are actions "in the interest of" or "for the benefit of" others. Webster's Third New International Dictionary (Unabridged) 198 (1971). We conclude, therefore, that the text of section 105(c)(1) supports the extension of protection, in appropriate circumstances, to individual miners exercising statutory rights on behalf of others. Accord, Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 134 (February 1982).

An individual miner's right to refuse to perform work in conditions posing a danger to himself is itself not found in the text of the Mine Act. It has come to be recognized and accepted, however, in view of clear legislative history, the overall statutory scheme and the underlying purpose of the Act. See, e.g., Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). Accord, Secretary v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), pet. for review filed, No. 84-3427, 11th Cir., July 19, 1984; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981).

In the present case, the parties cite the same legislative history relied on and discussed in the above-cited work refusal cases, but arrive at different conclusions as to its bearing on the existence of a miner's right to refuse work that threatens the well-being of another miner. 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 623-24; 1088-89; 1356 (1978). Consol argues, and the judge agreed, that this legislative history indicates that the right to refuse work is personal to the miner who is endangered. The Secretary and the UMWA argue that the legislative history indicates that a broad reading must be given to the Act's discrimination provisions, and that the right at issue is supported thereby.

Our review of the cited passages discloses no clear answer to the question before us. The legislative history does not specifically focus on or otherwise address the question of whether a miner may refuse an assignment that jeopardizes a co-worker's safety or health. Because of this lack of focus, we draw no relevant lesson from the use in the legislative history of the singular or plural form of words such as "his", "their", "miner", or "miners" in the discussion of the rights of miners. Id.

This Commission previously has stressed that, due to our adjudicatory function, we must give "cautious review" to any argument that the Commission recognize statutory rights claimed to exist despite "legislative silence" as to the asserted right. Council of Southern Mountains v. Martin County Coal Corp., 6 FMSHRC 206, 209 (February 1984), aff'd sub nom. Council of Southern Mountains v. FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985). Accord, UMWA v. Secretary of Labor, 5 FMSHRC 807, 810-15 (May 1983), aff'd mem., 725 F.2d 126 (D.C. Cir. 1983). We have further stated that although "[w]e do not quarrel with the general proposition that statutory rights and duties may be judicially inferred ... due respect for the limits of judicial power requires that any such inference be founded on a persuasive textual or legislative indication of the intended presence of the claimed right or duty. ... [T]here must be a persuasive nexus between that which is stated in a statute and that which is inferred from it." Council of Southern Mountains, supra, 6 FMSHRC at 209. We continue our adherence to these sound principles.

Unlike the asserted statutory rights that we rejected in Council of Southern Mountains and UMWA v. Secretary, in the present case we find the persuasive indication of the intended presence under the Mine Act of a miner's right to refuse to perform work that threatens the safety or health of another miner. This indication in part is derived from the "on behalf of others" language in section 105(c), but it is drawn primarily from the presence of the previously recognized statutory right of a miner to refuse to perform work that threatens his personal safety. We have reexamined the same legislative history and statements of Congressional concern requiring recognition of the latter right, and we can find no persuasive rationale for foreclosing the logical corollary at issue here. Certainly, given the force of Congressional concern for protecting the safety of miners expressed in the Mine Act, which concern led to the granting of a right to refuse unsafe work in the first place, it would be anomalous to hold that in exercising that right a miner could consider only a threat to his well-being without regard to whether that threat or another threat jeopardizes the safety or health of other miners.

We recognize the legitimate concerns of Consol regarding the need to maintain its ability to control its workforce effectively, particularly the need to avoid protecting under section 105(c) so-called "sympathy" work stoppages. To this end, we are in agreement with the statement by the Seventh Circuit in Miller v. FMSHRC, supra, that "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." 687 F.2d at 196. For this reason, a careful and reasoned examination of the circumstances proffered as justifying the exercise of this right is required whenever it is asserted.

We believe that the general analytical framework that has been established for evaluating the legitimacy of an individual miner's refusal to work under circumstances claimed to pose a danger to himself, when carefully applied, effectively can be used in examining a work refusal based on an asserted hazard to another miner. Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate, or at least attempt to communicate, to some representative of the operator his belief in the ... hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984) (emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.

It is in this latter regard that the judge's decision causes us some uncertainty. Although the judge did conclude that Cameron's "belief about the safety hazard was in good faith and was reasonable" (4 FMSHRC at 2211), he also found that some part of Cameron's fear was based on the experience level of the trailing motorman, rather than use of the trailing motor itself. 4 FMSHRC at 2216. The judge also stated that "it was clear to me ... that [Cameron] intended to reserve to himself the right to decide whether he would accept any other individual assigned by the operator to be his trailing motorman." Id. These statements conflict with the judge's previous finding concerning Cameron's reasonable, good faith belief that the procedure itself posed a hazard. Also, we are unsure as to what extent the judge's primary conclusion that the Act did not provide the right that we have recognized may have influenced his further findings and ultimate disposition. For these reasons, we deem it appropriate to remand this case for further consideration and findings in light of our decision.

Accordingly the judge's decision is reversed and this case is remanded for further proceedings consistent with this decision. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 28, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 82-322
U.S. STEEL MINING CO., INC.	:	

DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). The issue is whether a Commission administrative law judge correctly held that the violation of a mandatory safety standard by U.S. Steel Mining Co. ("U.S. Steel") was "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). For the reasons that follow, we affirm.

On June 18, 1982, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of U.S. Steel's Maple Creek No. 2 mine, located at New Eagle, Pennsylvania. During the inspection of the mine's haulage area the inspector observed that the power wires for an energized water pump, which came from the 550-volt trolley wire and passed through the pump's metal starting box, were not protected with a required bushing. The wires' insulation was intact and showed no excessive signs of wear. The inspector issued a citation alleging a violation of 30 C.F.R. § 75.515. 1/ The inspector also found that the violation was significant and substantial.

1/ 30 C.F.R. § 75.515 requires in part: "When insulated wires other than cables pass through metal frames, the holes shall be substantially bushed with insulated bushings."

U.S. Steel did not contest the fact of violation, but challenged the inspector's significant and substantial finding. At the hearing, witnesses for both MSHA and U.S. Steel agreed that at the time the citation was issued, there was no chance of the missing bushing causing an electrical shock because the insulation on the power wires was intact. However, the witnesses disagreed as to the prospective danger if the insulation on the wires was subsequently cut by the sharp edge of the metal box that they contacted. U.S. Steel's general maintenance foreman stated that the pump had several safety features that would eliminate the risk of electrical shock. He testified that if the insulation on the power wires wore through and the exposed conductors contacted the metal frame of the starting box, the circuit fuses would short circuit the pump, protecting any person coming in contact with the frame against electrical shock. The general maintenance foreman also stated that, apart from the primary grounding system, there was an additional frame ground system on the pump, that connected the frame to the rail of the nearby haulage track. If the fuses did not short circuit the pump, this additional ground would harmlessly ground electricity through the rail.

The inspector agreed that the pump had the built-in safety devices and that the devices were operational at the time he issued the citation. The inspector denied, however, that all of the devices would have to fail before anyone could be shocked. He testified that if the insulation on the power wires was damaged or broken, the ground wire could be severed and that a person touching the pump might then make a better ground than the frame ground itself. In such a case the fuse would not short circuit the pump and the person could be shocked or electrocuted.

The administrative law judge concluded that the violation was significant and substantial. The judge found that the pump vibrated and, in the absence of a bushing, the vibration could cause a cut in the insulation. He accepted the testimony of the inspector that the cut in the insulation could cause the pump to become the ground and, if the circuit protection failed, anyone touching the pump frame could be shocked or electrocuted. The judge concluded that the violation made such an occurrence reasonably likely. 5 FMSHRC 1788 (October 1983)(ALJ).

On review, U.S. Steel argues that the facts indicate that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial.

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. See 6 FMSHRC at 1836.

Applying these principles to the instant case, we affirm the judge's holding that the cited violation properly was designated significant and substantial. U.S. Steel's only witness did not deny that the missing bushing could contribute to a shock hazard. Rather, because of the pump's circuit fuses and its dual grounding system, he described the chance of miners being shocked or electrocuted as "very slight." Moreover, the inspector effectively testified that if the cited condition were left uncorrected an accident involving shock or electrocution was "reasonably likely" to occur. The inspector's statement that a person could serve as a better ground than the frame ground itself if the insulation on the wires was cut, was not refuted by U.S. Steel, and was accepted by the judge. The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground, we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.

Accordingly, we conclude that substantial evidence supports the judge's conclusion that the violation in this case was properly designated significant and substantial. U.S. Steel additionally argued

on review that the sole appropriate penalty for a violation that is not significant and substantial is $20. Although in view of our holding, it is unnecessary to reach that issue here, we previously have rejected this argument. See U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984). 2/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

Distribution

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 1 1985

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 83-280-R
v.	:	Citation No. 2022955; 9/6/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 83-281-R
	:	Citation No. 2022956; 9/6/83
	:	Docket No. WEVA 84-16-R
	:	Citation No. 2123823; 10/24/83
	:	Buckeye Preparation Plant

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Contestant;
James B. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on July 18, 1984, in Bluefield, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

Completion of the Record

At the hearing, counsel for the Secretary of Labor introduced Exhibits 1 through 10 and counsel for Consolidation Coal Company (Consol) introduced Exhibits A through O. Most of the exhibits introduced by Consol pertained to the transfer to Riverside Industries, Inc., of property owned by Consol. When I began to write the findings of fact to be included in this decision, I found that the legal instruments introduced by Consol at the hearing left ambiguities about some aspects of the transactions between Consol and Riverside. Therefore, I issued on October 16, 1984, an "Order Requiring Clarification of the Record". Consol's counsel replied to that order in a letter dated October 31, 1984. Attached to the letter were eight additional agreements and letters pertaining to the property transfer.

After I had reviewed the eight additional documents and Consol's letter of explanation, I concluded that I still could not make findings of fact concerning all aspects of the property transactions without additional information. Consequently, I wrote a letter dated November 5, 1984, to Consol's counsel and requested that he provide an additional explanation of certain aspects of the property transfer. Consol's counsel replied to my letter of November 5, 1984, in a letter dated November 9, 1984. Attached to the letter of November 9, 1984, were four supplemental documents pertaining to the property transfer. After I had read Consol's letter of November 9, 1984, and had examined the four supplemental exhibits, I found that the hearing record, as supplemented, provided sufficient information to support the 21 findings of fact which are hereinafter given.

Consol's counsel requested that the above-described supplemental information be received in evidence and offered to present witnesses at a supplemental hearing, if necessary, to support and explain the exhibits. The Secretary's counsel was given the opportunity to ask for any additional information or hearings which he might believe were necessary to complete the record or explain the additional documents submitted by Consol's counsel. The Secretary's counsel requested and was granted an extension of time so that he could examine the additional materials before submitting his reply brief. When counsel for the Secretary subsequently filed his reply brief, he agreed that the additional exhibits did not change the basic issues or arguments and agreed that the supplemental documents submitted by Consol in response to my order and letter should be admitted in evidence (Secretary's reply brief, p. 1).

I find that the additional information supplied by Consol is needed to complete the record in this proceeding. Therefore, there is marked for identification as Exhibit P a two-page letter dated October 31, 1984, addressed to me from Consol's counsel, including the eight documents described in the letter and attached to the letter. There is marked for identification as Exhibit Q a two-page letter dated November 9, 1984, addressed to me from Consol's counsel including the four documents described in the letter and attached to the letter. With agreement of the Secretary's counsel, Exhibits P and Q are received in evidence.

Issues

Counsel for Consol and the Secretary filed their initial briefs on October 1, and 15, 1984, respectively, and their reply briefs on October 23, 1984, and December 26, 1984. Consol's initial brief raises the following issues:

1. Does the Commission have the jurisdiction and authority to find Consol liable for citations issued for alleged violations of mandatory standards on a refuse pile in view of the fact that the citations were issued when Consol did not operate, control, or own the refuse pile?

2. Does the Commission have the jurisdiction and authority to order Consol to abate citations on a refuse pile which Consol does not operate, does not control, and does not own?

3. Were the citations validly issued against Consol?

4. Did the Secretary prove that the cited conditions are violative of the mandatory standards and did he prove Consol's liability for those conditions?

The Secretary's initial brief expresses the issues as follows:

1. Is Consolidation Coal Company liable as operator of the Buckeye Preparation Plant for violations under the Federal Mine Safety and Health Act of 1977 related to the refuse pile associated with the plant, assuming it owns the Preparation Plant itself due to an executed security agreement?

2. Does MSHA have jurisdiction over mine health and safety matters at a mine or related facility when no miners are affected but the adjacent properties and nearby persons are affected?

3. Did the violations alleged in Citation Nos. 2022955, 2022956, and 2123823, and contested by Consol in Docket Nos. WEVA 83-280-R, WEVA 83-281-R, and WEVA 84-16-R, respectively, occur?

It is obvious from the differences in which the parties express the issues that Consol is claiming that it does not own, control, or operate the refuse pile which resulted from operation of the plant, whereas the Secretary is claiming that Consol's admitted ownership of the preparation plant is necessarily associated with control and operation of the refuse pile.

A discussion of the parties' contentions must be based upon an understanding of the somewhat complicated factual background leading up to the issues raised in this proceeding. The testimony of the witnesses and the documentary evidence support the following findings of fact which will be used as the basis for resolution of the issues raised by the parties.

Findings of Fact

1. Section 109(d) of the Act and 30 C.F.R. § 41 require the operator of a coal mine to file with the Secretary of Labor the name and address of the mine and the name and address of the person who controls or operates the mine. Those sections of the Act and regulations also require each operator to designate a responsible official at each mine to receive a copy of any notice, order, citation, or decision issued under the Act. MSHA has prepared Legal Identity Report Form No. 2000-7 for the purpose of enabling operators to report the information required by the Act and regulations (Tr. 75; 96; 99; 101; Exh. 7).

2. According to the legal identity forms on file with MSHA, Pocahontas Fuel Company, a division of Consolidation Coal Company, began operating a mine, known as the Buckeye Mine, in Wyoming County, West Virginia, near the town of Stephenson, West Virginia, in 1963. The Buckeye Mine was then operated by Consol's Southern Appalachian Region, and then by Consol up to 1978, at which time Consol stopped producing coal from the Buckeye Mine, apparently because it became an unprofitable operation (Tr. 28; 72; 140).

3. Coal produced in the Buckeye Mine was transported by conveyor belt to the Buckeye Preparation Plant which was also owned and operated by Consol. Refuse from the preparation plant was trucked a distance of about 1,600 feet to a refuse pile (Tr. 34). That pile runs parallel to a county road for about 900 feet, extends back from the county road approximately 1,200 feet, and is about 200 feet high (Tr. 103). The pile does not impound any water because diversion ditches have been constructed to prevent water from being trapped behind it (Tr. 104).

4. Consol's operations at the Buckeye Mine and Preparation Plant were done under a lease obtained from a nonaffiliate, Pocahontas Land Company. Consol signed a letter agreement dated April 16, 1980, with Riverside, Inc., in which Consol agreed to sell to Riverside all of its personal property in the Buckeye Mine and Preparation Plant, plus Consol's leasehold rights to the property, with the consent of Pocahontas Land Company, to Riverside for $1,500,000 with a sum of $250,000 to be paid by Riverside on the date of closing and the remaining amount of $1,250,000 to be paid in seven equal installments plus 13 percent interest (Tr. 167-168; Exh. P). Riverside made a down payment of $250,000 on the date of closing, but $50,000 of that sum was used by Consol as payment for some mining supplies which had not been included in the long list of equipment which Consol had agreed to sell to Riverside for $1,500,000. Therefore, the principal sum of $1,500,000 was reduced by $200,000 to $1,300,000

and then by an unexplained sum of $2.00 to an amount of $1,299,998 which the Bill of Sale (Exh. M) required Riverside to pay in seven installments of $185,714 with 13 percent interest (Exh. Q).

5. The entire transaction between Consol and Riverside was subject to a security interest evidenced by Riverside's promissory note in the amount of $1,299,998 (Tr. 171). If Riverside defaulted in any way in making payments, Consol had the right to repossess all of the equipment in the Buckeye Mine and Preparation Plant (Exhs. G; I through O).

6. Soon after the signing of the agreements described in finding Nos. 4 and 5 above, Riverside became involved in a dispute with Consol about Consol's alleged failure to convey an additional shuttle car and some conveyor equipment. When Consol refused to agree with Riverside's interpretation of the basic agreements, Riverside brought a court action to try to obtain the disputed equipment. The action was settled so that Riverside did not have to pay an additional amount of $453,000 referred to in an Amendment to Security Agreement (Exh. L). Consol agreed to return Riverside's promissory note marked "canceled" and Consol also delivered two shuttle cars to Riverside as part of the settlement (Exh. Q).

7. An agreement between Riverside and Consol dated August 14, 1981, states that Riverside failed to pay the first installment of the purchase price when it was due on June 27, 1981, and provided that Riverside would pay $200,000 by August 27, 1981, plus $196,963.67 on or before September 27, 1981, or a total of $396,963.67 by September 27, 1981 (Exh. P). Riverside interpreted the agreement differently from Consol and paid a different amount of $354,713.74 on August 27, 1981, such amount having been comprised of a regular installment of $185,714 in principal and $168,999.74 in interest (Exh. Q).

8. Riverside then filed a proceeding in the United States Bankruptcy Court for the Southern District of West Virginia (Tr. 169). The payment of $185,714 in principal referred to in finding No. 7 above reduced the amount still owed by Riverside to $1,114,284 at the time the bankruptcy proceeding was initiated. The sum of $1,114,284 continued to be subject to 13 percent interest which amounted to $12,071.41 per month (Exh. Q). The bankruptcy court approved a settlement on March 11, 1982, allowing Consol to regain possession of its "collateral" consisting of the mine equipment in the Buckeye Mine and the Preparation Plant, including all equipment in the plant. At the time Consol reacquired its property, the 8 months of interest had increased the amount owed to Consol by Riverside to $1,211,759.20 (Exhs. H and Q).

9. When Consol reacquired the equipment in the mine, the equipment in the plant, and the plant structure itself, Consol claims that it did not reacquire any of the leasehold rights which it had transferred to Riverside and Consol claims that it has no right to perform any kind of work at the Buckeye Mine or Plant except for the express permission granted in the conveyances which specifically permit Consol to go on the mine property for the purpose of removing any of the equipment in the mine or at the preparation plant (Tr. 176-178).

10. During the period from 1978, when Consol stopped mining coal in the Buckeye Mine and ceased processing coal in the Buckeye Preparation Plant, up to June 27, 1980, when Consol transferred its leasehold and property rights to Riverside, MSHA's legal identity reports continued to show Consol as the operator of the Buckeye Preparation Plant and Refuse Pile. It is MSHA's position that a preparation plant cannot be operated without having access to a refuse pile where it can dump the refuse which results from processing raw coal (Tr. 96-97; 118-119). Under the provisions of 30 C.F.R. § 77.215, MSHA declared the Buckeye refuse pile to be a hazardous refuse pile because a burning pile may produce gases which can cause explosions (Tr. 115-116). After a pile has been found to be hazardous, the operator of the pile is thereafter required to file an annual report showing what the conditions at the pile are and also is required to certify annually that the pile is being maintained in accordance with applicable engineering and environmental criteria. Consol submitted such reports in 1979 although it was not actively mining coal from the mine or processing coal in the plant (Tr. 129; Exh. E).

11. During Consol's inactive coal-producing period from 1978 to June 27, 1980, MSHA issued Citation No. 637725 [not contested in this proceeding] on May 24, 1979, alleging that Consol had violated 30 C.F.R. § 77.215(h) because the slopes on the refuse pile exceeded 2 horizontal to 1 vertical and that materials from the slope were sliding out into the road after a period of rainfall so as to cause possible injury to persons traveling on the road (Tr. 64; Exh. 8). MSHA extended the time for compliance to September 21, 1979, because rainy weather had prevented Consol from completing work on the slopes. MSHA took no further action as to the alleged violation until June 24, 1981, at which time MSHA modified the citation to indicate that the operator of the refuse pile had been changed from Consol to Riverside. On that same date, MSHA extended the time for abatement to August 10, 1981, because of a work stoppage and the change in operator. The time for abatement was subsequently extended to October 20, 1981, with the observation that work was in progress to make the slopes 2 to 1 and that more time was needed to continue abatement work. A final extension of time was granted to May 1,

1982, indicating that some work had been done to abate the citation, but that Riverside was in bankruptcy and that the time for abatement needed to be extended to allow the matter to be resolved. On September 23, 1982, MSHA wrote Withdrawal Order No. 2002003 under section 104(b) of the Act on the ground that "[l]ittle effort has been made to abate the citation on the outslopes." (Tr. 65-69).

12. Before Consol conveyed the Buckeye Mine and Preparation Plant to Riverside, MSHA had sent Consol a letter dated August 30, 1979, advising Consol that its next annual report for the Buckeye Refuse Pile was due on March 4 1980 (Tr. 95; Exh. 9). Consol did not transfer the Buckeye operations to Riverside until June 27, 1980 (Tr. 171-172). Consequently, Consol should have submitted the annual report before it transferred the refuse pile to Riverside. By the time MSHA realized that the annual report had not been timely submitted, Consol had conveyed the Buckeye Mine and Preparation Plant to Riverside. Therefore, MSHA issued Citation No. 884652 on October 8, 1980, alleging that Riverside had violated section 77.215-2(c) by having failed to submit the annual report which was due on March 4, 1980 (Tr. 92; Exh. A). MSHA also issued Citation No. 884653 on October 8, 1980, alleging that Riverside had violated section 77.215-3(b) by failing to submit the annual certification for the refuse pile which was due on August 16, 1980 (Tr. 93; Exh. B). Riverside abated both alleged violations by filing the required reports within the time given in the citations (Exhs. A and B).

13. As indicated in finding No. 8 above, Consol reacquired the equipment in the Buckeye Mine and Preparation Plant, as well as the plant structure itself, on March 11, 1982. Consol did not file a legal identity report to show that it had reacquired the preparation plant until January 4, 1983. Consol contends that since it had reacquired only the plant structure and the equipment in the plant, without reacquiring any of the leasehold rights needed for producing coal to be processed in the plant, that it was not required to file a legal identity report except for the purpose of showing changes which had occurred in its supervisory personnel (Tr. 151). Consol had previously received Citation No. 881531 on March 4, 1981, for failure to file a new legal identity form to notify MSHA of a change in personnel (Tr. 152). Therefore, Consol claims that it submitted a legal identity form on January 4, 1983, solely to show the names of persons to receive correspondence from MSHA with respect to the Buckeye Plant (Tr. 155; Exh. 7). Consol claims that its filing of the legal identity form on January 4 was not intended to show ownership of the refuse pile (Tr. 155). Consol's witness testified that he entered the designation "N/A" on the form as a means of (1) advising MSHA that the plant was not operating, (2) showing

that no person was physically located at the plant for the purpose of receiving communications from MSHA, and (3) notifying MSHA that any communications about the plant would have to be sent to Consol's Regional Manager of Safety whose mailing address was then given as Horsepen, Virginia (Tr. 156).

14. Consol claims that it had made it clear to MSHA that the Buckeye Plant was inactive by sending MSHA a letter dated July 13, 1983, giving the names of persons who should receive correspondence for each of its active and inactive mines and preparation plants. That letter listed the Buckeye Mine and Preparation Plant under the heading of "Idle or Closed Mines" and indicated that correspondence about such mines or plants should be sent to the Regional Manager of Safety whose address had been changed to 28 College Drive, P. O. Box 890, Bluefield, Virginia (Tr. 154; Exh. F).

15. MSHA's inspection of the Buckeye Refuse Pile in September of 1983 showed that erosion had produced crevices and ditches in the pile to a depth of from 20 to 25 feet and that materials from the pile were continually being washed down on the county road which passes the pile (Tr. 43). Odors given off by the pile and the warmth of the pile's exterior made MSHA's inspector believe that a fire had started within the pile because erosion was allowing air to enter the pile's interior (Tr. 54). MSHA's inspector decided to issue citations for the dangerous condition of the pile to Consol because the legal identity report submitted by Consol on January 4, 1983, showed that Consol owned the inactive Buckeye Preparation Plant with which the pile had always been associated for purposes of issuing citations alleging violations of the mandatory health and safety standards (Tr. 57; Exh. 7). The inspector reasoned that Consol had not abated Citation No. 637725, described in finding No. 11, when Consol was undeniably the company which then owned and controlled the refuse pile (Tr. 65). Consol was the company which had contributed 90 percent of the refuse which made up the pile (Tr. 70). Consol's reacquisition of the equipment in the mine, the equipment in the plant, and the plant structure itself was, in MSHA's opinion, a reacquisition of control over both the preparation plant and the associated refuse pile (Tr. 59; 75; 97; 100).

16. For the reason given in finding No. 15, MSHA issued two citations to Consol on September 6, 1983. The first one was Citation No. 2022955 alleging a violation of section 77.215(a) because the outslopes of the pile were not compacted in such a manner as to minimize the flow of air through the pile (Tr. 48; Exh. 5). The citation stated that air was entering the pile through the ditches and crevices caused by erosion (Exh. 5). Section 77.215(a) requires that "[r]efuse

deposited on a pile shall be spread in layers and compacted in such a manner so as to minimize the flow of air through the pile." The second citation was No. 2022956 which alleged that Consol had violated section 77.215(h) because the outslopes of the pile exceed the ratio of 2 horizontal and 1 vertical at several locations (Tr. 44, Exh. 4). Section 77.215(h) requires that refuse piles "be constructed in compacted layers not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal and 1 vertical (approximately 27°)."

17. The MSHA inspector returned to the pile on October 24, 1983, and found that his previous belief about a fire in the pile was correct because smoke was now coming out of the pile and the exterior of the pile was hot to his touch. Therefore, he issued Consol a third citation, No. 2123823, on October 24, 1983, alleging a violation of section 77.215(j) because "[f]ire was allowed to exist in the refuse pile." The citation stated that the area on fire was approximately 200 feet long, 12 feet wide, and of indeterminable depth (Tr. 52-56; Exh. 6). Section 77.215(j) requires that all fires in refuse piles be extinguished in accordance with a plan approved by MSHA.

18. MSHA gave Consol to November 1, 1983, to correct the sloping, erosion, and compacting problems and to December 1, 1983, to extinguish the fires (Exhs. 4-6). Consol made no attempt to abate the alleged violations and filed the notices of contest which are the subject of this proceeding. Each of the notices of contest alleges that "Consol is not responsible for said condition and cannot abate it." Consol's evidence at the hearing shows that it is contending that Riverside is responsible for the condition of the pile because it was the last entity to operate the Buckeye Preparation Plant and deposit refuse on the pile (Tr. 168; 174-179). The reason that Consol alleges that it cannot abate the violations is that it now owns only the plant structure, the equipment in the plant, and the equipment in the mine. Consol claims that since it conveyed all of its leasehold interests to Riverside who still owns those interests, Consol has no right to go on the property on which the preparation plant and refuse pile reside for any purpose other than to remove the mine and plant equipment which it still owns (Tr. 191-192).

19. MSHA's evidence shows that Riverside deposited only a small amount of refuse on the pile and that the refuse which Riverside did deposit was correctly compacted and served a rehabilitative purpose by contributing to elimination of some of the conditions which are causing the pile to be hazardous (Tr. 69). MSHA's evidence also shows that Consol deposited 90 percent of the materials which make up the pile and Consol's failure to correct the sloping conditions when it was first

cited for that violation have resulted in the erosion which has allowed air to enter the pile and bring about the fire which now exists in the pile and which is continually spreading as time passes (Tr. 40-43; 54; Exhs. 3A, 3D, and 3E). The pile is located about 600 feet from the post office in the town of Stephenson, West Virginia, and a public school is located a short distance from the post office (Tr. 31; 34; Exh. 2).

20. The Buckeye Preparation Plant has been assigned identification No. 1211WV40070-01 (Tr. 31). After the Buffalo Creek disaster, MSHA made a survey of all refuse piles and found that a number was needed which would identify the area of each pile's location and identify the type of pile it was (Tr. 137). MSHA's witness explained that the number "1111" indicates a pile made up of anthracite coal refuse and that the number "1211" indicates a pile formed by bituminous coal refuse. The letters "WV" in the number indicate the State in which the pile is located. WV, of course, shows that the Buckeye pile is located in West Virginia. The number "4" after "WV" refers to MSHA District No. 4 and the numbers following "4" are merely sequence numbers (Tr. 118). The number after the dash shows how many refuse piles are located at a given mining site. The "01" in this proceeding shows that only one refuse pile exists at the Buckeye Mine and Preparation Plant (Tr. 102).

21. Although each refuse pile is given a number in accordance with the criteria described in finding No. 20, MSHA does not issue citations under that number. MSHA's reason for not using the refuse pile number for the purpose of citing violations is that MSHA associates all refuse piles either with a mine whose refuse produces the pile or a preparation plant whose refuse produces the pile (Tr. 98; 101; 118). MSHA assigns an identification number to all mines and preparation plants and that number never changes even if the mine or preparation plant is transferred or sold to a new or different owner from the entity which owned the mine or plant when the number was first assigned (Tr. 134-135). Therefore, all of the citations and orders discussed in this proceeding, whether issued in Consol's name or in Riverside's name, show the identification number of the Buckeye Preparation Plant, that is, No. 46-03242 (Exhs. 4-6; 8; A and B).

Consideration of Parties' Contentions

Consol's Claim that It Does Not Own the Refuse Pile

Consol's initial brief (p. 7) claims that the Secretary makes a specious argument in contending that Consol is liable for violations at the Buckeye refuse pile because Consol filed a legal identity form with respect to the Buckeye

Preparation Plant and, in so doing, became the operator to be cited for violations occurring at the refuse pile. Consol claims that it sold the Buckeye Mine, Preparation Plant, and all its leasehold rights to mine coal in that area to Riverside and that when Riverside defaulted on its payments, Consol reacquired only its "collateral" or "security interest" which consisted of the personal property in the mine, the personal property in the plant, and the plant structure itself, but did not reacquire the leasehold rights which still belong to Riverside or Pocahontas Land Corporation. Consol claims that since it did not reacquire any leasehold rights, it has no authority to go on the Buckeye mine property for any purpose other than to remove or sell mining equipment in the mine or in the preparation plant and that it has no authority whatsoever to go on mine property for the purpose of putting out a fire in the refuse pile or doing any work to make the pile conform with the mandatory safety standards.

Consol admits that it filed a legal identity report indicating that it owns the preparation plant after it reacquired the plant from Riverside, but Consol says the only reason it filed the legal identity report was to provide MSHA with up-to-date information concerning the name and address of the person to receive communications from MSHA with respect to the preparation plant. Consol claims that it entered "N/A" on the legal identity form to alert MSHA of the fact that the plant was not being operated and that it mailed MSHA a letter listing the Buckeye Preparation Plant among the idle facilities which it owns (Exhs. 7 and F). In such circumstances, Consol contends that MSHA knew that it did not file the legal identity form to accept liability for the refuse pile which it did not own or operate or control at the time the citations here involved were issued.

The arguments which Consol makes sound appealing until one examines all the facts. Consol or an affiliate did own, control, and operate the Buckeye Mine and Preparation Plant from 1963 to 1978 and, during that time, deposited 90 percent of the materials which make up the Buckeye refuse pile which is 900 feet wide, 1,200 feet long, and 200 feet high (Finding Nos. 2, 3, and 19 above). While Consol was operating the plant and depositing refuse on the pile, it had on file with MSHA a legal identify form, and during the time that Consol admittedly owned and controlled the pile, the refuse pile was declared by MSHA to be a hazardous one. That declaration thereafter required Consol to file annual reports certifying that it was maintaining the pile in accordance with safe engineering practices. Those reports were required from 1978 to 1980 even though Consol had stopped operating the plant in 1978 (Finding No. 10 above). During the inactive period,

Consol was cited on May 24, 1979, in Citation No. 637725 for a violation of section 77.215(h) for allowing erosion to develop in the pile by virtue of Consol's having failed to construct the pile with the required degree of sloping. Consol failed to abate that violation and MSHA extended the time for abatement to September 21, 1979. MSHA took no further compliance action with respect to Citation No. 637725 until June 24, 1981, when the citation was modified to recognize Riverside as the operator after Consol had made its futile sale of the Buckeye Mine and Plant to Riverside on June 27, 1980 (Finding No. 11 above).

The uncontroverted facts stated above show that Consol was the owner and operator which created the refuse pile in a manner which resulted in the pile's being cited for violating the mandatory safety standards while Consol admittedly owned it. The pile was also declared to be hazardous, thereby requiring special attention, while Consol owned and controlled it. Consol was then successful in selling the Buckeye Mine, Preparation Plant, and some leasehold rights to Riverside with the result that Riverside was, for a short time, considered by MSHA to be the operator to be held liable for correcting the hazardous conditions which existed in the pile at the time Riverside purchased it.

Consol applaudes MSHA for holding Riverside as the operator to be cited for violations after Consol sold the Buckeye facilities to Riverside, but Consol argues that MSHA improperly reverted to holding Consol liable for the violative conditions in the pile after Consol reacquired its personal property in the Buckeye Mine and Preparation Plant without apparently regaining any leasehold mining rights. Moreover, Consol claims that Riverside's retention of the leasehold rights continues to make Riverside liable for the hazardous conditions which exist in the pile and that MSHA should have remained active in Riverside's bankruptcy action to force Riverside to correct the violations in the refuse pile because Riverside is not really insolvent since its bankruptcy action pertains to a reorganization under Chapter 11, rather than an action under Chapter 7 which results in a discontinuance in business with the creditors sharing in whatever assets they can obtain (Consol's reply brief, p. 2).

Despite Consol's arguments that Riverside is financially sound and able to correct the violations in the refuse pile, Consol considered Riverside so insolvent that it entered the bankruptcy proceedings for the sole purpose of reacquiring its "collateral" or "security interest" in the mining equipment in the Buckeye Mine and Preparation Plant. Consol could have taken the position that a reorganization of Riverside's affairs under the supervision of the bankruptcy court would result in Riverside's being able to continue operating the

Buckeye properties and pay off its debt to Consol. Despite Consol's assurances that Riverside is still financially able to abate the hazardous conditions in the refuse pile, it is a fact that Riverside defaulted on its payments for the Buckeye properties and it is undisputed that Consol reacquired its equipment in the Buckeye Mine and Preparation Plant and the plant structure itself. Consol's reacquisition of the Buckeye properties necessarily carries with that reacquisition the responsibility to correct the violative conditions in the refuse pile.

It must be recalled that Consol sold the equipment in the Buckeye Mine and Preparation Plant and certain leasehold interests to Riverside for $1,500,000 and that Riverside actually paid Consol a sum totaling $604,713.74 before Consol reacquired the property (Finding Nos. 4 and 7 above). Thus, Consol received a return on its Buckeye Mine and Plant property which had been idle for about 2 years before it was sold to Riverside and reacquired. If Consol had corrected the sloping violation for which it was cited before it sold its property to Riverside, it is extremely unlikely that the erosion and fire in the pile would have developed, and Consol would not now be trying to avoid abating the hazardous conditions for which it alone is responsible.

Consol cannot successfully claim that the small amount of coal produced by Riverside at the Buckeye Mine resulted in a deterioration of the refuse pile because the inspector testified that Riverside had properly compacted the small amount of refuse which it had placed on the pile and that Riverside's use of the pile had had a rehabilitative effect on the pile, rather than a deleterious effect (Finding No. 19 above).

As a matter of fact, Consol's claim that it does not own sufficient leasehold rights at the Buckeye Mine and Preparation Plant to go on the Buckeye mine property for the purpose of correcting the hazardous conditions in the pile is not supported by the legal instruments on which Consol relies. The Security Agreement, paragraph 8, page 4, authorizes Consol "to maintain, use, utilize, sell or dispose of the Collateral on the premises of Debtor [Riverside]" (Exh. K). That language obviously is broad enough to permit Consol to use the equipment on the mine property for the purpose of correcting the hazardous conditions in the refuse pile. It is certain that Riverside would have no objections to Consol's going on mine property to correct the hazardous conditions in the pile which Riverside inherited from Consol in the first place.

MSHA's Claim that Consol Failed to Prove It Has No Leasehold Rights

MSHA's reply brief (pp. 1-2) makes the following contention:

> 2. However, it is the Secretary's position that in spite of all the exhibits submitted by Consol relating to the transactions between Consol, Riverside, and Pocahontas Land Company (Pocahontas) concerning the coal leases and preparation plant usage at Buckeye collieries and adjacent properties, there is no clear evidence that the refuse pile itself was even a part of these transactions or if it is so, which lease papers apply to its use. However, assuming that Riverside's lease did include the refuse pile, it appears likely that the subject leaseholds have, in fact, reverted back to Consol, the sublessor or Pocahontas, the lessor. Since it would appear to have defaulted on its lease, Riverside filed its petition for bankruptcy under Chapter 11. Further, there has been no evidence of any payment by Riverside to Pocahontas for the leasehold itself. Apparently, Riverside defaulted on its promissory note owed to Consol, and therefore defaulted on the lease resulting in the reversion of the subject property back to the sublessor (Consol) and lessor (Pocahontas) in accordance with general real property law. In any event, Consol has failed to carry its burden of proving its position that responsibility over the refuse pile was leased away to another entity, in this case, Riverside Industries. [Footnotes omitted.]

There is considerable merit to the Secretary's claim made in the above-quoted paragraph. In my order of October 16, 1984, I pointed out that Consol had failed to submit in evidence at the hearing a copy of the letter agreement between Consol and Riverside along with the map attached to the letter agreement. I pointed out in the order that Exhibit I provided that if there should be an ambiguity in the boundary specifications in the leasehold assignment, that the map controlled. Therefore, I requested that Consol submit a copy of the map along with other materials requested in the order of October 16, 1984. Although Consol submitted the map as a part of Exhibit P, the map is such a poor reproduction that it is impossible to determine from it what leasehold interests Consol actually conveyed to Riverside.

Consol's Claim that the Commission Has No Authority To Require Abatement

Although I have shown in the discussion above that there is no merit to Consol's claim that it has no authority to correct the hazardous conditions in the refuse pile, Consol argues

in its initial brief (p. 14) that a refuse pile may be abandoned with MSHA's permission if the pile is in compliance with the mandatory safety standards at the time the abandonment request is made. Consol says that if the pile develops problems, such as a fire in it, after the abandonment is authorized, MSHA will no longer take any action, and the hazardous condition becomes a problem for correction by the State in which the pile exists. Consol also notes that if an operator goes completely bankrupt under a Chapter 7 proceeding, as opposed to the Chapter 11 proceeding involving Riverside in this case, MSHA simply issues a closure order and refuses to allow anyone else to operate the pile until the outstanding violations are abated (Tr. 143-144).

Continuing its theme of not owning the refuse pile, Consol argues that the Commission cannot require Consol to abate a condition in a refuse pile which it does not own or control. Consol concludes its argument by saying that the Commission cannot order Consol to do an act which it cannot perform because the refuse pile is situated on property which is owned and controlled by another entity, namely, Pocahontas Land Corporation or Riverside.

Most of the arguments which Consol makes as to the Commission's lack of authority to enforce abatement are predicated on a factual background which is entirely different from the facts in this proceeding. Consol's observation that a refuse pile may be abandoned if it is in compliance with the mandatory safety standards has no application in this case because neither Consol nor Riverside ever proposed to MSHA that it be permitted to abandon the Buckeye refuse pile. Moreover, MSHA could not have authorized abandonment by either Consol or Riverside because the pile was cited for a violation of the mandatory safety standards while Consol owned it and was cited for that same violation and others while Riverside owned it. Therefore, neither Consol nor Riverside could have been permitted to abandon the Buckeye refuse pile before they had corrected the violations for which they had been cited, even if they had attempted to abandon the pile. Moreover, since Riverside was not involved in a Chapter 7 bankruptcy action, MSHA would have no reason to issue a closure order pending some day in the future when a new operator might propose to operate the Buckeye facilities.

As the Secretary argues in his initial brief (pp. 10-15), the Act was not intended to be applied in the technical and narrow sense urged by Consol. The Secretary correctly argues that MSHA has authority to cite an "operator" for violations of the mandatory health and safety standards. An operator is defined in section 3(d) of the Act as "any owner, lessee,

or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The court in BCOA v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), gave a broad interpretation to the word "operator" when it stated that:

> the Act does not limit the term operator to owners and lessees. It expressly mentions any "other person who * * * controls or supervises a coal mine." A coal mine, as we have pointed out in part III, is not merely an area of land and its facilities presently used to extract and process coal; it also includes an area of land and facilities that are "to be used" in the future for the extraction and processing of coal.

547 F.2d at 246.

Assuming, arguendo, that the evidence shows that Consol is not the owner in title of the refuse pile, it is uncontroverted that Consol was the owner of the preparation plant at the time the citations here involved were issued. It cannot be successfully argued that the preparation plant is unrelated to the refuse pile because the evidence shows that Consol created the refuse pile when it operated the plant and that Riverside continued to contribute to the refuse pile when it owned the preparation plant (Finding Nos. 3 and 19 above). While Consol claims that it does not intend to resume production of coal at the Buckeye Mine and Preparation Plant, it admittedly reacquired the plant for the purpose of selling it to anyone else who might be interested in producing coal there. It is unlikely that anyone could construct a new preparation plant at the Buckeye site any more cheaply than it could buy Consol's plant. Therefore, Consol's present ownership of the plant carries with it a possibility that coal may be mined at the Buckeye plant site in the future. Therefore, as the court stated in the BCOA case above, Consol is holding a preparation plant which constitutes "facilities" which may be used in the future for the extraction and processing of coal. Consequently, Consol is the operator of the refuse pile within the meaning of the Act and is the proper party to be cited for violations found to exist in the refuse pile.

The Commission rejected in Eastern Associated Coal Corp., 4 FMSHRC 835 (1982), the same line of reasoning on which Consol relies in this proceeding. In the Eastern case, the claim was made that Eastern was not liable for violations in a refuse pile which was created by coal production by a mine operator other than Eastern and which was located 800 to 1,000 feet from Eastern's preparation plant. The Commission held that Eastern was liable for the fire which was burning in that refuse pile even though the pile was not situated in a surface

working area where Eastern's employees were required to work or travel. The Commission also held that the Secretary is not required to show that the burning pile created a hazard to miners in the normal and reasonable course of employment. All that the Secretary was required to prove was noncompliance.

In this proceeding, even though Consol is not presently dumping refuse on the refuse pile, it is a fact that MSHA's evidence conclusively showed that materials from the pile are continually being washed across a county road which people are required to travel to reach their homes. Moreover, the pile is located only 600 feet from the post office in the town of Stephenson, West Virginia, and there is a school near the post office (Finding Nos. 11, 16, and 19 above). The Secretary's initial brief (p. 14) refers to a quotation in the Congressional Record for June 20, 1977, by Senator Kennedy in which he stated that the Act should be interpreted to "ensure that those who live around mines and who are affected by those mines or mining operations are protected from faulty mines as well as the miners themselves."

The Supreme Court has stated in several cases that Federal agencies entrusted with administering Federal statutes should be given broad powers which are to be exercised on the basis of the powers given to them by the acts they administer without regard to legal technicalities. For example, in United Gas Improv. Co. v. Continental Oil Co., 381 U.S. 392 (1965), an interstate natural-gas company purported to purchase developed gas leases in order to avoid the authority of the Federal Power Commission [now Federal Energy Regulatory Commission] to control the price of natural gas flowing in interstate commerce. The Supreme Court upheld the Commission's opinion ruling that the purchase of developed leaseholds was the equivalent of a conventional sale of natural gas subject to the Commission's jurisdiction. In upholding the Commission's assertion of jurisdiction, the Court stated that "a regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." 381 U.S. at 400.

The Supreme Court also held in California v. Southland Royalty Co., 436 U.S. 519 (1978), that the State of Texas could not allow production of gas from a State-owned lease to be sold in interstate commerce without thereafter obtaining permission from the Federal Energy Regulatory Commission to abandon the sale, despite the fact that the State of Texas cannot be considered to be a "natural-gas company" as that term is defined in the Natural Gas Act.

In Public Service Co. v. Federal Energy Reg., 587 F.2d 716 (5th Cir. 1979), the court disposed of an argument similar to Consol's claim that it cannot be required to abate hazardous

conditions in a refuse pile which it claims not to own. In that case the court stated as follows:

> Petitioners also seek exemption from the abandonment requirement on the grounds that Superior did not have the legal authority to dedicate Texas's royalty gas, gas that Superior did not own. This argument was, however, handily disposed of in Southland, where the owners challenged Gulf's legal authority to dedicate their gas. Admitting the "appealing resonance" of the maxim that "'no man can dedicate what he does not own'", the Court concluded that indeed he could. Id. at 527. Dedication is not a matter of a lessee's giving away or selling gas that it does not own, the Court explained, but rather a matter of changing the regulatory status of that gas. Superior's consented-to acquisition of the interstate certificate is effective to dedicate Texas's gas whatever the parties' relationship might be under local law.

587 F.2d at 720.

The Supreme Court also held in National Labor Rel. Bd. v. Hearst Publications, 322 U.S. 111, 129 (1944), that the word "employee" as used in the National Labor Relations Act was to be defined by reference "to the purpose of the Act and the facts involved in the economic relationship", rather than exclusively by reference to common law standards or local law. In Gray v. Powell, 314 U.S. 402, 416 (1941), the Court held that "the purpose of Congress which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code."

The Act here involved was intended by Congress to bring about safe and healthful conditions in the mining industry. Once an operator produces coal and creates a refuse pile, it is obligated to correct any hazardous conditions which occur in that pile, and it may not escape that obligation by selling the preparation plant associated with the pile and then reacquire the preparation plant without also reacquiring the obligation to correct the hazardous conditions which exist in the pile.

Consol's claim (initial brief, p. 12) that it is being perpetually held to be a guarantor of the pile's conformity with the mandatory safety standards is without merit because it is its act of reacquiring the preparation plant which caused MSHA to cite Consol for violations in the pile. If Riverside had not defaulted on its payments to Consol, Riverside would have continued to be held responsible by MSHA for the hazardous conditions in the refuse pile.

Consol's Claim that the Secretary Failed to Prove Violations

Consol's claim (initial brief, pp. 10-11) that the Secretary failed to prove that violations occurred is based on the contentions already rejected above, namely, that the Secretary did not prove that Consol owned or controlled the refuse pile at the time the citations were issued. Consol did not introduce any evidence whatsoever to rebut the Secretary's evidence showing that the refuse pile contained the violations alleged in the citations. Two of the citations (Nos. 2022955 and 2022956) were issued on September 6, 1983. They alleged that Consol had violated sections 77.215(a) and 77.215(h) for failure to compact the materials deposited on the pile so as to bring about a minimum flow of air and for failure to compact the refuse to form a 27-degree slope (Finding No. 16 above). Consol's initial brief (p. 10) claims that it constructed the pile before MSHA had promulgated a regulation requiring a 27-degree slope and that MSHA does not require an operator to remove old refuse and recompact it to a 27-degree slope. It should be noted that Consol was cited for the sloping violation before it ever sold the Buckeye facilities to Riverside. Consol did not abate the sloping violation nor correct the erosion in the pile and MSHA did not put any pressure on Consol to abate the violation. Instead, after Consol sold the facilities to Riverside, MSHA modified the citation issued to Consol to require Riverside to abate the sloping and erosion conditions in the pile. When Consol reacquired the preparation plant, MSHA could just as easily have modified the original citation (No. 637725) again to show that Consol was once again obligated to correct the sloping and erosion conditions in the pile. The fact that MSHA issued an entirely new citation (No. 2022956) does not change the fact that Consol was obligated to correct those conditions, especially since the conditions resulted from Consol's poor compacting procedures when the pile was originally created (Finding No. 11 above).

The third citation (No. 2123823) was issued by MSHA on October 24, 1983, and alleged that Consol had violated section 77.215(j) by allowing fire to exist in the pile. MSHA's evidence shows that when the inspector examined the pile on September 6, 1983, he suspected that a fire had started in the interior of the pile at the time he wrote the two citations issued that day, because the surface of the pile was warm to his touch. The inspector knew that the erosion which he had observed in the pile for several years was allowing air to enter the pile and he believed that the oxygen in the air had resulted in the commencement of a fire, but he could not see any smoke on September 6 to confirm his suspicions.

When the inspector returned to the refuse pile on October 24, 1983, he observed smoke and knew that the pile was on

fire (Finding No. 17 above). The witness introduced as Exhibits 3A through 3F some color photographs which clearly show the hazardous conditions at the pile. The photographs were taken on July 17, 1984, the day before the hearing was held, rather than on October 24, 1983, the day the citation was written. The photographs leave no doubt but that the refuse pile is badly eroded, is allowing materials to be deposited on the county road near the pile, and is exposing the people of Stephenson, West Virginia, to the unpleasant fumes of the burning pile.

Inasmuch as Consol introduced no evidence to rebut the Secretary's evidence showing that the violations occurred, and in view of the fact that I have hereinbefore rejected Consol's claims that it does not own or control the pile and cannot be validly cited for violations in the pile, I find that the violations occurred, that the citations should be affirmed, and that Consol's notices of contest filed in Docket Nos. WEVA 83-280-R, WEVA 83-281-R, and WEVA 84-16-R should be dismissed.

Consol's Complaint about the Identification No. Used to Cite Violations at Refuse Piles

As explained in Finding Nos. 20 and 21 above, MSHA developed a numbering system to identify all refuse piles following the Buffalo Creek disaster. That number for the Buckeye refuse pile is 1211WV40070-01. The first four numbers show that the pile was formed from refuse from a bituminous coal mine. The two letters indicate that the pile is located in West Virginia. The number "4" indicates that the pile is located in MSHA District No. 4. The numbers after "4" are simply sequence numbers, except that the number after the dash is intended to show the number of refuse piles at any one location.

Consol's initial brief (p. 9) contends that MSHA ought to cite violations at refuse piles under the refuse pile number described in the preceding paragraph, instead of citing violations under the identification number of the coal mine or preparation plant which contributes refuse to the pile. Consol notes that refuse piles may be used for reclamation of the coal which is deposited in them. If that occurs, the refuse piles are given their own mine identification numbers just as if they were producing coal mines.

I am discussing Consol's complaint about MSHA's choice of identification numbers in an effort to cover all of Consol's arguments, but I fail to see how the instant claim advances Consol's position in this proceeding. First, the Buckeye refuse pile is not being reclaimed by anyone to obtain coal. Therefore, it has not been given an independent

mine identification number, nor has any operator filed a legal identity form to show that it is an operator doing reclamation work. Second, all of the citations here involved contain a reference to Refuse Pile No. 1211WV40070-01 and therefore clearly identify the Buckeye refuse pile by the number which Consol would like to see MSHA use. The citations also have Consol's name in Item 6 as the operator of the refuse pile and show in Item 8 the identification number of the Buckeye Preparation Plant.

MSHA's witness testified that when an identification number is assigned to a mine or a preparation plant, that number is not changed when a different entity assumes control of the plant (Finding No. 21 above). When Riverside became the operator of the Buckeye Preparation Plant, all citations issued during Riverside's brief ownership named Riverside as the operator and continued to use the same identification number for the preparation plant which had been assigned to the plant when it was first owned by Consol.

A citation or order issued by MSHA would be useless for bringing about abatement of unsafe conditions unless it could be served upon a person who has control of a mine or preparation plant. That is one of the main reasons for MSHA's requiring operators of mines and plants to file legal identity forms so that MSHA will be able to obtain action toward abatement of the conditions described in the citations and orders. Consequently, it is the person to be served, shown in Item 5 of a citation or order, who is of primary importance in bringing about abatement of unsafe conditions. The citations involved in this proceeding were served on the persons shown as responsible in Riverside's and Consol's legal identity forms. While the identification numbers of a mine or plant help identify the facility which has contributed the materials which comprise the refuse pile, those numbers do not solely determine which entity MSHA considers to be liable for abating the unsafe conditions. Moreover, as indicated above, MSHA seems to have allowed for Consol's complaints about the identification numbers it uses in its citations and orders pertaining to refuse piles by using the refuse pile number, as well as the preparation plant number, so as to provide as much enlightenment as possible for MSHA's purposes and those of the person who is served with the citations and orders. Therefore, I find that Consol's complaints about MSHA's selection of identification numbers when writing citations pertaining to refuse plants are not well founded and must be rejected.

WHEREFORE, it is ordered:

Citation No. 2022955 dated September 6, 1983, alleging a violation of section 77.215(a), Citation No. 2022956 dated

September 6, 1983, alleging a violation of section 77.215(h), and Citation No. 2123823 dated October 24, 1983, alleging a violation of section 77.215(j), which are the subject of Consolidation Coal Company's notices of contest filed in Docket Nos. WEVA 83-280-R, WEVA 83-281-R, and WEVA 84-16-R, respectively, are affirmed, and Consolidation Coal Company's notices of contest filed in those three docket numbers are dismissed, for the reasons hereinbefore given.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 6, 1985

JESSE J. BRAGG, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 84-91-D
v.	:	PIKE CD 84-2
BIG OAK COAL CORPORATION, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On April 12, 1984, an order was issued to Complainant to show cause why his complaint of discrimination should not be dismissed for failure to provide certain information. On September 13, 1984 a second show cause was issued. The period allowed in these orders for response has expired and no reply has been received from Complainant.

Accordingly, the case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF HARRY PORTER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 84-181-D
	:	MSHA Case No. PITT CD 84-5
v.	:	Emerald No. 1 Mine
EMERALD MINES CORPORATION, Respondent	:	

DECISION

Appearances: Michael J. Healey, Esq., Healey & Davidson, Pittsburgh, Pennsylvania, for Complainant; R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, Complainant Harry Porter contends that he was denied overtime by Respondent, for whom he was employed as a miner, because he had requested that a preshift examination be performed in his work area on January 5, 1984. He alleges that this request was activity protected under the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801.

Pursuant to notice, I called the case for hearing in Pittsburgh, Pennsylvania, on December 11, 1984. Harry Porter, Mike Hogan, Arthur Kelly, and Terrance Rafferty testified for Complainant; Donald R. Zitko, Gary Michael Dubois and Guy Nyswiner testified on behalf of Respondent. Both parties have filed posthearing briefs. I have reviewed the entire record and have considered the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of the Emerald No. 1 Mine near Waynesburg, Pennsylvania. Complainant Harry Porter was employed at the subject mine as a miner.

2. Porter worked for Emerald or its predecessor from January, 1949 to the present. He has held various jobs including, miner operator and mechanic. He has been President of the UMWA Local Union, Chairman of the Mine Committee and Chairman of the Safety Committee. He was elected to the UMWA District Executive Board in June 1982.

3. In June 1983, Porter was appointed a full time UMWA International Health and Safety Representative. He resigned that position on December 1, 1983, and returned to Emerald as a general laborer. He was working the midnight shift on January 5, 1984.

4. Emerald had a policy of making overtime work available for its employees both on production and maintenance sections. Porter worked overtime after returning to Emerald in December, 1983, more than half the time. In most of the instances when he did not work overtime, it was by his own choice. He was the most senior employee on his shift in the general labor classification.

5. When a production shift works overtime, at least one miner is designated to bring the bus out of the section in order that the next shift have transportation in. That miner does not receive overtime.

6. On January 5, 1984, Porter was assigned to work with Terry Rafferty in a non-production area picking up cables and hoses, inspecting the battery charger and other miscellaneous duties. They were to work without supervision and were given their own mantrip or bus to travel to the work site.

7. When they arrived at the work area, Porter looked for evidence that a preshift examination had been made and was unable to find any. He called shift foreman Donald Zitko to report this fact and Zitko told him he would send someone to perform the examination. Zitko did not exhibit any annoyance or hostility toward Complainant as a result of the call.

8. Zitko directed Construction foreman Guy Nyswiner to perform the preshift examination and he did so. Thereafter, Complainant and Rafferty began their work. Nyswiner did not display annoyance or hostility toward Complainant because he asked for the preshift examination.

9. Zitko later told Nyswiner the areas of the mine that Nyswiner should examine prior to the next shift. He also told him that the bus which Porter and Rafferty used would be needed to provide transportation in for the next shift.

10. Nyswiner told Complainant and Rafferty that they would be unable to work overtime that morning. When Complainant asked why, Nyswiner replied that Zitko directed him to have the bus available for the next shift.

11. Complainant left the mine at the end of the shift. He asked Zitko why he was refused overtime and Zitko said he did not know. Zitko denied telling Nyswiner that Complainant could not work overtime.

12. Nyswiner interpreted Zitko's instruction to have the bus available for the next shift as a direction that Complainant and Rafferty could not work overtime. Zitko testified that arrangements could have been made to have Complainant and Rafferty picked up and taken outside by another vehicle but "it would have been difficult." (Tr. 147). Complainant did not request such arrangements and the company did not offer to attempt to make them.

ISSUES

1. Whether Respondent discriminated against Complainant in denying him overtime because of activity protected under the Act?

2. If so, to what relief is Complainant entitled?

CONCLUSIONS OF LAW

Complainant and Respondent are protected by and subject to the provisions of the Mine Safety Act, and specifically section 105(c) of the Act.

In order to establish a prima facie case of discrimination, a miner has the burden of establishing that he was engaged in protected activity, and that he suffered adverse action which was motivated in any part because of that activity.

Secretary/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); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by establishing that the miner was not engaged in protected activity, or that the adverse action was not motivated, in any part, by the protected activity. The operator may also raise an affirmative defense, if it cannot rebut the prima facie case, by showing that it was, in part, motivated by unprotected activities and that it would have taken the adverse action for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Secretary/Jenkins v. Hecla-Day, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984). I reject the suggestion in Respondent's brief that the Commission should adopt the test set out in the earlier Boich case: Boich v. FMSHRC, 704 F.2d 275 (6th Cir. 1983), in which the court held that an operator does not bear the burden of proof to establish his affirmative defense but only the burden of coming forward with the evidence. The 6th Circuit reversed its earlier decision on the basis of NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). My reading of Commission decisions subsequent to Transportation Management persuades me that in terms and in actuality, it has followed the Pasula test and the rationale of the second Boich decision.

PROTECTED ACTIVITY

Complainant is a miner with extensive experience. He is safety conscious and is known by mine management to be safety conscious. He is especially concerned about the importance of preshift examinations because he took part in investigations on behalf of the Union of explosions in non-face areas (not involving Respondent's mine). His request for a preshift examination of the area to which he was assigned on January 5, 1984, was clearly related to safety, and therefore, was activity protected under the Act.

ADVERSE ACTION

Complainant was denied or did not receive overtime work and overtime pay on January 5, 1984. Respondent argues that the amount involved ($20.14) is so small as to be de minimis. From the public point of view, which is the primary point of view of section 105(c), even a minimal penalty administered

because of safety complaints is serious. I hold that the denial of 1 hour overtime work and overtime pay is adverse action under the Mine Act.

MOTIVATION FOR THE ADVERSE ACTION

Zitko, the shift foreman, was responsible for assigning tasks and areas of responsibility to the foremen, and to have all working areas preshifted for the following shift. Zitko was also responsible for getting the mantrips to the "bottom" for the use of the incoming day shift. When he received the call from Complainant Porter, he realized that the area in which Porter was to work had not been preshifted by the prior shift, apparently because they were not aware that the midnight shift was going to work in the area. I accept Zitko's testimony that he did not deny Complainant the opportunity for overtime, but merely instructed Nyswiner to have the car Complainant rode in at the bottom at the end of the shift. Nyswiner interpreted this to mean that Complainant could not work overtime. I find the testimony of Zitko and Nyswiner to be logical and truthful. I am persuaded that the denial of overtime to Complainant was not, in any way, related to his request for a preshift examination. There is no evidence of annoyance, anger or animosity on the part of Zitko or Nyswiner. There is no direct evidence of a discriminatory motive, and no evidence from which such a motive could reasonably be inferred. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination under the Act, and his case must be dismissed.

ORDER

Based on the above findings of fact and conclusions of law, the above proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-26-M A.C. No. 05-00791-05510
v.	:	Schwartzwalder Mine
COTTER CORPORATION, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Barry D. Lindgren, Esq., Denver, Colorado, for Respondent.

Before: Judge Carlson

BACKGROUND

This case arose out of an inspection of the Schwartzwalder underground uranium mine owned by Cotter Corporation (hereinafter "Cotter"). A representative of the Secretary of Labor (the Secretary) conducted the inspection on October 6, 1983 and issued the single citation which is the subject of this proceeding on the same day. A hearing on the merits was held on September 10, 1984 at Denver, Colorado, under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). Cotter filed an extensive post-hearing brief; the Secretary ultimately elected not to do so.

The Secretary seeks a $180.00 civil penalty based upon his inspector's finding that Cotter violated the mandatory safety standard published at 30 C.F.R. § 57.18-25. That standard provides:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

Richard Coon, federal mine inspector, testified for the Secretary. Three miners, as well as a shift boss and the mine's safety and training specialist, testified for Cotter.

REVIEW AND DISCUSSION OF THE EVIDENCE

I

The evidence shows that when Mr. Coon inspected the mine on November 6, 1983, he saw Romolo Lopez operating a jackleg drill in stope 17-3. Lopez was working without a partner in the stope which was about 5 feet wide and 10 to 12 feet high. Lopez told the inspector that he ordinarily worked with a partner, but that he did not have one that day. The nearest work station for other miners was stope 17-4, some 50 to 60 feet distant, where two miners, Paul Herrera and Bobby Varela were drilling and performing other tasks. Persons in 17-4 could not hear or see a miner in 17-3. The shift had begun at 8:00 a.m.; the inspector climbed up into stope 17-3 and observed Lopez sometime between 10:00 a.m. and 10:15 a.m. These facts are not in dispute.

The inspector regarded use of a jackleg drill as inherently hazardous. This perceived hazardous activity coupled with Lopez's isolation from fellow employees caused the inspector to issue a citation and withdrawal order 1/ alleging violation of the "working alone" standard.

Respondent presents multiple defenses. It contends that operation of a jackleg drill is not a "hazardous condition" within the meaning of the cited standard; that Lopez "could be heard or seen on a regular basis commensurate with the risk involved;" and that he was not "working alone" within the sense intended by the standard.

The first argument lacks merit. The undisputed evidence shows that the jackleg drill used by Lopez weighed about 100 pounds. Inspector Coon, relying on many years' experience as a miner and an inspector, described at length the mishaps that could befall a jackleg operator. The drill, Coon claimed, is basically unstable with its single support leg, and may fall over on the operator, pinning him against the floor or wall. Also, the drill steel may break, causing the drill to pitch forward unexpectedly; or the steel may become stuck during drilling and the entire drill may rotate, inflicting injuries upon the operator as he tries to control it.

His opinion was supported by computer-generated summaries of drilling accidents in underground metal and nonmetal mines for the calendar years 1981 through 1983 and part of 1984. Together, these reports show that injury accidents to jackleg operators are common. 2/

1/ The order is not at issue in this proceeding.

2/ Respondent suggests that the reports are of doubtful relevance since many of the entries do not identify the type of drill involved except as "not [a] roof bolter." In the 1983 report (exhibit P-4), however, 40 out of 148 accident descriptions specify that the drill involved was a jackleg. Reports for the other years are similar.

A report 3/ compiled by MESA, MSHA's predecessor agency, from figures gathered in 1973 and 1974 (exhibit P-1), reached the conclusion that 31 percent of the injuries in underground metal and nonmetal mines involving machinery were caused by rock drills. Of these, 55 percent were produced by jackleg drills. The report described essentially the same types of hazards as those described by the inspector in this case.

Respondent suggests that the age of the report renders it invalid. In this regard, respondent specifically urges that the report does not and cannot show the effects of the rigorous training program for miners required under the subsequent 1977 Act. This may be true with respect to the weight to be accorded the numbers of accidents in 1973 and 1974. Absent evidence of any significant change in the design or use of jacklegs, however, the report's analysis of the basic hazard presented by the drills is entitled to evidentiary weight. The numbers of accidents reported from 1981 through 1984 show that despite training programs, use of jacklegs continues to cause accidents.

Beyond attacking the 1973-74 report, respondent presented evidence that jackleg drills in its Schwartzwalder mine had been involved in no significant accidents. This anecdotal approach does not rebut the solid evidence of hazard presented by the inspector and reflected the MSHA statistics. Where miners use a jackleg drill, a substantial possibility of injury is present. Nor is it significant that the evidence shows that the injuries most likely to result from jackleg drill accidents would not be life threatening or grievous. A condition which presents an opportunity for injuries of any magnitude involves a "hazard".

I hold that the area in which jackleg drilling takes place is one "where hazardous conditions exist," within the meaning of 30 C.F.R. § 57.18-25.

II

Before considering respondent's remaining defenses, some additional factual background is necessary. The inspector agreed that Varela and Herrera, the two miners in stope 17-4, had told him that the shift boss had instructed Herrera to check on Lopez. His recollection however, was that the instruction was to check "every hour or so."

Redmond, the shift boss, and Herrera, Varela and Lopez, however, insisted that Herrera had been instructed to "bounce back-and-forth between Varela and Lopez." These witnesses were

3/ "Analysis on Injuries Involving Jackleg Rock Drills Underground, 1973-1974," R.H. Oitto, Health Safety and Analysis Center, Denver, Colorado.

sequestered during the presentation of the respondent's case, and their testimony was essentially consistent as to what each was doing on the morning of the inspection and the time that Lopez was alone and the time that he was not. Shift boss Redmond maintained that Herrera was to have alternated his presence between the 17-4 and 17-3 areas depending on what Varela and Lopez were doing at any given time in the mining cycle (Tr. 103). Lopez indicated that he had three holes to drill on the morning in question before loading and shooting explosives. Each hole, he said, should take about 10 minutes to drill. The shift began at 8:00 a.m. and he actually reached 17-3 at about 8:30 a.m. He performed non-drilling tasks until about 8:40 a.m. Herrera, he testified, arrived there about a half an hour after he did, or at about 9:00 a.m., and spent about 10 or 15 minutes with him. About 3 or 4 minutes later, according to Lopez, Redmond, the shift boss, climbed into the stope and stayed about 15 minutes. When Redmond left, Lopez, according to his own account, had about 2 minutes of drilling left. The MSHA inspector and Mr. Duffy, the company safety specialist, appeared 3 or 4 minutes after Redmond left, Lopez testified, and the inspector told him to shut down and go find Redmond. Lopez wore no watch on that day, and acknowledged that he estimated the times about which he testified. He further acknowledged that on other days he had sometimes drilled for as long as an hour by himself, and that while miners ordinarily did not work alone, it was not uncommon for them to do so (Tr. 116-117). On the day in question, however, his impression was that he spent no more than 10 minutes drilling alone (Tr. 119).

Herrera testified that he got to the 17-3 stope at about 9:00 a.m. and stayed there about 15 minutes, during which time Lopez drilled for about 10 minutes. As he walked along the manway after coming out of the stope, Herrera met Redmond coming toward 17-3. According to Herrera, Redmond had not told him how often he was to check Lopez; as a miner's helper, however, he knew what Lopez was assigned to do that day, and therefore knew that he should be with him about every half hour to help (Tr. 132-133).

Varela, the third man on the crew, testified that he spent most of the morning tramming. He stated that he was never up in stope 17-3, but that he twice walked down the manway to the opening of 17-3 and listened to the sound of Lopez's drill. Varela maintained that since he heard the drill starting and stopping, he knew that Lopez could not be in difficulty.

Randy Duffy, respondent's safety and training specialist, accompanied the federal inspector on his visit the morning of October 6th. Duffy testified that as he and the inspector proceeded toward the 17-3 stope, they met Mr. Redmond in the manway coming from 17-3. According to Duffy, when he and the

inspector reached Lopez he was drilling with approximately 4 feet of a 6-foot drill steel in the hole. The inspection party remained there for about 15 minutes while the inspector shut down the 17-3 area because Lopez was drilling without a partner. Lopez was sent to find Redmond, the shift boss. As he and the inspector departed, he testified, they met Herrera who said he was on his way to help Lopez load the explosive rounds for which he had been drilling.

According to notes Duffy took at the time of inspection, the alleged violation was abated at about 10:00 a.m. (According to the inspector's citation and testimony the violation was observed at 10:15 a.m.).

Mr. Duffy acknowledged that the "practice" at the Cotter mine was to use two-man crews, and that it was not "normal" for one miner to work by himself (Tr. 154-155). In his view, however, where manpower was short, a miner was not working "alone" if other miners were working on the same level to "check on him."

III

I reject the suggestion that Mr. Varela's two brief pauses to listen at the base of stope 17-3 contributed in any substantial way to the safety of the miner drilling above. No evidence indicated that Varela's presence there was other than desultory and momentary. Listening for "cries for help" (or the absence of drilling noise) on such a random and transient basis cannot satisfy the requirements of the standard.

Cotter's strongest argument centers on the part-time presence of Herrera and Redmond in stope 17-3. Lopez was not required to "work alone," the argument goes, because he was not alone for much of the morning, and because the standard imposes a less-than-absolute requirement that a co-worker be present at all times.

The Commission apparently has had no occasion to construe the "working alone" standard cited by the Secretary in this proceeding. It has, however, dealt with a virtually identical standard, 30 C.F.R. § 77.1700, which applies to surface coal mines. That standard provides:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

The only difference of substance between the surface standard and the underground standard is the addition of the phrase "unless he can communicate with others" in the former.

In Old Ben Coal Company, 4 FMSHRC 1800 (1982), the Commission defined the term "alone" as it appears in the surface mining standard. The Commission held:

> The term "alone," which is not defined in the regulation, refers in common usage to being separated or isolated from others. Webster's Third New International Dictionary (Unabridged), at 60 (1971). In our view, the standard is directed at situations where miners are effectively, or for practical purposes, working alone notwithstanding some occasional contact with others. Here, there is no dispute that Mitchell was working by himself on the coal pile. Old Ben argues that Mitchell was part of a "team," but the evidence shows that no one observed or had contact with him on a regular or continuing basis and Old Ben has conceded that no one was responsible for keeping in touch with him. Such interaction as Mitchell had with the preparation plant employee was sporadic and insubstantial.

Cotter, in the present case, maintains, in effect, that Lopez was a member of a three-man "team" or crew and that Herrera was "responsible" for contacting Lopez on a regular or continuing basis. Thus, Cotter relies heavily on Old Ben to show that Lopez was not working alone in the sense intended by the standard.

Before examining the validity of Cotter's contention, we must consider more of the Commission's reasoning in Old Ben. At the very core of that decision is the following construction laid upon the terms "communicate," "be heard," and "be seen." The Commission said this:

> In construing these terms we reject either an approach requiring constant communication or contact under all conditions, or an approach allowing any minimum level of communication or contact to satisfy the standard. Rather, we hold that the standard requires communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication increases. (Emphasis added.)

In applying this test to the facts in the present case, one must first decide whether the "communication 4/ and contact" provided by Cotter for Lopez were of a "regular and dependable nature." The facts in that regard are not as clear as they might be, but the preponderant evidence tends to show that Herrera was told that he was to divide his time between Varela and Lopez, and that based upon past experience and the nature of the mining cycle, Herrera understood that he was to be present with Lopez at approximately 30-minute intervals. In the most literal sense, the contacts may have been both "regular" and "dependable," but I have difficulty with the length of the visits. None of the three crew members wore a watch underground, and all testimony as to time was therefore estimated. Given the estimates most favorable to Cotter, Lopez's morning was as follows: He reached the 17-3 workplace at about 8:30 a.m. and after completing some preparatory work not involving the drill, he was ready to drill at 8:40 a.m. Herrera showed up at about 9:00 a.m. and stayed for 10 to 15 minutes (Tr. 110, 124). Redmond, the shift boss, arrived 3 or 4 minutes after the time Herrera left, and stayed about 10 or 12 minutes (according to Redmond himself) or 15 minutes (according to Lopez) (Tr. 90, 110, 111). Lopez estimated his actual drilling time while alone at 5 to 10 minutes (Tr. 119). He also insisted that the total drilling time should have taken no more than 10 minutes for each of the three holes (Tr. 108). Inspector Coon maintained that he arrived at the 17-3 stope at 10:15 a.m. and that Lopez was still drilling. Mr. Duffy insisted that the arrival time was 10:00 a.m.

Accepting the 8:40 a.m. beginning time for drilling, and the most favorable 10:00 a.m. time for the arrival of the inspection party, the respondent's versions of the sequence and length of the various visits to stope 17-3 do not square with the total elapsed times by the clock. Between 8:40 a.m. and 10:00 a.m. an hour and 20 minutes elapsed. Lopez admits that he began drilling at 8:40 a.m., and all witnesses agree that he was still drilling when the inspector arrived at the scene. No evidence suggests that Lopez performed any non-drilling tasks after 8:40 a.m. The most favorable estimates of Herrera's and Redmond's presence in stope 17-3 add up to but 30 minutes. Consequently, Lopez was alone for 50 out of the 80 minutes after the drilling began.

4/ The concept of "communication" as used in the surface mining standard and dealt with by the Commission in Old Ben, is essentially a surplusage. It adds nothing to the mere notions of seeing and hearing set out in the underground standard cited in the present proceeding.

One may question why the drilling took 80 minutes when Lopez insisted that each of the three holes required but 10 minutes. Apart from the possibility that Lopez's estimates of drilling times were too optimistic, it is quite likely that he was speaking only of the time that the drill was actually penetrating rock. The evidence of record convinces me that the hazards attendant to use of the jackleg drill are not limited to those which occur when the drill is running. Accidents may occur when the drill is repositioned between holes, when the leg is being extended or retracted, when drill steels are being replaced, etc. This is especially so because of the weight and bulk of the drills.

The question thus becomes whether there was contact with Lopez of a "regular and dependable nature commensurate with the risk present" in drilling with a jackleg when he was in fact alone or isolated for 50 out of 80 minutes. For purposes of this decision, it will be assumed that general instruction for Herrera to be present to help Lopez from time-to-time, as the mining cycle required, meant that he would come to stope 17-3 on a reasonably regular and dependable basis. This is so even though the testimony made it abundantly clear that safety was never articulated as one of the reasons for the presence of a second man. The "regular and dependable" requirement is surely met whenever a second miner is present on a reliable basis, no matter what the motive. Regarding Mr. Redmond's presence, the situation is less clear. The shift boss testified that it was his custom to "periodically check on employees" (Tr. 89). There was no evidence that his visits to various worksites for the crew were regularized in any sense, or that they were coordinated with Herrera's visits, or indeed whether his actual presence at stope 17-3 sometime after Herrera left was a mere fortuity. It will also be noted that while Herrera suggested that he understood he should check on Lopez every 30 minutes, he in fact did not return to stope 17-3 until nearly an hour after his first visit. Nevertheless, for the purpose of this decision, since Herrera and Redmond together did in fact spend 30 minutes in stope 17-3, it will be held that their presence for those minutes was in general accord with a plan to provide periodic contact with Lopez on a regularized basis.

Concerning the second part of the question, however, I am unable to conclude that two 15-minute visits during an 80-minute span of drilling provided a contact with Lopez "commensurate with the risk present." In reaching this conclusion I acknowledge that the hazard presented in this case was of a lesser magnitude than that presented in Old Ben, supra. There, death or serious injury were likely in the event of an accident. In the present case the evidence from the inspector and the supporting accident

records tends to show that the overwhelming number of jackleg accidents are less than life-threatening. For that reason I would not and do not conclude that the full-time presence of another miner was necessary. On the other hand, Lopez worked in isolation for at least 50 minutes, given the reading of the evidence most favorable to Cotter. Since there was a reasonable possibility that during that time the heavy drill could have toppled on him rendering him unconscious, fracturing bones or causing lacerations leading to dangerous blood loss, I must hold that the two visits, spaced as they were, did not constitute a level of contact commensurate with the risk.

In this regard another consideration must be borne in mind. The Commission in Old Ben, supra, made this observation:

> [N]othing in the standard suggests that prevention is not a concern .... The standard has a dual purpose, to prevent accidents by timely warning when possible and to expedite rescue and minimize injury when an an accident does occur.

In the present case, because of the confined and secluded nature of the workplace, the preventive purpose of the standard could simply not be achieved without the presence of another miner.

I therefore conclude that in this case a miner was allowed to work alone in an area where hazardous conditions existed that endangered his safety. Moreover, the area was one from which his cries for help could not be heard and at which he could not be seen. I further conclude that the length and frequency of the periods of contact with the lone worker by other miners, including supervisory personnel, were not commensurate with the risk present. 5/

5/ In reaching this conclusion I have not overlooked Cotter's contention that the "working alone" standards have application only to hazards "outside normal conditions in the mining industry." Monterey Coal Company, 3 FMSHRC 439 (1981). Cotter asserts that this limiting definition was adopted by the Commission in Old Ben, supra, and hence must be followed. It is true that the administrative law judge whose result was affirmed in Old Ben used such a test. 3 FMSHRC at 1890-91. The Commission, however, assiduously avoided ratification of that

(Footnote continued)

IV

The Secretary charges that the violation in this case was "significant and substantial" under section 104(d)(1) of the Act. Such a violation exists where there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). In the present case, I conclude that the violation does rise, by a small margin, to the "significant and substantial" level. The most likely injuries from a jackleg accident would range from minor to moderate in severity. There is a reasonable likelihood, nevertheless, that injuries could be reasonably serious. Therefore, the Secretary properly classified the violation as "significant and substantial."

V

The Secretary seeks a civil penalty of $180.00. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance. The record in this case contains no direct evidence bearing on any of these elements except for gravity and good faith. Owing to the nature of the hazard discussed earlier in this decision, the gravity of the violation should be considered moderate. Compliance was immediate. Given the lack of evidence on the other factors, none can be counted against Cotter. Upon the evidence before me, I conclude that $50.00 is an appropriate penalty.

Fn. 5/ continued

part of the decision below, simply stating that under an "industry standards" test, or the "ordinary hazard" test urged by the Secretary, the hazard in question was a "hazard" within the meaning of the standard. Old Ben, 4 FMSHRC at 1802. I do not speculate on what the result would be in this case under an "industry standards" test. I find no hint in the standard that any specialized or esoteric meaning of hazard was intended. I construe the standard to call for an ordinary interpretation of the phrase "hazardous conditions," and I am convinced that an objective factual showing that a hazard exists is sufficient.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the findings of fact contained in the narrative portions of this decision, the following conclusions of law are made:

(1) This Commission has the jurisdiction necessary to decide this case.

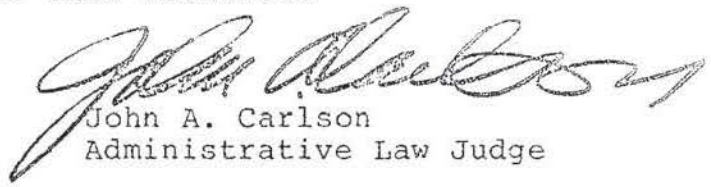
(2) The respondent, Cotter, violated the mandatory safety standard published at 30 C.F.R. § 57.18-25 as alleged in the citation herein.

(3) The violation was "significant and substantial" within the meaning of section 104(d)(1) of the Act.

(4) The appropriate civil penalty for the violation is $50.00.

ORDER

Accordingly, the citation is ORDERED affirmed, and Cotter shall pay to the Secretary of Labor a civil penalty of $50.00 within 30 days of the date of this decision.



John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 6, 1985

NANCY S. BOWEN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 84-84-D
v.	:	
	:	HOPE CD 83-32
POND CREEK MINING COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On April 13, 1984, an order was issued to Complainant to show cause why her complaint of discrimination should not be dismissed for failure to provide certain information. On September 13, 1984 a second show cause was issued. The period allowed in these orders for response has expired and no reply has been received from Complainant.

Accordingly, the case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 84-162 A. C. No. 15-05325-03504
v.	:	No. 2 Surface Mine
LOST MOUNTAIN MINING, INC., Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Lloyd R. Edens, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Steffey

Pursuant to an order providing for hearing issued October 24, 1984, a hearing in the above-entitled proceeding was held on December 12, 1984, in Hazard, Kentucky, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence, I rendered a bench decision, the substance of which is reproduced below (Tr. 158-169):

This proceeding involves a proposal for assessment of civil penalty, seeking to have a penalty assessed for an alleged violation of 30 C.F.R. § 77.1001. The evidence shows the following findings of fact should be made, which I shall list in enumerated paragraphs.

1. Inspector Harold Kouns went to Lost Mountain Mining, Inc.'s No. 2 Surface Mine on January 31, 1984, and he was accompanied by his supervisor, Charles Conatser. Both of the individuals were concerned about the highwall in the No. 2 Pit area. Inspector Kouns wrote a citation, No. 2196562, in which he stated that loose hazardous materials had not been stripped for a safe distance from the highwall for approximately 250 feet in distance. The highwall was approximately 60 feet in height, and the loose material existed while coal was being removed. The loose hazardous material was taken

down to the inspector's satisfaction by the dragging of a dragline chain across the face of the highwall, and the inspector terminated the citation 2 hours after it was issued, by stating that the loose hazardous materials had been cleaned off of the highwall. The inspector was concerned about both loose rocks, and an overhanging of materials about the middle on the right side of the area where the end loading machine was piling up coal and loading trucks. It was the inspector's view that the rocks, which he believed were unconsolidated, could be shaken loose by the drilling that was taking place in the area. He testified about experiences which he had had in which rocks had fallen off of highwalls and bounced off of tires of equipment and gone through windshields of end loaders and injured the operator. Consequently, he believed that the violation was serious, and he indicated in his citation that he believed that the operator's negligence was moderate, and that if a rock had fallen, the result might have been a permanent disabling injury.

2. Russel Draughn is respondent's safety and loss control employee. He testified that he came to the pit area which had been alleged to have an unsafe highwall, and he stated that he examined the highwall, that he saw no loose material which he felt would have fallen, that he observed no spalling of materials at the base of the highwall, and that he did not think that there was any ground for Inspector Kouns to write a citation.

3. Michael Ivey is respondent's production superintendent. He is an engineer, and has worked as an engineer around coal mines for about 9 years, and he has been the production superintendent for about 1-1/2 years. He had inspected the highwall in question on the same morning that the citation was issued, at about 6:00 a.m., at which time the artificial lighting was sufficient to enable him to make a satisfactory examination, and he felt that there was no loose material on the highwall. He described in some detail the method used by respondent to construct highwalls. He presented as Exhibit B a photograph showing the highwall before any materials were dragged across it. He also presented as Exhibits C and D pictures of a 50-ton bucket which is dragged across the highwall to make it safe by removing all loose material. Materials which are not torn off by the bucket are packed down by the 50-ton bucket. He additionally presented as Exhibits H and I two photographs showing the highwall areas after the 30-foot chains were dragged across them, and it was his opinion that the materials on the highwall were loosened by the dragging of the chain, and that if anything, the wall was less safe after the dragging of the chain than it was before.

4. A person examining Exhibits B, H, and I would be led to the same conclusion that Mr. Ivey reached, because Exhibit B is photographed at an angle which does not enable one to see with great detail the exact makeup of the material on the highwall, whereas, Exhibits H and I are in a little more direct focus, and they do tend to show the highwall with greater clarity than Exhibit B does.

5. Larry Miller is a dragline operator, and he worked in the No. 2 pit area on January 31, but he did not actually operate the dragline on that day because he was involved in doing some repairs on the dragline, but he was present. He is not sure that he personally ran the dragline bucket over that particular highwall, but he saw nothing about the highwall shown in Exhibit B which was different from the usual highwall that he constructed. It was his opinion that the highwall was not hazardous.

6. Harold Perkins is an end loader operator for respondent, and he has been doing that kind of work for 6 years. He stated that on January 31 he had been loading trucks for about 2-1/2 hours before the inspectors showed up, and he did not think that the highwall was unsafe. He said if he had thought it was unsafe he would have asked his supervisor to correct any problem before he worked under it. He denied that he had ever told the inspector that he thought that the highwall was unsafe, or that he appreciated the inspector's issuing the citation about the highwall.

7. Tobe Lawson is the foreman who was in charge of the pit area on January 31. He had been making an inspection, along with Michael Ivey, before the citation was written, and he did not think that the highwall had any hazardous loose materials on it. Both end loaders had stopped operating after the inspector issued the citation and he wanted to get the citation abated as soon as possible. Therefore, he attached the chain, which weighs about a ton, to the dozer's blade and dragged it back and forth across the face of the highwall until the inspector was satisfied that the loose materials had been removed.

8. Charles Conatser, who is an MSHA inspector supervisor, testified in rebuttal that on the morning of January 31, 1984, he saw the highwall as soon as he arrived in the pit area, and that he felt there were overhanging materials along the top of the highwall which were hazardous. He also saw pieces of rock which he felt were loose. They were 8 inches wide and 12 inches long, and he believed that the highwall was a hazardous area. He stated that he did not suggest to Inspector Kouns that the citation be issued. As an inspector supervisor, he deliberately did not give his own opinion about the highwall until the inspector had issued the citation. He stated, however, that if the inspector had not issued the

citation for the highwall, he would have issued a citation. It was also Conatser's opinion that the chain had improved the conditions on the highwall and had removed the loose materials. He stated that although Exhibit I still shows an overhang at the top, that overhang, in his opinion, is less hazardous than it was before the dragging was done. He agreed with Inspector Kouns that the hazardous materials had been removed and that the citation was properly terminated.

9. Inspector Kouns was also recalled and he specifically indicated on Exhibit B an area revealing an overhang which he believed was hazardous. He also pointed to a place where he felt the loose rocks existed. He said that he would issue a citation again if he were to see the same conditions in the future.

I conclude that the above findings correctly summarize the evidence which has been presented. Section 77.1001 reads as follows: "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

The first matter to be considered in a penalty case is whether a violation occurred. The evidence presented in this case by respondent causes me to feel that there were good grounds for respondent to believe that no violation existed. When I examined Exhibits B, H, and I, it seemed to me that Exhibit B, which was taken before any corrective measures were performed, would be a highwall which seems to be relatively nonhazardous. If I had been there and only had the view which I can see from Exhibit B, I would be inclined to agree with respondent's witnesses that the highwall is not so hazardous as to be in violation of section 77.1001.

On the other hand, when Inspector Kouns pointed out the areas on Exhibit B about which he was concerned, there is no doubt that there is an overhang at that area. There are places in that same area down farther on the wall which appear to contain rocks which possibly could fall, and which may have been loose. The Seventh Circuit held in Old Ben Coal Corp. v. Interior Bd of Mine Operations Appeals, 523 F.2d 25, 31 (1975), that inspectors should be sustained, unless they clearly abuse their discretion, because their concern is for the safety of the miners.

While I have no criticism of respondent for the matter, it is a fact that companies are in business to make a profit, and they naturally have a somewhat different view from that of an inspector who is there solely for safety, whereas they are there to produce coal and keep an eye on safety at the

same time. It is possible that at times their judgment is different from that of the inspector, but I believe that this case presents one of those situations in which the company has presented convincing evidence that no violation occurred. On the other hand, I have to take into consideration that the inspector was there, and he did look at this highwall under better conditions for evaluating safety than I have from a single photograph. Consequently, I am going to sustain the allegation that there was a violation of section 77.1001. I am finding that a violation occurred with the additional support that the inspector's opinion has also been confirmed by his supervisor who was present, and who did not attempt to influence him before he had come to the conclusion that a violation existed.

When it comes to the criteria that a judge is required to consider in assessing a penalty, which of course he has to do if he finds that a violation occurred, the parties have entered into certain stipulations with respect to four of the criteria, which are very helpful. Those stipulations have been received in evidence as Exhibit 4. They agree that respondent is subject to the jurisdiction of the Commission. They state that in 1983 respondent produced 501,187 tons of coal from the No. 2 Surface Mine, and that Lost Mountain, the respondent in this proceeding, is a subsidiary of Mountain Coals, Incorporated, and that the total company operations resulted in an annual tonnage of 1,414,262 tons. Those statistics support a conclusion that respondent is a large operator. To the extent that penalties are based on the criterion of the size of respondent's business, a penalty in an upper range of magnitude would be appropriate.

As to respondent's history of previous violations the stipulations indicate that respondent has not previously been cited for a violation of section 77.1001 within the last 24 months. Consequently, no portion of the penalty should be based on the criterion of respondent's history of previous violations.

The stipulations also state that assessment of the penalty of $168 proposed by the Secretary in his proposal for assessment of civil penalty would not affect respondent's ability to continue in business.

It has been stipulated that respondent abated the violation in a timely manner. Consequently, no portion of the penalty should be assessed because of respondent's failure to show a good faith effort to achieve rapid compliance.

The fifth criterion of negligence must be evaluated in light of all the evidence which I have summarized in my findings. The Commission held in Penn Allegh Coal Co., 4 FMSHRC

1224 (1982), that a judge is not bound by the inspectors' or the witnesses' opinions as to negligence, as it is his responsibility to draw legal conclusions from the evidence considered as a whole. I believe that in view of the abundant amount of evidence which the respondent has presented in this case that we have in this instance a true difference of opinion on behalf of management and its employees, as opposed to the inspectors, and I believe that that evidence supports a finding that respondent was not negligent in the occurrence of the violation.

The final criterion to be considered is gravity. The Commission has discussed the fact that an inspector may note on a citation issued under section 104(a) that a violation, in the inspector's opinion, is significant and substantial, as that term is used in section 104(d)(1) of the Act, specifically, that the violation is of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard. The Commission defined the term "significant and substantial" in National Gypsum Co., 3 FMSHRC 822 (1981) by stating at page 825:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard 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.

Thereafter, the Commission in Consolidation Coal Co., 6 FMSHRC 189 (1984), and Mathies Coal Co., 6 FMSHRC 1 (1984), applied its National Gypsum definition of significant and substantial in four steps. Step No. 1 is whether a violation occurred, and I have already found that a violation occurred. Step No. 2 is whether the violation contributed a measure of danger to a discrete safety hazard. The evidence in this case is so equivocal on whether there was a specific hazard that I am of the opinion that step No. 2 has not been proven when one considers the entire record with respect to it. It is possible that a rock might have fallen and might have injured someone. But it is more likely than not that this coal would have been cleaned up and no rock would have fallen and no one would have been injured.

The third step is whether there is a reasonable likelihood that the hazard contributed to would result in injury. That consideration also has to be evaluated in light of all the facts, and I am not convinced that the record supports a finding that the hazard, if any, would have contributed to or resulted in an injury.

The fourth step in evaluation is whether there is a reasonable likelihood that the injury in question would be of a reasonably serious nature. The inspector did present some testimony to the effect that rocks have been known to fall down and hit tires on end loaders and bounce through the windshield and injure people. But first of all, you have to have a reasonable likelihood that that is going to happen, and in light of respondent's evidence, I think I must recognize the fact that there is an honest difference of opinion here, and the entire record does not convince me that there was a reasonable likelihood that an injury would occur of a reasonably serious nature in this instance. Consequently, I find that the inspector's citation should be modified to eliminate the designation of "significant and substantial".

Since I have found that a violation occurred, and since the Act requires that a penalty be assessed for any violation (Tazco, Inc., 3 FMSHRC 1895 (1981)), regardless of its gravity, I think that a penalty in this instance of $20 would be appropriate in view of the fact that the violation was nonserious and that there was no negligence associated with its occurrence.

WHEREFORE, it is ordered:

(A) Citation No. 2196562 issued January 31, 1984, is modified to delete therefrom the designation of "significant and substantial".

(B) Lost Mountain Mining, Inc., within 30 days from the date of this decision, shall pay a civil penalty of $20.00 for the violation of 30 C.F.R. § 77.1001 alleged in Citation No. 2196562 dated January 31, 1984.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 7 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-26-M A. C. No. 47-00220-05503
v.	:	Oshkosh Mine (Yard 396)
VULCAN MATERIALS COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on February 11, 1985, a motion for approval of settlement. Under the parties' settlement agreement, respondent would pay a reduced penalty of $750 instead of the penalty of $1,000 proposed by MSHA for the single violation of 30 C.F.R. § 56.9-3 alleged in this proceeding.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The motion for approval of settlement and other pleadings in the official file provide information regarding the six criteria. The proposed assessment sheet indicates that over 27,000 annual hours were worked at respondent's mine involved in this proceeding and that the controlling company worked annual hours of approximately 5,100,000. Those working hours support a finding that respondent operates a large business and that any penalty determined in this proceeding should be in an upper range of magnitude to the extent that it is based on the criterion of the size of respondent's business.

The motion for approval of settlement states that payment of the penalty agreed upon by the parties will not cause respondent to discontinue in business. Therefore, it is not necessary to reduce the penalty by any amount under the criterion that payment of penalties would cause respondent to discontinue in business.

The proposed assessment sheet shows that respondent has been assessed with only one alleged violation during six inspection days for the 24-month period preceding the writing of the order involved in this proceeding. Use of those

statistics to make the calculation described in 30 C.F.R. § 100.3(c) of MSHA's assessment formula results in a conclusion that no portion of the penalty should be assessed under the criterion of respondent's history of previous violations.

The penalty of $1,000 proposed by MSHA in this proceeding is based upon a waiver of the use of the routine assessment formula described in section 100.3 and the determination of a penalty pursuant to narrative findings, as described in section 100.5. The narrative findings do not give respondent any reduction in the penalty under the criterion of whether respondent demonstrated a good-faith effort to achieve compliance after the combined order and citation were issued. A subsequent action sheet in the official file, however, indicates that the order was terminated on August 2, 1984, after new brake shoes and other equipment had been installed. The inspector's termination states that the truck "was in good, safe operating condition". Inasmuch as the citation was alleged in an order, the inspector did not specify a time for abatement. MSHA does not provide an operator with the 30-percent reduction for good-faith abatement, pursuant to section 100.3(f), unless a citation containing an inspector's time for abatement is involved. In view of the extensive rebuilding of the truck's brakes in this instance, it would be appropriate to allow for some reduction of the penalty under the criterion of good-faith abatement.

The foregoing conclusion is based in part on the statement in respondent's answer to the proposal for assessment of civil penalty to the effect that the truck being used when the order was issued was a spare truck which was utilized only when two regular trucks normally used were out of service for maintenance or repair. The fact that the brakes on the spare truck were completely overhauled indicates that respondent was concerned about having the spare truck restored to the "good, safe operating condition" referred to by the inspector's termination sheet.

The remaining two criteria of negligence and gravity require a brief discussion of the situation which caused the issuance of the order and citation. An off-road production truck was used to haul limestone from the quarry to the crusher. It traversed some steep inclines in doing so. When the driver of the truck applied the truck's brakes, they were inadequate to stop the truck. The inspector considered respondent to be very negligent for allowing the truck to be operated with defective brakes and he believed that the truck constituted an imminent danger in the circumstances.

It is not possible to determine how much of the proposed $1,000 penalty was specifically allocated by MSHA under the criterion of negligence. The motion for approval of settlement

indicates that the truck's brakes were inspected by a foreman prior to the time that the truck was placed in service and found to be adequate. Respondent's answer to the proposal for assessment of penalty states that it is the company's policy to require the drivers of all mobile equipment to make safety checks of the equipment prior to operating it and to report any defects to the foreman. Respondent states that the driver of the truck in question failed to report any defective brakes to his foreman on the day the order was issued.

Respondent's answer also alleges that the truck driver was displeased by the fact that he was required to operate the spare truck which had a mechanical shift as opposed to the automatic transmission with which the trucks in normal usage are equipped. It is further alleged that the driver of the truck may have deliberately driven through deep water in the quarry to reduce the effectiveness of the truck's brakes before calling them to the attention of the inspector.

It is not possible to determine from the motion for approval of settlement exactly how much weight the parties gave to the above allegations in agreeing to reduce the proposed penalty, but the motion indicates that the Secretary's counsel discussed the allegations with the inspector. Apparently, there was sufficient merit to some of respondent's contentions to cause the Secretary's counsel to conclude that the degree of respondent's negligence was not as great as it was previously considered to be by MSHA when a penalty of $1,000 was proposed.

There is little doubt but that the violation was serious since it appears that the brakes would not bring the truck to a stop at a time when the truck was empty.

The discussion above indicates that the parties agreed to reduce the penalty to $750, primarily under the criterion of negligence. If a hearing had been held, it is likely that a credibility determination would have had to be made as to the degree of the operator's negligence. If it had been proven at the hearing that the driver failed to report the truck's inadequate brakes to the foreman prior to complaining about them to the inspector, there would have been considerable support for a finding that respondent's negligence was not so great as to warrant a penalty of $1,000. In such circumstances, I find that the parties have given a reasonable basis for agreeing to a reduction of the proposed penalty from $1,000 to $750.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the parties' settlement agreement is approved.

(B) Within 30 days from the date of this decision, Vulcan Materials Company shall pay a civil penalty of $750.00 for the violation of section 56.9-3 alleged in Order and Citation No. 2088669 dated July 18, 1984.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 7 1985

EMILIANO ROSA CRUZ, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 83-62-DM
PUERTO RICAN CEMENT COMPANY, INC., Respondent	:	MSHA Case No. MD-83-44

ORDER

Before: Judge Broderick

On July 19, 1984, I issued a decision on the merits in the above case in which I ordered that Respondent reinstate Complainant to the position from which he was discharged on April 25, 1983, or to a comparable position at the same rate of pay. I also ordered that Respondent pay back wages to Complainant from April 25, 1983 to the date of his reinstatement, together with interest thereon, in accordance with the formula set out in the Arkansas-Carbona case. I also ordered Respondent to pay reasonable attorney's fees and costs of litigation incurred by Complainant.

Subsequent to the decision, Complainant submitted without objection a copy of the Collective Bargaining Agreement between Respondent and the Labor Union representing Complainant. Complainant also submitted a statement of back pay and interest and a statement of attorney's fees and expenses. Respondent submitted a reply to the statement of back pay and interest, and a statement that it did not object to the amount claimed as attorney's fees and legal expenses.

On motion of Respondent, I ordered Complainant to furnish information permitting Respondent to request a statement of interim earnings from the Social Security Administration. I also ordered Complainant to furnish Respondent with a certified copy of his income tax return for 1983 and copies of all job applications made by Complainant since his discharge. Complainant has responded to these orders.

I. BACK PAY AND INTEREST

A. COMPUTATION

On August 17, 1984, Complainant submitted a statement of back pay and interest pursuant to my order. He claimed a total of $18,059.97, of which $16,999.28 represented gross back pay and $1,060.69 represented interest to September 12, 1984. Respondent filed a reply to the statement on September 12, 1984. According to Respondent, Complainant's calculations were in error in that he claimed wage differential for holiday pay, and the differential is paid only when the employee actually works. According to Respondent, Complainant's gross back wage entitlement (assuming liability) would be $16,539.70. Respondent also objected to the interest rate Complainant used from July 15, 1984 to September 30, 1984. Complainant did not respond to these allegations of Respondent. I accept Respondent's computation of back pay entitlement, and adopt the worksheet submitted as showing Complainant's entitlement to back pay through September 12, 1984, in the gross amount of $16,539.70. In addition, he is entitled to interest at the rate of 16 percent from January 1, 1983 to June 30, 1983, at the rate of 11 percent from July 1, 1983 to December 31, 1983, at the rate of 11 percent from January 1, 1984 to June 30, 1984, and at the rate of 11 percent (not 13 percent) from July 1, 1984 to September 12, 1984, in accordance with the Arkansas-Carbona formula.

B. INTERIM EARNINGS

Complainant has supplied a copy of his income tax return and has authorized the Social Security Administration to give Respondent a copy of his earning record. Complainant testified in this case on March 30, 1984. The only questions concerning interim earnings or seeking other employment were asked by me. The statement of back wages fails to reflect the earnings testified to. Counsel for Complainant agrees that Complainant's back pay entitlement should be reduced by the interim earnings he

received in January and February 1984. Respondent has sought to depose Complainant on this issue but I denied the motion as being untimely. There is no evidence that Complainant has had interim earings other than those testified to.

C. CHRONIC ABSENTEEISM

My decision of July 19, 1984, found that Complainant was off work a considerable number of days and that an inordinate number of his absences occurred on the day before and after weekends and holidays. Respondent argues that a record of chronic absenteeism justifies a reduction in the back pay award. The Commission has stated that the purpose of the relief in a section 105(c) case is to "restore the employee to the situation he would have occupied but for the discrimination." Secretary/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (1982). Secretary/Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042 (1983). Therefore, I conclude that the back pay may properly be reduced because of Complainant's absenteeism. He was absent 78 days in 1981, 49 days in 1982 and 4 days in 1983. (He worked to April 25). Thus, he averaged approximately 56 days off per year during the 2-1/3 years prior to his discharge. (This seems a more reasonable period then the 3-year period suggested by Respondent). The contract allowed 18 days per year sick leave. Therefore, I will reduce the award by 38 days per year from the date of Complainant's date to the date of my decision. Since I have ordered reinstatement, Respondent's liability for back pay thereafter will not be reduced based on his absentee record. To simplify the computation, a reduction of 9.5 days pay should be taken from the amount due for each quarter as back pay.

ATTORNEYS FEES AND COSTS

Complainant requests reimbursement for attorneys fees in the amount of $2,340.00 and expenses of litigation in the amount of $113.16. The fee request is based upon 39 hours at the rate of $60 per hour. Respondent does not object to the claim for attorneys fees and legal expenses and it will be approved.

Therefore, within 30 days of the date of this order, Respondent is ORDERED

1. To pay Complainant back wages in the following gross amounts:

(a)	2nd Quarter 1983	$2,036.35
	3rd Quarter 1983	2,889.86
	4th Quarter 1983	2,912.31
	Christmas bonus 1983	363.76
(b)	1st Quarter 1984	$2,294.32
	2nd Quarter 1984	3,203.91
	3rd Quarter 1984	2,839.19

From the above amounts, the following should be deducted:

(a) Interim earnings from January 1, 1984 to February 18, 1984, at the rate of $134 per week (3.35 per hour).

(b) An amount equal to 9.5 days per quarter from April 25, 1983 to July 19, 1984, on account of Complainant's absenteeism.

To the resulting amount, Respondent IS ORDERED TO pay interest at the rate of 16 percent per year (.0004444 per day) from January 1, 1983 to June 30, 1983, at the rate of 11 percent per year (.0003055 per day) from July 1, 1983 to September 30, 1984, in accordance with the formula set out in Arkansas-Carbona.

2. Respondent is FURTHER ORDERED to pay to Complainant's attorney the amount of $2,453.16 as attorney's fees and expenses of litigation.

/James A Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 8 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. WEVA 84-124
BARRETT FUEL CORPORATION, Respondent	:	A.C. No. 46-06473-03523
	:	Docket No. WEVA 84-222
	:	A.C. No. 46-06473-03528
	:	Docket No. WEVA 84-333
	:	A.C. No. 46-06473-03530
	:	Docket No. WEVA 84-370
	:	A.C. No. 46-06473-03531
	:	Clinton No. 3A Mine
	:	Docket No. WEVA 84-309
	:	A.C. No. 46-06450-03523
	:	Docket No. WEVA 84-310
	:	A.C. No. 46-06450-03522
	:	Docket No. WEVA 84-332
	:	A.C. No. 46-06450-03524
	:	Docket No. WEVA 84-365
	:	A.C. No. 46-06450-03525
	:	Docket No. WEVA 84-369
	:	A.C. No. 46-06450-03526
	:	Docket No. WEVA 84-398
	:	A.C. No. 46-06450-03527
	:	Docket No. WEVA 84-399
	:	A.C. No. 46-06450-03528
	:	Docket No. WEVA 85-16
	:	A.C. No. 46-06450-03529
	:	Docket No. WEVA 85-79
	:	A.C. No. 46-06450-03532
	:	Clinton No. 3 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

This matter is before me on the parties' motion to approve settlement of the captioned matters at 50% of the amount initially assessed, $28,783 for the 80 violations charged.

Based on an independent evaluation and de novo review of the circumstances, including the operator's impaired financial condition I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED. It is further ordered that the operator and/or its corporate principals pay the amount of the settlement agreed upon, $14,391.50, in monthly installments of $1,000 commencing April 1, 1985 until the full amount of the penalties assessed are paid. It is FURTHER ORDERED that approval of this settlement is without prejudice to the Secretary's right to proceed against corporate principals, production operators or others in the event of a default in payment by Barrett Fuel Corporation.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

MAR 12 1985

333 W. COLFAX AVENUE, SUITE 400
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-32-M A.C. No. 26-00093-05506
v.	:	Pabco Gypsum-Apex Quarry
PACIFIC COAST BUILDING PRODUCTS, INC., Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
E. David Stroebling, Esq., Las Vegas, Nevada, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against respondent in accordance with Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a).

Citation 2088401 alleges respondent violated 30 C.F.R. § 55.12-17 relating to power circuits. The Secretary originally assessed a proposed penalty of $63.00 for this violation.

At the hearing the parties stipulated that a violation of the standard occurred. Further, it was agreed that the last two sentences of the citation should be vacated.

The parties further agreed that respondent is a moderate-sized company with a low history of violations. In addition, the citation was abated in good faith.

It was further agreed that the imposition of a penalty would not affect the ability of the company to remain in business. Further, it was agreed there was no negligence on the part of the operator.

Considering all of the statutory criteria, I deem that a civil penalty of $40.00 is appropriate for this violation.

Accordingly, I enter the following:

ORDER

1. Citation 2088401 and a penalty of $40.00 are affirmed.

2. Respondent is ordered to pay the sum of $40.00 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 12 1985

ROY D. LUCAS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 83-48-D
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	MSHA Case No. HOPE CD 82-47

FINAL ORDER

Appearances: Joseph A. Colosi, Esq., Camper & Seay, Welch, West Virginia, for Complainant; R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, and Sally S. Rock, Esq., Eastern Associated Coal Corp., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Kennedy

This matter is before me on complainant's challenge to the tentative decision of August 9, 1984, denying his claim and dismissing his complaint. Based on a de novo evaluation and review of the record, I find complainant failed to sustain his ultimate burden of showing that protected activity played a substantial or motivating part in the decision to discharge Roy Lucas from his job as a service foreman on August 13, 1982. I further find the operator carried its burden of showing that even if protected activity was arguably involved in the decision to discharge Mr. Lucas he would in any event have been discharged for his unprotected activities alone. I also find that complainant failed to show by a preponderance of the reliable, probative and substantial evidence that (1) he was wrongly accused of perpetrating the serious safety violation for which he was discharged, or (2) that the unprotected activities for which he was discharged were a mere pretext. NLRB v. Transportation Management Corp., 462 U.S. 392 (1983); Bioch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); Donovan v. Stafford Const. Co., 732 F.2d 954 (D.C. Cir. 1984); Dickey v. FMSHRC, 3 MSHC 1233 (3d Cir. 1984); Hecla-Day Mines Corporation, 3 MSHC 1527 (1984); Haro v. Magma Copper Co., 2 MSHC 1897 (1982); Robinette v. United Castle Coal Co., 2 MSHC 1213 (1981); Pasula v. Consolidation Coal Co., 2 MSHC 1001 (1981), rev'd on other grounds, sub. mon., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

I

Complainant misconceived his burden of proof. This is not surprising as the shifting burdens of production and persuasion that govern discrimination cases have long been confusing to the Courts, the Commission and counsel.

As complainant asserts he carried his burden of showing, at least arguably, that protected activity may have played a part in the decision to discharge. But this satisfied only the burden of establishing a prima facie motive and not, as he suggests, his ultimate burden of persuasion as to the true motive. As I read the precedents it would be clear error to substitute a prima facie showing of unlawful intent for complainant's ultimate burden of persuasion as to the existence of a retaliatory motive for an adverse action.

In attempting to carry his ultimate burden complainant encountered evidence which showed (1) that it was doubtful that protected activity played any part in the decision to discharge, and (2) that serious unprotected activity intervened between the claimed protected activity and the decision to discharge. Indeed, the operator's affirmative defense showed that it was the safety violation plus complainant's disingenuous attempt to alibi as well as his unsatisfactory work record that were uppermost in Mr. Meadow's mind at the time he made the decision to discharge Lucas. Walter A. Schulte v. Lizza Industries, 3 MSHC 1176, 1182 (1984).

The question then is what was the operator's burden. Whether the operator's burden is one merely of production or production and persuasion has for some time been a matter of dispute among the circuits and before the Supreme Court. As I read Transportation Management, Robinette, Pasula and their progeny, the operator's first option is to show that it was at least as probable as not that no protected activity occurred or that protected activity played "no part" or "no substantial or motivating part" in the decision to take adverse action. If the operator succeeds in placing the evidence in equipose or in negating by a preponderance of the credible evidence the prima facie case he will prevail. 1/

If, on the other hand, the operator is not content to rest on his rebuttal case he may proceed to attempt to show

1/ I found, and I hereby confirm, that the operator succeeded in showing that protected activity played "no substantial part" in the decision to discharge. Bench Decision, Finding 6.

that, at worst, his motives were mixed and that he would in any event have taken the adverse action for complainant's unprotected activity alone. This, the so-called affirmative defense route, requires under the Court's and the Commission's precedents assumption of a burden of both production and persuasion. 2/

The operator suggests the way may still be open to apply the Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), test, as the court did in the first Boich case, 704 F.2d 275. 3/ Under this test first devised for Title VII cases the operator has only a burden of production sufficient to raise a question of fact as to the true motive for the adverse action. Complainant then has the burden of showing that "but for" the protected activity he would not have been discharged. Williams v. Boorstein, 663 F.2d 107, 117 (D.C. Cir. 1980). This is not, however, the prevailing view under the NLRB Act or the Mine Act.

Under the prevailing view, it is necessary that the operator show that assuming without conceding he entertained an unlawful motive he nevertheless had a lawful or legitimate motive and this motive was standing alone sufficient cause for the adverse action. This showing he must make by a preponderance of the evidence. If the operator does not make a persuasive showing as to this or if the complainant shows the dual motive was a mere pretext the employer or operator does not carry his intermediate burden of persuasion and complainant prevails. Thus, the burden in the case of the dual or mixed motive defense is on the operator to disentable his motives and make a persuasive showing, i.e. a showing by a preponderance of the evidence that despite his illegal motive the adverse action would have been taken for the permissible motive alone.

Once the operator meets his burden of production and at least arguably his burden of persuasion, the complainant in

2/ This accords with the NLRB's Wright Line test as approved by the Supreme Court in Transportation Management.

3/ It is important to recognize that in Transportation Management the Supreme Court did not establish a rule of its own for the allocation of the burden of proof in NLRB cases. It merely accorded "deference" to the rule established by the Board. It is likely that it would accord the same deference to the Commission's rule which differs somewhat from that of the NLRB. In Burdine, on the other hand, the Court established a rule to be followed by the Article III courts in deciding Title VII cases.

order to ensure that he carries his ultimate burden of persuasion may also "attempt to refute [the] affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have been taken in any event for such unprotected activities alone." Robinette, supra, n. 20. This reformulation of the ultimate burden of production and persuasion adopts "both the 'in any way' and 'but for' tests" and underscores the fact that the ultimate burden always rests with complainant. Pasula, supra at 1010. The difference between the Court's tacit rejection of the "but for" test in NLRB cases and the Commission's melding of the two tests for the Mine Act is, as this case demonstrates, of little practical consequence as under either test the ultimate burden of persuasion rests with complainant. 4/

It was in this sense that I found that the evidence did not refute and therefore did not support a finding that "but for" the claimed protected activity Mr. Lucas would not have been discharged but to the contrary that the preponderant evidence showed Mr. Lucas would in any event has been discharged for his unprotected activities alone. Bench Decision Findings 9, 10.

II

With respect to the claim of disparate treatment, I note that, as I found, the two contract miners present when the violation occurred shared responsibility for the hazard created. 5/ As the Commission has noted, however, neither

4/ While Pasula and Robinette outline the order and allocation of proof as a three-stage process, it is clear that the actual presentation of evidence does not contemplate a trifurcated trial, but simply sets forth the proper method of analysis after the relevant evidence is before the trial judge. Evidence relating not only to the complainant's prima facie case, but also the operator's articulated nondiscriminatory reason and the complainant's demonstration of pretext, is, as it was in this case, frequently presented during the course of the complainant's case in chief. Similarly, the evidence presented by the operator in its case in chief will almost always, as it did in this case, contain evidence directed at refuting the complainant's assertions of pretext, as well as evidence to support the claim of unprotected activities and again as in this case, evidence to attack the prima facie case.

5/ Evidence of disparate treatment may be used either to support a prima facie case or to refute a dual motive defense. Walter A. Schulte, supra.

it nor its trial judges "sit as a super grievance or arbitration board meting out industry equity. Once a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." Secretary ex rel Chacon v. Phelps Dodge, 2 MSHC 1505, 1511 91981), rev'd on other grounds, sub. nom. Donovan v. Phelps Dodge, 709 F.2d 86 (P.C. Cir. 1983); Haro v. Magma Copper, 2 MSHC 1897, 1898-99 (1982).

Further, as Mr. Lucas acknowledged, it is permissible for management to hold supervisory employees to a higher standard of responsibility and accountability than hourly employees. Compare, Dickey v. United States Steel, 2 MSHC 2168, aff'd., sub. nom. Dickey v. FMSHRC, 3 MSHC 1233 (1984). I took into account the claim of disparate treatment in weighing the bona fides of the operator's claim that Lucas would have been discharged whether or not his protected activity played a part in the decision. Upon further analysis I am persuaded that Mr. Meadows, the mine superintendent who made the final decision, did so because he had a good faith, reasonable belief that Lucas was the foreman responsible for the nipping cable hazard, that it was a life threatening hazard, and that, rightly or wrongly, Lucas in his panic over the matter, tried to fabricate an alibi. I am also persuaded by the contemporaneous, corroborating physical circumstances that it would have been impossible to operate the dust buggy without using the nipping cable. Mr. Meadows chose to believe, and I submit on the basis of what he knew, quite rightly, that Mr. Lucas was on the track entry after 2:00 a.m.; that he was, in fact, the last miner to leave the track entry that morning; and that in doing so he so concentrated on helping the two contract miners get the derailed dust buggy back on the tracks he forgot to remove the unfused nipping cable from the trolley wire.

III

There is no gainsaying the fact that Mr. Lucas' immediate supervisor, Harry Stover, the third shift mine foreman, was a harsh taskmaster who rode Lucas unmercifully and unfairly. Despite the fact that he was responsible for hiring Lucas, Stover immediately took a strong personal and job-related dislike to Lucas for the latter's more relaxed style of workforce management.

Stover was a hard driver who looked upon Lucas as a soft touch for his work crews--inclined to give them too many work breaks and disinclined to drive them to the point of exhaustion over hard physical tasks. Lucas was truly the ham in the sandwich and in a no-win position

between Stover's unceasing demands for productivity and the contract miners' pleas for some consideration in the performance of the hard physical labor demanded.

As the record shows, between the time Lucas was hired to work in February 1982 until he was fired in August the two men engaged in several verbal altercations over how various tasks should be performed and how long it should take to accomplish them. Only one of these, the crib block incident on April 20, 1982, involved arguably protected activity that resulted in an unsatisfactory work warning. However, as I have found, and now confirm, the safety related activity occurred before the cribs arrived and did not, at least in my judgment, play a part in Stover's decision to issue the warning for failure to set enough cribs after they arrived on the section and before the shift ended.

The other incidents that resulted in the issuance of unsatisfactory work warnings occurred on March 16 and July 16, 1982. 6/ These incidents did not involve any safety related activity. Nevertheless, they did show that Stover had a strong anti-Lucas animus.

The incidents of April 8, May 8, May 21 and June 3 arguably involved safety related activity but did not result in any overt adverse actions by Mr. Stover. Mr. Lucas admitted he made no protest to Stover or anyone else in management with respect to the unsafe mining practices he allegedly participated in on May 8 and May 21, 1982. The April 8 incident involving Stover's refusal to furnish communications or transportation to Lucas and his crew may have stirred Stover's personal resentment toward Lucas but did not demonstrate a pervasive or even transitory anti-safety animus. The claim that Stover harbored resentment over the April 8 incident until he could find an excuse, as he allegedly did so April 20, to issue an unsatisfactory work warning is, I find, speculative and unsupported by a preponderance of the credible evidence.

Taken as a whole complainant's evidence shows a pattern of conduct on the part of Stover that boded ill for Lucas' job security, but, as I find, this did not stem from Lucas' claimed concerns for safety. These concerns, while

6/ The March 16 incident involved a verbal warning for letting the work crew quit early. The July 16 incident involved a written warning for failure to accomplish the timely installation of a car spotter.

real, were, in my opinion, exaggerated to meet the needs of advocacy and the exigencies of a hard case. Many activities in an underground coal mine involve the weighing of risks, the exercise of judgment, and sometimes heated disagreements over what risks are or are not acceptable. Often the law or the collective bargaining agreement will, when viewed in hindsight, provide a bright line between acceptable and unacceptable risks. Just as often, however, in the heat of the moment and with the pressure to act the line is blurred if not entirely illusory.

Honest, even if heated, disagreements between two foremen over what risks are or are not acceptable is not probative of an anti-safety animus on the part of management. Nor is every dispute over productivity versus safety, without more, evidence that a discharge for unprotected activity was ineradicably tainted with an anti-safety animus.

When supervisory personnel lose respect and confidence in one another someone has to go. Unfortunately, as in other spheres of life, it is usually the subordinate who is, rightly or wrongly, made the scapegoat. I find it a matter of regret that Lucas did not have self-confidence enough to break the iron vice by going over Stover's head. Only two months after he was hired he knew he had two strikes against him and that unless he succeeded in calling Stover's hand before Meadows his job security was in jeopardy. Lucas passed up his chances on May 8, May 21 and June 3 to make, if he could, a clear and convincing record of Stover's and management's claimed anti-safety animus. The breaker post incident of June 3 demonstrated, of course, that Lucas could be wrong and Stover right over a disputed safety issue with no attempt by Stover to retaliate. Further, Lucas was just plain wrong in attributing the August 10 rail runner incident to Stover. The contemporaneous record showed that Stover was on vacation at that time and at the time of Lucas' discharge on August 13, 1982.

Consequently, even if I impute to top management all of Stover's anti-Lucas animus I cannot find that this was the functional equivalent of an anti-safety animus. Rightly or wrongly, management including the mine superintendent, Mr. Meadows, was convinced that Lucas was a poor supervisor and that his work history and Stover's evaluations, as reflected in his progressive discipline file, made him a candidate for early removal. Bradley v. Belva, 2 MSHC 1729, 1736 (1982).

This is the background against which one must weigh Meadows' statement that Lucas would not have been discharged for the nipping cable violation alone. Meadows, I find, was being perfectly candid. Few, if any, miners are ever discharged for committing safety or health violations. The tradition among both management and labor, with the acquiescence of MSHA, is that by and large miners are not to be disciplined for even serious safety violations.

I have no doubt that if Lucas had been a highly regarded member of the management team, such as Stover, he would not have been discharged for the nipping cable violation. 7/ But, as Meadows testified, Lucas' record was against him, and, worst of all, Meadows believed he tried to fabricate an alibi that was so transparently false that Meadows would have put his own reputation in jeopardy if he had accepted it. I believed Mr. Meadows when he testified that Lucas was not discharged for the safety violation alone, but for that plus his poor performance record and, most importantly, for his attempt to dissemble over the nipping cable incident. On the record considered as a whole therefore, I am compelled to conclude and affirm that Lucas was discharged for unprotected activity alone and that retaliation for protected activity played no substantial part in the decision to effect the adverse action.

Accordingly, it is ORDERED that the tentative decision of August 9, 1984, a copy of which is attached hereto and incorporated herein, as supplemented by this Order be, and hereby is, ADOPTED and CONFIRMED as the final disposition of this matter.

Joseph B. Kennedy
Administrative Law Judge

7/ I note in passing that among Stover's less endearing qualities was his stubborn refusal to admit, in the face of overwhelming evidence, that the use of unfused nipping cables was a common practice in the Harris No. 1 Mine.

APPENDIX

TENTATIVE DECISION

I find a preponderance of the credible evidence shows:

1. That Roy Lucas, James Taylor, and Jennings Harrison were jointly and severally responsible for leaving the nip cable energized between shifts on August 12, 1982.

2. That the condition created a serious hazard of shock, burn, or electrocution to other miners.

3. That under Eastern's progressive disciplinary policy, the creation of this hazard was just cause for the discharge of one or all of those responsible.

4. That the discharge of Roy Lucas on August 13, 1982, for the role he played in creating the nip cable hazard did not violate any rights guaranteed him under Section 105(c) of the Mine Safety Law.

5. That the activity for which Roy Lucas was discharged was not protected by the Mine Safety Law.

6. That none of Mr. Lucas' claims of protected activity motivated the decision to terminate his employment.

7. That Mr. Lucas would have been discharged for the nip cable incident, despite any previous protected activity because the nip cable incident was, standing alone, just cause for his discharge.

8. That the motive for Mr. Lucas' discharge was not tainted or rendered unlawful by any intent to retaliate for any of his protected activity.

9. That the evidence does not support a finding that but for the claimed protected activity Mr. Lucas would not have been discharged.

10. That on the contrary, the preponderant evidence shows that Mr. Lucas would, in any event, have been discharged for his failure to prevent the hazard occasioned by the energized nipping cable.

11. That while the unsatisfactory work warning of April 20, 1982, involved protected activity, that activity did not play a part in management's decision to issue the warning. I agree that in issuing the warning management failed to take into account the roof hazard that Mr. Lucas addressed prior to the time the cribs arrived. I also agree that Mr. Lucas' reluctance to short circuit the ventilation system was justified, even if the diversion of the air, as it turned out, did not adversely affect ventilation at the face. I am not in a position to second guess management's finding that Mr. Lucas failed to accomplish enough work on the cribs. I am inclined to the view that management's decision was on balance unjustified. Even so, this warning was not the deciding factor in the decision of August 13, 1982, to terminate Mr. Lucas.

12. The single predominate motive for the termination was the nip cable incident. Thus while there was management animus toward Mr. Lucas, it stemmed, rightly or wrongly, from his perceived performance deficiencies and not from safety complaints.

13. Accordingly, it is ordered that the complaint be, and hereby is, dismissed.

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MAR 13 1985

FRANCIS M. JANOSKI, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 85-16-D
v.	:	MSHA No. VINC CD 84-14
R AND F COAL COMPANY, Respondent	:	Rice No. 1 Strip Mine

ORDER DISMISSING COMPLAINT

Before: Judge Koutras

Statement of the Case

On July 17, 1984, the complainant Francis M. Janoski, filed a discrimination complaint pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, with MSHA's St. Clairsville, Ohio, field office. Mr. Janoski's complaint stated that he was employed by the respondent from September 22, 1983 to November 11, 1983 and from May 11 to May 25, 1984, as a "seasonal truck driver," and that his employment with the respondent was terminated on May 25, 1984, after a physical examination he had taken on May 10, 1984, revealed that he had pneumoconiosis (black lung). His claim was that his termination or discharge was discriminatory and a violation of section 105(c) of the Act.

MSHA conducted an investigation of Mr. Janoski's complaint, and by letter dated November 16, 1984, informed him that on the basis of a review of the information gathered during the investigation, MSHA concluded that a violation of section 105(c) had not occurred. The letter also advised Mr. Janoski that since it was possible that his complaint "may be applicable to section 428 of the Mine Act," it was being forwarded to the Department of Labor, Employment Standards Administration, for its consideration. Mr. Janoski was also informed of his right to file a complaint with this Commission.

By letter dated November 26, 1984, and received November 28, 1984, Mr. Janoski filed a complaint with the Commission pursuant to section 105(c)(1) of the Act, and his complaint states in pertinent part as follows:

I was employed by R and F Coal Company from September 22, 1983, to November 11, 1983, and again from May 11, 1984, to May 25, 1984, as a seasonal truck driver. On May 25, 1984, my foreman, Brad Ankrom, informed me that Bill Gossett, Superintendent, instructed him to tell me that May 25, 1984, would be my last day of work, due to a problem with my physical. Dr. Ajit S. Modi, was employed by R and F Coal Company to conduct a physical examination and concluded 'the chest x-ray revealed chronic lung disease and pneumoconiosis.' The doctor suggested that I no longer work in dusty areas. My physical examination was conducted on May 10, 1984. (copy of Dr. Modi's letter attached.)

I feel that R and F Coal Company wanted to terminate my employment with them because if indications revealed that I had pneumoconiosis (black lung) then as my employer they would have to pay into my black lung benefits and not any previous employer. Previous to my seasonal work with R and F Coal Company, I was working for many years with another coal company. I did not know until the physical examination on May 10, 1984, that I had any symptoms of black lung. When I had an examination in September 1983 for R and F Coal Company there was no mention of any chest x-ray problems.

MSHA's reason for denying my 105(c) discrimination complaint was based on Part 90 rights, which is for underground employees of mines and I, however, am a surface coal miner and was discriminated against on the basis of 'applicant for employment.' I have never worked in the underground coal mines and feel this was an unfair decision to reach.

On February 4, 1985, the respondent filed an answer to Mr. Janoski's complaint, and at the same time filed a motion to dismiss the complaint, with a supporting memorandum. The respondent admits that Mr. Janoski was employed as a temporary, seasonal truck driver from September 22, 1983 to November 11, 1983, and that he received an offer of temporary employment in early May 1984, contingent upon his satisfactorily passing a physical examination. Respondent also admits that Mr. Janoski was given a physical examination on May 10, 1984, and that on May 25, 1984, he was informed that since he had failed to meet all of the requirements for employment, the offer of temporary employment was rescinded.

Respondent's arguments in support of the motion to dismiss.

In support of its motion to dismiss, the respondent maintains that the Commission lacks subject matter jurisdiction, and that Mr. Janoski's complaint fails to state a claim under section 105(c) of the Act.

With regard to the assertion that the Commission lacks jurisdiction to entertain the complaint, the respondent cites two cases where the former Interior Board of Mine Operations Appeals and the Commission ruled that claims involving alleged pneumoconiosis discrimination cannot be processed through the Commission under section 105(c), but instead lie within the jurisdiction of the Secretary of Labor. Higgins v. Old Ben Coal Corporation, 1 MSHC 1169 (1974) aff'd on other grounds sub. nom. Higgins v. Marshall, 585 F.2d 1035 (D.C. Cir. 1978). cert. denied, 441 U.S. 931 (1979); Matala v. Consolidated Coal Co., 1 MSHC 2001 (1979).

Higgins involved a claim by several miners that they were discriminated against by virtue of the fact that they suffered from pneumoconiosis in that the mine operator failed to maintain their current rate of pay after transferring them to less dusty areas of the mine. The Interior Board of Mine Operations Appeals dismissed the complaint for lack of jurisdiction, and stated as follows at 1 MSHC 1172:

> . . . since there is specific statutory provision for review of discharge and/or discrimination of a miner based upon the fact that such miner suffers from pneumoconiosis, as here alleged, we need not speculate whether, in the absence of such provision, this Board could or should assume jurisdiction under some other provision of the Act, specifically 110(b). We think it highly unlikely that Congress intended to confer jurisdiction upon both the Secretary of Labor and the Secretary of the Interior pertaining to the same subject matter within the confines of the same Act. Higgins, 1 MSHC at 1172. (Section 110(b) of the 1969 Act is substantially similar to Section 105(c) of the Act.)

Matala involved a claim similar to that in Higgins, and Matala's complaint was pending on appeal with the Interior Board of Mine Operations Appeals at the time the Secretary of the Interior's adjudicative functions under the 1969 Coal Act were transferred to the Commission. Upon consideration of Matala's appeal of the dismissal of his complaint, the Commission cited with approval the prior ruling by the Board in Higgins as quoted above, and stated as follows at 1 MSHC 2002:

> We conclude, however, that Matala's allegation of discrimination should be resolved under the extensive provisions of section 428(b) of the Black Lung Benefits Act, which are enforced by the Secretary of Labor, not the Commission. Despite Matala's attempt to characterize this dispute as a section 110(b) discrimination claim, his application raises issues of discrimination related exclusively to rights of miners afflicted with pneumoconiosis. Congress has provided a more specific remedy in the black Lung Benefits Act for claims of discrimination based on pneumoconiosis and there is no need for this Commission to apply the more general provisions of section 110(b) of the 1969 Act in Order to provide Matala with a remedy for any discriminatory practices which might be present in this case.

In support of its conclusion that Mr. Janoski has no discrimination claim under section 105(c) of the Act, the respondent points out that Mr. Janoski alleges that he was an applicant for employment who was the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 of the Act, and was thus protected by the clause in section 105(c) prohibiting discrimination against any miner or applicant for employment who is the subject of such medical evaluations and potential transfer.

Respondent maintains that the standards promulgated pursuant to section 101 are those set out as 29 C.F.R. Part 90, and that section 90.1 provides that such standards are only applicable to miners who are employed at underground coal mines or at surface work areas of underground coal mines. Since the respondent operates a surface coal mine, and since Mr. Janoski admits that he is a surface coal miner and had never worked in the underground coal mines, respondent concludes that Mr. Janoski is not a protected person entitled to relief under section 105(c) of the Act.

Discussion

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any

coal or other mine subject to this Act * * * because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * * . (Emphasis added.)

Section 101(a)(7), of the Mine Act provides in pertinent part as follows:

> * * * where appropriate, any such mandatory standards shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

Section 428(a) of the Black Lung Benefits Act, 30 U.S.C. § 938(a), provides as follows:

> No operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of this subsection the term 'miner' shall not include any person who has been found to be totally disabled.

The mandatory health standards authorized by section 101(a)(7) of the Mine Act, are found at 30 C.F.R. Part 90.

Pursuant to those regulations a miner employed at an underground coal mine or at a surface area of an underground coal mine may be eligible to work in a low dust area of the mine where there has been a determination that he has evidence of pneumoconiosis. If there is evidence of pneumoconiosis, a miner may exercise his option to work in a mine area where the dust levels are below 1.0 milligrams per cubic meter of air.

Richard C. Johnston v. Olga Coal Company, WEVA 82-236-D, 5 FMSHRC 1151 (June 20, 1983), and Gary Goff v. The Youghiogheny and Ohio Coal Company, 6 FMSHRC 2055 (August 24, 1984), were both decided by Commission Judge Gary Melick subsequent to the Matala and Higgins cases. The Johnston case involved a complaint by a miner pursuant to section 105(c)(3) of the Mine Act alleging that his level of pay was reduced by the mine operator in violation of his statutory rights as a miner deemed to have been transferred because of pneumoconiosis. The case proceeded to hearing, and after finding that the complainant had voluntarily waived and relinquished his right to transfer, Judge Melick held that the complainant had failed to meet his initial burden of proving that his reduction in pay was in violation of section 105(c)(1) of the Mine Act, and he dismissed the complaint.

The Goff case concerned a complaint of alleged discrimination under section 105(c)(1) of the Mine Act because of an underlying medical condition, pneumoconiosis. Relying on Matala v. Consolidation Coal Co., supra, Judge Melick summarily dismissed the complaint and ruled that a complaint of discrimination on the basis of pneumoconiosis should be resolved under section 428(b) of the Black Lung Benefits Act, rather than under section 105(c) of the Mine Act. Judge Melick stated as follows at 6 FMSHRC 2057:

> While the anti-discrimination provisions of section 105(c)(1) of the 1977 Act replacing and enhancing the provisions of section 110(b) of the 1969 Act are broader in coverage than the comparable provisions of the 1969 Act, the rationale for having discrmination complaints based on allegations that the miner suffers from pneumoconiosis resolved under the specific statutory provisions set forth in the Black Lung Benefits Act has continuing validity.

Mr. Goff filed an appeal of Judge Melick's dismissal of his complaint with the Commission, and on September 26, 1984, the Commission granted his petition for discretionary review, and the case is now before the Commission for further adjudication.

Conclusion

I take note of the fact that under section 428 of the Black Lung Benefits Act, a coal mine operator is prohibited from discharging, or otherwise discriminating against, a miner employed by him by reason of the fact that the miner is suffering from pneumoconiosis. Applicants for jobs in a coal mine are not covered by section 428, and are not afforded the protections provided in section 428 for employees. On the other hand, the discrimination prohibitions found in section 105(c) of the Mine Act extend to coal mine applicants as well as miners on the payroll. Applicants who are the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 are protected by section 105(c). However, the extent of any such protection is specifically tied to the regulations promulgated pursuant to section 101 of the Mine Act.

Mr. Janoski asserts that MSHA's denial of his discrimination complaint under section 105(c) of the Mine Act was based on the fact that as a surface coal miner he was not covered by MSHA's Part 90 regulations, and therefore had no rights under those regulations. The applicable MSHA regulations promulgated pursuant to section 101 are those found in Part 90, Title 30, Code of Federal Regulations, 30 C.F.R. Part 90. As correctly pointed out by the respondent, those regulations only apply to miners who are employed at underground coal mines or at surface work areas of underground coal mines. Since the respondent operates a surface coal mine, and since Mr. Janoski has admitted that he is a surface coal miner and has never worked in the underground coal mines, I conclude that he is not a protected person entitled to relief under section 105(c) of the Mine Act. Accordingly, I conclude that his complaint should be dismissed.

Since I have concluded that Mr. Janoski has no cause of action under section 105(c) of the Mine Act, I see no need to address the jurisdictional question raised by the respondent as part of its motion to dismiss. The issue concerning the Commission's jurisdiction to entertain complaints of this kind is now pending before the Commission in the Goff case.

ORDER

The respondent's motion to dismiss the complaint on the ground that it fails to state a claim under section 105(c) of the Mine Act, IS GRANTED, and the complaint IS DISMISSED. */

George A. Koutras
Administrative Law Judge

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*/ I take official notice of a Memorandum of Understanding between MSHA and the Employment Standards Administration (ESA), a separate agency within the Department of Labor, 44 Fed. Reg. 75,952, December 21, 1979. The agreement provides for a central clearing house for inquiries and investigations by MSHA and ESA for discrimination complaints filed under section 105(c) and 428 of the Mine Act. MSHA and ESA are responsible for coordination and consultation in the handling of such complaints, and since MSHA has advised Mr. Janoski that it has forwarded his complaint to ESA, he should contact MSHA or ESA directly to ascertain the status of his complaint within the ESA. I believe that MSHA has a duty to monitor Mr. Janoski's ESA complaint, and to specifically advise him of the status of its referral to that agency. I also believe that MSHA has a duty to specifically and fully advise Mr. Janoski as to the reasons supporting its conclusion that his rights under section 105(c) were not violated.

slk

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FALLS CHURCH, VIRGINIA 22041

MAR 13 1985

LOCAL UNION 1609, DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Complainant	:	COMPENSATION PROCEEDING
	:	Docket No: PENN 85-91-C
v.	:	Greenwich No. 1 Mine
GREENWICH COLLIERIES, Respondent	:	

DECISION

Before: Judge Moore

On February 22, 1985, Respondent Greenwich Collieries filed a Motion for Summary Decision. On March 8, 1985, the United Mine Workers of America filed a Motion to Stay the Proceedings and a Memoranda in Support Thereof and in Opposition to the Motion for Summary Decision.

I DENY the Motion to Stay. While the Commission has cases before it that might govern the outcome of this case, I have no idea when the Commission might decide these cases and in some cases, for one reason or another, the Commission does not rule on all the issues presented to it. Also, in a recent decision, Secretary of Labor v. Youghiogheney and Ohio Coal Company, the Commission, on the behest of MSHA vacated the citation and dismissed the case without ruling on an issue which is pertinent to the instant case. 1/ I think it is my job to make my ruling on the issues as I see them and the Commission can either affirm or reverse.

On November 7, 1984 at 11:00 A.M. the inspector issued an imminent danger order when he learned that "a concentration of methane in excess of 5% has been found by a certified employee of this company in the immediate return of the A4-71 active working section". At 3:30 that afternoon, he issued a citation under Section 104(a) of the Act alleging a violation of 30 C.F.R. 75.316-2(i). This latter section is not a

1/ The issue was whether a concentration of more then 1% methane constituted a violation. The Secretary's trial staff thought so but its appellant staff did not. The Commission decided not to rule on the issue in such a nonadversary situation.

mandatory standard but is a criterion to be used by district managers in approving a ventilation system. The miners idled by the § 107 imminent danger order then sought compensation pursuant to § 111 of the Act. That section requires, regardless of the validity of the order, "full compensation by the operator at the regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order, shall be entitled to full compensation by the operator at the regular rates of pay for the period they are idled, but for not more than four hours of such shift." The company admits that it owes the compensation described above.

The section goes on to say that if the mine or an area thereof is closed by a § 104 or § 107 order, "for a failure of the operator to comply with any mandatory health or safety standards . . . [compensation shall be] for such time as the miners are idled by such closing, or for one week, whichever is the lesser." It is this "long term" compensation that is at issue in this case. In order to get long-term compensation the closure order issued for a violation must be valid. At the outset the question is: was the order issued for a violation of a mandatory standard? I hold that it was not. Under § 301(c)(2) of the miscellaneous provisions of the Federal Mine Safety and Health Amendments Act of 1977, we are bound by the rulings of the Interior Board of Mine Operations Appeals until told otherwise by the Commission or a Court. The Board's holdings were succintly summarized by Judge Broderick in Secretary of Labor v. Youghiogheney and Ohio Coal Company, FMSHRC 1581, 1584, September 19, 1983). He said:

> In a case under the 1969 Coal Act, the Board of Mine Operations Appeals held that a finding of methane in excess of six percent six feet from the working face did not in itself establish a violation of section 303(h)(2) of the Coal Act (this statutory provision is identical to 30 C.F.R. §75.308. Eastern Associated Coal Corporation, 1 IBMA 233 (1972). The holding was reaffirmed in Mid-Continent Coal and Coke Company, 1 IBMA 250 (1972) where the Board said: "Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation." IBMA at 253. In 1977, the Board held that a 5 percent methane accumulation in the face did not establish a violation of 30 C.F.R. § 75.301 (requiring ventilation of active workings with

air of sufficient volume and velocity to dilute, render harmless and carry away explosive gasses). "The Board is of the opinion that it would be patently inconsistent administration to hold that an excessive methane accumulation constitutes a violation under 30 C.F.R. § 75.301 when the provisions of 30 C.F.R. § 75.308 provide for specific actions to be taken when such an excessive accumulation is discovered." Mid-Continent Coal and Coke Company, 8 IBMA, 204, 212, (1977).

I see no essential difference between the case at bar and the cases before the Board of Mine Operations Appeals. Four and one half hours after issuing the order, the inspector issued a citation which he said was a part of the order. I have never seen this type of procedure before, but in any event a citation can not close a mine nor idle workers, and it did not allege a violation of a mandatory standard. The criteria are for the guidance of MSHA district managers, not standards that can be violated by mine operators. The Board of Mine Operations Appeals has so held. The Valley Camp Coal Company, 3 IBMA 176, 181, (1974). And, as stated, we are bound by these decisions until they are reversed.

I hold that the miners were not idled by an order issued "for a failure of the operator to comply with any mandatory health or safety standards . . ." The Motion for Summary Decision is GRANTED in favor of Greenwich Collieries insofar as long term compensation is concerned and that portion of the complaint is DISMISSED. Inasmuch as Greenwich admits it owes the short term compensation, it is ORDERED to pay that compensation within 30 days, with interest figured in accordance with the Commission's decision in Secretary Ex Rel Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983). Footnote 15 of that decision is attached.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th Street, NW., Washington, D.C. 20005 (Certified Mail)

Attachment

/db

15/ The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	$1,000
Second quarter (beginning April 1, 1983)	$1,000
Third quarter (beginning July 1, 1983)	$1,000
Total net back pay	$3,000

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;
11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:
$1,000 net back pay x 91 accrued days of interest (last day of first quarter plus the entire second quarter) x .0004444 = $40.44

Plus,

(b) At 11% interest for entire third quarter through the date of payment:
$1,000 net back pay x 105 accrued days of interest (the third quarter plus 15 days) x .0003055 = $32.07

(c) Total interest award on first quarter:
$40.44 + $32.07 = $72.51

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter
$1,000 x 1 accrued day of interest x .0004444 = $.44

Plus,

(b) At 11% interest for the entire third quarter through date of payment:
$1,000 x 105 accrued days of interest x .0003055 = $32.07

(c) Total = $.44 + $32.07 = $32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:
$1,000 x 16 accrued days of interest x .0003055 = $4.88 total

(4) Total Interest Award:

$72.51 + 32.51 + 4.88 = $109.90

This amount is added to the total amount of back pay ($3,000), for a total back pay award of $3,109.90.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-53-M A.C. No. 10-01249-05501
v.	:	Lake Fork Pit
LAKE FORK GRAVEL, INC., Respondent	:	

ENTRY OF DEFAULT AND FINAL DECISION
AND ORDER OF ASSESSMENT

Before: Judge Lasher

Respondent, Lake Fork Gravel, Inc., has failed to respond to my Order to Show Cause dated February 26, 1985. Respondent has also failed to comply with the Prehearing Requirements set forth in the Notice of Hearing herein dated February 7, 1985, in two respects. First, it has failed to respond to initiatives of counsel for the Petitioner, Rochelle Kleinberg, to communicate with it to comply with such requirements. 1/ Secondly, Respondent has failed to file with the undersigned the written submissions required by the second paragraph of such prehearing requirements. Thus, Respondent effectively has become unreachable by all reasonable processes of communication and has otherwise failed to establish good cause for its various failures to comply with standard prehearing requirements. Accordingly, it is found to be in default and to have waived its right to a hearing and to contest the proposed penalties for the 6 violations alleged and described in Petitioner's Proposal for Assessment of Penalty. 29 C.F.R. 2700.63.

1/ Counsel for the Secretary has advised me on March 11, 1985, that she has called Respondent's Sacramento, California phone number (916) 929-4245)) on two occasions, 2/12/85 and 2/19/85, and left messages but that Respondent has failed to return these calls; Counsel has also tried to reach Respondent on numerous occasions at its Idaho number (208) 634-2158)) to no avail.

It is therefore ordered that the hearing scheduled to commence in Boise, Idaho, on March 19, 1985, be CANCELLED, and that Respondent pay the following penalties, totaling $154.00, to the Secretary of Labor within 30 days from the date hereof:

Citation Number		Penalty
2225896		$ 54.00
2225897		20.00
2225898		20.00
2225899		20.00
2225900		20.00
2226501		20.00
	Total	$154.00

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Rochelle Kleinberg, Esq., Office of the Solicitor, U.S. Department of Labor, 8003 Federal Building, Seattle, Washington 98174 (Certified Mail)

Mr. Charles L. Chesney, Lake Fork Gravel, Inc., P.O. Box 60405 Sacramento, California 95860 (Certified Mail)

Mr. Charles L. Chesney, P.O. Box 733A, Lake Fork, Idaho 83635 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

INDUSTRIAL RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. VA 85-10-R
v.	:	Citation No. 2455472; 12/6/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Buchanan No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Steffey

Counsel for contestant filed on February 5, 1985, a notice of contest seeking review of Citation No. 2455472 dated December 6, 1984. Section 105(d) of the Federal Mine Safety and Health Act of 1977 requires that an operator notify the Secretary of Labor within 30 days of receipt of a citation that he intends to contest the citation. The certificate of service shows that contestant did not serve a copy of the notice of contest on the Secretary until February 1, 1985, which was 56 days after contestant received the citation.

Section 2700.20 of the Commission's rules, 29 C.F.R. § 2700.20, provides for a contestant to file a notice of contest with the Commission "at or following the timely filing of his notice of contest with the Secretary." The Commission's rules, therefore, recognize the need for a contestant to notify the Secretary that a citation is being contested within 30 days after its receipt by contestant.

The notice of contest states that an informal conference with respect to Citation No. 2455472 was held in Richlands, Virginia, on January 14, 1985, which resulted "in said citation remaining in full force and effect." Contestant has not submitted any modification of the citation occurring after December 6, 1984, which might justify a notification to the Secretary of an intent to contest the citation within 30 days after a modification of the citation. An informal conference is not the equivalent of a modification or change in a citation which expands the 30-day notification period required by section 105(d).

Soon after the 1977 Act was passed, I issued on January 30, 1979, in Island Creek Coal Company, Docket No. PIKE 79-18, an order of dismissal in which I interpreted section 105(d) as

requiring an operator to file a notice of contest with the Commission within 30 days of issuance. I dismissed the application for review in that case because it was filed with the Commission 3 days after the 30-day period had expired. The Commission affirmed my decision in Island Creek Coal Co., 1 FMSHRC 989 (1979).

The notice of contest in this proceeding was not served on the Secretary until 26 days after the 30-day notification period had expired. Therefore, the notice of contest must be dismissed as having been untimely filed.

Contestant may, of course, contest the validity of the citation when the Secretary files a proposal for assessment of civil penalty with respect to the violation alleged in the citation. Energy Fuels Corp., 1 FMSHRC 299 (1979).

WHEREFORE, it is ordered:

The notice of contest filed on February 5, 1985, in Docket No. VA 85-10-R, is dismissed for failure of contestant to comply with the 30-day notification period provided for in section 105(d) of the Federal Mine Safety and Health Act of 1977.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

J. Scott Tharp, Esq., Tharp, Liotta & Janes, P. O. Box 1509, Fairmont, WV 26554 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 19 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 84-51-D
ON BEHALF OF	:	MSHA Case No. BARB CD 84-14
GREGORY BROWN,	:	
Complainant	:	No. 1 Mine
v.	:	
	:	
A & L COAL COMPANY, INC.,	:	
Respondent	:	

ORDER

Before: Judge Broderick

The parties have stipulated to the amount due to Complainant as back wages pursuant to my decision of November 5, 1984.

In accordance with the stipulation, Respondent is ORDERED to pay the following sums to Complainant within 30 days of the date of this order:

December, 1983

3 days's compensation	$ 192.00
Interest	22.91
	$ 214.91

January, 1984 through March, 1984

Compensation	$3,836.00
Expenses incurred in procuring interim employment	130.00
	$3,966.00
Less interim earnings	480.00
	$3,486.00
Interest	332.01
	$3,818.01

	$ 214.91
	3,818.01
Total Compensation Due	$4,032.92

Payment of the above amount will comply with and satisfy the Order to pay back wages contained in my decision of November 5, 1984.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAR 22 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-94-M A.C. No. 26-00458-05502
v.	:	Buffalo Road Pit and Mill
ARC MATERIALS CORPORATION, WMK TRANSIT MIX, Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Michael Glancy, General Manager, WMK Transit Mix, Las Vegas, Nevada, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against the respondent in accordance with Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The civil penalties sought here are for the violation of a safety regulation. The petitioner seeks $98.00 for each violation.

Citations 2245538 and 2245539

These citations charge respondent with violating Title 30, Code of Federal Regulations, Section 56.9-3, which provides as follows:

> 56.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

Summary of MSHA's Evidence

MSHA Inspector Vaughn Cowley inspected respondent's open pit sand and gravel operation on January 30, 1984 (Tr. 7, 8).

The company used trucks to haul materials from the pit to the crusher dump area (Tr. 8). On the day of the inspection, the company was using its two rubber-tired WABCO Model C-35 dump trucks (Tr. 8, 9). Each vehicle hauls approximately 35 tons.

The inspector requested a ride to the dump area with the company foreman (Tr. 9). He also requested that the driver engage the brakes on a 175-yard-long ramp. The truck, travelling at 15 miles per hour, hardly slowed down as it came to a stop (Tr. 10, 11). The truck finally came to a stop 25 yards after it entered the flat area. The brakes were not working since they would not stop the truck on the grade (Tr. 11).

After the truck came to a stop, the inspector wrote an imminent danger order due to the company's failure to provide adequate brakes (Tr. 11).

The inspector found that the same condition also existed on the WABCO company truck number 2. The company mechanics stated they had never had the time to completely go through the brakes to fix them (Tr. 12).

Extensive repairs were made by the company to the two vehicles (Tr. 13, 14).

After testing the brakes, the inspector felt they were adequate. However, he did notice the brake linings were smoking and had to be adjusted. He told the operator to back off the linings (Tr. 14, 15).

Respondent's Evidence

Michael Glancy, General Manager for WMK Transit Mix, indicated that the company's two WABCO trucks operated at a speed of 20 to 22 miles per hour on the haul road. The 10-foot-wide trucks operate in a 22 to 30-foot-wide roadway (Tr. 19, 20).

The company employees are instructed to make a daily maintenance repair order listing anything wrong with the equipment (Tr. 22).

The company disagrees with the inspector's statement that the brakes weren't adequate and witness Glancy had no such knowledge (Tr. 22, 23). There was, however, a leaking wheel cylinder in each of the trucks (Tr. 22). Kits were placed in them and the company adjusted the brakes after the citation issued (Tr. 22, 26).

Discussion

The testimony of the MSHA inspector establishes violations of the regulations in these two vehicles. I credit his expertise concerning the condition of the WABCO trucks.

While respondent's witness Glancy indicated the brakes were adequate, it is virtually uncontroverted that the vehicle barely slowed down when the driver engaged its brakes (Tr. 10). The brakes in fact were not working to the point where they would stop the truck on the grade (Tr. 11).

The citation should be affirmed.

A portion of respondent's evidence addresses the issues concerning a civil penalty. It is asserted the company did not know that the brakes were inadequate (Tr. 23). Further, it is contended that the company was not negligent as initially alleged (Tr. 6, 28). Further, respondent questions the issue of seriousness for this violative condition (Tr. 6, 28).

The statutory criteria for assessing a civil penalty is contained in Section 110(i) of the Act, now 30 U.S.C. 820(i).

In this case the company should have known that the brakes were inadequate. In testing the vehicles, they would not stop on the road. Normal operating procedures require the vehicles to stop under these conditions.

No credible evidence supports the claim that respondent did not know that the brakes were inadequate.

While it is contrary to the judge's initial views concerning the imposition of a penalty (Tr. 29), I now conclude that the facts establish that the imposition of the proposed penalties is warranted.

Order

Based on the facts found to be true in the narrative portion of this decision, and based on the conclusions of law as stated herein, I enter the following order:

1. Citation 2245538 and the proposed civil penalty of $98.00 are affirmed.

2. Citation 2245539 and the proposed civil penalty of $98.00 are affirmed.

3. Respondent is ordered to pay the sum of $196.00 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

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Mr. Michael Glancy, General Manager, WMK Transit Mix, P.O. Box 14697, Las Vegas, Nevada 89114 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 25 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-2
	:	A.C. No. 34-01357-03507
v.	:	
	:	Welch Mine No. 1
TURNER BROTHERS, INC., Respondent	:	

DECISION

Appearances: Ann Maria Soares, Esq., and Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Robert J. Petrick, Esq., Muskogee, Oklahoma, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by 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 two violations of regulatory standards. The general issues before me are whether Turner Brothers Inc. (Turner) has violated the regulations as alleged, and if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation Number 2218067, issued under section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 77.1601(c) and reads as follows:

> Employee Doug Brush (Front-End Loader Operator) supervised by Roger Regan was observed (on the left platform holding the handrail) outside the cab of the 992-C Front-End Loader. The Front-End Loader was operating at pit 001-0 by Roger Regan (Mine Superintendent) and was being used to load overburden into rear dump trucks.

The cited standard states that "no person shall be permitted to ride or be otherwise transported on or in the following equipment whether loaded or empty; . . . (c) outside the cabs and beds of mobile equipment . . . ."

It is not disputed that the noted employee was in fact standing on the platform of the front-end loader while it was being operated by the mine superintendent. The door to the operator's cab was closed and the employee was holding onto a handrail with one hand. The platform surface was 30 by 36 inches and was elevated 6 to 8 feet above ground. The loader was being used to scrape ground material to form a dam to keep water off a roadway. According to MSHA inspector Johnny Newport there was a serious hazard to that employee from falling and suffering broken bones.

Respondent argues that it was necessary for the employee to be positioned on the loader platform for instructional purposes. The employee was the regular loader operator and was being shown by the mine superintendent how to use the minimum amount of ground material to form a dam. The Respondent is accordingly raising the affirmative defense of "impossibility of compliance". In order to establish that defense the Respondent must prove that (1) compliance with the cited standard either would be functionally impossible or would preclude performance of required work and (2) alternative means of employee protection are unavailable. Secretary v. Sewell Coal Company, 3 FMSHRC 1380 (1981), aff'd 686 F.2d 1066 (4th Cir. 1982).

In this case the mine operator has failed to prove either of the two requisite elements of the defense. I find greater credibility in the testimony of Inspector Newport that the mine superintendent could have successfully demonstrated the techniques of manipulating the front-end loader to the regular operator while that operator was safely observing from the ground. The purpose of instructing the regular loader operator was not so much to observe the manipulation of controls within the cab but to observe the manipulation of the scoop in such a way as to construct a dam by scraping up ground material. Since Respondent has also failed to show that alternative means of employee protection were unavailable, the asserted defense cannot be sustained. The citation is accordingly affirmed.

In light of the undisputed evidence that Respondent has been previously cited for the same type of violation and that Inspector Newport had previously warned the mine superintendent against employees riding outside the equipment, and indeed had given him copies of MSHA bulletins citing

fatalities caused by those practices, I conclude that the mine superintendent was grossly negligent in directing his employee to ride outside the cab of the loader. That negligence is imputed to the mine operator. Secretary v. Ace Drilling Co., 2 FMSHRC 790 (1980).

I also conclude from the uncontested evidence that the circumstances presented a reasonable likelihood that the employee would suffer serious injuries such as broken bones as a result of the cited practice. Accordingly the citation and the attendant "significant and substantial" findings are affirmed. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).[1]/

Order Number 2218074, also issued pursuant to section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R.§ 77.404(a) and charges as follows:

> The Ford 600 flat bed vehicle (used to carry explosives and detonators) operating on the haulroad near Pit 001-0 was not being maintained in a safe operating condition in that the steering wheel would turn approximtely 360 degrees before the front wheels would turn left or right. A steering box was observed in the bed of the vehicle. The steering box was used as parts to repair the vehicle.

The cited standard requires in relevant part that "mobile . . . equipment shall be maintained in safe operating condition and . . . equipment in unsafe condition shall be removed from service immediately."

According to the undisputed testimony of MSHA Inspector Johnny Newport the subject vehicle was operating on the haulage road toward the explosives magazine. Although the truck was then empty it was regularly used to carry detonator caps, primers and "wet bags" containing an explosive known as "AMFO". It is further undisputed that its steering wheel could be turned 345 to 350 degrees in either direction without any response from the wheels.

[1]/ Inasmuch as Respondent did not contest this section 104(d)(1) citation pursuant to section 105(d) of the Act, I am without authority to consider the special "unwarrantable failure" finding in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Company 1 FMSHRC _____ (1979). There is however ample evidence to support such a finding herein.

The haulage road over which the truck was operating was approximately 25 feet wide, 1 mile long and was composed of rock and dirt. It had at least one turn, and one 300 foot stretch with a 10 to 20 degree grade. The road also had some bumps, provided for two way traffic and was used by various equipment including pickup and dump trucks, a grader, and inspector's vehicles. Within this framework Inspector Newport opined that there was indeed a "significant and substantial" hazard of serious or fatal injuries from an accident regardless of whether the truck was carrying explosives. He concluded that it was reasonably likely that the cited vehicle would be unable to avoid a collision with another vehicle using the road.

While not denying the existence of the cited conditions Superintendant Regan felt that no hazard existed from the defective steering condition. He reached this conclusion from his understanding that the truck was never driven more than 15 miles an hour. Regan also opined that since the brakes were operational the truck could stop within 10 feet. Regan observed that since the caps, detonators and explosives are kept separately on the truck it was highly unlikely that any explosion would result from any truck accident. Inspector Newport agreed that there was little likehood of an explosion absent a fire.

Within this framework it is clear that a serious hazard of collision existed from the defective steering on the cited truck. While superintendent Regan felt that no hazard existed because the truck could be stopped within 10 feet there was such a serious lack of control in the ability to steer the vehicle that even such a distance on a two-way road only 25 feet wide could be fatal. It is highly unlikely that the cited truck was capable of turning fast enough to avoid an emergency such as a swerving vehicle or pedestrian suddenly stepping in its path. Under the circumstances it is clear that a "significant and substantial" hazard existed. Mathies Coal Company, supra. Order Number 2218074 is accordingly affirmed with its attendant "significant and substantial" findings.

The government also claims that the mine operator was negligent in allowing the cited violation because of the negligence of the explosives truck driver. Under certain circumstances a violation committed by a non-supervisory employee may result in a finding of operator negligence. See Secretary v. A.H. Smith Stone Company, 5 FMSHRC 13 (1983). Among the factors to be considered are the supervision, training and discipline of employees to prevent violations of the standard at issue. A.H. Smith Stone Company, supra. The

violation and hazard presented by the defective steering in the cited explosives truck was so plainly obvious that it reflects a seriously deficient and, indeed, negligent supervision, training and discipline of the employee driving the truck. A properly supervised, trained and disciplined employee would clearly have taken that truck out of service immediately. I therefore agree that operator negligence contributed to the violation herein.[2/]

In determining the amount of penalty to be asssesed in this case I am also considering that the mine operator is of medium size and has a moderate history of violations. I note however that a violation of the standard cited in Citation Number 2218067 had previously been committed. Contrary to the Government's allegations I find that the cited conditions were abated promptly. The employee riding outside of the cab of the front-end loader cited in Citation Number 2218067 was immediately removed and the violation cited in Order Number 2218074 was corrected by replacement of the defective steering box within 3 hours. There is no evidence that the penalties assessed herein would have any effect on the operators ability to remain in business.

ORDER

Citation Number 2218068 and Order Number 2218074 are affirmed. Turner Brothers, Inc. is hereby order to pay the following civil penalties within 30 days of the date of this decision:

Citation Number 2218068 - $300; Order Number 2218074 - $600.

Gary Melick
Administrative Law Judge
(703) 756-6261

2/ For the reasons stated in footnote 1 supra the unwarrantable failure findings associated with this order are not before me. I note, however, on the facts of this case that such a finding would be amply supported.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 2[illegible] 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 85-49
	:	A.C. No. 15-02709-03598-A
v.	:	
	:	Docket No. KENT 85-50
PAUL DOUGLAS GREGORY, FRANK THOMAS KNIGHT Respondents	:	A.C. No. 15-02709-03599-A
	:	Camp No. 1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed motions to approve settlement agreements and to dismiss the cases. The individual respondents have agreed to pay the proposed penalties of $500 each. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlements are appropriate under the Act.

WHEREFORE, the motions for approval of settlements are GRANTED, and it is ORDERED that Respondents Paul Douglas Gregory and Frank Thomas Knight each pay a penalty of $500 within 30 days of this order. The hearings previously scheduled for April 1, 1985 are accordingly cancelled.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

BCNR MINING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket Nos. PENN 83-1-R
v.	:	PENN 83-4-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order Nos. 2012610: 9/16/82 2012602: 9/8/82 Clyde Mine

DECISION

Appearances: Bronius K. Taoras, Esq., BCNR Mining Company, Meadow Lands, Pennsylvania, for Contestant; David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Fauver

These proceedings involve review of two withdrawal orders issued at BCNR Mining Corporation's Clyde Mine, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The cases were consolidated and heard in Pittsburgh, Pennsylvania.

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

FINDINGS OF FACT

Docket No. PENN 83-4-R

1. The Clyde Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. On September 8, 1982, while inspecting the Clyde Mine, MSHA Inspector John Poyle attempted to determine whether a pre-shift examination had been performed in One West Section. When the inspector was unable to locate dates, times, or initials by a pre-shift examiner, he brought the shift foreman to the section to help search but they found nothing. By an entry recorded in the "State Book," the

inspector determined that a pre-shift examination had been made. The inspector decided that a violation of 30 C.F.R. § 75.303 had occurred because the pre-shift examiner had not marked the date, time and his initials at the places examined.

3. The inspector believed the citation was unwarrantable because the examiner knew or should have known that the date, time, and initials were required to be placed in the areas examined. He therefore issued a section 104(d)(2) order (No. 2012602). The inspector did not look into or consider the reasons for the violation at the time he issued the unwarrantable failure order. His trip back into the area with the dayshift foreman was to verify that the date, time, and initials were not there.

4. The pre-shift examiner, Kevin Warchol, had lost his chalk in the course of the midnight shift prior to doing the pre-shift examination in question. A loading machine had gotten stuck in a wet, muddy, area and Mr. Warchol had worked in the mud under the machine while trying to free it. Later he tried to use his pen to write on canvas, but that did not work. The immediate face area had not been rock-dusted at that time so rock dust could not be used to mark the faces.

5. Upon completing his pre-shift examination, Mr. Warchol was called to the scene of a haulage problem where he stayed until the end of the shift, when he went to the surface. By the time he was finished, the day shift, which started at 8:00 a.m., had gone into the mine.

Docket No. PENN 83-1-R

6. On September 16, 1982, Inspector John Poyle, accompanied by his supervisor, Eugene Beck, and BCNR's representative, George Comadena, conducted a regular surface inspection at the Clyde Mine.

7. Inspectors Poyle and Beck followed fresh vehicle tracks to the mine's refuse dump. Before entering the dump, the inspectors stopped on the roadway leading into the dump when they observed a highwall on a refuse pile. Mr. Poyle was concerned with the height of the highwall and so he, Mr. Beck, and Mr. Comadena went to the mine's safety department to review the mine's ground control plan. Following their review of the ground control plan, the party returned to the dump, this time going farther into the refuse area. While

inspecting the highwall, which exceeded the 12-ft. height permitted by the ground control plan, Mr. Poyle observed an overhang of approximately five feet protruding from the highwall. The inspectors found this condition to be an imminent danger because they believed the overhang was likely to fall if hit or bumped by equipment and could cause death or serious injury. Inspector Poyle issued a section 107(a) withdrawal order (No. 2012610).

DISCUSSION WITH FURTHER FINDINGS

Docket No. PENN 83-4-R

On September 8, 1982, Inspector Poyle issued section 104(d)(2) Order 2012602 citing a violation of 30 C.F.R. § 75.303. He alleged that the violation (failure to place time, date and initials at places examined) was "unwarrantable" and "significant and substantial," but at the hearing the Secretary conceded that this was not a "significant and substantial" type violation.

BCNR concedes that there was a violation of 30 C.F.R § 75.303, but seeks to vacate the order on the grounds that (1) the violation was not "unwarrantable," and (2) there was no proof that a complete "clean" inspection of the mine had not occurred since the last section 104(d) order.

First, I find that the pre-shift examiner's failure to place the time, date and his initials at the places examined was not "unwarrantable" in the circumstances of this violation. He had lost his chalk, conditions were wet and he could not write with his pen. Hindsight may point to other things he might have tried, such as marking a brattice curtain with his thumbnail or a tool edge, but they did not occur to him and, overall, I find that the evidence does not establish an "unwarrantable" violation.

Secondly, the Secretary offered no evidence that there had not been a complete "clean" inspection of the mine since the last preceding section 104(d) order.

For the above reasons, the 104(d)(2) order should be changed to a section 104(a) citation. It should be thus modified, instead of being vacated, because there was a violation of the standard cited.

Docket No. PENN 83-1-R

This case involves an order of withdrawal for a condition which Inspectors Poyle and Eugene Beck found to be an imminent danger.

Inspectors Poyle and Beck followed fresh vehicle tracks to the refuse dump. Before entering the dump the inspectors stopped on the roadway leading into the dump when they observed a highwall on a refuse pile. Mr. Poyle was concerned with the height of the highwall and so he, Mr. Beck and Mr. Comadena went to the mine's safety department to review the mine's ground control plan. Following their review of the ground control plan, the party returned to the dump, this time going into the refuse area. Inspector Poyle estimated that the highwall was about 25 feet high. While inspecting the highwall, Mr. Poyle observed an overhang of about five feet protruding from the highwall, caused by extracting material from the bottom of the refuse pile. The overhang was about 18 to 20 feet wide.

I find that a preponderance of the reliable evidence establishes that the overhang constituted an imminent danger. The inspectors reasonably surmized from their observation of highlift tracks leading into the refuse area that red dog was being removed from the bottom of the pile. Red dog is slate and burned coal which can be used for laying driveways. Although Mr. Comadena told them no one worked in that area, they reasonably concluded that a highlift was being used to extract red dog from the refuse pile. By following the highlift tracks the inspectors observed a highwall that proved to be in violation of the ground control plan (by exceeding the 12-ft. limit). Later, when they moved closer to inspect the highwall, they became aware of the overhang condition, which they determined to be an imminent danger. As Mr. Beck described the condition, the highwall was not at an angle of repose or rest (the maximum angle at which a heap of any loose or fragmented solid material will stand without sliding) and the overhang was sticking out. It was clear that work was being done in this area, i.e., the removal of red dog from the bottom of the pile. Indeed, it was the removal of red dog that created the overhang. The inspectors' concern was that during a future extraction the overhang could collapse causing death or serious injury. As Inspector Poyle testified: "My opinion was if someone came in that was removing this red dog and would hit it, that whole lap could collapse on top of them (Tr. 81)." Mr. Beck testified: "When he [Inspector Poyle] said he was going to close it down I said I would back him up a hundred percent. If he didn't do it I would have instructed him [to issue a closure order] at that time (Tr. 132).

The presence of highlift tracks leading into the refuse area combined with the loose material made it obvious that mining was going on and that there was no reason to believe it would not continue. Upon close observation, at a more favorable angle, the inspectors discovered that the undermining of the refuse pile created an overhang of unmined material. The inspectors' concern that the overhang might collapse if struck by a vehicle during future extraction was justified by the facts. If material is removed from the bottom of pile, there is a clear risk that the material above will lose support and hence stability. The inspectors acted with reasonable care and judgment by not waiting for another extraction to see if the undermined pile would continue to hold.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. On September 8, 1982, BCNR Mining Corporation violated 30 C.F.R. § 75.303 in that the pre-shift examiner did not mark the time, date, and his initials at the places he examined. However, the Secretary did not meet his burden of proving that the above violation was "unwarrantable" and that a "clean" inspection had not occurred since the last section 104(d) order. Therefore, section 104(d)(2) Order No. 2012602 should be converted to a section 104(a) citation.

3. The Secretary met his burden of proving an imminent danger as alleged in section 107(a) Order No. 2012610.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's Order No. 2012602, dated September 8, 1982, is MODIFIED as follows:

   a. It is changed from a section 104(d)(2) order to a section 104(a) citation.

   b. The allegations of "unwarrantable" and "significant and substantial" are deleted from the citation.

c. The period at the end of the first sentence in the condition or practice section of the citation is deleted and the words "in that" are substituted, and the next word, "There," is changed to lower case: "there."

2. As so modified, Citation No. 2012602, dated September 8, 1982, is AFFIRMED.

3. The Secretary's Order No. 2012610, dated September 16, 1982, is AFFIRMED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 13 1985

EMERALD MINES CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 84-191-R
	:	Citation No. 2253632; 6/15/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Emerald No. 1 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Representative of Miners	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 84-206
	:	A.C. No. 36-05466-03543
v.	:	
	:	Emerald No. 1 Mine
EMERALD MINES CORPORATION, Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania for Contestant/Respondent Emerald Mines Corporation (Emerald);
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner, Secretary of Labor (Secretary);
Earl R. Pfeffer, Esq., Washington, D.C., for United Mine Workers of America (UMWA).

Before: Judge Broderick

STATEMENT OF THE CASE

Emerald initiated a contest proceeding contesting the citation issued on June 15, 1984, on the grounds that the violation alleged in the citation did not occur, and that the special findings in the citation of unwarrantability and significant and substantial were improper. The

Secretary denied the allegations, and the UMWA filed an appearance as representative of the miners in support of the citation. The Secretary subsequently filed a proposal for a penalty. The two proceedings were consolidated by Order issued October 15, 1984.

Pursuant to notice, the consolidated cases were called for hearing in Pittsburgh, Pennsylvania, on December 12, 1984. James S. Conrad and Harry Porter testified on behalf of the Secretary. Martin Doney, J. D. Russell, and Anthony Robert Dean testified on behalf of Emerald. No witnesses were called by the UMWA. All parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Emerald was the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Emerald No. 1 Mine.

2. Emerald's mining operations affect interstate commerce.

3. Emerald is a medium sized operator, and the subject mine is a large mine, producing approximately one million tons of coal annually.

4. In the 24 months preceeding the issuance of the subject citation, there were 294 violations cited at the subject mine. Three of the prior violations cited were of 30 C.F.R. § 75.303.

5. The ability of Emerald to remain in business will not be affected by the assessment of a penalty in this case.

6. Emerald showed good faith in promptly abating the violation charged in the contested citation.

7. The area of the mine involved in this case is the 6 Right haulage entries, No. 3 entry of which was an old intake escapeway. Coal was not being produced in this area at the time involved in these cases. It was described as "more or less a construction area that is being set up for a new section" (Tr. 21).

8. On June 13, 1984, Harry Porter, a miner working at the subject mine, was assigned to work in the 6 Right section No. 3 entry to put up guarding on a cable. He was unable to find evidence that a preshift examination had been made and told management of this. After the shift was completed, he checked the mine examiner's book and found no entries for June 12 or June 13 to show that preshift examinations had been performed.

9. In fact, the area had been examined on June 13, by section foreman Marty Doney who made a notation of the examination in his section book. No hazardous conditions were found. Doney called shift foreman Don Zitko who was on the surface and told him of the examination. However, the examination was not recorded in the mine examiner's book kept on the surface.

10. On June 14, 1984, at the beginning of his shift, Porter asked Doney whether the area had been preshifted and Doney assured him that it had. Federal Mine Inspector James Conrad arrived at the scene and at Porter's request, Conrad explained to Doney that all areas where men are being sent to work must be preshifted and the results recorded.

11. On the following morning, (this was the morning of June 15), Porter checked the mine examiner's books, and there was no record of a preshift examination having been performed of the area in question on June 14.

12. In fact, the area was not preshift examined on June 14. Doney had been under the mistaken impression that the third shift foreman Bobby Dean had performed the examination.

13. It was the practice at the subject mine for the foremen to indicate in a report made at the end of the shift what areas they expect to work in the following day. Doney was asked: "Q. Did you expect that that area would be pre-shifted on the fourteenth? A. It usually is. If we tell people they are going to work in an area, the areas usually are examined." (Tr. 102).

14. On June 15, 1984, Inspector Conrad issued a citation under section 104(d)(1) of the Act for a violation of 30 C.F.R. § 75.303 because "a preshift examination of the 6 Right haulage old intake escapeway No. 3 entry from the No. 29 crosscut to 10 crosscut had not been performed by a certified person prior to sending two union employees into said area. The employees were sent to perform work on a deenergized high voltage cable on the day shift of June 14, 1984."

15. At the time the citation was issued, the condition of the roof in the area in question was good. There was some coal sloughage of the ribs, the entry was on intake air, and no methane was found. There was no electrical power in the No. 3 entry, and coal was not being produced.

STATUTORY PROVISION

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

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

REGULATORY PROVISIONS

30 C.F.R. § 75.303 provides as follows:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which

men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

(b) No person (other than certified persons designated under this § 75.303) shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this § 75.303 has been made within 8 hours immediately preceding his entrance into such area.

30 C.F.R. § 75.2(g) provides in part as follows: "(4) 'Active workings' means any place in a coal mine where miners are normally required to work or travel;"

ISSUES

1. Whether the condition cited was a violation of the mandatory standard as alleged?

(a) Did the area involved constitute "active workings?"

2. If so, whether the violation was significant and substantial?

3. If so, whether the violation was caused by the operator's unwarrantable failure to comply with the standard?

4. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

Emerald is subject to the Act in the operation of the mine and I have jurisdiction of the parties and subject matter of these cases.

THE VIOLATION

Emerald concedes that the area in question, the No. 3 entry of the 6 Right section, was not examined within 3 hours preceding the beginning of the day shift on June 14, 1984. There is no dispute that miners were assigned to work and did actually perform work in the area on the day shift on June 14. Emerald takes the position, however, that the area did not constitute "active workings," because miners were not "normally" or "regularly" assigned to work or travel in the area. I interpret the preshift examination requirement to apply to any area in the mine where miners work or travel. The definition in 30 C.F.R. § 75.2(g)(4) does not limit but rather expands the areas: a preshift examination is required in an area where miners normally are required to work or travel even though they do not in fact work or travel there on the shift in question. The purpose of the

standard is to detect hazards which might result in injury to miners. The purpose would be ill served if it included only areas where miners regularly worked or travelled and excluded areas where they in fact worked or travelled at the time of a citation but did so in an irregular manner. It is clear that the preshift examination requirement is not limited to coal producing areas: conveyor belt entries are active workings. Jones & Laughlin Steel Corp., 3 FMSHRC 1721 (1981), 5 FMSHRC 1209 (1983), UMWA v. FMSHRC, 3 BNA MSHC 1289 (D.C. Cir. 1984); as are escapeways, Old Ben Coal Co., 3 FMSHRC 608 (1981); and return air courses, Kaiser Steel Corp., 3 IBMA 489 (1974); and high voltage cable entries, Mid-Continent Coke & Coal Co., 1 IBMA 250 (1972). The second sentence in the standard requires specific examinations and tests to be performed in "every working section in such workings." It is clear that the area involved herein is not a working section. Does this limit or delineate the term active workings used in the first sentence? I think not. It merely elaborates and makes more specific the kind of preshift examination required to be made in working sections. It would be illogical, and would render the first sentence meaningless, to conclude that the only examinations required were examinations of working sections. I hold that any area in an underground coal mine to which miners are assigned to work or through which they are required to travel constitutes active workings and a preshift examination is mandated by 30 C.F.R. § 75.303. Therefore, I conclude that a violation of the standard has been established in this case.

SIGNIFICANT AND SUBSTANTIAL

The Commission has grappled with the question of how to determine whether a violation is significant and substantial in National Gypsum Co., 3 FMSHRC 822 (1981) and Mathies Coal Co., 6 FMSHRC 1 (1984). In the latter case, the Commission held that:

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

The violation found in this case is the failure to perform a required inspection. How is the seriousness of such a violation to be evaluated? How does one evaluate the hazard to which the violation contributes? By what is disclosed on an examination of the area after the examination? Emerald contends that this is the test. But the hazard and the violation here involve, not the condition of the area as such, but rather the assigning of miners to work in an uninspected area. 30 C.F.R. § 75.300-4 requires daily inspection of main fans; 75.304 requires onshift examinations for hazardous conditions including methane and oxygen deficiency; 75.306 requires weekly ventilation examinations; 75.314 requires special inspection of idle and abandoned areas; 75.800-3 requires testing and examination of circuit breakers. There are other similar requirements. Can it seriously be argued that failure to perform one of these examinations is not significant and substantial if a post-violation examination does not show hazardous conditions? The whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal mine contributes to "a measure of danger to safety" which is reasonably likely to result in a reasonably serious injury. The violation was significant and substantial.

UNWARRANTABLE FAILURE

The Interior Board of Mine Operations Appeals interpreted the term unwarrantable failure under the Coal Act in Zeigler Coal Co., 7 IBMA 280 (1977). A violation is caused by unwarrantable failure, according to the Board, if the operator "has failed to abate the conditions or practices constituting [the] violation . . . [which it] knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Id. at 295-96. See also United States Steel Corporation, 6 FMSHRC 1423, 1436-37 (1984); Secretary v. U.S. Steel Mining Company, Inc., 6 FMSHRC 310, 313 (ALJ 1984). The facts of the present case show (1) miners worked in the area in question on at least 2 days prior to the violation; (2) the examination on June 13 (the day prior to the violation) was made only after the foreman was reminded of it by a miner, and it was not entered in the mine examiner's book. (3) At the beginning of the shift on June 14, the same miner asked whether the area had been preshifted and the federal inspector reminded the foreman of the requirement for conducting preshift examinations; (4) the failure to examine was not intentional. It resulted from a misunderstanding by the foreman on the previous shift. These facts persuade me that the failure to conduct the preshift examination resulted from a lack of reasonable care: reasonable care would have made the operator devise a more efficient system for scheduling preshift examinations in areas where miners are scheduled to work. The operator was given sufficient notice to inform him that the current practice was not working. Therefore, I conclude that the violation was caused by Emerald's unwarrantable failure to comply with the regulation.

PENALTY

The above discussion demonstrates, I think, that the violation was serious and was caused by the operator's negligence. The operator is of moderate size and the mine is a large mine. The history of previous violations is

moderate. There is no evidence that the imposition of a penalty in this case will have any effect on the operator's ability to continue in business. The violation was abated promptly and in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $150.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the contested Citation No. 2253632 is AFFIRMED, including its special findings of a significant and substantial violation and an unwarrantable failure to comply.

IT IS FURTHER ORDERED that Emerald shall within 30 days of the date of this decision pay the sum of $150 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge

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MAR 26 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 84-91-M
	:	A.C. No. 29-00174-05519
v.	:	
	:	Amax Mine and Mill
AMAX CHEMICAL CORPORATION, Respondent	:	

DECISION

Appearances: Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Charles C. High, Jr., Esq., Kemp, Smith, Duncan & Hammond, El Paso, Texas and James L. Dow, Esq., Dow, Feezer & Williams, Carlsbad, New Mexico, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by 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 six violations of regulatory standards. The general issues before me are whether the Amax Chemical Corporation (Amax) has violated the regulations as alleged and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, ie, whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation Numbers 2235657, 2235659 and 2235660 charge violations of the regulatory standard at 30 C.F.R. § 57.3-22 and allege that certain areas of loose and drummy sounding roof had not been adequately roof bolted or supported. The cited standard reads as follows:

> Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily

visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

It is not disputed that the cited roof areas were in fact "drummy" sounding. Amax contends however that the existence of a drummy sounding roof is not sufficient to prove that the roof or back is "loose" within the meaning of the cited standard and that without some additional evidence MSHA's case herein must fail. At hearing, Robert Kirby the Amax general mine superintendant and a graduate mining engineer conceded that a drummy sound does in fact indicate a separation in the roof strata but he maintained that even though the strata is separated the roof material is not necessarily "loose". Kirby pointed out that the ore in the Amax mine is composed of potassium chloride (potash) and sodium chloride and is "quite elastic". The mine roof can therefore bend before breaking. Kirby testified that it is nevertheless the practice at the Amax mine to roof bolt all drummy areas as "insurance" against roof falls.

According to Scresh Desai, the superintendant for production and safety at the Amax mine, a drummy sound indicates either loose top or lessened adhesion between strata because of the presence of carnallite or mud seams.[1]/ Desai conceded that carnallite or mud seams in the roof strata presented the same hazard of roof falls as a physicial separation in the strata. According to Desai, it is the practice at the Amax Mine to cut areas of carnallite out of the top in order to control it.

MSHA Inspector Clyde Bays testified that roof bolting is not specifically required by the regulations governing potash mining and roof bolting is not practiced in many areas of such mines. Bays observed however that it is the standard practice in the industry for miners to continuously check roof conditions by the sounding method, and where a drummy sound is detected, to insert supportive bolts into the drummy sounding roof area. Bays further noted that while not all drummy sounding roof areas constitute a hazard there is no other practical way to determine the soundness of roof conditions in the absence of visible fractures. It has accordingly been the industry practice and MSHA's requirement that

[1]/Carnallite is described as a massive, granular, greasy, milk-white, soluble, hydrous, magnesium-potassium chloride. A Dictionary of Mining, Mineral, and Related Terms, U. S. Department of Interior Bureau of Mines.

in the absence of visible fractures all drummy sounding areas be supported.

Where visible fractures are present in the drummy sounding area Bays said that further tests can be performed to determine whether the roof is hazardous. If a scaling bar cannot bring down the suspect area then, according to Bays, the roof is safe and no citation will be issued.

While Amax argues that the presence alone of drummy sounding roof or back is not sufficient to support a finding that the roof is "loose" within the meaning of the cited standard that argument is not supported by its own evidence. Even adopting its definition of "loose" as "not rigidly fastened or securely attached" or as "loosely cemented . . . material" it is clear that the violations have been proven as charged. The testimony of Amax witness Scresh Desai is alone sufficient to support the violations within those definitions. Desai testified that a drummy sounding roof is evidence of either a physical separation in roof strata or loosened adhesion between the strata because of the presence of carnallite or mud seams. See Secretary v. Contract Mining Company, 6 FMSHRC 2315 (1984).

Secretary v. Magma Copper Company, 3 FMSHRC 345 (1981) cited by Amax is inapposite. In that case evidence existed that the cited wall was not in fact hollow sounding. In addition, it is not known whether the physical characteristics of the mine wall there at issue were in any way similar to the roof conditions in the potash mine here at issue.

While Amax also attempts in its posthearing brief to reinstate a claim that the cited standard is unenforceably vague, that claim was clearly waived at hearing (T. 44). Moreover Respondent's own proffered definition of the term "loose" was applied in this case and it acknowledged that it was standard practice at the Amax mine to roof bolt drummy sounding areas as "insurance". This evidence corroborates the testimony of Inspector Bays that roof bolting drummy areas is and was at relevant times the accepted and standard practice of the potash mining industry. Thus in any event the standard has been interpreted in light of the "reasonably prudent person test" and can not be considered unconstitutionally vague. Secretary v. U.S. Steel Corporation, 5 FMSHRC 3 (1983).

I have also examined the studies conducted at the Amax mine to detect ground movement in alleged drummy areas. Essentially no movement was detected in any of the tested areas over nearly a four month period. However MSHA was apparently not asked to participate in or observe the studies and had no input as to the location of the test sites. The

location of the sites is of course critical to the validity and reliability of any such tests. In any event, even assuming the sampled roof showed no movement over the testing period that fact does not in itself negate the seriousness of the separate and distinct conditions cited as hazardous in this case. Indeed Inspector Bays conceded that he could not predict when the cited areas would fall, if ever. He based his assessment of the hazard on his experience with drummy roof and the history of previous roof falls.

Violations are "significant and substantial" if: (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonable likelihood that the hazard contributed to will result in injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). In this regard each of the cited conditions must be considered separately. With respect to Citation Number 2235657 I do not find the evidence to be sufficient to establish a "significant and substantial" violation. According to Inspector Bays the cited area had already been roof bolted and no effort was made to bar down the fractured area before additional roof bolts were inserted. Consistent with Bays' own testimony that this drummy sounding area would present no hazard if it could not be barred down, the gravity of this violation cannot be properly evaluated. Additional uncertainty exists from the testimony of both Kirby and Bays that drummy sounds may continue to emanate from areas such as this that have already been roof bolted. Under the circumstances I can attribute but little negligence to the operator for this violation.

Citation Number 2235659 involved two drummy roof areas each 8 to 10 feet in diameter. Foreman Young conceded that the areas were drummy and that the day shift had been working under the area. Indeed, the continuous miner was still in the cited entry at that time. Under the circumstances I find that fatal roof falls were reasonably likely. The violation was accordingly "significant and substantial". In light of Young's admissions the violation must also be attributed to operator negligence.

Citation Number 2235660 involved a drummy roof area 10 to 12 feet in diameter. There was no roof support in an area that was also in the direct path of shuttle cars traveling to and from the dumping location. There was accordingly a reasonable likelihood of serious or fatal injuries from roof falls. The violation was "significant and substantial". It may also reasonably be inferred from the failure of the operator to have detected these conditions during required examinations, that the violation was caused by its negligence.

In determining the amount of penalties in this proceeding I have also considered that the mine operator is large in size and has a significant history of violations of the standard at 30 C.F.R. § 57.3-22, the standard found violated in three of the citations herein. There is no dispute that the violations were abated promptly.

At hearing the Secretary moved to vacate Citation Number 2235658 and moved to settle Citation Numbers 2235655 and 2235656. Sufficient evidence was presented at hearing to support the motions and they were granted.

ORDER

The Amax Chemical Corporation is hereby ordered to pay the following civil penalities within 30 days of the date of this decision:

Citation Number		Amount
2235655		$ 20
2235656		20
2235657		50
2235658	(vacated)	
2235659		300
2235660		300
		$690

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 27 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 84-99 A. C. No. 11-01845-03552
v.	:	Zeigler No. 5 Mine
ZEIGLER COAL COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner;
J. Halbert Woods, Esq., Des Plaines, Illinois, for Respondent.

Before: Judge Steffey

Pursuant to a notice of hearing dated November 28, 1984, a hearing in the above-entitled proceeding was held on January 15 and 16, 1985, in Champaign, Illinois, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

The proposal for assessment of civil penalty filed by the Secretary of Labor sought to have civil penalties assessed for a total of six alleged violations of the mandatory health and safety standards. The parties presented evidence with respect to four of the alleged violations and entered into a settlement agreement with respect to two of the alleged violations. After the parties had completed their presentations of evidence with respect to each of the contested violations, I rendered a bench decision, the substance of which is hereinafter given along with the citations to the record where each bench decision appears in the transcript. The parties' settlement agreement is discussed under a separate heading at the end of the decision.

CONTESTED ISSUES

Citation No. 2323513 7/25/84 § 75.503 (Exhibit 1)(Tr. 89-102)

The first alleged violation in this proceeding was contained in Citation No. 2323513 which alleges a violation of 30 C.F.R. § 75.503 in that a 14 BU loading machine, Serial No. 9208, Approval No. 2F1532A-8, contained four openings in

excess of .007 inch between the box and the light switch involving a step flange. There was also one opening in excess of .004 inch between the cover and the main controller panel. Additionally, there was an opening in excess of .004 inch between the cover and the main controller panel.

I shall make some findings of fact pertaining to this violation.

1. The loading machine cited was situated about five crosscuts from the working face at the time the inspector checked its permissibility. The loading machine was parked and was not being used actively at the time the inspector made his examination. The inspector nevertheless cited the excessive openings in the various compartments as being in violation of the permissibility standard because it was his belief from talking to the miners on this section that the loading machine is from time to time taken inby the last open crosscut to be used for cleanup purposes, even though he agreed that Zeigler had converted from conventional mining to continuous mining for the entire No. 5 Mine and that the loading machine was therefore not used in the normal mining process.

2. The Secretary of Labor's counsel presented as a witness, in addition to the inspector, the UMWA safety committeeman who traveled with the inspector in this instance, and he also testified that he is aware of having seen loaders used inby the last open crosscut for cleanup purposes even though he also testified that Zeigler has converted to a continuous mining machine operation. The safety committeeman testified that he had not personally seen the loader cited in this particular instance being at the face of the No. 4 Unit which is here involved, but he was of the opinion, based on statements made by other miners, that the loading machines on all units were taken to the face from time to time and used for cleanup purposes.

3. Respondent presented as a witness the company's safety inspector who traveled with the MSHA inspector in this instance, and Zeigler's witness testified that the No. 2 Unit, and the No. 3 Unit to a certain extent, were wet and frequently have a fireclay bottom which makes the surface of the mine floor very unstable so that the loading machines on those units have to be taken to the face and used for the purpose of cleaning up mud so that the mine floor can be made stable enough for the continuous mining machine to be taken from one place to another. Zeigler's witness, however, was not absolutely sure that the loader on the No. 4 Unit here involved is never taken to the face. It was his opinion as a section foreman, which position he holds at the present time, that it would be unwise to bring the loading machine to the face simply for

ordinary cleanup purposes for the simple reason that it creates hazards in the form of trailing cables and general confusion and additional personnel at the face, so that in his opinion, if the unitrak (or scoop), which is normally used to clean up at the face, should be unavailable or inoperative on a given occasion, he would propose bringing in another unitrak rather than bringing up the loading machine for cleanup purposes.

I believe that those findings cover the essential points made by the two parties. The section which is alleged to have been violated, namely, section 75.503, provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

Counsel for Zeigler concentrated his argument on the last portion of that section which provides that equipment has to be kept permissible "which is taken into or used inby the last open crosscut of any such mine." The operator's counsel states that inasmuch as Zeigler had converted from conventional mining equipment to continuous mining equipment, that the loading machines on each section or unit were there simply because they were left over from the conventional type of mining, and that while they were kept in compliance with section 75.1725, which only requires that equipment be kept in a mechanically safe operating condition, that they were not kept for the purpose of being used in the production of coal. He therefore claimed that since the loaders were not going to be used inby the last open crosscut, they did not have to be maintained in a permissible condition in compliance with section 75.503. He also stressed the fact that the testimony of no witness really shows that he personally had seen the loading machine involved in this instance being used inby the last open crosscut on the No. 4 Unit.

The Secretary's counsel has emphasized, on the other hand, that there is testimony by all three witnesses to the effect that loading machines are used in some instances inby the last open crosscut in the No. 5 Mine and that there is no certainty that the loading machine on the No. 4 Unit would never be used inby the last open crosscut. It follows, of course, that if the loading machine is used inby the last open crosscut, it would have to comply with section 75.503 by being permissible.

I have noted that respondent's witness endeavored to sustain Zeigler's position with respect to the fact that these loading machines were kept in a safe operating condition in the sense that they were inspected and made safe from the standpoint of having good brakes and not having some defective mechanical piece that might create a hazard, but he tried

to distinguish that kind of safety from the electrical type of safety which is associated with the possibility of creating a spark in the mine atmosphere at a time when there is methane present in an explosive concentration. It is possible to make that distinction; that is, that a piece of mining equipment not taken inby the last open crosscut merely has to be in safe operating condition mechanically, but does not have to be maintained in a fine state of repair with respect to joints and openings where electrical sparks may cause an explosion in the presence of methane.

The Commission has decided a case very similar to this one. In Solar Fuel Co., 3 FMSHRC 1384 (1981), the Commission reversed an administrative law judge's decision because he had vacated two citations alleging violations of section 75.503 based on findings that a continuous mining machine and a roof-bolting machine were outby the last open crosscut. The facts showed that the equipment was outby the last open crosscut when the citations were written, but mining had been done on the day the citations were written. The administrative law judge had interpreted section 75.503 to require that equipment actually be taken inby or used inby the last open crosscut. The Commission said that the judge had used the past tense, whereas the regulations are couched in terms of the present tense. The Commission said that all that needs to be shown is the intention of taking equipment inby the last open crosscut. The Commission said that the emphasis is not on where the equipment is located at the time of the inspection, but whether the equipment will be taken inby the last open crosscut. The Commission further noted that the purpose of permissibility standards is to assure that equipment will not cause a mine explosion or a fire. The Commission said that section 75.503 applies not only to equipment taken inby the last open crosscut when inspected but also to equipment which is intended to be or is habitually taken or used inby the last open crosscut even if the inspection actually occurs outby the last open crosscut.

The Commission also held in U. S. Steel Mining Co., Inc., 6 FMSHRC 1866 (1984), that four bolts missing in attachment of a lens in a headlight assembly was a significant and substantial violation even though at the time the violation was cited, there was an indication that there was adequate ventilation and no methane was present in explosive quantities. Also the Commission in that case noted that U. S. Steel had failed to present any evidence in support of its argument that methane in a headlight had never caused an explosion.

I believe that the Solar case decided by the Commission could be used in support of Zeigler's argument in this case because in that instance it appears that the evidence supported the argument that those pieces of equipment were from

time to time, and certainly were intended to be, used inby the last open crosscut, whereas in this instance, the testimony fairly well supports the conclusion that this particular loading machine would not be taken inby the last open crosscut.

Other portions of the Commission's decision in the Solar Fuel case, however, emphasize that the purpose of the standard is to assure that equipment will not cause a fire or explosion, and I believe that one could also conclude from the testimony that there is at least a possibility that a section foreman, in his desire to clean up coal, even on the No. 4 Unit, might take the loading machine inby the last open crosscut and use it.

If Zeigler's personnel are only inspecting that loading machine for the purpose of making sure that it is mechanically safe, and if the section foreman should not be aware of that fact, there is a possibility that he might have that piece of equipment taken to the face and used without having his electrician check the permissibility just prior to taking it inby the last open crosscut. Therefore, I think that the intention of the regulation is that if there is a piece of equipment on the section, which on some units is taken inby the last open crosscut, and which in some possible situation prevailing in the No. 4 Unit, could be taken inby the last open crosscut and used, I think that it ought to be maintained in permissible condition under section 75.503. Consequently, I find that a violation of section 75.503 occurred.

Having found that a violation occurred, I am required to assess a civil penalty under the six criteria. The parties have stipulated to some facts which enable me to deal with some criteria.

First of all, as to the size of the operator's business, it has been stipulated that the No. 5 Mine produces about 303,000 tons of coal per year and that Zeigler produces at all of its mines approximately 1,625,000 tons of coal per year. Those production figures support a finding that Zeigler is a large operator and that penalties should be in an upper range of magnitude to the extent that they are determined under the criterion of the size of respondent's business.

As to the criterion of whether the payment of penalties would cause the company to discontinue in business, the parties have stipulated that payment of penalties would not cause Zeigler to discontinue in business. Therefore, no penalty determined under the other criteria needs to be reduced under the criterion that payment of penalties would cause the operator to experience adverse economic hardship.

The next criterion is whether the operator demonstrated a good-faith effort to achieve rapid compliance once the violation had been cited. The facts show that the inspector issued the citation at 10:00 a.m. and he provided that the violation should be corrected by 10:00 p.m. He wrote an action to terminate at 8:00 p.m. finding that the permissibility standard had been complied with. Consequently, Zeigler showed a good-faith effort to demonstrate rapid compliance because it corrected the violation before the time given by the inspector had expired. Therefore, no portion of the penalty should be assessed under that criterion.

The Secretary's attorney presented as Exhibit 9 a list of previous violations which have occurred during the last 24 months at No. 5 Mine, and that exhibit shows that there have been 31 previous violations of section 75.503. Unfortunately, many of them were just immediately prior to the occurrence of the violation here involved. There were two violations on July 24, 1984, which was the day before the one cited in this instance, that is, July 25, 1984. There was another one on July 17, another on July 16, another on July 11, three on July 10, and two on July 9. There were 10 violations in July prior to July 25. The legislative history of the Act, S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comments about history of previous violations:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. 1/

According to Exhibit 9, which lists the previous violations, many of the violations of section 75.503 were classified as nonserious and were given single penalty assessments of $20 each as provided for in 30 C.F.R. § 100.4. The ones, however, that I referred to above as immediately preceding the one here involved, were considered to be "significant and

1/ Reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

substantial." 2/ One of those was assessed at $147 and another one for $98. The first significant and substantial penalty shown on Exhibit 9 in July was $147, so if the intent of Congress is taken into consideration, I should increase the penalty in this instance by roughly $300 under the criterion of history of previous violations.

The fifth criterion is whether the operator was negligent in bringing about the violation. The inspector was of the opinion that moderate negligence was associated with the violation, but that is a little more severe evaluation than the evidence, taken as a whole, supports. The Commission held in Penn Allegh Coal Co., 4 FMSHRC 1224 (1982), that a judge is not bound by the inspector's or the witnesses' opinions as to negligence, but that it is his responsibility to draw legal conclusions from the evidence considered as a whole. Consequently, if I consider all the facts showing that Zeigler had converted to a continuous mining machine operation and did have the feeling that it could use a loading machine on a section outby the last open crosscut without maintaining it in a permissible condition, and apparently it did intend to use this particular piece of equipment outby the last open crosscut, I think that we could consider negligence to be zero in this instance because Zeigler did have an intent to avoid a serious situation and did think that it was in compliance with the permissibility section. For that reason, I find that no portion of the penalty should be assessed under the criterion of negligence.

The final criterion to be considered is gravity. While the Commission has indicated that a judge may take into consideration what might have happened if a condition is not corrected so that a piece of equipment is continued to be used until a violation does result in injury, I believe in this instance that that would be somewhat unfair to the operator because there was no intent on the No. 4 Unit to take this loading machine inby the last open crosscut, and if the company's intention had been carried out so that this machine was never taken inby the last open crosscut, no one would have been exposed to a serious hazard. On the other hand, if this violation had resulted in equipment being used inby the last open crosscut in a nonpermissible condition, there would, of course, have been the possibility that methane might exist in a sufficient concentration to cause an explosion. The

2/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.

possibility of occurrence of mine disasters is always something that each section foreman and each miner has to work in light of at all times.

For the aforesaid reasons, I find that there was at least a moderate amount of gravity associated with having a piece of equipment on the section which was not permissible. Consequently, under the criterion of gravity, a penalty of $100 is reasonable. As I indicated above, a penalty of $300 should be attributed to the criterion of history of previous violations. When that amount is added to the penalty of $100 assessed under gravity, a total penalty of $400 should be assessed for the violation of section 75.503 alleged in Citation No. 2323513 dated July 25, 1984.

Citation No. 2323515 7/25/84 § 75.503 (Exhibit 3)(Tr. 164-170)

The next citation which was contested by the operator in this proceeding is No. 2323515 alleging a violation of section 75.503 because the shuttle car on the No. 4 Unit was not maintained in a permissible condition. The specific alleged violation pertained to the headlight on a shuttle car. The lens was not secured to prevent it from coming off the light, the screw retainer was broken, and the locking device was not in proper condition. A lens retainer cover was improperly assembled and lead seals were not pressed to make the lens cover permissible. The pertinent factual circumstances will be set forth in the following findings:

1. The inspector testified that at the time he came on the section to check the permissibility of the shuttle car, it had been tagged and locked out and was in the process of being repaired by the mechanic on the section. The inspector discussed the mechanic's instructions received from his section foreman and was advised that the mechanic had been asked to repair a panel on the shuttle car and also a different headlight from the one cited by the inspector. The inspector indicated to the mechanic that he would examine the remaining portions of the machine to see if it was otherwise within the provisions of section 75.503 as to permissibility. The mechanic consented to that arrangement. The inspector continued with his inspection and cited the violation which has been described above.

2. The UMWA safety committeeman testified that he heard the same conversation between the mechanic and the inspector which has been discussed in finding No. 1 above. He and the inspector both agreed that the shuttle car and its trailing cable were warm. That warmth indicated to them that the shuttle car had been used shortly before the repairs had been instituted.

3. Zeigler's safety director, who also accompanied the inspector, testified that he had been told by the section foreman that the mechanic was working on the shuttle car to repair some permissibility violations or problems which had been discovered on the midnight to eight shift. The information that those repairs needed to be done had been referred to the section foreman on the day shift. The day shift foreman had instructed the mechanic to make the repairs which had been discovered on the midnight shift, and the mechanic was told to check the entire shuttle car for permissibility before it was put back into service.

4. The inspector was recalled for examination, and he further explained that he had had a conversation with the section foreman after he came out of the mine. That conversation occurred on the surface of the mine, and at that time the section foreman indicated to the inspector that he did not think the inspector should have cited the permissibility violation pertaining to the other headlight because the section foreman said, "We were going to correct all those things before the equipment was put back into service." The inspector said that he had not been so advised by the mechanic. Therefore, he felt that he was justified in having cited the violation. The inspector indicated, however, that if the mechanic had told him that he intended to inspect the entire shuttle car for permissibility before it was put back in service, he would have asked the mechanic to advise him when he had finished working on the machine and had finished checking it for permissibility, and that the inspector would then have made his examination for permissibility.

5. One other point that the inspector made during his initial testimony was that he had examined the shuttle car for permissibility while it was being worked on by the mechanic so that his inspection would not cause the machine to be out of operation for an additional period of time over and above the time that it was out for the repairs and examination by the mechanic. The inspector thought that his inspection performed while the shuttle car was out of service was to Zeigler's benefit because it enabled the shuttle car to be placed into productive operation for a greater period of time than it could otherwise have been used.

I think those are the pertinent facts that were developed. Zeigler's attorney has moved that the citation be vacated because the company was doing all it could to see that its equipment was permissible at the time the inspector made his examination of the shuttle car, that the equipment was tagged and locked out and was not being used, and that he does not think that the inspector should be permitted to examine a piece of equipment and cite violations at the same time the

company is in the process of correcting existing violations of which the company had knowledge.

The Secretary's attorney has argued, on the other hand, that Zeigler's representative did not make clear to the inspector that the mechanic had been given instructions to check other aspects of permissibility before the machine was put back into operation, and that Zeigler's failure to bring those matters to the inspector's attention was the cause of the inspector's going ahead with the examination at the time he performed it.

Counsel for Zeigler cited a case decided by the former Board of Mine Operations Appeals in Zeigler Coal Co., 3 IBMA 366 (1974), in which the Board held that inspection of equipment should not be performed when equipment is being repaired and is out of service. The Board made a similar ruling in Plateau Mining Co., 2 IBMA 303 (1973), and, so far as I know, the Commission has not overruled either of those Board decisions.

It seems to me in this instance that there is enough equivocation in the testimony to support Zeigler's argument. The company's witness seems to be certain of the fact that the section foreman had instructed the mechanic to complete not only the repairs that he was performing but to perform a complete permissibility check before the equipment was put back into service. It is also a fact that the inspector agreed that the section foreman had talked to him after the shift had ended and had expressed a belief that the inspector should not have written this particular citation because it was the section foreman's intention to have all the permissibility matters corrected on the machine before it was put back into service.

The inspector thought he had a basis for having gone ahead with the inspection in this instance, but this type of confusion and doubt could, of course, as the inspector indicated, have been eliminated simply by the inspector's telling the mechanic and the section foreman to let him know when they had stopped working on the equipment and not to use it until he could have a chance to check it because he had come there on that day to make a permissibility examination.

I think in this instance that there was ample indication that the shuttle car would not be used until all of the permissibility aspects of it had been examined. The facts support Zeigler's argument that this particular inspection should not have been made until the company had been afforded an opportunity to finish its work on the equipment. Therefore, the order accompanying my decision will vacate Citation No. 2323515.

Citation No. 2323517 7/25/84 § 75.316 (Exhibit 5)(Tr. 238-249)

The next contested violation in this proceeding is a violation of section 75.316 alleged in Citation No. 2323517. The citation states that Zeigler had not complied with its approved ventilation and dust control plan because on July 27, 1984, only 23 of the water sprays on the continuous mining machine were operational when the inspector made his examination of that machine. Paragraph 1 on page three of the Ventilation Plan, which is Exhibit 7 in this proceeding, provides that 25 of the 34 sprays on the machine are to be operational. The facts pertaining to the alleged violation will be set forth as follows:

1. The inspector testified that the failure to have the required 25 sprays operational indicated a high degree of negligence because the company provided in its own ventilation plan that it would have 25 of them operational, but he found only 23 to be operational. He pointed out that there are 34 sprays on the machine and that the difference between the 23 that were operating and the 34 that were on the machine indicates a disparity of 11 that were not operating. He also was of the opinion that failure to have the 25 operational was a significant and substantial violation because, over a long period of time, persons who were exposed to excessive respirable dust may contract pneumoconiosis.

2. The UMWA committeeman, who was with the inspector, supported the inspector's belief that the violation was significant because the sprays should have been operational in his opinion. He also emphasized the fact that one of the hoses to the water sprays was broken, and that that would have a tendency to lower the pressure to all of the sprays if the hose supplying pressure to any one of them was broken.

3. Respondent's safety director, who was accompanying the inspector, did not see the continuous mining machine in operation, and, therefore, could not state whether he agreed with the inspector's belief that there was an excessive amount of dust in the atmosphere at the time the machine was being used. He did, however, present as exhibits some analyses of respirable dust samples, and those all indicated that Zeigler had been successful at keeping respirable dust on the No. 4 Unit down to about 1 milligram instead of the 2 milligrams that are permitted, and for that reason, he did not think that the failure to have 25 sprays operable, as opposed to 23, was a serious violation. There is no testimony to show that there was any less dust in the atmosphere after the violation was corrected than there was before the violation was corrected.

4. Zeigler presented as a witness its Director of Safety and Health, and his background shows that he had been involved in some of the early research in trying to develop methods that would alleviate the concentration of respirable dust at the working face of coal mines. His experience in that endeavor was obtained while he worked for MSHA or its predecessor, and he had found through his experimentations that the main way to alleviate respirable dust at the working face was the installation of a scrubbing system. That system was described by both of respondent's witnesses as a sort of vacuum sweeper attachment which pulls air from the front of the continuous mining machine, and, in doing so, brings the dust associated with the cutting of the coal into contact with large amounts of water so that the dust is converted, along with the coal, into a slurry and thereby reduces dust to such an extent that the original scrubbers had an efficiency of about 73 percent even when there were as few as 13 or 14 water sprays in operation.

5. Zeigler's Director of Safety and Health testified further that the system being used in the No. 5 Mine is referred to in the Ventilation and Control Plan as a Joy flooded bed type which is much more advanced and effective than the prototype which he had used in the early research days of alleviating respirable dust. The Joy flooded bed type of scrubber has an efficiency of 95 percent or greater. He stated that he had written the respirable dust plan which is in the record as Exhibit 7, and that he had used a very conservative number of having 25 of the 34 sprays on the continuous mining machine in an operable condition to allow for the fact that some of the sprays might not be operational on a given day, and that in his opinion, unless the sprays were reduced to 14 or less, would there be any likelihood that the respirable dust on the No. 4 Unit would be in excess of the 2 milligrams required by the mandatory health and safety standards.

I believe that those are the primary facts that were developed in support and against the alleged violation in this instance. The respondent's attorney has not denied that there were only 23 of the required 25 sprays operable on the continuous mining machine at the time the citation was written, and since the plan does provide for 25 sprays to be operational, I naturally must conclude that a violation of section 75.316 occurred.

Zeigler's counsel does not contest the occurrence of the violation, but directs his argument to the fact that the inspector considered the violation to be "significant and substantial," and he argues that the citation should be modified to show deletion of the designation of "significant and substantial." As noted in footnote 2 above, the Commission held

in the Consolidation case that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, specifically, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The Commission, as Zeigler's counsel pointed out in his argument, defined the term "significant and substantial" in its National Gypsum case, 3 FMSHRC 822 (1981).

The Commission has enlarged upon its definition of "significant and substantial" in the Mathies Coal Co. case, 6 FMSHRC 1 (1984), and also in the Consolidation case which I just cited at 6 FMSHRC 189. In those two cases, the Commission evaluated the definition in four steps. One is whether a violation occurred. Two is whether the violation contributed a measure of danger to a discrete safety hazard. Three is whether there is a reasonable likelihood that the hazard contributed to will result in injury. Four is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Counsel for Zeigler has argued that his testimony shows that there had not been a citation of the No. 4 Unit for a violation of the respirable dust standards for an extensive period of time prior to the citing of this violation as to the number of sprays in operation on the machine, and that the testimony of the safety director at Zeigler's mine shows that there was no likelihood that anyone would have been exposed to excessive respirable dust as a result of the violation here involved.

The Secretary's counsel has argued that there is no contradiction of the inspector's testimony or of the safety committeeman's testimony that the required 25 water sprays were inoperative, but he stressed primarily the negligence of the operator in failing to have the water sprays operational.

I have already indicated that a violation occurred, and that, of course, takes care of the first step required to consider the designation of "significant and substantial" in the citation. The second step is whether the violation contributed a measure of danger to a discrete safety hazard. There is no doubt that the testimony shows that there may be an increase in respirable dust when water sprays are not working properly on a continuous mining machine, and there is also a possibility that an explosion may occur if all of the factors required for an explosion are in existence. The testimony emphasized the possibility of igniting methane. Consequently, there is evidence to support a finding that a discrete safety hazard is involved which is either excessive respirable dust or the possibility of an explosion of methane.

The third requirement in the significant and substantial evaluation is whether there is a reasonable likelihood that the hazard contributed to will result in injury. On that particular requirement, it appears to me that Zeigler introduced evidence to support a finding that there was not a reasonable likelihood that the hazard in this instance would have resulted in injury. Zeigler presented as Exhibit C information showing that there had been no citation for a violation for a dust standard for about a year prior to this citation.

Zeigler's safety director also testified at length that the primary method for controlling respirable dust, as well as dust in any form at the working face, was through the scrubber which had been installed on the continuous mining machine. The dust-control plan itself shows that the primary means of dust control will be the scrubbing device attached to the continuous mining machine, and the manager of safety also stressed that in the basic research done to develop these scrubbers, even 14 water sprays were sufficient to keep the respirable dust below a concentration of 2 milligrams. The inspector did not address the efficiency of the scrubber versus the water sprays. Therefore, I find that the fact that the company had operational only 23 sprays out of the 25 that were required was not such a violation that it could reasonably be expected that the inoperable condition of two water sprays would have been likely to have caused an injury.

Finally, the fourth consideration is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Here again, the evidence presented, when it is examined in its entirety, will show that there was not likely to be a reasonably serious injury in this instance. There was certainly enough water from 23 operable sprays, taken in conjunction with the scrubbers, to keep respirable dust down and also to counteract the likelihood of ignition as a result of methane being present at the face.

Consequently, I believe that Zeigler's counsel has successfully argued that the citation should be modified to eliminate the designation of "significant and substantial." A violation of section 75.316 has been shown to exist, however, and a civil penalty must be assessed (Tazco, Inc., 3 FMSHRC 1895 (1981)). The Secretary's counsel has indicated that MSHA proposed a penalty of $206 in this instance, and that he believes that there is enough negligence and enough gravity associated with the violation to merit a penalty of no less than $206, whereas Zeigler's counsel has indicated that if the designation of "significant and substantial" is eliminated from the citation, that a penalty of $20 would be appropriate.

In the previous discussion of assessing the penalty for the violation of section 75.503 in Citation No. 2323513, I noted that respondent is a large operator, that payment of penalties would not cause it to discontinue in business, and those findings are, of course, applicable to the existing assessment. There was a good-faith effort shown again in this instance to achieve rapid compliance because the inspector gave respondent until 4:00 p.m. to abate the violation, and he wrote an action to terminate at that same time, 4:00 p.m., showing that the water sprays had been cleaned and were operative and the broken hose had been replaced. Therefore no portion of the penalty should be assessed under the criterion of good faith.

Insofar as the history of previous violations is concerned, Exhibit 9 shows that the company has only been cited for four previous violations of section 75.316, and all of those occurred almost a year prior to the violation involved in this instance. As the matter of fact, the company shows a very marked improvement in its resolve to avoid a violation of section 75.316. Therefore, I shall assess no penalty under the criterion of history of previous violations because of the company's obvious effort made to eliminate violations of the respirable dust standards and of its ventilation and dust control plan.

The fifth criterion to be considered is negligence, and on that, the Secretary has made his primary argument in this instance by pointing out that Zeigler had already given itself a leeway from the 34 sprays that are on the machine down to the 25 that are required to be operational under its plan, and the Secretary's counsel has argued that it shows a high degree of negligence for the company to fail to keep at least those 25 in operation at all times. When it is considered that Zeigler's own witnesses indicated that an examination of the machine occurs during the actual working cycle and that the water sprays are inspected during each shift, it does seem to me that it is a high degree of negligence to fail to find that these sprays are operational, and the section foreman and the continuous mining machine operator know that they have this leeway between 34 and 25, and it seems that that is a pretty liberal provision that they can have that few operative out of the 34. Consequently, I agree with the Secretary's attorney that this was a violation involving a considerable amount of negligence. Therefore, under the criterion of negligence, I believe that a penalty of $200 would be appropriate.

The final criterion to be considered is gravity. Under that criterion, I have indicated that most of the testimony was directed to either showing that the violation was serious or to showing that it was not serious. I have already found

that it was not a serious violation, and I have given the reasons for finding it to be nonserious. I believe that a penalty of $10 would be appropriate under the criterion of gravity. Consequently, when I issue the decision in this case, Zeigler will be directed to pay a penalty of $210 for the violation of section 75.316 alleged in Citation No. 2323517.

Citation No. 2323518 7/26/84 § 75.1105 (Exhibit 6)(Tr. 391-406)

The final contested violation in this proceeding is Citation No. 2323518 issued July 26, 1984, alleging a violation of section 75.1105 because the battery barn or charging station in the No. 5 Mine was not vented to the return air course when tested by the inspector with a smoke tube. A considerable amount of testimony was introduced by both parties, and the evidence will be summarized in the following paragraphs.

1. The inspector who wrote the citation traveled to the battery barn shown in Exhibit D, and he was accompanied by the UMWA safety committeeman. The inspector proceeded into the battery station and noted that there were battery-charging receptacles throughout the battery station which extended about 160 feet from east to west. He noted that on the extreme east end of the station, there was a blowing fan and an exhaust fan, the blowing fan being on the south side and the exhaust fan on the north, and he felt that the ventilation was adequate in that area. He proceeded to the west side of the station and noted that there was a 2-inch tube allowing air to leave the battery station at approximately the center of the station. He then proceeded into the west end of the station and was impressed by the fact that he could detect no movement of air in that area. The inspector then released some smoke and found that the smoke was suspended in the atmosphere without showing any visible movement in any direction. Using the aspirator with a smoke tube, he checked the area of the west end in several locations and could detect no air movement at all. He was accompanied also by Zeigler's electrician who made no comment as to the adequacy of the use of the smoke tube. The inspector thereafter issued the citation described above alleging the violation of section 75.1105.

2. The inspector considered the violation to be the result of a high degree of negligence because in his opinion the company was aware of the requirements that the battery station be ventilated because fans had been placed in the east end and some aperture had been made about the center of the station. He believed that the entire battery station should have been ventilated as well as the east end appeared to be. He also considered the violation to be sufficient to cause an injury because he believed that hydrogen could accumulate in the battery-charging station. He stated that hydrogen is released

when batteries are charged and he feared that there might be an explosion from accumulation of hydrogen from the possibility of sparks from electrical equipment which existed in the battery-charging station.

3. The inspector wrote approximately 10 other citations of various violations of the mandatory safety standards in the station, including the fact that some bare wires were exposed and the fact that the hoist for raising batteries from equipment was resting on an electrical connector box. Therefore, he felt there were electrical hazards in the station which might ignite hydrogen if it should happen to exist in sufficient quantity.

4. The company presented as its witness its Manager of Safety who has had 3 years of experience working for Zeigler, and approximately 11 years of experience working for MSHA, and who had inspected the No. 5 Mine many times prior to becoming Zeigler's Manager of Safety. He presented extensive testimony to the effect that this battery-charging station is supplied with intake air from a downcast which provides 350,000 cubic feet of air per minute which is split at the bottom of the mine where the battery-charging station exists. A volume of 90,000 cubic feet per minute is directed into the vicinity of the battery-charging station while the remaining quantity of 250,000 cubic feet per minute is directed to the only working sections in the mine which are located to the east and north of the area where the battery-charging station exists.

5. The Manager of Safety pointed out that while Exhibit D shows a white area surrounding the battery-charging station, which normally would indicate neutral air accompanied by a low velocity, that, for all practical purposes, the area around the entire battery-charging station could be shown in blue, as the rest of the area around the station is shown, because he says there was a considerable amount of air passing along the entry which is used as a travelway to the battery-charging station. Therefore, he said that there was an adequate amount of intake air going into the battery-charging station at all times. He also testified that the area around the battery-charging station is sealed so that air does not go into inactive areas around the station and that all the intake air is directed to an upcast or return away from the battery-charging station and, for that reason, there is a large amount of air passing through the battery-charging station.

6. The Manager of Safety stressed the fact that the battery-charging station had been in existence for about 10 years, that it had been inspected at least 75 times during its existence, and that no inspector had ever found it to be

in violation of section 75.1105 because, apparently early in its existence, it had been required by an inspector to have the two fans previously described installed in the east end. As far as he was concerned, that ventilation was all that was required in addition to the 2-inch aperture which, he thought, might be slightly larger than 2 inches, and which had been installed about the center of the station at the very initiation of the station. In his opinion, there was no possibility that the failure to have a vent in the west end of the station, as required by the inspector in this case, could have been a hazard because he noted that the battery-charging station is a large area, which is approximately 10 feet high in the east end and 7 to 8 feet high in the west end. Because of the station's spaciousness, he believed that the hydrogen that might accumulate would tend to go to the high side of the station in the first place. In the second place, he stated that hydrogen will not explode unless it is from 4 to 75 percent of the total volume of the atmosphere, and he felt that there was no possible likelihood that hydrogen would escape from the charging of batteries to such an extent that it could reach a concentration of explosive quantity in the large area comprising the battery-charging station. Additionally, he believed that since the entire area around the station is intake air being moved at very high velocity, that if any fire should occur, the fumes and toxic fumes, carbon monoxide, and other hazards from a fire would necessarily be directed to the return because all the air around the entire battery-charging station is going to the return and cannot go to any working sections because there are no working sections in that area of the mine.

7. The Manager of Safety also was critical of the inspector's smoke-tube test because he said that the inspector should have gone very close to the stoppings in the west end to determine whether there was a movement of air because the stoppings are subjected to so much air pressure from the large amount of air circulating in the vicinity of the battery-charging station that the stoppings do not keep air from passing through them. In other words, they are not impervious to air movement. Therefore, he believed that the fact that the smoke did not move in the west end when tested by the inspector could not be taken as proof that the west end was not ventilated sufficiently to comply with section 75.1105.

8. The Secretary's counsel presented as his rebuttal witness the safety committeeman who had accompanied the inspector when he made his smoke-tube test and inspected the other portions of the battery-charging station. He stated that the inspector took his smoke-tube test as previously described, and that he could detect no movement of air whatsoever when the smoke was released. He testified additionally that after the inspector required an 8- by 16-inch cement

block to be knocked out of the stopping on the north side of the west end of the battery station, smoke was again released, and it did not go anywhere. It remained motionless as before, until the inspector allowed his light to shine into the opening made by removal of the cement block. It was then realized that the wall was constructed of double layers of cement blocks and that the outer layer of blocks was still intact and would not allow smoke to pass through the 8- by 16-inch hole made on the inside of the first layer of blocks. Therefore, a block was also knocked out of the second layer of blocks which had been constructed against the first one. A smoke-tube test was again made, and this time the smoke went through the 8- by 16-inch hole made by the knocking out of a block in each of the two layers constituting the wall of the battery-charging station. The safety committeeman said that no one had complained about noxious fumes or hydrogen or hazards in the battery-charging station since it was initially constructed. He said that early in the station's existence, there had been a detection of hydrogen sulfide or noxious fumes in sufficient amount to cause the miners to request that something be done. That problem resulted in the installation of the fans in the east end of the station which have been described above.

I believe that the above findings constitute the main points made by the witnesses. Counsel for Zeigler has moved that the citation be vacated on the grounds that the battery-charging station was already in compliance with section 75.1105 at the time the inspector made his examination and required the additional block to be knocked out for ventilation on the west end, and that the regulation does not refer to any amount of air that has to be provided in a battery-charging station, and also does not provide that more than one ventilation point has to be supplied for a battery-charging station. He also stressed the fact that the station does get a lot of air, but that it has to be restricted because the Manager of Safety had indicated that the air entering the station can be below freezing and can result in freezing the batteries and causing problems if an excess amount of air is allowed into the station. Therefore, he believed that the battery-charging station was in compliance with the regulation and that the inspector unnecessarily required an additional ventilation point.

The Secretary's counsel has stressed the facts which I have given in finding Nos. 1 through 3 above. He believes that the inspector properly wrote a citation, that the additional ventilation which the inspector required was within the purview of section 75.1105, and that there was a hazard in the form of a possible explosion from the hydrogen released in the area or from the electrical equipment in the area.

Section 75.1105 reads as follows:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may provide shall be of fireproof construction.

Of course, the main thrust of the inspector's citation relates to the second sentence in the quotation given above, namely, that "air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return." Counsel for both parties agree that while Exhibit D shows only intake air surrounding the battery-charging station, the intake air from the station is headed for the return, and, therefore, can be considered to be return air for the purpose of applying section 75.1105.

The thrust of Zeigler's argument as to no violation relates primarily to the fact that there were admittedly an exhaust fan and a blowing fan in the east end of the station, and those fans and the 2-inch aperture at the center of the station had been there for perhaps 10 years and no additional requirements for ventilation have been required. Zeigler argues that there is nothing in section 75.1105 to spell out how much air current is required or how many openings have to be in a battery-charging station and that there is simply nothing in section 75.1105 that would support the inspector's requirement that an additional ventilation opening be made in the west end.

There is a lot of merit in Zeigler's argument, and I am hardpressed to disagree with Zeigler, but the Commission in practically all of its decisions, except possibly the one in Mathies Coal Co., 5 FMSHRC 300 (1983), has stressed the fact that the Act and the regulations should be liberally construed because they have as their purpose the preservation of life and health of the miners. In the Mathies case, the Commission said that the judge had erred because he had held that an elevator was a moving machine part within the meaning of section 75.1722(a) and that that was going a little too far afield, but in its decisions interpreting the standards, the Commission has stressed that safety should be given the primary emphasis in interpreting the regulations. Consequently, I believe that the inspector was within the purview of this section in his belief that the west end of the battery-charging station was not sufficiently ventilated into the return.

The question of whether the inspector's test-tube examination was adequate is sufficiently supported by the testimony of the inspector and the UMWA safety committeeman to make me believe that there was not an adequate amount of ventilation in the west end because the smoke did not move when the first block was knocked out of the stopping but the smoke did readily go out the hole made in the stopping when the second block was removed. I believe that the fact that the smoke went out after the hole was made is a good indication that the additional ventilation was needed.

Another aspect of the validity of the inspector's requirement of the additional ventilation relates to the statement of Zeigler's Manager of Safety to the effect that air entering the center of the battery-charging station would not necessarily be pulled by those fans in the east end all the way into that area because he felt that there was so much leakage in the stoppings and so much air pressure on the entire station that air would be pulled out of the station through the stoppings regardless of whether any additional openings were made. I believe that on balance, however, that his belief is rebutted by the fact that smoke did not go out until the additional opening was made in the west end. That fact appears to show that a double layer in a permanent stopping is more resistant to the passage of air through it than the Manager of Safety realized.

Having found that a violation existed, it is necessary that I assess a civil penalty. In this decision I have already made findings concerning the criteria of the size of the company and the fact that penalties would not cause the company to discontinue in business. I have made reference before to Exhibit 9 which lists history of previous violations for the No. 5 Mine, and that shows only four previous violations of section 75.1105 and only one of those violations occurred in July of 1984, and the rest occurred in 1983. Consequently, I don't think that there is such an unfavorable history of previous violations that a very large portion of the penalty should be assessed under that criterion. Consequently, a penalty of $10 will be assessed under history of previous violations.

The inspector gave the company until 10:00 a.m. on the day the citation was written to abate the violation, and he wrote an action to terminate on the same day at 10:00 a.m. stating that the west end had been ventilated to the return air course by removing two concrete blocks. Consequently, the company demonstrated a good-faith effort to achieve rapid compliance and no portion of the penalty should be assessed under that criterion.

The fifth criterion is negligence. The inspector felt that the company was highly negligent in failing to install ventilation in the west end because it had done so in the east end. He believed that management should have realized that there was not sufficient movement of air in the west end, and therefore concluded that there was a high degree of negligence. The findings that I have made above indicate that Zeigler certainly had reasons for believing that the battery-charging station was adequately ventilated because it had put in the two fans I described and another aperture about the center of the station. The Manager of Safety who inspected this mine many times as an MSHA inspector believed that there was a sufficient velocity of air going through the stoppings to ventilate the west end, and while it appeared to me that that may not be true, the facts are that he had a logical basis for his belief, and I have barely been able to find a violation at all. Consequently, I believe that the violation was the result of no negligence on the part of the company, and no portion of the penalty should be assessed under that criterion.

The seriousness of the violation is the final criterion to be considered. The inspector's testimony about the seriousness of the violation is offset in large part by the Manager of Safety's beliefs that there was no seriousness whatsoever and those opposing views have been spelled out in the findings above, and it is likely that the violation was not serious. The only case that I know of in which the Commission has touched upon the possibility of seriousness as to hydrogen is in the case of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529 (1983), in which the Commission held that a miner was sufficiently worried about his safety to be supported in his refusal to put out or try to put out a fire on a scoop's battery because he feared that hydrogen might explode in the battery and throw acid and shrapnel on him.

Since the inspector did cite some electrical violations, and there was, as the Manager of Safety agreed, always a possibility that where there are electrical installations, there can be a short circuit which could conceivably cause a fire, and since batteries were present in this station, I suppose that you could have a problem of an exploding battery, but I think for the most part, the violation, as described by the inspector under the conditions that he found, was only very slightly serious. I am inclined on the facts of this case to hold that there was not a reasonably strong likelihood that an injury would occur or that it would have been a serious one if anything had occurred because of the conditions that existed -- the type of ventilation that existed all around the station and the few people who were required to stay in the station for any length of time, and the other factors pertaining to the nonserious nature of the violation described in finding No. 6 above. I believe that

all of the aforementioned factors tend to require a finding that a very low portion of the penalty be assessed under gravity. Therefore, I find that a penalty of $25 should be assessed under the criterion of gravity for a total of $35 for this violation of section 75.1105.

SETTLEMENT

The parties entered into a settlement agreement with respect to two alleged violations (Tr. 103-106). Under the settlement agreement, Zeigler would pay in full the penalties proposed by MSHA which amounted to $91 for each violation.

One of the violations was alleged in Citation No. 2323514 which stated that Zeigler had violated section 75.517 because the trailing cable for the loading machine was not adequately insulated and fully protected at one location. The outer jacket of the cable had been damaged and repaired, but the inner insulated power conductors were exposed at that location. The other violation was alleged in Citation No. 2323516 which stated that Zeigler had violated section 75.503 by failing to maintain the continuous mining machine in a permissible condition because there were several openings in the electrical components which were in excess of .004 inch.

MSHA proposed a penalty of $91 for each violation based primarily on the inspector's evaluation of negligence and gravity. In each instance, the inspector considered the violation to have been associated with moderate negligence and to have been moderately serious. In each instance, MSHA reduced the penalty by 30 percent under section 100.3(f) of the assessment formula because Zeigler demonstrated a good-faith effort to achieve rapid compliance after the violations had been cited. Under the criterion of history of previous violations, MSHA assigned two penalty points based on the calculation described in section 100.3(c) of the assessment formula, using the statistics that Zeigler had been assessed for 90 violations during 255 inspection days. MSHA assigned nine penalty points under the criterion of the size of respondent's business, utilizing coal-production figures in the same range of magnitude which I have previously discussed in this proceeding.

My examination of the procedures used by MSHA to arrive at a proposed penalty of $91 for each alleged violation shows that the penalties were properly determined under MSHA's assessment formula described in section 100.3. Therefore, I find that the parties' settlement agreement, under which Zeigler agreed to pay each of the proposed penalties in full, should be approved.

I should note that Exhibit 9 in this proceeding indicates that Zeigler has an unfavorable history of previous violations

with respect to prior violations of both section 75.503 and section 75.517. If the parties had introduced evidence with respect to each of the alleged violations and if the Secretary's counsel had succeeded in proving that violations occurred, I would have assessed civil penalties based on the evidence in this proceeding without giving any consideration to MSHA's proposed penalties because, as the Commission has held in two recent decisions in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984), and U. S. Steel Mining Co., Inc., 6 FMSHRC 1148 (1984), the Commission and its judges are not bound by MSHA's assessment procedures described in Part 100 of Title 30 of the Code of Federal Regulations when assessing penalties on the basis of evidence presented at a hearing.

When I am evaluating settlement proposals, however, the parties have not introduced any evidence with respect to the issues involved in the settlements. In such circumstances, I am required only to determine if appropriate penalties have been proposed by MSHA on the basis of the information MSHA had when determining its proposed penalties. It would be improper for me to interpose evidence received in a contested proceeding with respect to a single criterion for the purpose of showing that a proposed penalty might be unduly low unless I also have evidence before me with respect to other criteria such as negligence and gravity. Also, when citations are contested, there is the additional possibility that MSHA will be unable to prove that violations occurred. Moreover, when parties settle cases, they are engaging in appraisals of the strengths and weaknesses of their respective cases and are making trade-offs in accordance with those evaluations. Consequently, the process of evaluating settlements is entirely different from the process of deciding cases on the basis of evidence presented at a hearing. For the aforesaid reasons, my approval of the parties' settlement agreements should not be considered as being inconsistent with the procedures which I have utilized to assess penalties in the decisions which I have rendered with respect to the issues raised in the contested aspects of this proceeding.

WHEREFORE, it is ordered:

(A) Citation No. 2323517 is modified to remove therefrom the designation of "significant and substantial" in Item No. 11a of that citation.

(B) Citation No. 2323515 dated July 25, 1984, alleging a violation of section 75.503, is vacated for the reasons hereinbefore given.

(C) Zeigler Coal Company shall, within 30 days from the date of this decision, pay civil penalties totaling $827.00,

of which an amount of $645.00 is allocated to the respective violations as shown in paragraph D below, and an amount of $182.00 is allocated to the respective violations as shown in paragraph E below.

(D) Penalties totaling $645.00 have been assessed with respect to the contested issues in this proceeding as shown below:

Citation No. 2323513 7/25/84 § 75.503	$400.00
Citation No. 2323517 7/25/84 § 75.316	210.00
Citation No. 2323518 7/26/84 § 75.1105	35.00
Total Penalties Assessed in Contested Proceeding	$645.00

(E) The parties' settlement agreement resulted in the payment of penalties totaling $182.00 which are allocated as follows:

Citation No. 2323514 7/25/84 § 75.517	$ 91.00
Citation No. 2323516 7/25/84 § 75.503	91.00
Total Penalties Agreed upon in Settlement Proceeding	$182.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 28, 1985

MARION L. ADAMS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. YORK 84-15-DM
v.	:	
	:	MD 84-23
J. L. OWENS III, CONTRACTING a/k/a J. L. OWENS III, a/k/a EASTERN AGGREGATES, INC., Respondent	:	Eastern Aggregate Mine

FINAL ORDER

Before: Judge Merlin

The parties have reached settlement in the above-captioned matter under the following terms:

Respondent shall provide Complainant with --

1. A five (5) year annuity with a company of Complainant's choice payable to the Complainant or his heirs or assigns at the rate of Five Hundred Dollars ($500.00) monthly certain.

2. A payment of the sum of Ten Thousand Dollars ($10,000.00), out of which sum the Complainant shall pay all of the court costs together with an agreed upon attorney's fee in the amount of Seven Thousand Five Hundred Dollars ($7,500.00).

The Complainant agrees --

1. To terminate his employment with Respondent and waive his right to re-instatement as of April 27, 1984.

2. To dismiss his complaint in these proceedings.

Both Complainant and Respondent agree to execute mutual releases, releasing the other from all torts, claims and monies due to the date of this Agreement; known and unknown.

I conclude the foregoing settlement including the attorneys fee is proper and it is therefore Approved.

The foregoing settlement approval supersedes all prior orders regarding relief.

This case is hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Timothy D. Murnane, Esq., P. O. Box 125, Davidsonville, MD 21035 (Certified Mail)

William E. Kirk, Esq., Townshend and Kirk, P. A., Melridge Building, 700 Melvin Avenue, Annapolis, MD 21401 (Certified Mail)

/gl

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 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 84-43
	:	A.C. No. 36-02398-03522
v.	:	
	:	Grove No. 1 Mine
G M & W COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
James F. Beener, Esq., Barbera and Barbera, Somerset, Pennsylvania, for Respondent.

Before: Judge Melick

In the early morning of July 11, 1983, both legs of miner Louis Sinclair were severed when a shuttle car pinned him against a rib at the G M & W Coal Company, Grove No. 1 Mine. He died of his injuries a few hours later. The evidence shows that the operator of that shuttle car had customarily operated a Joy Model 21SC but less than 2 hours before this tragic accident was transferred to a Joy Model 10SC in which the brake and tram control pedals were in reverse position. The investigators surmise that during the course of work activities the shuttle car operator suddenly became aware that his car was moving toward the deceased and attempted to engage the brake pedal. Tragically, because the brake and tram control pedals on the Model 10SC were opposite those on the shuttle car he ordinarily operated, he accidentally engaged the tram pedal rather than the brake pedal and pinned the deceased against the rib.[1]/

[1]/Astonishingly there appears to be no Federal requirement that mining equipment have standardized positions for the tram and brake pedals. According to witnesses at hearing a single manufacturer may produce the same equipment with the tram and brake pedals in opposite positions. Moreover it is not uncommon for the same type of equipment to be operating in the same mine but with these critical pedals in opposite positions.

Following its investigation, MSHA issued a section 104(g)(1) order on July 13, 1983 alleging a violation of the standard at 30 C.F.R. § 48.7(c) and charging that the shuttle car operator had not received adequate task training for the type of shuttle car he was operating.[2]/ MSHA thereafter filed the captioned civil penalty proceeding seeking civil penalties of $3,000 for the alleged violation. At the hearing on February 28, 1985, MSHA moved for approval of a settlement agreement requiring payment of $2,000 in penalties. It is noted in the motion that the available evidence does not conclusivly prove that the accident was caused by the inadequency of the new task training provided the shuttle car operator. It was MSHA's position that while new task training might have prevented the accident, the accident may also have been caused by human error under emergency conditions. In any event the motion sets forth adequate grounds for the proposed settlement under the criteria set forth in section 110(i) of the Act.

WHEREFORE the motion for approval of settlement is GRANTED and it is ORDERED that Respondent pay a penalty of $2,000 within 30 days of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

[2]/Section 104(g)(1) reads as follows:

> If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not receive the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

Distribution:

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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 29 1985

LOCAL UNION 762, DISTRICT 5, (VESTA #5 MINE), UNITED MINE WORKERS OF AMERICA (UMWA),	:	COMPENSATION PROCEEDING
	:	Docket No. PENN 84-92-C
LOCAL UNION 6430, DISTRICT 4, (GATEWAY MINE), UNITED MINE WORKERS OF AMERICA (UMWA),	:	LaBelle Preparation Plant
LOCAL UNION 6159, DISTRICT 4, (BOBTOWN MINE), UNITED MINE WORKERS OF AMERICA (UMWA), Complainants	:	
v.	:	
LABELLE PROCESSING COMPANY, VESTA MINING COMPANY, AND A. T. MASSEY COAL COMPANY, INC., Respondents	:	

ORDER GRANTING MOTION TO DISMISS

Before: Judge Steffey

Counsel for complainants filed on March 26, 1985, in the above-entitled proceeding a motion to withdraw the complaint for compensation and "for an order dismissing the above proceedings with prejudice but without findings of fact or conclusions of law." The motion states that complainants' counsel has discussed the filing of the motion with respondents' counsel and that respondents are not opposed to the grant of the motion and the dismissal of the proceedings.

A large number of pleadings have been filed by the parties in this proceeding and I have issued several orders granting or denying various procedural requests, but no ruling has been made with respect to the merits of the complaint. Inasmuch as complainants are the parties who instituted the proceeding and inasmuch as respondents have no objection to the grant of the motion, I find that good cause has been shown for granting complainants' motion.

WHEREFORE, it is ordered:

The motion to withdraw the complaint for compensation filed on March 26, 1985, is granted, the complaint is deemed to have been withdrawn, and all further proceedings in Docket No. PENN 84-92-C are dismissed with prejudice.

Richard C. Steffey
Administrative Law Judge

Distribution:

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*U.S. GOVERNMENT PRINTING OFFICE: 1985-461-256/24555

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