MARCH 1986

Commission Decisions

Administrative Law Judge Decisions

MARCH 1986

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

Secretary of Labor, MSHA on behalf of James Corbin, Robert Corbin and A.C. Taylor v. Sugartree Corporation, Terco, Inc., and Randall Lawson, Docket No. KENT 84-255-D. (Judge Melick, February 5, 1986)

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

Secretary of Labor, MSHA on behalf of Robert Ribel v. Eastern Associated Coal Corporation, Docket No. WEVA 84-33-D. (Judge Koutras, January 21, 1986)

Wilfred Bryant v. Dingess Mine Service, Winchester Coals, Inc., Joe Dingess and Johnny Dingess, Docket No. WEVA 85-43-D. (Interlocutory review of Judge Kennedy's order of January 27, 1986)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 4, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	Docket Nos. LAKE 82-93-R
	:	LAKE 82-94-R
UNITED MINE WORKERS OF AMERICA (UMWA)	:	LAKE 82-95-R
v.	:	
SOUTHERN OHIO COAL COMPANY	:	

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the issue is whether miner representatives who participated in post-inspection conferences held on mine property pursuant to 30 C.F.R. § 100.6(a) are entitled to compensation under section 103(f) of the Mine Act (30 U.S.C. § 813(f)) for the time spent in the conferences. A Commission administrative law judge held that section 103(f) of the Act authorizes payment of compensation to a miner representative for time spent participating in post-inspection conferences conducted at a mine immediately or shortly after the completion of a physical inspection of the mine. 5 FMSHRC 729, 759 (April 1983)(ALJ). However, finding that the particular conferences in issue were not the kind of post-inspection conferences compensable under section 103(f), the judge granted the operator's notices of contest and vacated three citations charging violations of section 103(f). 5 FMSHRC at 759-63. We agree with the judge that in appropriate instances post-inspection conferences at mines are compensable under section 103(f) of the Act. We disagree, however, with his conclusion that the conferences involved in this case do not qualify for section 103(f) compensation. Accordingly, we reverse.

The essential facts are not in dispute. Three contested citations issued to Southern Ohio Coal Company ("SOCCO"), involving similar facts and the same legal issues, are consolidated in this proceeding. Docket Nos. LAKE 82-93-R and LAKE 82-94-R, arise out of conferences conducted on May 24, 1982, at SOCCO's Meigs No. 2 mine by inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The purpose of the meetings was to review citations for which civil penalties had not been proposed previously. Docket No. LAKE 82-95-R, involves a similar conference held on May 24 and 26, 1982, at SOCCO's Raccoon No. 3 mine.

All of the conferences at issue stemmed from MSHA's adoption on May 1, 1982, of revised civil penalty regulations (47 Fed. Reg. 22,286, 22,294-22,297 (1982)), codified at 30 C.F.R. Part 100. Among these regulations is section 100.6(a), which states:

> All parties shall be afforded the opportunity to review with MSHA each citation and order issued during an inspection.

In publishing these regulations, MSHA indicated that all outstanding citations and orders that had not been reviewed for penalty proposal purposes under MSHA's prior rules by May 21, 1982, would be governed by the new procedures. 47 Fed. Reg. 22,286. The three conferences at issue were held pursuant to this policy as section 100.6(a) reviews and, in fact, were among the first conducted under the authority of that provision.

Twenty citations were reviewed at the two conferences held at Socco's Meigs No. 2 mine on May 24, 1982. The citations had been issued during a regular quarterly inspection at the mine between March 3 and May 15, 1982. The first conference, held from approximately 9:00 a.m. to 12:00 noon, covered 14 of the citations. This meeting was conducted by MSHA inspector Dalton McNece and was attended by Carl Curry, a SOCCO safety supervisor, and Robert Koons, a miner representative. In general, the participants discussed the facts surrounding the alleged violations. The discussion included such topics as the seriousness of the violations, the operator's negligence, and the good faith of the efforts to abate the violations. As a result of the conference, the designation of two of the violations as "significant and substantial" violations was deleted. See 30 U.S.C. § 814(d)(1).

The second conference, held from approximately 2:00 to 2:30 p.m., was conducted by MSHA inspector Myron Beck. Mr. Curry and miners' representative Frank Goble attended this meeting. The remaining six citations were discussed. The content of the afternoon conference was substantially the same as that of the morning meeting. Inspector McNece testified that the time spent in these conferences was unusually long because of the parties' unfamiliarity with the new Part 100 procedures. He estimated that current section 100.6(a) conferences last from five to 45 minutes, depending on the number of citations involved. SOCCO

subsequently refused to compensate the miner representatives for the time spent participating in the conferences and MSHA issued two section 104(a) citations (30 U.S.C. § 814(a)) alleging violations of section 103(f) of the Act. 1/ (At the hearing, counsel for SOCCO and the Secretary agreed that testimony regarding the third citation would be the same as that for the other two citations).

The administrative law judge noted that section 103(f) specifically mandates that miner representatives be given an opportunity to accompany an inspector during the physical inspection of a mine, to participate in pre- or post-inspection conferences held at the mine, and to be compensated for the time spent in accompanying the inspector during the mine inspection. 5 FMSHRC at 751. Because section 103(f) does not specifically mandate compensation during the time spent participating in pre- or post-inspection conferences, the judge questioned whether Congress intended that the miner representative be compensated for time spent in conferences or meetings held at the mine after the physical inspection of the mine is completed. After examining the legislative history of section 103(f),

1/ Section 103(f), 30 U.S.C. § 813(f), states:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre -or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jursidictional prerequisite to the enforcement of any provisions of this Act.

[Emphasis added]

the judge concluded that Congress intended compensation for the miner representative if he participates in the pre-inspection conferences held at the mine or in the post-inspection conferences held at the mine immediately or shortly after the completion of the inspection. 5 FMSHRC at 759.

The judge then held that the conferences at issue were not "post-inspection" conferences, as that term is used in section 103(f), and hence were not compensable. Noting that "post-inspection conference" is not defined in the Mine Act or in the Secretary's regulations, the judge, looking to the legislative history, described a post-inspection conference as an interchange between an inspector and members of an inspection party, occurring immediately after a physical inspection of a mine, and involving a discussion of the inspector's rationale for issuing a citation or order, his fixing of an abatement time and other safety and health matters related to the inspection. 5 FMSHRC at 757. The judge concluded that Congress desired the miner representative to be able to fully participate in and to be compensated for pre- and post-inspection conferences so that the representative could make a meaningful contribution to the safety and health of miners by being afforded an opportunity to address safety and health concerns resulting from the inspection, when the facts and circumstances of the inspection are fresh and when the parties to the conference can explore ways to correct the conditions and achieve prompt abatement. 5 FMSHRC at 759, 762. The judge found, however, that the subject conferences had no meaningful effect on safety and health because they occurred long after the completion of the inspections and abatement of the violations, and because the miner representatives who participated in the conferences were not present during the inspections. Consequently, the judge concluded that the conference accomplished nothing more than affording the operator an opportunity to take advantage of the Secretary's Part 100 penalty assessment procedures and were not compensable conferences. 5 FMSHRC at 762-63.

We agree that section 103(f) of the Mine Act requires that a miner representative be compensated for participation in pre- or post-inspection conferences. As the judge noted, section 103(f) clearly mandates that a miner representative be afforded the opportunity to accompany an inspector during the physical inspection of the mine, and to participate in pre- or post-inspection conferences held at the mine. Section 103(f) further provides that the miner representative "shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." While section 103(f) does not expressly mention compensation for pre- or post-inspection conferences, the legislative history of the Act clearly indicates Congress' intent that section 103(f) requires such compensation.

The report of the Senate Committee which largely drafted much of the 1977 Mine Act states the purpose of the provision for miner participation and compensation contained in section 103(f). In addition to discussing the rights of the miner representative to accompany an inspector during an inspection, the report states:

> [T]he opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at [an] opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at [a] closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

S. Rep. No. 181, 95th Cong., 1st Sess. at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-17 (1978) ("Legis. Hist.")(emphasis added). The Conference Report likewise states that a miner representative is to be paid by the operator "for his participation in inspections and conferences." Legis. Hist. at 1323. Further, the matter was discussed on the floor of the House during the oral report to the House by the conference committee. During this oral report both Congressman Perkins and Congressman Gaydos stated that the bill authorized miner representative participation and compensation for pre- and post-inspection conferences. Legis. Hist. at 1357, 1361.

With the intent of Congress so clear, we agree with the judge that section 103(f) requires compensation for a miner representative who participates in "pre- or post-inspection conferences" held at the mine. We do not agree, however, with the judge's further conclusion that to be compensable a post-inspection conference must be held immediately or shortly after the completion of the physical inspection of a mine. We need not in this opinion set forth all of the contours for compensable post-inspection conferences. While we agree that for greater effectiveness and orderly process, a post-inspection conference should ordinarily take place within a reasonably immediate time frame after completion of the physical inspection of a mine, circumstances may exist which lead to legitimate postponement or delay of the conference.

The judge further found that the conferences at issue were non-compensable "assessment conferences", held pursuant to 30 C.F.R. § 100.6(a) and incident to MSHA's civil penalty assessment authority, rather than compensable conferences held incident to the participatory rights of the miner representative as set forth in section 103, and therefore that they were not compensable post-inspection conferences. 5 FMSHRC at 761. We disagree.

Our review of section 103(f) and of MSHA's Part 100 regulations compels us to reject the attempted distinction between MSHA's physical inspections and attendant post-inspection conferences, and post-inspection assessment conferences conducted pursuant to section 100.6(a) of the Secretary's civil penalty assessment regulations. Section 103(f) requires compensation for "post-inspection conferences held at the mine." As the judge noted, neither the statute nor the Secretary's regulations define a "post-inspection conference." However, as noted above, the purpose of the miner representatives' participation rights under section 103(f) is to "enable miners to understand the safety and health requirements of the Act and ... [to] enhance miner safety and health awareness." Legis. Hist. at 616. As Representative Gaydos stated, "... attendance at the closing conference enables miners to be apprised more fully of the inspection results." Legis. Hist. at 1361. Thus, the pertinent inquiry is whether the substance of the post-inspection conference advanced these goals.

The record establishes that at the post-inspection conferences at issue the inspectors reviewed each citation, explained the reasons for its issuance, and discussed the findings made in conjunction with the citation such as "gravity", "negligence", "good faith abatement" (section 110(i)) and whether the violation was "significant and substantial" (section 104(d)(1)). The representatives of the operator and of the miners had the opportunity to present their views on the asserted violations and the inspectors' findings. The inspectors, in turn, had the opportunity to modify the findings in response to the discussions. In fact, as a result of these discussions, the inspectors deleted two of the "significant and substantial" findings.

We conclude that the subject matter of these post-inspection conferences directly related to the enforcement of the Mine Act through the inspection process, and thus to safety and health issues. We realize that the discussions had another aspect in that the information exchanged would be considered by MSHA's Assessment Office in determining the amount of penalties proposed for the violations pursuant to the criteria and procedures set forth in 30 C.F.R. §§ 100.3 to 100.5. However, the inspection and assessment functions of the Mine Act are neither wholly discrete nor mutually exclusive. The participation of the miner representative in the post-inspection conferences and the resulting discussion of the violations could assist inspectors in carrying out their enforcement responsibilities and increase miner and operator awareness of the conditions which resulted in the cited violations. Even when the discussions centered on factors which would impact upon the penalty proposed for a violation, they served to enhance safety. A discussion of the "gravity" of a violation or of the "significant and substantial" nature of a violation involves consideration of the hazards to miners created by the violation. A discussion of whether the operator was negligent involves consideration of the standard of care an operator must exercise in seeking to prevent violations and hazardous conditions.

Thus, we conclude that the post-inspection conferences at issue here were compensable under section 103(f) of the Act. 2/

Accordingly, the conclusion of the judge that the conferences at issue are not compensable under section 103(f) is reversed and the contests of the citations are denied. 3/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ We recognize that the judge particularly was troubled by the delay between the inspections and the post-inspection conferences. 5 FMSHRC at 755, 762. The delay here, however, was of a sui generis nature occasioned by the introduction and implementation of MSHA's new Part 100 procedures. The judge was further troubled by the fact that the four to six miner representatives and the five management representatives who accompanied the inspectors at various times during the inspections were not present at the conferences. 5 FMSHRC at 755, 762. This fact is not sufficient to change the compensable character of the conferences. Many mines are so large that numerous miner representatives accompany an inspector or inspectors during an inspection, and even when post-inspection conferences are held close in time to the inspection, these same miner representatives may be unavailable to participate in the conferences.

3/ 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 26, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PAUL SEDGMER, JR., EDWARD BIEGA, AND DENNIS GORLOCK	:	
v.	:	Docket No. LAKE 82-105-D
CONSOLIDATION COAL COMPANY	:	

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2)(1982). The complaint alleges that Consolidation Coal Company ("Consol") unlawfully suspended the complainants for refusing to operate heavy mobile equipment at speeds which they considered to be unsafe. Consol maintains that the complainants were disciplined lawfully for operating their equipment too slowly. Following a hearing on the merits, a Commission administrative law judge dismissed the Secretary's complaint. 6 FMSHRC 1740 (July 1984)(ALJ). For the reasons stated below, we affirm the judge's decision in result.

On April 12, 1982, the complainants returned to Consol's Reclamation Services No. 60 Mine in Ohio to work as pan operators following a three-month layoff occasioned by a lack of reclamation work. 1/ Several days later, on April 15, 1982, complainants Sedgmer and Gorlock were part of a pan crew operating their equipment in a loading and dumping cycle.

1/ A pan, also called a scraper, is a 95,000-pound vehicle used to scrape earth and haul it to another location.

Robert Busby, the crew's foreman, believed that certain crew members deliberately were working slowly. He asked Mine Superintendent James Taylor to visit the site. Taylor did so and agreed that certain members of the crew were engaged in a production slowdown. Taylor asked several of the pan operators why they were operating their equipment so slowly and whether they could increase their speed. Sedgmer and Gorlock both told him that they were going as fast as prevailing conditions would permit. Following his exchange with Taylor, Gorlock asked an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), who was at the site, how fast he should operate his pan. The inspector responded that each equipment operator must judge proper operating speed based upon the conditions he encounters and the capabilities of his equipment. Complainant Biega was not at work that day.

Not satisfied with the equipment operators' pace of production, Taylor asked Thomas Cyrus, a company reclamation supervisor, to structure a time-motion study. The time-motion study devised was to involve a "deadhead" operation, that is, driving empty pans from one reclamation area to another. Neither the pan operators nor their foreman was to know that the study was being conducted. The deadhead operation was scheduled for Friday, April 23, 1982. The regular pan crew was augmented that morning by bulldozer operators and mechanics. Foreman Busby used a list prepared by Superintendent Taylor to assign operators to the 13 pans. The first four pans were assigned to bulldozer operators and mechanics. The next five pans were assigned to regular pan operators. The last four pans were assigned to the complainants and John Hornyak, a mechanic.

The time-motion study covered almost the entire route of the equipment relocation. No times were recorded for approximately the first mile of the run in order to permit the operators to bring their pans up to operating speed. The total distance considered in the time-motion study amounted to approximately 9.7 miles. The results of the time-motion study showed that the fastest operator completed the run in 28 minutes. The slowest operator in the first nine pans completed the run in 40 minutes. Complainant Biega took 55 minutes to finish, while complainants Gorlock and Sedgmer took 74 minutes and 76 minutes, respectively, to complete the run. 2/

Upon completion of the deadhead operation, the complainants were flagged over to the side of the road. Taylor asked each of the miners two questions: whether there was anything mechanically wrong with his pan and whether there was anything unsafe about his pan. All three of the complainants responded in the negative. Taylor then told the complainants to remain in their pans. They did so until the end of their shift, a period of about six hours. At that time, they were told to report to Taylor's office at 7:00 a.m. on Monday, April 26, 1982.

2/ The first nine pans completed the run without mishap. Mechanic Hornyak was taken out of the deadhead by Robert Laine, a maintenance supervisor, because he saw the brakes on Hornyak's pan smoking. Not having completed the deadhead, Hornyak's results were not evaluated in the time-motion study.

On April 26, the complainants reported to Taylor's office accompanied by an agent of the United Mine Workers of America ("UMWA"), which represented Consol's employees at the mine. Taylor spoke with each man individually and handed each a notice of suspension with intent to discharge. The letter concluded that each complainant had engaged in a slowdown and had violated a number of employee conduct rules governing insubordination and participation in a work stoppage or slowdown. The complainants, following the grievance procedures contained in the collective bargaining agreement between Consol and the UMWA, appealed the disciplinary action taken against them. The arbitrator who heard the case concluded that the complainants had engaged in a slowdown, but that their actions did not warrant dismissal. Instead, the complainants each received a 30-day suspension without pay or benefits.

Following the arbitrator's decision, the Secretary filed a complaint under the Mine Act on behalf of Sedgmer, Biega, and Gorlock. In his decision, after a hearing on the complaint, the Commission administrative law judge found that during the deadhead run the complainants had taken a "leisurely trip" relying on the belief that only equipment operators rightfully can determine the speed at which they will operate their equipment. 6 FMSHRC at 1744. As a matter of law under the relevant mandatory safety standard, the judge held that the speed at which a pan may be operated properly and safely is not within the sole discretion of the pan operator. 6 FMSHRC at 1745. 3/ The judge indicated that the question of the complainants' good faith belief in a safety hazard was not a controlling factor in this discrimination proceeding. Id. According to the judge, the crucial question was whether Consol, in taking disciplinary action against the complainants, held a good faith belief that the complainants were engaged in a slowdown. Id. The judge found that the results of the time-motion study justified Consol's belief in this regard. Id. Notwithstanding his statements regarding the relevancy of the complainants' belief in a safety hazard, the judge examined the testimony regarding the dust and traffic conditions which the complainants alleged created a hazard. He found that the road conditions encountered by all the operators were approximately the same and not so severe as to justify abnormally slow speeds. 6 FMSHRC at 1743-46. The judge decided the case in Consol's favor and dismissed the Secretary's complaint. 6 FMSHRC at 1746.

On review, the Secretary of Labor challenges the judge's decision on the grounds that it fails to comply with Commission Procedural Rule

3/ 30 C.F.R. § 77.1607(c) provides:

> Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and type of equipment used.

65(a) and that it is inconsistent with the Commission's settled discrimination precedent. 4/ The Secretary argues that the judge's decision provides no clear findings or legal foundation that can be challenged or subjected to meaningful review. Accordingly, the Secretary suggests that the Commission either remand the case to the judge for reconsideration and entry of a decision that meets applicable standards, or that the Commission enter the necessary factual findings based on the record and analyze them in accordance with governing precedent.

We agree that the judge's decision is not a model of clarity. Nevertheless, we have examined carefully the judge's findings and the record as a whole. Based on this review, we are satisfied that the judge entered the minimum necessary findings. We conclude further that, with certain clarifications, his determination on the merits is supported by substantial evidence and is consistent with applicable principles of discrimination law. Compare Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (April 1984), aff'd sub nom. Gravely v. Ranger Fuel Corp. and FMSHRC, No. 84-1511 (4th Cir. May 24, 1985), with The Anaconda Co., 3 FMSHRC 299 (February 1981).

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event 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, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant.

4/ Rule 65(a) provides in pertinent part:

> Form and content of judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. ...

29 C.F.R. § 2700.65(a).

Robinette, supra, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

With respect to the first element of the prima facie case in this proceeding, the Secretary contends that the complainants were engaged in a form of protected work refusal. The Commission has held that a miner's work refusal is protected under section 105(c) of the Mine Act if the refusal is based on the miner's good faith, reasonable belief in a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). See also Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982). The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work. See, e.g., Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397 (June 1984). However, the facts of the present case do not reveal an unambiguous refusal to work. Rather, the claim is advanced that the miners chose to perform work in what they believed to be a safe manner, although it was contrary to the manner of operation envisioned by the operator. In Sammons, supra, the Commission indicated that, in appropriate cases, such activity could enjoy the protection of the Act, but that the involved miner must still hold a reasonable, good faith belief in the existence of a hazard, and ordinarily should communicate, or at least attempt to communicate, to the operator his belief in that hazard's existence. Sammons, 6 FMSHRC at 1397-98. We also made clear that "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform [a] task" would lie outside the ambit of statutory protection. Sammons, 6 FMSHRC at 1398.

Thus, the initial issue is whether the complainants' conduct in driving the pans at a speed determined by the mine operator to be unacceptably slow, was predicated on a reasonable, good faith belief that to operate their equipment at a faster speed would have been unsafe. Central to this inquiry are the perceptions of the complainants that prevailing road conditions on April 23, 1982, justified, on safety grounds, their comparatively slow speed of operation. 5/

5/ The judge stated that the complainants' belief in the existence of a hazard is not a "controlling factor" and that it is "the motivation of the employer that is crucial." 6 FMSHRC at 1745. If the judge intended to suggest that the miners' belief in a hazardous condition was legally irrelevant, he erred. Pasula, 2 FMSHRC at 2789-96; Robinette, 3 FMSHRC at 807-12.

In essence, as the judge noted (6 FMSHRC at 1744-45), all three complainants testified to the effect that the pan operator commands an absolute discretion in determining how fast the equipment should be operated. They stated that the deadhead route was dusty and that other haulage traffic was present. All three alleged that these factors necessitated a slow speed, and also that they maintained slow speeds in order to reduce the generation of more dust along the route. All three disclaimed any intent to work slowly in order to preserve work for themselves.

In evaluating the complainants' testimony, the judge found that they had not engaged in a deliberate slowdown designed to hamper Consol's operation and to avoid layoff. 6 FMSHRC at 1744. This language may be read as suggesting that the complainants acted in good faith. Assuming that they held a good faith belief, it is still necessary to establish the separate and conjunctive element that the belief was reasonable. See Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC at 993, 997 (June 1983). Concerning the miners' reasonable belief -- the issue on which we conclude that this case turns -- the judge analyzed and weighed the pertinent evidence and found that the miners' "leisurely trip" lacked a reasonable basis in safety-related concerns. As discussed below, we agree with the judge's disposition of this issue and find it supported by substantial evidence and grounded in credibility resolutions that the judge was best positioned to make.

The judge noted the existence of conflicting testimony regarding the road conditions encountered by the pan operators during the deadhead operation. 6 FMSHRC at 1743-44. Contrary to the testimony of the complainants, four of the operators in the main group of pans testified that dust was not a problem for them. Superintendent Taylor and the other management personnel, who traversed the deadhead route several times observing the pan operators' progress, testified that dust, traffic, and road surface conditions were not significantly different for any of the pan operators. 6 FMSHRC at 1744. The judge found expressly that the road conditions encountered during the deadhead were no more dusty for the complainants than they were for the other members of the pan crew, and that the complainants were not held up by other traffic. 6 FMSHRC at 1744, 1746. In this regard, the judge stated that "there [was] no evidence of a traumatic change in the road conditions" between the beginning and the end of the test. 6 FMSHRC at 1744. He concluded, "I do not find that such extremely dusty conditions existed, and I cannot find that the time and motion study was unfair." 6 FMSHRC at 1746. In reaching these factual findings, it is apparent that the judge credited the relevant testimony of the operator's witnesses and discounted the complainants' claims of unsafe road conditions. The judge's factual findings, which in part turn on credibility, are supported by substantial evidence and must be upheld. In reaching this conclusion we also rely on the testimony by the MSHA inspector that the overall safety consciousness of the operator was very good, that the haulage road was well-maintained, that management never set a speed as far as he knew, and that he had never issued a citation to one of Consol's operators for

operating at an unsafe speed. Tr. 665-71. All of these facts support the judge's holding that the complainants' belief in the existence of a safety hazard was unreasonable. 6/

Finally, we note also that while the judge observed that the complainants had made safety complaints from time to time, he found that there was no evidence that such complaints had any connection with the disciplinary action taken against them. 6 FMSHRC at 1745. With the exception of Sedgmer, whose testimony that he raised safety concerns prior to the deadhead run was disputed and not credited by the judge, none of the complainants raised any safety concerns with Consol management before, during, or after the deadhead operation. While such communications are not only expected, in ordinary course, in work refusal situations, their absence also lends weight to the conclusion that the disagreement here as to operating speed did not have a sound basis in safety concerns. Sammons, 6 FMSHRC at 1397-98.

We conclude that substantial evidence supports the judge's conclusion, whether express or implied, that the complainants failed to prove that their conduct was premised on a reasonable belief in the existence of a hazard. Thus, they failed to establish protected activity and a prima facie case. The Secretary's complaint was properly dismissed.

6/ We note that while 30 C.F.R. § 77.1607(c) necessarily delegates to the equipment operator a certain degree of latitude in determining safe operating speeds, this determination is not within his absolute discretion. Compliance with section 77.1607(c) must be judged on an objective, "reasonable person" basis, rather than on the basis of the subjective perceptions of each and every equipment operator. Cf. Great Western Electric Co., 5 FMSHRC 840, 841-43 (May 1983). Just as an MSHA inspector may determine that equipment is being operated at too fast a speed, a determination can also be made by persons other than the equipment operator that the equipment is being driven slower than conditions warrant.

Accordingly, on the foregoing bases, we affirm the judge's decision in result. 7/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have been designated 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
WASHINGTON, D.C. 20006

March 26, 1986

ROBERT SIMPSON	:	
	:	
v.	:	Docket No. KENT 83-155-D
	:	
KENTA ENERGY, INC.	:	
	:	
and	:	
	:	
ROY DAN JACKSON	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This matter presently is pending on review before the Commission. On January 31, 1986, the Commission issued an order directing, in part, that complainant Robert Simpson's Motion to Reopen the proceedings to pursue successorship issues be held in abeyance pending the Commission's resolution of the underlying question of liability for violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On February 10, 1986, Simpson filed a Petition for Reconsideration of that aspect of the Commission's January 31 order. Previously scheduled oral argument on the merits of this case was heard before the Commission on February 26, 1986.

We confirm our January 31 order. We conclude that it is appropriate to resolve first the issue of liability presented to us on review before directing any proceedings dealing with successorship issues. Accordingly, Simpson's Petition for Reconsideration is denied. The merits of this case as well as Simpson's Motion to Reopen stand submitted. 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford has elected not to participate in the consideration or disposition of this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
March 28, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 84-49
UNITED STATES STEEL MINING COMPANY, INC.	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and involves two alleged violations of a roof control standard for underground coal mines, 30 C.F.R. 75.200 (1985). 1/ The administrative

1/ The cited standard provides in pertinent part:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuous basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form ... The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners.

law judge found that United States Steel Mining Company, Inc. ("U.S. Steel") committed two violations of the cited standard and assessed civil penalties of $7,500 and $350. 6 FMSHRC 2693 (November 1984)(ALJ). We granted U.S. Steel's petition for review of the judge's decision and heard oral argument.

The issues raised by U.S. Steel are: (1) whether in regard to the first violation the judge properly found that U.S. Steel was negligent in connection with a fatal roof fall; and (2) whether the judge properly found that U.S. Steel violated its roof control plan by failing to install a temporary jack for roof support. For the following reasons, we reverse and remand on the negligence issue and affirm on the violation issue.

The alleged violations occurred at the Maple Creek No. 1 Mine, an underground coal mine owned and operated by U.S. Steel. Glen Ward and Nathan Klingensmith were district underground plan coordinators responsible for setting spads and sight lines at U.S. Steel's mines. (Spads and sight lines insure that entries and crosscuts will be driven straight and at proper angles.) As underground plan coordinators they worked in different mines and different areas of a mine as needed and assigned.

On the morning of May 23, 1983, Ward and Klingensmith reported to Earl Walters, the acting mine foreman at the Maple Creek No. 1 mine for their daily work assignment. Walters testified that he and Ward discussed the mining that had been done on previous shifts. They examined the mine maps to determine where spads would be needed that day. Walters testified that he specifically told Ward to set spads in No. 20 split at the intersection of the No. 7 room.

When the two miners arrived at the section of the mine that contained the intersection of No. 20 split and the No. 7 room the section foreman, Walter Franczyk, was on the mine telephone conducting business. They greeted the section foreman, and they proceeded past him. For some unexplained reason, rather than going to the intersection of the No. 20 split and No. 7 room as directed by Walters, Ward and Klingensmith proceeded to the intersection of the No. 20 split and No. 6 room.

The No. 6 room was one of two working places on the section. At the start of the morning shift on May 23, the No. 6 room had already been mined and bolted up to, but not including, the intersection with the No. 20 split. Prior to commencing mining on the section and prior to the arrival on the section of Ward and Klingensmith, Franczyk had met with his section crew and had visited the intersection. The continuous mining machine operator and the operator's helper advised Franczyk that the roof in the intersection of No. 6 room and No. 20 split was drummy. 2/ Franczyk instructed them to cut the drummy roof down.

2/ The term "drummy" is defined as, "Loose coal or rock that produces a hollow, loose, open, weak, or dangerous sound when tapped with any hard substance to test condition of strata; said especially of a mine roof. ..." A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968).

The continuous miner operator and his helper were at the intersection when Ward and Klingensmith arrived. The helper warned Klingensmith, "I wouldn't go in there if I were you." Tr. 31, 47. Nevertheless, Klingensmith proceeded under the unsupported roof where he remained for ten minutes installing two spads. He came out from under the unsupported roof, and Ward then proceeded under the unsupported roof and climbed up onto the continuous mining machine to put more spads in the roof. Klingensmith again went under unsupported roof and was preparing to assist Ward when the roof collapsed on the miners. Ward and Klingensmith were killed. As a result of the accident, MSHA issued the two roof control violations now before us on review.

In one of the citations, the Secretary first asserted that U.S. Steel violated 30 C.F.R. § 75.200 when Ward and Klingensmith proceeded beyond the last permanent support and under unsupported roof. U.S. Steel conceded the violation but argued that the violation was not the result of its negligence. 3/ The judge found otherwise. In doing so, he relied on the testimony of MSHA Inspector Swarrow, one of two MSHA inspectors who investigated the accident, that the section foreman is responsible for the safety of everyone on his section. The judge stated that the section foreman has the "authority and responsibility to control what happens on his section." The judge therefore concluded that foreman Franczyk was negligent "in not stopping the decedents to find out their destination and what they were going to do." 6 FMSHRC at 2696. Finding that the section foreman's negligence was attributable to the operator, the judge found U.S. Steel negligent. We do not agree.

The Commission has held that when a violation is committed by a miner, the mine operator's negligence may be gauged by considering the forseeability of the miner's conduct, the risks involved, and the operator's supervision, training and disciplining of its employees to prevent violations of the standard at issue. A.H. Smith Stone Co., 5 FMSHRC 13 (January 1983). All of the witnesses who testified in this proceeding agreed that the decision of Ward and Klingensmith to proceed beyond the last permanent roof supports and under unsupported roof was inexplicable and unforeseeable. Nor was any evidence offered by the Secretary to establish that U.S. Steel's selection or training of Ward and Klingensmith was in any way inadequate. To the contrary, the evidence clearly establishes that Ward and Klingensmith were very experienced underground plan coordinators who had received all required training concerning the hazards of working under unsupported roof and who, as far as is known, had never before performed their jobs under unsupported roof. Thus, there is nothing in the record from which to conclude that Ward and Klingensmith's own lack of care is attributable to U.S. Steel under the imputation principles discussed in A.H. Smith Stone.

3/ Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), requires that in assessing penalties for violations the Commission must consider, among other criteria, "whether the operator was negligent".

The Commission also has held that consideration of a foreman's negligence is proper in assessing a penalty against an operator. Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981). Where a foreman's negligence is at issue the Commission looks to whether the foreman acted with the care required by all of the circumstances surrounding the violation. Southern Ohio Coal Co., 4 FMSHRC 1459, 1461 (August 1982). In finding negligence, the judge relied on the inspector's statement that a section foreman is responsible for the safety of everyone on his section. This ipso facto approach to a section foreman's negligence cannot be fully reconciled with the Commission's emphasis in Southern Ohio that the determinants of a section foreman's duty of care are the circumstances under which the violation arose.

The pertinent inquiry here is whether, under the circumstances described, section foreman Franczyk breached a duty of care toward Ward and Klingensmith. The record establishes that Ward and Klingensmith were employees who were not in Franczyk's chain of command. They were employees who worked in all of U.S. Steel's mines in the district and when they worked in the Maple Creek No. 1 mine, they were assigned as needed to different areas of the mine by the mine foreman. Nevertheless, Ward and Klingensmith were well known to Franczyk. Thus, when he saw them on his section he had every reason to assume what they were there to set spads, as directed by the mine foreman. This was not a situation in which unknown persons, with unknown responsibilities, were present in Franczyk's section.

Franczyk was on the telephone conducting mine business when Ward and Klingensmith arrived on his section, greeted him and proceeded past him. To his knowledge, Ward and Klingensmith had never installed spads under unsupported roof. Further, he had absolutely no basis to think that they would be installing spads in an area where the continuous miner operator and his helper were working to take down drummy roof. The inspector stated that the conditions in the intersection of the No. 20 split and No. 6 room were not in violation of the Mine Act. Drummy roof in a working place is not uncommon and to remove the danger posed, 30 C.F.R. § 75.200 requires the roof to be supported or adequately controlled. Franczyk was in the process of complying with this requirement; he ordered the continuous miner operator and his helper to take down the drummy roof. After the drummy roof was removed, required roof bolting would have commenced. While there might be conditions on a section so unusual and hazardous that a section foreman would be under a duty to warn everyone on the section of the existence of the hazards, here, given the obvious nature of the conditions and the expertise and experience of Ward and Klingensmith in working with mine roof, a warning to the two miners not to enter into an area of unsupported roof, and not to set spads until the roof had been supported, was not required and Franczyk's "failure" to give such warning does not constitute a lack of reasonable care. We conclude, therefore, that under these facts Franczyk was not negligent. 4/

4/ On review, the Secretary alternately argues that the negligence of Ward and Klingensmith can be imputed to the mine operator because, as management employees, Ward and Klingensmith were agents of U.S. Steel

(footnote 4 continued)

The second citation charged that U.S. Steel violated its approved roof control plan in that a temporary jack had not been installed on the left side of the intersection of No. 6 room and No. 20 split as specified in Drawing No. 1 of the plan. The judge held that the violation occurred as alleged.

Section 302(a) of the Mine Act, 30 U.S.C. § 862(a), and the mandatory safety standard which implements section 302(a), 30 C.F.R. § 75.200, require the operator to adopt and the Secretary to approve a roof control plan suitable to the conditions of the mine. Such plans are intended to be essentially negotiated agreements between the Secretary and the operator regarding procedures to be followed by the operator in the interest of miner safety and for the control and support of roof and ribs. Cf. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Penn Allegh Coal Company., 3 FMSHRC 2767 (December 1981); Bishop Coal Company, 5 IBMA 231 (1975). In recognition of this negotiation process the Commission has held that:

> [A]fter a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.

Penn Allegh, 3 FMSHRC at 2770. The basis of the dispute in this case is a disagreement over the application of provisions of the previously agreed upon plan. The plan did not include a specific drawing for the mining and roof support sequence to be followed during the mining of an intersection, a routine occurrence. The Secretary argued and the judge found that Drawing No. 1 of the approved roof control plan applied to the mining of the intersections. Under Drawing No. 1, a second temporary jack is installed after the third cut of coal has been mined and before a fourth cut is mined. Because the second temporary jack was not set and a fourth cut of coal had been mined, the judge found that U.S. Steel was in violation of its approved roof control plan and of 30 C.F.R. § 75.200. 6 FMSHRC 2696-97. For the reasons that follow, we conclude that substantial record evidence supports the judge's findings concerning the applicability of Drawing No. 1 and the violation thereof.

At the hearing MSHA Inspector Moody stated that Drawing No. 1 was applicable to the intersection. The inspector acknowledged that Drawing No. 1 depicts an entry with two ribs of coal and that the intersection

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Footnote 4 end.

and their actions are directly attributable to their employer. However, this issue was not raised before the judge. Instead, it was first advanced on review. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. § 823(d)(2)(A)(iii). Jones & Laughlin Steel Corp., 5 FMSHRC 1209, 1212 (July 1983). Such good cause has not been demonstrated. Therefore, this issue is not properly before us and we decline to reach the question as to whether employees such as Ward and Klingensmith are "agents" of an operator within the meaning of section 3(e) of the Mine Act. 30 U.S.C. § 802(e).

had only one rib. However, he stated that the row of roof bolts on the right side of the intersection (Letter "C", Op. Ex. 3) served the same support function as a rib and thus took the place of the right rib on Drawing No. 1. Further, the inspector testified that the temporary jack, when installed, serves a roof support function and reduces the area of unsupported roof to which miners are exposed when installing the permanent roof supports required by the plan. A first temporary jack was installed. The testimony of both MSHA Inspector Swarrow and of U.S. Steel's chief mine inspector established that a fourth cut of coal was mined and a second temporary jack was not installed.

U.S. Steel contends that the judge erred in concluding that Drawing No. 1 applies. It argues that a different provision of its plan, Drawing No. 23, applies to the mining of intersections. It states that Drawing No. 23 depicts a situation where it is unnecessary for a miner to proceed under unsupported roof to advance ventilation or to take gas samples. According to U.S. Steel, the only purpose of the temporary jacks indicated in Drawing No. 1 "is to protect people going under the roof to advance curtain, take tests, or set bolts." Brief at 8. It asserts that in the mining of the cited intersection there was no need for a miner to go under unsupported roof in order to advance line curtains or take gas samples. Stating that Drawing No. 23 is more analogous to the cited intersection than Drawing No. 1, it argues that the setting of temporary jacks was not required and that it did not violate its roof control plan in this respect. 5/

Section 113(d)(2)(A)(ii)(I) of the Mine Act mandates that factual findings of administrative law judges be upheld if supported by substantial evidence of record. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The judge here found the conclusion that Drawing No. 1 applied to the mining of intersections to be "inescapable". We might not have reached this conclusion so readily. The operator's argument that Drawing No. 23 also can be analogized to the mining of intersections because the required ventilation and gas testing can be accomplished from under the adjoining, previously bolted entry cannot be rejected summarily. If all required ventilation and gas testing can be accomplished from an adjoining entry without miners entering under unsupported roof, then Drawing No. 23, viewed in conjunction with Drawing No. 24, conceivably could be read to support the mining sequence argued for by U.S. Steel. However, we

5/ U.S. Steel also argues that even if Drawing No. 1 applied the setting of a second jack was not required until mining sequence No. 3 was completed, and that this had not yet occurred. This argument is rejected. MSHA Inspector Swarrow and U.S. Steel's witness Cortis testified that cut No. 4 had been completed except for a little "cleaning up." Even if cut No. 4 was not completely finished, a second jack was required under Drawing No. 1 immediately upon completion of cut No. 3. The subsequent determination to remove more roof would not have affected the previously triggered requirement of setting a second jack.

cannot say that the trial judge's conclusion that Drawing No. 1 applied is not supported by substantial evidence. The testimony of the MSHA inspector that Drawing No. 1 applies to the mining of intersections was detailed and consistent and provides a substantial basis supporting the judge's finding. Also supportive of this conclusion is the fact that one temporary jack had been set by the miners, which would have been required by Drawing No. 1, but not by Drawing No. 23.

Accordingly, we affirm the judge's conclusion that Drawing No. 1 was applicable and was violated. We note, however, that roof control plans are reviewed at least every six months. If U.S. Steel continues to believe that a provision other than Drawing No. 1 should apply when mining an intersection, it has the opportunity to pursue this when the plan is next reviewed.

For the foregoing reasons, we reverse the judge's finding that U.S. Steel was negligent in connection with the two miners working under unsupported roof, and we remand to the judge for recomputation of an appropriate penalty. We also affirm the judge's conclusion that U.S. Steel violated 30 C.F.R. § 75.200 by failing to install a second temporary jack pursuant to Drawing No. 1 of U.S. Steel's approved roof control plan. 6/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ Chairman Ford has elected not to participate in the consideration or disposition of this case.

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Chief Administrative Law Judge Paul Merlin
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

March 5, 1986

HOMESTAKE MINING COMPANY, Contestant	:	CONTEST PROCEEDING Docket No. CENT 86-24-RM Citation No. 2635045; 11/14/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Homestake Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 85-93-M A.C. No. 39-00055-05545 Docket No. CENT 85-118-M A.C. No. 39-00055-05550
HOMESTAKE MINING COMPANY, Respondent	:	Homestake Mine

DECISION AND ORDER OF DISMISSAL

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., and Robert A. Amundson, Esq., Amundson, Fuller and Delaney, Lead, South Dakota, for Contestant/Respondent;
James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Lasher

Docket No. CENT 85-118-M. At the commencement of the hearing in this expedited and consolidated proceeding, the Secretary moved to withdraw his Proposal for Penalty Assessment for failure of proof. The motion was granted pursuant to 29 C.F.R. 2700.11 and the Section 107(a) Order and the Section 104(a) Citation No. 2358414 involved was ordered vacated on the record. Accordingly, this docket is DISMISSED.

Docket No. CENT 85-93-M. Subsequent to the commencement of the hearing, and after further investigation, the Secretary moved to dismiss this proceeding for failure of proof. The motion, construed to be to withdraw the Proposal for Penalty Assessment, was granted pursuant to 29 C.F.R. 2700.11, and Citation No. 2097258 was ordered vacated on the record. Accordingly, this docket is DISMISSED.

Docket No. CENT 86-24-RM. Subsequent to the commencement of the hearing, and after further investigation, the Secretary moved to vacate the Section 104(d)(1) Citation (No. 2635045) involved for failure of proof. The motion was granted on the record, and the subject Citation was ordered vacated. Accordingly, the docket is DISMISSED.

The vacation of the three citations set forth above are with prejudice to the Secretary to reinstitute the same in the future.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 5, 1986

EMERALD MINES CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 85-298-R
	:	Citation No. 2401863; 8/8/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Emerald No. 1 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Chapman, Duff & Hasley, Pittsburgh, Pennsylvania, for Contestant;
Heidi Weintraub, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;
Tom Shumaker, United Mine Workers of America, Masontown, Pennsylvania, for Intervenor.

Before: Judge Melick

This case is before me upon the Notice of Contest filed by Emerald Mines Corporation (Emerald) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act" to challenge the issuance by the Secretary of Labor of citation No. 2401863 under the provisions of section 104(d)(1) of the Act.[1] The Secretary moved for dismissal of the case on the grounds that there was no justiciable issue in that Emerald had already paid the civil penalty corresponding to the citation and that 90 days

[1]Section 104(d)(1) provides in relevant 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."

had elapsed without any additional section 104(d) orders having been issued. According to the Secretary the case was therefore moot. The Secretary's motion was taken in part as a Motion For Summary Decision under Commission Rule 64, 29 C.F.R. § 2700.64, and documents submitted in connection with the motion were supplemented at limited hearings under that rule. The Secretary's motion was thereafter granted in part and denied in part. The corresponding bench decision appears below with only non-substantive modification:

> To the extent that Emerald does concede that it paid the penalty proposed by the Secretary for Citation Number 2401863 as a 104(a) citation, I find that the fact of the violation and the "significant and substantial" findings related to that citation have been the subject of a final disposition. Those issues, I find, have indeed been waived by payment of the penalty. [Old Ben Coal Co., 7 FMSHRC 205 (1985)].
>
> Now whether the 104(d)(1) "unwarrantable failure" findings that were later added to the citation have also been the subject of a final disposition by the payment of that penalty, is still an issue that may be further probed in these limited proceedings. I will provide additional opportunity for the Secretary to present evidence on that subject, pursuant to Commission Rule 64(b).
>
> So, to the extent that there does exist a genuine issue of fact based on the pleadings, documents, and affidavits submitted to me, regarding whether the 104(d)(1) citation was included in that penalty payment, and should likewise be considered waived, the Secretary's motion must be denied. [Commission Rule 64]
>
> Now, the Secretary also asserts in paragraphs 2 and 3 of his motion that the 104(d)(1) "unwarrantable failure" issue is, in any event, a moot issue. Now, there may be other reasons why this is not moot, but I find that the "unwarrantable failure" issue is not a moot issue because the history of violations attributed to Emerald reflects the existence of the more serious 104(d)(1) citation as opposed to a less serious 104(a) citation. This history could be used in any future proceedings to increase penalties imposed against Emerald, both by the Secretary under his regulations, and by the Commission, under section 110(i) of the Act. In other words

> as long as the 104(d)(1) characterization is associated with that citation, there indeed is a viable issue because of potential prejudice to Emerald in the future assessment of civil penalties. Now, there may be other reasons why this issue is not moot, but I don't find it necessary to consider any other reasons. So, with respect to the Secretary's paragraphs 2 and 3, in his motion to dismiss, those are also denied.

Following limited hearings on the Secretary's Motion under Commission Rule 64(b) a further bench decision was rendered. That decision appears as follows:

> I am prepared to rule. I find that the testimony of Mr. Machesky [Emerald's Safety Director] is, indeed, fully credible. It is undisputed that when Mr. Machesky paid that section 104(a) citation, [on behalf of Emerald] he believed he was paying only a penalty for a 104(a) citation. I certainly accept his testimony that he did not then understand that his payment of that penalty would have had any impact on the 104(d)(1) modification to that citation.
>
> Thus, when the penalty was paid on the citation, it was paid as a section 104(a) citation, and the only issues that were thereby waived were the fact of the violation cited and the amount of civil penalty. Those are the only issues that had become final by the payment of that penalty and the issue of "unwarrantable failure" survived that payment of penalty. The Secretary's motion to dismiss is, therefore, denied on that issue.

Emerald's Motion for Partial Summary Judgment under Commission Rule 64 was also considered at hearing. Emerald sought dismissal of the "unwarrantable failure" findings in the citation alleging inter alia that "an unwarrantable failure allegation must be based on an actual inspection of the mine and observance of the condition as opposed to an investigation performed after the fact."

The undisputed evidence on the motion is as follows. On August 8, 1985, at 8:00 a.m. Joseph Koscho, an inspector for the Federal Mine Safety and Health Administration (MSHA), issued Citation No. 2401863 under section 104(a) of the Act charging a "significant and substantial" violation of the standard at 30 C.F.R. § 75.308. The citation alleged as follows:

"During a 103(g)(1) investigation it is determined that power from the continuous miner serial number JM2567 was not immediately de-energized when 2.5% to 2.6% methane was detected, also changes were made in the ventilation in the working places before the continuous miner in the working place was de-energized. The incidence [sic] took place in number 1 haulage 002 section in a crosscut being driven from 3 room to 2 room on 7/29/85."

On August 23, 1985, Inspector Koscho modified the citation changing item 9 "Type of Action" from "104(a)" to "104(d)(1)" and noting that "the subject citation is hereby modified to show item 9-type of action to be changed from 104-a to 104-d-1 as per instruction of upper MSHA supervision."

The events leading to the issuance of the citation are as follows. On July 30, 1985, Inspector Koscho had received a section 103(g)(1) complaint concerning an alleged accumulation of methane at the Emerald No. 1 Mine on July 29, 1985.[2] Koscho began his investigation on July 31, 1985, by visiting the mine and talking to Lampman Don Kelly on the surface. At this point he was investigating allegations that the hand-held methane detectors had not been working properly and were poorly maintained. Koscho reviewed the records concerning the methane detectors and found no violations. He then

[2]Section 103(g)(1) provides as follows:

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

proceeded into the East Mains section of the mine to interview miners who had been present at the time of the alleged methane violation reported in the "103(g)" complaint.

The next day, August 1, 1985, Inspector Koscho returned to the mine and for the first time visited the underground area in which the cited violation had occurred i.e., in the crosscut between the No. 2 and No. 3 entry in the 002 section. According to Koscho, conditions on August 1 differed from conditions that reportedly had existed on the date of the violation. In this regard Koscho found "very little methane" on August 1st and observed that since the violation 2 full cuts of coal had been removed from the No. 3 entry and 1 cut from the No. 2 entry. Koscho tested the methane monitor on the continuous miner which had been used on the date of the violation and found it to be working. He also obtained records concerning the retraining of mine employees. This was a "long drawn out affair" since some records were not readily obtainable.

Upon obtaining all of the requested documentation Koscho finally wrote the section 104(a) citation on August 8, 1985. He did not observe the violation that occurred on July 29, and acknowledged that conditions were different when he was physically on-site on August 1, 1985. The citation was based upon the unsworn statements of the miners who purportedly observed the violation. On August 23, 1985, Koscho modified the section 104(a) citation to a citation under section 104(d)(1) of the Act based on the same information he used to issue the section 104(a) citation.

Within this framework of evidence it is clear that the citation at bar was not based on an inspection of the mine but upon an investigation through subsequent interviews and the examination of records conducted by the inspector several days after the incidents giving rise to the violation. A finding of "unwarrantable failure" under section 104(d)(1) must however be based upon an "inspection" of the mine. See Emery Mining Corporation, 7 FMSHRC 1908 (1985) (Judge Lasher) citing therein the order of Judge Steffey in Westmoreland Coal Company, WEVA 82-340-R et.al); Southwestern Portland Cement Company, 7 FMSHRC 2283 (1985) (Judge Morris) and NACCO Mining Company, 8 FMSHRC _____ (Jan 14, 1986) (Chief Judge Merlin). Under the circumstances the "unwarrantable failure" allegation herein cannot be supported and the citation as a citation under section 104(d)(1) of the Act must fail.

Accordingly the Motion for Partial Summary Decision filed by Emerald is granted and the citation at bar is modified from a citation under section 104(d)(1) of the Act to a citation under section 104(a) of the Act. Inasmuch as Emerald has already paid the civil penalty proposed by the

Secretary of Labor for Citation No. 2401863 as a section 104(a) citation, further proceedings in this matter are unneccessary.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 7, 1986

YOUGHIOGHENY AND OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING Docket No. LAKE 85-76-R Order No. 2330257; 4/25/85
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 85-37 A. C. No. 33-00968-03582
v.	:	Docket No. LAKE 85-93 A. C. No. 33-00968-03609
YOUGHIOGHENY AND OHIO COAL COMPANY, Respondent	:	Nelms No. 2 Mine

DECISION

Appearances: Robert Kota, Esq., St. Clairsville, Ohio, for Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for Respondent/Petitioner.

Before: Judge Maurer

These consolidated cases are before me pursuant to section 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). Docket No. LAKE 85-37 is a civil penalty proceeding filed by the petitioner against the respondent seeking a civil penalty assessment in the amount of $500 for an alleged violation of 30 C.F.R. § 75.403 as noted in section 104 (d)(1) Citation No. 2331148. The primary issues before me in this case are whether Youghiogheny and Ohio Coal Company (Y&O) violated the regulatory standard at 30 C.F.R. § 75.403 and, if so, a determination must be made as to the appropriate civil penalty to be assessed for that violation considering the criteria under section 110(i) of the Act. Docket No. LAKE 85-76-R and LAKE 85-93 are before me to contest an order of

withdrawal issued to Y&O pursuant to section 104(b) of the Act (Order No. 2230257) and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA) for that order and the section 104(a) citation underlying that order (Citation No. 2330248). In these cases MSHA seeks a civil penalty of $305 for alleged violation of 30 C.F.R. § 71.100. In the notice of contest case, the issues are whether a valid order was issued and whether it should be sustained, vacated, or modified. In the civil penalty case, the issues are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

An evidentiary hearing was held in Wheeling, West Virginia, on October 24, 1985. The parties filed post hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

STIPULATIONS

The parties stipulated to the following (Tr. 10):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. The Y&O Coal Company is a moderate-sized operator.

3. The Y&O Coal Company is an operator as defined by §3(d) of the 1977 Mine Act.

4. The Nelms No. 2 Mine of the Y&O Coal Company is a mine as defined by §3(h) of the 1977 Mine Act.

5. The amount of penalty assessed would not impair the operator's ability to continue in business.

I. Docket No. LAKE 85-37 (Citation 2331148)

This citation was issued by MSHA Inspector Frank J. Kolat on September 5, 1984, and alleges as follows:

> The floor, roof and ribs in the crosscut between E to D entry were inadequately rock dusted in the #7 Seam Mains left side (015-0) working section. Starting at 15 + 47 crosscut between E to D entry for a distance of 45 feet, also D entry the floor starting at 15 + 04 and extending inby for a distance of 66 feet. These areas were more than 40

feet outby the faces. Three (3) samples were collected to substantiate this citation. Butch Dyer was the section foreman that mined coal on this section on midnight shift. Ralph Dutton was the section foreman today on dayshift, and Bill Wright was the unit manager in charge.

Inspector Kolat testified at the hearing that on September 5, 1984, he, accompanied by Mr. Andy Jacubic from Y&O's safety staff and Mr. Larry Ward from the union safety committee entered the Nelms No. 2 Mine and proceeded to an area of the mine known as the No. 7 Seam, 3 section left side No. 015. This was an active working section. They arrived on the section at approximately 9:15 a.m. Kolat inspected six entries in this section--A-1, A, B, C, D and E. While inspecting D entry he found the floor was black for a distance of 109 feet from the face. Additionally, he found the floor, roof, and ribs were black for approximately 45 feet in the crosscut between D to E. However, as respondent points out, the inspector was less than convincing during his cross-examination as to whether the area needing rock-dusting in D entry was 109 feet, 66 feet, or 86 feet, or somewhere in between. The preponderance of evidence on this point indicates to me that the petitioner has borne his burden of proof to the extent that 86 feet plus some unspecified distance beyond in D entry needed rockdusting to be in compliance with 30 C.F.R. § 75.403 1/ and I so find. I note that the respondent does not contest the fact that there was a violation of 30 C.F.R. § 75.403, but maintains that only 66 feet needed rockdusting and of that only 6 feet was required to be immediately rockdusted since the operator is required to clean and rockdust only within 40 feet of the face and then another cut of coal may be taken which equals 60 feet. Likewise, with regard to the area inadequately rockdusted in the crosscut between E and D entry, respondent does not dispute the regulatory violation,

1/ 30 C.F.R. § 75.403 provides:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourse shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

but maintains that only approximately 13 feet needed rock-dusting while the inspector testified it was about 45 feet. The weight of the totality of the evidence on this point I find to be on the side of the petitioner, and I find that approximately 45 feet of the crosscut between D and E entry needed immediate rockdusting to be in compliance with the cited regulation.

Inspector Kolat took methane readings at the face areas of the entries and found 0.1% to 0.3% at the faces. He also took three dust samples; the first, from the floor of the crosscut between D and E entries was 15% incombustible; the second, from the roof and ribs of the crosscut between D and E entries was 16.2% incombustible; and the third, from the floor of D entry, was 26% incombustible. These results do indeed fall far below the 65% incombustible content required by 30 C.F.R. § 75.403.

Accordingly, I find that a violation has been proven. An appropriate civil penalty must also be assessed if a violation is found and a determination must be made as to whether that violation was "significant and substantial."

On that morning, respondent had nine men and some mining equipment operating on this section. They had a roof bolting machine operating in C entry at the face and a scoop car operating in A and B entries. However, the respondent's unrebutted evidence which I find to be credible is that this equipment was in permissible condition. Further, there is no evidence that there was any float dust in the area.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

> 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 and 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 an illness of a reasonably serious nature.

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of "significant and substantial" in four steps. The first step was whether a violation occurred, and I have already dealt with that by finding that a violation of 30 C.F.R. § 75.403 indeed occurred. The second step is whether the violation contributed a measure of danger to a discrete safety hazard. In this case, Inspector Kolat testified that the nine miners working on that section had been subjected to an additional hazard because of the potential increased danger of explosion and fire especially in light of the fact that this is a gassy mine, liberating over one million cubic feet of methane in a twenty-four hour period. I find that there was a discrete safety hazard and the violation did contribute an additional measure of danger. The third step in applying the definition is whether there is a reasonable likelihood that the hazard contributed to will result in injury, and the fourth step is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. While I have found that there were no immediate ignition sources proven to exist at the time the citation herein was issued, I nevertheless find on the basis of Inspector Kolat's testimony the existence of a reasonable likelihood of increased danger of explosion or fire resulting in serious injuries or fatalities. This was an active section, 86+ feet of the floor in D entry and 45 feet of the floor, roof, and ribs in the crosscut between D and E entries were black and had an incombustible content ranging from 15% to 26% when the standard requires a minimum percentage of 65%. Further, this is a gassy mine, liberating over one million cubic feet of methane in a twenty-four hour period. As the inspector testified, if you would have a gas pocket at the face, ignition from whatever source would reasonably likely lead to an explosion or fire exacerbated by the highly volatile nature of the unrockdusted areas that would or could carry the fire on through the section. Accordingly, I find the violation is "significant and substantial". For the same reasons, I find a high degree of gravity associated with the violation, that is, the occurrence of the event against which the cited standard is directed was "reasonably likely."

Appropriate Penalty

Under section 110(i) of the Act, the following criteria are to be considered in assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent,

(4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation. It is stipulated herein that the operator is moderate-sized and that the amount of penalty will not affect the operator's ability to continue in business. A computer printout summarizing a history of 32 prior violations of 30 C.F.R. § 75.403 at the Nelms No. 2 Mine over a two year period (GX-2) indicates to me that a chronic problem of non-compliance with this particular standard exists. Further, I find that the management of Y&O had actual knowledge of the violation at issue prior to the issuance of the subject citation even though the condition was not recorded by the previous night shift section foreman on his onshift report nor by the day shift foreman on either his preshift or onshift report, as it should have been. The company's position on this issue is that the day shift foreman had every intention to clean and rockdust the areas involved before mining. However, the citation was issued first and I find that the operator is chargeable with a high degree of negligence in failing to correct this condition which it's management knew existed, especially in light of its violation history in this area. I have already stated my findings on gravity, supra, and further find that the operator did expeditiously clean up these areas and bring them into regulatory compliance after the citation was issued. Considering all of these facts, I conclude that a penalty of $400 is appropriate.

Although the parties in their closing arguments asked me to make a ruling on whether the citation herein was properly classified as an "unwarrantable failure," inasmuch as the operator 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, PIKE 78-70-P (1979). There is, however, ample evidence to support such a finding herein.

II. Docket Nos. LAKE 85-76-R and LAKE 85-93 (Citation 2330248 and Order 2330257)

These cases involve the issuance of a section 104(a) citation (No. 2330248) on March 14, 1985, and a related

section 104(b) order (No. 2330257) issued on April 25, 1985, for an alleged violation of 30 C.F.R. § 71.100. 2/

The Citation

The citation herein was issued by MSHA Inspector Nick Vucelich and alleged as follows:

> Based on the results of three (3) valid dust samples collected by MSHA inspector the average concentration of respirable dust in the working environment of the designated work position 902-0-392, was 4.2 mg/m3 which exceeded the applicable limit of 2.0 mg/m3. Management shall take corrective action to lower the respirable dust and then sample each production shift until five (5) valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. The following list of samples were those used to determine the citation.

On the 7th, 11th, and 13th of March 1985 Inspector Vucelich conducted respirable dust sampling tests of Y&O's tipple operator. The operator wears a sampling pump while working at various locations on the surface, including the sampling plant, for approximately seven hours. The tipple operator on the 7th was Edward Krankovich. On the 11th and 13th it was Gary Fisher. The tipple operator's duties include cleaning the sampling plant for about one hour per shift where coal on conveyor belts is crushed by a hammermill. The sampling plant is an L-shaped windowless building approximately 40 feet wide, 70 feet long and about 40 feet from floor to ceiling, with a door on either end. As the coal enters the building, the hammermill crushes it. The tipple operator's job in this building is to sweep the coal dust off the walls, floors, and equipment with a broom and hand brush.

Mr. Fisher testified at the hearing and stated that the sampling plant was extremely dusty at the time the citation

2/ 30 C.F.R. § 71.100 provides:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with § 71.206 (Approved sampling devices; equivalent concentrations).

was issued and had been since it was installed and put on line some two years before. It took him on average one hour per shift to clean the plant and after it was back in operation for an hour he states you couldn't hardly tell anyone had been in there. He was concerned about the atmosphere in the sampling house because with all the float dust in suspension there was danger of an explosion.

The results of the three aforementioned respirable dust sampling tests were 3.3 milligrams of respirable dust on March 7, 1985; 1.5 milligrams on March 11, and 8.0 on March 13, 1985. Theaverage was 4.2 milligrams. This amounts to a violation of 30 C.F.R. § 71.100 which requires that exposure level be maintained at 2.0 milligrams or less. The operator again admits that there was a violation of the cited standard and accepts the fact that the samples showed this.

On March 14, 1985, after he received the results of the sampling, Inspector Vucelich issued the 104(a) citation herein and gave the company twenty working days to abate the same.

The operator was and had been aware of the excessive dust in the sampling plant and was attempting to alleviate the problem. They tried various corrective measures such as washing it down with a water hose, installing limit switches on the feed conveyor to shut down the hammermill when there was no coal on the conveyor, and using small industrial-type vacuum cleaners. None of these things worked. Ultimately, they installed a total dust collection system at a cost of $45,000.

Inspector Vucelich made a finding of moderate negligence on this citation because the hazard presented, i.e., an extremely dusty environment, could cause an occupational illness called coal worker's pneumoconiosis or "black lung," and these conditions had prevailed in the sampling plant for some two years, since it was opened in 1983. He made a gravity finding of "reasonably likely" and marked this as a "significant and substantial" violation because the level of respirable dust in the sampling plant was such that it was reasonably likely to lead to serious health problems for the tipple operators who spend approximately one hour a day in that environment and/or could cause an ignition of coal dust.

In its defense, Y&O contends that even though the samples demonstrate a violation of 30 C.F.R. § 71.100, the negligence finding, the gravity finding and the "S&S" finding on the

citation are not supported by the evidence. I disagree. It is undisputed that the operator knew of the extremely dusty conditions in its sampling plant for the two years of its existence. Even given the fact that this was a difficult engineering problem to solve and a relatively expensive one to correct, two years is simply too long to have allowed this situation to exist. As for the danger to the health of the tipple operators who had to spend approximately one hour per shift in that environment for a period of two years, it is evident to me that it is reasonably likely there has been some adverse impa to their health of a serious nature, i.e., chronic lu. sease (pneumoconiosis). The additional danger of an explos n caused by the suspended float dust also existed for this extended period of time. I find that the violation has been proven as charged.

The Withdrawal Order

During the abatement period, the operator took and submitted samples as follows:

March 20, 1985	1.4	milligrams
March 21, 1985	1.5	"
March 22, 1985	3.9	"
April 8, 1985	1.5	"
April 9, 1985	3.9	"

The average respirable dust concentration of these five samples is 2.4 milligrams which was still out of compliance with the pertinent regulation.

Therefore, on April 25, 1985, Inspector Vucelich issued a section 104(b) withdrawal order alleging as follows:

> Results of the five (5) most recent samples received by ADP and collected by the operator from the working environment of the designated work position surface area No. 902-0 occupation code 392 shows an average concentration of 2.4 mg/m3. Due to the obvious lack of effect by the operator to control respirable dust, the period of reasonable time for abatement of this violation is not further extended and all miners working in the area shall be withdrawn until the violation is corrected.

When Inspector Vucelich issued the aforementioned order, it is clear and undisputed that the violation had not been abated within the time specified in the citation, i.e., by 8 a.m. on April 15, 1985. The question before me then is whether the inspector acted reasonably in refusing to extend

the time for abatement. The reasonableness of his actions must be determined on the basis of the facts confronting him at the time he issued the order. United States Steel Corporation, 7 IBMA 109 (1976).

In determining whether the period for abatement should have been extended by Inspector Vucelich at that time, the following factors should be considered: (1) the degree of danger that any extension would have caused to miners, (2) the diligence of the operator in attempting to meet the time originally set for abatement, and (3) the disruptive effect an extension would have had upon operating shifts. Consolidation Coal Company, BARB 76-143 (1976).

The overriding consideration in this regard is, of course, the degree of danger that any extension would have caused the tipple operators. It is obvious that any extension of the abatement period would have commensurately extended the individuals' exposure to the hazards enumerated above.

The second consideration is the diligence of the operator in attempting to meet the time originally set for abatement. Inspector Vucelich testified that the excessively dusty condition had existed for some two years and in his opinion just issuing a regular citation and giving extensions was not getting the problem resolved. He stated that, "with this (b) Order we started to get results." Accordingly, I conclude that Y&O did not make a diligent effort to abate the condition until the section 104(b) order was issued.

Lastly, the third factor to consider is the disruptive effect that an extension of abatement time would have on operating shifts. There are no allegations made by the parties on this point and no evidence was taken apropos of this issue. Therefore, I find that any adverse effect the order had is far outweighed by the other factors considered herein. I therefor conclude that Inspector Vucelich did not act unreasonably in not extending the time for abatement. Accordingly, Order of Withdrawal No. 2330257 was properly issued and is affirmed.

Appropriate Penalty

Under section 110(i) of the Act, the following criteria are to be considered in assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent,

(4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation. The operator and the mine here at issue are moderate in size and it is stipulated that the amount of penalty assessed would not impair the operator's ability to continue in business. The only other violation of the cited standard in evidence in this record is one in April of 1984. However, the record is replete with evidence that the operator had actual knowledge of the excessively dusty conditions in the sampling plant for some two years. I specifically find that the operator was highly negligent in failing to abate the cited condition within the time specified for abatement after it knew of the condition for two years. It is therefore obvious to me that Y&O failed to exercise good faith to achieve timely abatement and indeed did not achieve abatement until after the order of withdrawal had been issued. The health hazard and potential for an ignition of suspended coal dust was allowed to continue to exist for a very long period of time. These conditions posed a danger of at least serious injury to at least two miners. Considering all of these factors, I conclude that a penalty of $400 is appropriate.

ORDER

Citation No. 2331148 is AFFIRMED. Likewise, Citation No. 2330248 and Order No. 2330257 are hereby AFFIRMED. Youghiogheny and Ohio Coal Company is ORDERED to pay a penalty of $800 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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March 7, 1986

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 86-29-R
v.	:	Citation No. 2705734; 10/23/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine

ORDER OF DISMISSAL

Appearances: David A. Laing, Esq., and Alvin J. McKenna, Esq., Alexander, Ebinger, Fisher & Lawrence, Columbus, Ohio, for Contestant;
Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent.

Before: Judge Broderick

Pursuant to notice, the above proceeding was called for hearing in Fairmont, West Virginia on November 20, 1985. The parties agreed on the record to a settlement of the contested citation, whereby MSHA would remove certain areas from the scope of the citation (requiring the installation of guard rails), and Contestant agreed to install berms and guardrails in the remaining areas. The abatement time of the citation was extended.

On March 5, 1986, Contestant filed a motion to withdraw its Notice of Contest on the ground that the provisions of the agreement had been effected and the citation was terminated.

Premises considered, the motion is GRANTED and this proceeding is DISMISSED.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 85-170
	:	A. C. No. 46-06661-03503
v.	:	No. 3 Mine
E.C. COAL SALES COMPANY, INC., Respondent	:	

DEFAULT DECISION

Before: Judge Maurer

On February 19, 1986, a show cause order was issued in this case giving respondent ten (10) days to show cause why its ANSWER should not be struck and a DEFAULT DECISION entered against it for its failure to answer official correspondence or otherwise actively defend this case.

Respondent has again failed to respond and therefore is deemed to have waived any further right to a hearing. The proposed civil penalties shall therefore be made the final order of the Commission.

WHEREFORE IT IS ORDERED that respondent pay the Secretary's proposed civil penalties in the amount of $186 within 30 days of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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

E. C. Coal Sales Company, Inc., P. O. Box 2005, Beckley, WV 25802 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 11, 1986

BOYD ASHER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 85-28-D
	:	MSHA Case No. BARB CD 84-40
FAIRDALE MINING, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

Efforts by the Commission Chief Judge and the undersigned to serve show cause orders upon Respondent by certified and first class mail at the addresses provided by Complainant have been unsuccessful with the documents most recently being returned marked by the U.S. Postal Service as "Attempted - Not Known" and addressee "unknown" at those addresses.

Accordingly on February 25, 1986 an order to show cause was issued to the Complainant requiring him to provide evidence of service of his Complaint upon a lawfully designated corporate agent, and to provide the undersigned with the address of said corporate agent, on or before March 7, 1986. Counsel for the Complainant replied on February 28, 1986, but did not provide sufficient evidence that the complaint was served upon a lawfully designated corporate agent, did not identify any lawfully designated corporate agent upon whom service could be made and did not provide a valid address for said corporate agent.

Commission Rule 7, 29 C.F.R. § 2700.7 provides in relevant part that a complaint of discharge, discrimination or interference "shall be served by personal delivery or by registered or certified mail, return receipt requested." Rule 4(d)(3) Federal Rules of Civil Procedure (applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b)) provides that service upon a domestic corporation shall be made "by delivering a copy of the . . . complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

The Complainant in these proceedings has failed to provide satisfactory proof of service upon a lawfully designated corporate agent and has failed to provide the

identity of or address for any such agent after adequate opportunity has been given. Under the circumstances I have no choice but to dismiss these proceedings.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 1986

BRYAN P. EVERSON	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. LAKE 85-13-DM
	:	MSHA Case No. MD 84-32
ONEIDA SAND & GRAVEL, INC.,	:	
Respondent	:	Oneida Sand & Gravel

DECISION

Appearances: Roy Batista, Esq., Andrews, Greg, Batista & Andrews, Canton, Ohio, for Complainant
James B. Lindsey, Esq., Boggins, Centrone & Bixler, Canton, Ohio, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Bryan P. Everson alleging that he was discharged from Oneida Sand & Gravel, Inc. (Oneida) on March 23, 1984, in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act."[1]

In order for Mr. Everson to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge from Oneida was motivated in any part by that activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corp, 462 U.S. 393 (1983),

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[1]Section 105(c)(1) reads in part as follows:
"No person shall discharge . . . or cause to be discharged . . . or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any . . . mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in any . . . mine or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act."

affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Everson maintains that he refused to show up for work at the Onieda sand and gravel plant on March 21, 1984, because of hazardous conditions caused by freezing rain. According to the evidence the Complainant had several years experience at various sand and gravel operations and knew most of the jobs in the business. He had previously worked for Oneida beginning in 1983 but, because of the seasonal nature of the business, was laid-off and began receiving unemployment benefits in December 1983. In early March 1984, Oneida vice president Rodney Smitley wished to resume operations and tried to locate Everson. Everson was then continuing to collect unemployment benefits and was in Florida for the Daytona races. Smitley was finally able to contact Everson on March 14, 1984, and asked him to return to work immediately. Everson, who was continuing to receive unemployment benefits, requested a delay until Monday March 19 and Smitley agreed.

It is not disputed that Everson thereafter worked at the Oneida Plant on March 19 and 20 but called in on March 21, telling Smitley that because of the freezing rain "we can't work" and "the best thing to do was to wait for the weather to clear up". Everson also informed Smitley in this phone call that since the weather for the next 3 days was forecast to be similar he would not appear for work for the remainder of the week. Smitley then offered Everson work inside the garage but Everson declined because the heaters were not vented outside and claimed that the fumes would bother him. Everson concedes that he did not inquire as to the conditions at the job site nor did he visit the job site either that day or the following 2 days. He does not contend, moreover, that his refusal to show up for work was based on any inability to drive to work because of hazardous road conditions.

Rodney Smitley acknowledged that Everson called on the morning of March 21, and said that he was taking the rest of the week off. According to Smitley he told Everson during this phone call that it was important for him to appear for work that day because he already had trucks waiting to be loaded. Smitley anticipated that Everson would operate the front end loader, loading trucks with sand and gravel when they appeared, and while waiting for empty trucks, would work inside the heated garage disassembling spare parts for the dragline.

It is not disputed that the front-end loader was equipped with a heated cab and windshield wipers. Moreover, according to Smitley, conditions at the plant were not unsafe that

morning. Smitley himself loaded the trucks that day without any particular difficulty. According to Smitley the area in which the front-end loader operated was flat and paved with gravel. There was little snow accumulation and there was no hazard.

Smitley was obligated by contract to continue to provide sand and gravel so he found it necessary to hire a replacement for Everson. Commencing on March 22nd, the new employee performed the jobs that Everson would have performed including work in the garage disassembling parts and loading trucks with the front-end loader. On March 23rd Everson called Smitley asking if he could return to work the following Monday. Smitley told him that he had already been replaced.

In order for Everson's work refusal in this case to be considered protected under the Act he must prove that he then entertained a good faith, reasonable belief that to work under the conditions presented would have been hazardous. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). In this regard Everson testified that as he was driving to work on the morning of March 21st his car window started freezing up and there was ice and snow on the trees, ground and sidewalks. After driving about 2-1/2 miles he stopped and called the plant, advising Smitley that the weather was so bad it would be hazardous to work. It is not disputed that during this phone call Smitley told Everson that he was needed that day to load trucks already waiting and that he could also work inside the heated garage.

The only evidence regarding conditions at the Onieda plant on that day comes from Rodney Smitley. He operated the front-end loader in Eversons absence and did not find the conditions to be hazardous. The loader was operated from a heated cab on a flat gravel surface. Thus, as a factual matter, the conditions have not been shown to have been hazardous. Moreover Everson never inquired about nor checked the conditions at the plant himself and refused to show up for work for the rest of the week based upon a long range weather forecast. Under the circumstances I cannot find that Everson entertained a reasonable or good faith belief that the conditions at the plant were hazardous in regard to the contemplated work.

In reaching this conclusion I have not disregarded Everson's testimony that he suffered a concussion several years before at another plant when he fell some 12 feet from a screen and struck his head on frozen ground. However Everson was never asked to work on the screen at the Oneida plant on the day at issue and there is no evidence that

Everson would have been asked to perform such work. Everson has accordingly failed to establish a prima facie violation of section 105(c)(1) of the Act and this complaint must therefore be dismissed. Pasula, supra.[2]

Gary Melick
Administrative Law Judge

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James B. Lindsey, Esq., Boogins, Centrone & Bixler, Central Trust Tower - 7th Floor, Canton, OH 44702 (Certified Mail)

Mr. Rod Smitley, Oneida Sand & Gravel, 8000 Blade Road, Malvern, OH 44644 (Certified Mail)

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[2]In his complaint filed with this Commission on November 16, 1984, Mr. Everson also made vague allegations of subsequent discriminatory activity and clarified at hearing that "probably in May 1984" he had been offered a job by Rod Smitley conditioned on his "unemployment" getting "straightened out" but that Smitley later said that his father would not allow it because of complaints Everson made to OSHA and MSHA. The record at hearing shows that Everson in fact did file complaints to MSHA and OSHA in April 1984 and that, as a result, Oneida was issued several MSHA citations. These allegations of unlawful discrimination are separate and distinct from the allegations before me and have not been presented to the Secretary of Labor as required by section 105(c)(2) of the Act. Accordingly, I found at hearing that these complaints were premature and that I was without jurisdiction at that time to entertain them.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 1986

BRIAN T. VEAL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 86-29-D
v.	:	
KERR-McGEE COAL CORP., Respondent	:	

ORDER DENYING MOTION TO DISMISS
PREHEARING ORDER

On December 19, 1985, Complainant filed a complaint alleging that he was discharged by Respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). On January 14, and February 18, 1986, Respondent filed a Motion to Dismiss on the grounds that the complaint fails to state a cause of action and is frivolous. The motion does not attempt to analyze or discuss the documents filed pro se by Complainant, but merely states the conclusion that they do not state a cause of action under the Act.

The Complaint, in the form of a letter to the Commission dated December 16, 1985, alleges:

1) The MSHA District Manager wrote a complimentary letter to Respondent.

2) Complainant was denied the right to representation during the MSHA investigation of his complaint.

3) MSHA did not notify Complainant of the basis for its denial of his complaint.

I conclude that none of these allegations state a cause of action under section 105(c) since they do not involve adverse action by Respondent against Complainant for activities protected under the Act.

The Complaint goes on to list 9 "specifications" in support of Complainant's claim:

1. The vehicle involved, called a "gopher," was an experimental one and was undergoing testing and evaluation. (It appears elsewhere that claimant

contends he was discharged following an accident while he was operating the vehicle.) A brake caliper bolt was broken on the vehicle. The vehicle did not have an independent emergency brake. The vehicles at Respondent's mine were modified for third and fourth gear operation, which could be hazardous. This fact was known to the Respondent and to MSHA, but the vehicle operators were not warned of the hazard.

2. Operator and passenger training for personnel driving and riding in the gophers was brief, informal and inadequate. Safety devices were not installed.

3. The terrain in the mine was hazardous for the vehicles. The company or MSHA closed off a section following the accident.

4. Job performance competition imposed mental pressures on personnel which affected safety.

5. Complainant worked under a supervisor who was not properly certified or trained.

6. Respondent provided false information to the MSHA investigator concerning Complainant's safety records.

7. Respondent failed to provide prompt and proper emergency medical treatment following Complainant's accident and performed blood analysis testing without reasonable cause.

8. The investigation failed to recognize a deficiency in the training and qualifications of instructors.

9. The Respondent prompted and coaxed witnesses during the investigation and attempted to force Complainant to sign an accident report which was false.

The claim filed with MSHA on October 8, 1985 asserted that Complainant had been dismissed because he had an accident because of bad brakes on a vehicle that had been red tagged. "The PV was given to me to use by my supervisor who had been driving it and there was no red tag on it." The complaint further stated that Complainant was discharged because he is taking medication for an injury due to a previous accident.

The file contains a copy of a handwritten statement taken by an MSHA Investigator on November 6, 1985, which copy was sent to the Commission by Complainant.

The statement indicates that Complainant was injured in a roof fall accident in January 1985 and was off work for some time. It states that he is still receiving treatment. After returning to work he was "worked hard" and "harrassed." The company "used my injury as an example and told all the employees that they were beat out of a safety award because of my accident . .

The statement describes the accident of September 30, 1985 when Complainant was driving a PV and collided with a coal pillar because he had no brakes. The following day he was asked to sign an accident report, but refused "because it did not state the cause of accident properly." ". . . they got angry and . . . harrassed me and told me to fill out another accident report." The following day he was told he was being terminated because he "neglected to turn in the weak brakes on the P.V." He was not given a written explanation of his termination.

Complainant requests reinstatement and back pay.

In order to establish a prima facie case of discrimiantion under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event 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, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Boards's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

The question presented by the Motion to Dismiss is whether Complainant has stated a cause of action under section 105(c), that is, whether he has alleged that the adverse action visited upon him (his dismissal) was motivated in any part by protected activity. In deciding this question without having heard any evidence, I am mindful that Complainant is not represented by counsel, and that his "pleadings" are rambling documents. They do, however, allege (1) safety related complaints, (2) an animus on the the part of Respondent apparently related to those complaints.

Under the circumstances, I conclude that the documents in the file allege facts which, if true, are sufficient to establish a prima facie case. Therefore, the Motion to Dismiss is DENIED. Respondent is ORDERED to file an answer to the complaint within 15 days of the date of this order.

PREHEARING ORDER

In accordance with the provisions of section 105(c) of the Act,this case will be called for hearing at a time and place to be designated in a subsequent notice.

The parties are directed to exchange lists of witnesses who may be called to testify at such a hearing and copies of exhibits which may be offered in evidence. Copies of witness lists and exhibits shall be exchanged and furnished me on or before March 28, 1986. The parties shall by the same date indicate the preferred hearing site, and inform me of any dates in May 1986 which would pose scheduling difficulties were I to select them for hearing.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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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

March 12, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 84-100-M
	:	A.C. No. 42-01789-05502
	:	Cottonwood Mine
HYDROCARBON RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Mr. Chad Evans, Former General Manager, Hydrocarbon Resources, Inc., Salt Lake City, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place on May 21, 1985, in Salt Lake City, Utah.

The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citations

There are four citations contested in this case.

Citation 2008144 alleges a violation of 30 C.F.R. § 57.3-22, now codified as § 57.3022, which provides 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.

Citation 2008145 alleges a violation of 30 C.F.R. § 57.19-110, now codified as § 57.19110, which provides as follows:

> A substantial bulkhead or equivalent protection shall be provided above persons at work deepening a shaft.

Citation 2008146 alleges a violation of 30 C.F.R. § 57.19-24(b), now codified as § 57.19025, which provides as follows:

> (a) Wire rope shall be attached to the load by a method that develops at least 80 percent of the nominal strength of the rope.
>
> (b) Except for terminations where use of other materials is a design feature, zinc (spelter) shall be used for socketing wire ropes. Design feature means either the manufacturer's original design or a design approved by a registered professional engineer.
>
> (c) Load and attachment methods using splices are prohibited.

Citation 2008147 alleges a violation of 30 C.F.R. § 57.11-37, now codified as § 57.11037, which provides as follows:

> Ladderways constructed after November 15, 1979, shall have a minimum unobstructed cross-sectional opening of 24 inches by 24 inches measured from the face of the ladder.

Stipulation

At the commencement of the hearing the parties stipulated that Bruce Green, an employee of respondent, was fatally injured when struck by a falling rock.

Respondent's representative further stated that the company has six employees. In addition, respondent has gross income under $10,000 (Tr. 6-9).

The Secretary's Case

After being advised of a fatality, MSHA, by its Inspector Ronald L. Beason, inspected respondent's Cottonwood Mine on December 28, 1982 (Tr. 13-16). The mine was under development and at the time the only

activity was the driving of a shaft, by hand, at the 415-foot level (Tr. 16, 80). The vertical 12-foot-wide shaft went from foot wall to hanging 1/ wall. A slight bend could be observed in the shaft as it descended (Tr. 17, 18).

The shaft was divided into three compartments. They consisted of a utility compartment with a vent line, a manway compartment with an emergency escapeway and a skip compartment. The skip compartment, through which the mine is entered, was an open 8 by 8 foot area (Tr. 18, 19). The skip bucket was 22 inches thick, i.e., from front to back. It had a one-ton capacity and measured 46 inches wide and 48 inches deep (Tr. 19, 20).

Bruce Green was killed on December 23, 1982. On the day of the subsequent inspection the bottom 100 feet of the mine had filled with water (Tr. 20, 21). The inspector learned of the configuration of the bottom of the shaft from the company's representative, Chad Evans (Tr. 22).

At the time of the accident the mining procedure was for the miners to hand muck the ore in the bottom of the shaft. They would thereafter hand muck the ore into the skip bucket when it returned after a six-minute trip to the surface. When the skip was filled and moved to the surface, the miners would continue digging in the skip compartment and move the ore to the utility and manway compartments (Tr. 22-25, 29-30). The company had been mining in this manner for three weeks. Prior to that time the miners used a vacuum system to move the gilsonite to the surface. But that system became inoperative three weeks before the accident (Tr. 22).

When the bucket went up and down the shaft it dragged the sides and the hanging wall (Tr. 28). When the inspector descended into the shaft he observed and sounded the loose ground in a number of areas. The following levels were tested: 10 to 60, 163, 170, 177, 190, 200, 215, 240, 290, 300, 315 and 320. There was a large hump at the 260-foot level where the shaft went from hanging to foot wall. At this point the gilsonite vein separated from the shaft (Tr. 28, 34-38). There were no bolts or lagging to prevent rocks from falling into the shaft (Tr. 40). There was danger that the whole area of the hanging wall could fall from the 10-foot level to the 60-foot level. A number of rocks had fallen (Tr. 40).

In the inspector's opinion the condition of loose ground he observed five days after the fatality, especially at the 60-foot level, also existed on the day of the accident (Tr. 39, 40, 49).

1/ A foot wall is at the bottom of an angle; a hanging wall is overhead (Tr. 17).

The skip compartment did not have a bulkhead (Tr. 29-31). When using the vacuum system the skip itself could be used as a bulkhead; however, it could not serve as such when it was hauling ore to the surface. There was a two-foot opening on each side of the skip. This would permit rocks to fall and strike miners (Tr. 31-33). The company had a type of a bulkhead at the surface. This bulkhead would not prevent loose material from dropping down the shaft. Its function was to prevent ore from dropping down the shaft after it had been dumped at the surface (Tr. 33).

In a mine of this type a bulkhead should be positioned immediately over the miners working in the bottom of the shaft. The bulkhead protects the miners from being struck by any material that might fall in the shaft. There were bulkheads over the utility and manway compartments together with a landing every ten feet (Tr. 26-29, 62-63).

Bruce Green was killed when he was struck by a 6 by 6 by 1/2 inch rock. At the time Green and his father were basically under the utility compartment. Bruce Green had reached out and was mucking in the bottom of the shaft (Tr. 41, 42, 61). A proper bulkhead over the skip would have prevented the rock from striking the miner (Tr. 42).

The company's log books failed to indicate that there had been any shaft inspection from December 21 through December 23 (Tr. 44).

Inspector Beason also inspected the six U-bolts that held the rope to the skip bucket. The saddle was on the shorter, or the dead end of the rope. The rope can be damaged when a bolt is placed on its working end. The bolt itself is designed so as to protect the live end of the rope (Tr. 45, 46, 79).

The manway compartment served as an emergency escapeway. Ten-foot ladders extend from one level to another. Several of the manways were obstructed. One such passage, through a bulkhead, measured only 8 inches by 14 inches. To continue up the manway it would be necessary to crawl out into the open shaft and swing up to the next level (Tr. 46-47).

The Respondent's Case

Chad L. Evans indicated that he was the general manager for the company at the time of this accident.

Evans, who was present during the MSHA inspection, also conducted his own investigation (Tr. 87-89). The witness submitted a drawing of the shaft (Tr. 90, 91; Ex. R1).

Evans indicated that as the bucket was ascending, Royce Green was standing under the utility area and his son was under the manway area. The miner was killed when he bent over to pick up a shovel.

The area between the skip and the sidewalls was probably less than two feet on each side. However, he also indicated the lateral distance from the skip to the sidewalls varied from 26 inches to four feet (Tr. 94, 96).

MSHA told the company they could use the skip again. In addition, three previous inspections in 1982 and 1983 failed to show a violation of the regulations contested here (Tr. 99; Ex. R2, R3, R4).

Evans had instructed his miners never to go into a skip compartment without overhead protection (Tr. 120). Evans' mining experience indicated a need for a bulkhead before the fatality (Tr. 124, 125). He had been advised that a bulkhead was in place. The placement of a skip over the miners constituted such a bulkhead (Tr. 124, 125).

In rebuttal Inspector Beason testified that Evans indicated that he had not known that a bulkhead was necessary (Tr. 130, 136). In addition, the hoist reports and daily logs indicated that 20 buckets were moved on the day shift. This evidence contradicted Evans' testimony that three buckets were moved each shift (Tr. 133). The number of buckets indicated to the inspector that the two miners were working when the skip was moving (Tr. 126, 133).

Discussion

We will consider the citations in numerical sequence.

Citation 2008144

This citation requires that the ground be taken down or adequately supported before any other work is done. The operator failed to comply with this regulation. The inspector described in detail the loose ground he both observed and sounded in the shaft. Respondent's manager confirmed this evidence when he testified that forty percent of the loose was removed in abating the violative condition (Tr. 100).

Citation 2008144 should be affirmed.

Citation 2008145

The evidence relating to the installation of a substantial bulkhead indicates there was no such bulkhead. The operator's management confirmed this condition. The miners at the time were deepening the shaft. These work conditions made the standard directly applicable.

Citation 2008145 should be affirmed.

Citation 2008146

In connection with this citation the inspector detailed his findings concerning the U-bolts. He further expressed his opinion that the operator violated the regulation.

Respondent offered no contrary evidence.

Citation 2008146 should be affirmed.

Citation 2008147

The record indicates that the ladderways were obstructed. One such ladderway only measured 8 inches by 14 inches. These facts establish a violation of the regulation. The operator offered no contrary evidence.

However, § 57.11-37 by its very terms applies to ladderways constructed after November 15, 1979. There is no evidence in this case indicating when this ladderway was constructed.

Such evidence is necessary in order to sustain a violation of the regulation.

Civil Penalties

The statutory mandate for assessing civil penalties is contained in 30 U.S.C. § 820(i). It provides as follows:

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

The Secretary proposed the following penalties:

Citation 2008144 (loose ground)	$4,000
Citation 2008145 (bulkhead)	2,000
Citation 2008146 (U-bolts)	20
Citation 2008147 (ladderways)	20

The record indicates the operator had no previous violations (Tr. 85; Ex. R2, R3, R4, R5). The operator should be considered as small in view of its income as well as the number of its employees. The negligence of the operator is apparent inasmuch as the violative

conditions were all open and obvious. The only evidence of the operator's financial condition bearing on its effect to continue in business is that the company's gross income was under $10,000. In the absence of any facts to the contrary I find that the payment of penalties will not cause respondent to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974). The loose ground and the lack of a bulkhead directly contributed to the death of the miner, hence the gravity is apparent and exceedingly high. In support of its good faith the operator argued that it has always attempted to provide a conscientious and well-maintained [safety] effort (Tr. 145, 146). The evidence fails to establish the operator's claim. However, the company established its statutory good faith by abating the violative conditions in this case.

On balance, I believe the penalties as set forth in the order of this decision are appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 57.3-22, § 57.19-110 and § 57.19-24(b).

3. The Secretary failed to prove a violation of 30 C.F.R. § 57.11-37.

ORDER

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

1. Citation 2008144 is affirmed and a penalty of $2,000 is assessed.

2. Citation 2008145 is affirmed and a penalty of $2,000 is assessed.

3. Citation 2008146 is affirmed and a penalty of $20 is assessed.

4. Citation 2008147 and all penalties therefor are vacated.

5. Respondent is ordered to pay to the Secretary the sum of $4,020 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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

Mr. Chad Evans, Hydrocarbon Resources, Inc., 3098 Highland Drive, Suite 100, Salt Lake City, Utah 84106 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

March 12, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 85-23-M
	:	A.C. No. 42-00415-05506
	:	Cedar City Mine
v.	:	
	:	Docket No. WEST 85-24-M
WESTERN ROCK PRODUCTS CORPORATION, Respondent	:	A.C. No. 42-01572-05505
	:	Sorenson Pit Mine

DECISION APPROVING SETTLEMENT

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Darrell G. Whitney, Western Rock Products Corporation, St. George, Utah, pro se.

Before: Judge Lasher

Subsequent to the commencement of the hearing in the above two consolidated dockets, Respondent agreed to pay the penalties set forth in the Secretary's Proposal for Penalty in full, to wit:

Docket No. WEST 85-23-M

Citation No.	Proposed and Agreed Penalty
2358849	$ 227.00
2358850	20.00
2358851	227.00
2358852	227.00
2358853	227.00
2358854	276.00
2358855	276.00
TOTAL	$1,480.00

Docket No. WEST 85-24-M

Citation No.		Proposed and Agreed Penalty
2358856		$ 58.00
2358858		20.00
2358859		20.00
2358860		20.00
2360661		20.00
2360662		20.00
2360663		20.00
	TOTAL	$178.00

Both parties agreeing, and the settlement appearing reasonable and proper, the settlement was approved from the bench. That approval is hereby affirmed and both proceedings are DISMISSED. The reasonableness and good faith approach of both parties is noted.

ORDER

Respondent if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the sum of $1,658.00.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

Mr. Darrell G. Whitney, Western Rock Products Corporation, 675 N. Industrial Road, #3, St. George, UT 84770 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 13 1986

MARTHA PERANDO, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. YORK 85-12-D
	:	MSHA Case No. MORG CD 85-17
METTIKI COAL CORPORATION, Respondent	:	

DECISION DENYING MOTION TO DISMISS

Appearances: Martha Perando, Deer Park, Maryland, pro se
Lisa B. Rovin, Esq., Crowell & Moring, Washington, DC on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by Martha Perando under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination and discharge by the Mettiki Coal Corporation (Mettiki) in violation of section 105(c)(1) of the Act.

More particularly Ms. Perando has cited five alleged acts of discrimination culminating in her discharge on March 27, 1985:

> First, I was not advised of my rights as a miner. Second, I was transferred from the mine sight [sic] to the lab at a loss of pay. Underground gross $520.20. Lab gross $383.20. The lab was not any better. Third, the form 11001 has not been filed after reporting shortness of breath and heavy preasher [sic] on my chest. Fourth, I was harassed due to filing a compensation claim against Mettiki Coal, letters of reprimand being placed upon me without any notice of not doing the work up to the standards of the company. Fifth, I was terminated on March 27, 1985 while off work under doctor's care.

Mettiki subsequently filed a motion to dismiss the complaint on the grounds that it failed to state a claim for which relief may be granted under section 105(c)(1) of the

Act.[1] The motion is deemed in part to be a motion for summary decision under Commission Rule 64, 29 C.F.R. § 2700.64, and documents submitted in connection with the motion were supplemented at limited hearings under that Rule. At those hearings the Complainant withdrew paragraphs 1 and 3 of her complaint and clarified the remaining paragraphs. To the extent that there is any deviation from her original complaint with respect to paragraphs 2, 4 and 5, I consider the complaint to have been amended by Ms. Perando's testimonial presentation.

In determining whether the complaint in this case "fails to state a claim for which relief may be granted under 105(c)(1)" of the Act, the well pleaded material allegations of the complaint are taken as admitted. Goff v. Youghiogheny & Ohio Coal Company, 7 FMSHRC 1776 (1985); 2A Moores Federal Practice ¶12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the Complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. id.

[1]Section 105(c)(1) of the Act provides as follows:

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

Ms. Perando alleges in the second paragraph of her complaint that she suffered unlawful discrimination when she suffered a loss of pay after being transferred from underground work to laboratory work. She alleges that she acquired a severe health impairment, industrial bronchitis, as a result of her underground work at Mettiki and was informed by her doctors that she should no longer work in the underground coal mine environment. Ms. Perando maintains that she informed Mettiki officials that she could no longer work underground and thereafter was given a lower rate of pay for work in the laboratory.

I find that these allegations are sufficient under either of two theories of unlawful discrimination under the Act. Her loss of pay following transfer could be viewed as retaliation for "notifying the operator or the operator's agent . . . of an alleged danger . . . or health violation". In addition her allegations could support a claim of discriminatory reduction in pay because of a protected work refusal i.e., the refusal to continue working in the good faith reasonable belief that to continue working would have been hazardous. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Accordingly I find that Perando's complaint in this regard presents a claim or claims cognizable under the Act.

In reaching this conclusion I have not disregarded Respondent's argument that the right of transfer without a loss of pay under section 105(c)(1) is limited to those cases arising under "a standard published pursuant to section 101" of the Act i.e., limited to cases where the Secretary has promulgated specific standards governing the cited health impairment. However Ms. Perando has not alleged a violation of those specific "right-to-transfer" provisions. Moreover I find nothing in the language of section 105(c)(1) or any Congressional intent that would bar an action based on the allegations herein under the legal theories cited in the preceding paragraph. See Atkins v. Cyprus Mines Corporation, 8 FMSHRC _____ Docket No. WEST 84-68-M, February 27, 1986 (Judge Morris).

Ms. Perando also alleges in her complaint that she was harrassed after she filed a workmans compensation claim with the state of Maryland. That claim was filed on December 17, 1984, and alleged that she contracted industrial bronchitis while working underground at Mettiki. Ms. Perando alleges that Mettiki officials knew of this filing and discriminated against her by thereafter requiring her to report her absences on a daily basis one half hour before the beginning of her work shift even though no one was present at that time to receive her calls.

She further alleges that because of her inability to complete these telephone calls in the absence of a responsible company official she was discriminatorily charged with unexcused absences. She seeks to have all such unexcused absences expunged from her personnel records. I find that these allegations are sufficient to set forth a claim of discrimination based on Ms. Perando's purported notification to "the operator or the operator's agent . . . of an alleged danger . . . or health violation". Accordingly these allegations also present a claim cognizable under section 105(c)(1) of the Act.

Finally Ms. Perando alleges in her complaint that she was terminated on March 27, 1985, while off work under a doctor's care. She explained at hearing that what she meant was that she was discharged because she had a serious medical condition caused by Mettiki and that she could not and would not work because of the hazardous health environment presented in the laboratory and in the underground mine. This complaint may also be construed as an alleged work refusal in the face of hazardous conditions. See discussion of paragraph two of the complaint, supra. Accordingly, I find that this allegation also sets forth a claim cognizable under the Act.

Under the circumstances Mettiki's motion to dismiss filed in this case is denied. This matter will accordingly be set for hearing on the merits.

Gary Melick
Administrative Law Judge

Distribution:

Ms. Martha Perando, P.O. Box 3012, Deer Park, MD 21550 (Certified Mail)

Lisa B. Rovin, Esq., Crowell, Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOHNNIE LEE JACKSON, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 86-36-D MSHA Case No. MADI 85-17 Rogers No. 2 Mine
v.	:	
TURNER BROTHERS, INC., Respondent	:	

DECISION AND ORDER DENYING TEMPORARY REINSTATEMENT

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; Robert Petrick, Esq., General Counsel, Mark Secrest, Assistant General Counsel, Turner Brothers, Inc., Muskogee, Oklahoma, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns an Application for Temporary Reinstatement filed by MSHA on January 22, 1986, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, and Commission Rule 29 C.F.R. § 2700.44(a), seeking the temporary reinstatement of the complainant Johnnie Lee Jackson to his position of bulldozer operator at the respondent's Rogers No. 2 Mine. MSHA has concluded that the complaint of discrimination filed by Mr. Jackson is not frivolous. In support of this conclusion, MSHA included an affidavit executed by Michael Yanak, Jr., Technical Compliance specialist, Office of Technical Compliance and Investigation, MSHA, Arlington, Virginia, a copy of the complainant's complaint executed September 23, 1985, and a prior statement executed by him on September 18, 1985.

The respondent filed a response to the request for temporary reinstatement on January 28, 1986, and requested a hearing pursuant to the Court's decision in Southern Ohio Coal Company, et al., v. Donovan et al., 774 F.2d 693 (6th Cir. 1985). A hearing was convened in Muskogee, Oklahoma, on February 5, 1986, and the parties appeared and participated fully therein.

Issue

The issue presented in this proceeding is whether or not the complainant is entitled to temporary reintatement pending the adjudication of the merits of his claim that he was unlawfully discharged for making safety complaints to mine management.

MSHA's Testimony and Evidence

Complainant Johnnie Lee Jackson testified that he was discharged by the respondent on September 9, 1985. At the time of his discharge he was employed as a D-10 bulldozer operator, and he had been employed by the respondent for 4-1/2 years. He stated that he had operated the bulldozer for approximately a year and a half and that he has 10 years of experience as a bulldozer operator (Tr. 25-26).

Mr. Jackson stated that he believed he was discharged because the respondent wanted to get rid of him for making safety complaints about his bulldozer. He stated that he was discharged by mine superintendent Ronald Sisney, and he asserted that Mr. Sisney gave him no reason for the discharge. Mr. Sisney simply told him that Robert Turner, the mine owner told him to fire him and that if he didn't, Mr. Turner would fire Mr. Sisney (Tr. 27-28).

Mr. Jackson stated that immediately prior to his discharge the left wall of the rock overburden which had been shot caved in on his bulldozer and came through the door of his machine. He was in the process of "slot pushing" the overburden with his machine. The overburden was being pushed into the pit and he was pushing or cutting 22 foot wide cuts while taking the overburden down to the coal layer. He described the procedure and the work being performed immediately prior to the accident.

Mr. Jackson stated that after the material caved in on his machine he had to climb over the rock in order to get out of his machine. After getting out of his machine, he waited for approximately 10 minutes, and mine operator Robert Turner was the first person to appear at the scene (Tr. 29-36).

Mr. Jackson stated that immediately before the slide, he had backed up his machine to the highwall and put the blade down. He then observed some movement of rocks and pebbles on the 45 to 50 foot highwall and knew that the wall was going to slide in on him. He pulled up his blade and started to move out, but a portion of the wall slid and fell in on the left side of his machine. A large rock came through the left door of the machine, and other rocks landed on the machine at the left tra and hood, and one rock came through the window on the driver's side of the machine. He climbed out and over the rock from the left side of the machine. He could not get out of the right side because the right door latch would not work and he could not get the door open (Tr. 38).

Mr. Jackson stated that the right door of his machine could not be opened, and he asserted that it had been in this condition for "a couple of weeks." He stated that he had complained about the condition of the door daily to Mr. Sisney and to the dirt foreman, Terry Beck. When he complained to Mr. Sisney, Mr. Sisney simply told him to use the left door. Mr. Jackson believed that the condition of the door was unsafe because he could be trapped in the machine in the event of an emergency (Tr. 39-41).

Mr. Jackson described how he got out of his machine after the rock slide, and he stated that he sustained injuries to the lower right side of his back and to his neck between the shoulder blades, and that glass got into his eyes (Tr. 42). He received medical treatment for his injuries, and a doctor advised him that he had a 10 percent disability because of his injuries (Tr. 43).

Mr. Jackson stated that the accident was not avoidable, and that while in his machine he was watching the highwall, which was his normal practice. He stated that the highwall "looked good" prior to the accident, and "it looked like a good solid wall" (Tr. 44). In his opinion, there was nothing he could have done to foresee the accident, and he confirmed that it had never happened to him in the past.

Mr. Jackson stated that he was aware of the fact that the respondent has fired other employees for causing accidents and for being involved in accidents which they did not cause. He was also aware of individuals who have commented that they were either involved in accidents or caused accidents but were not fired (Tr. 46). He has never seen any written company policy stating that causing or creating an accident would result in a discharge (Tr. 47).

Mr. Jackson denied that he did anything to cause the rock to fall on his machine, and he was not aware that the respondent made an investigation of the accident (Tr. 48). However, he was told that the machine door glass was knocked out, a precleaner breather knocked off, and that the door frame was bent. He was told that the machine was out of service for about an hour and a half or two hours (Tr. 49).

Mr. Jackson stated that he constantly complained about the slick tracks on his machine, but he indicated that any safety concern over this condition would depend on where the machine was operating. The slick tracks would be a safety problem if the machine were operating on a hill because there would be no traction. However, while "slot pushing" on level ground, the slick tracks would not present a safety hazard. He operated his machine with slick tracks for approximately a month and a half, but the respondent took care of the problem and replaced the tracks. The tracks on his machine were replaced approximately 2 or 3 weeks before the accident (Tr. 49-53).

Mr. Jackson stated that he also constantly complained about the rear-view mirrors being knocked off of the end-dump machine he was operating (Tr. 54). He confirmed that the mirrors are knocked off trucks at least once a month by the end loaders, and he conceded that this was "normal wear and tear" (Tr. 56). He confirmed that the respondent eventually would replace the mirrors, but only after his repeated complaints (Tr. 58).

Mr. Jackson confirmed that he knew he had a right to refuse to operate unsafe equipment, and he conceded that he would operate a piece of equipment which he knew to be unsafe because he had to work to support his family. He also confirmed that while he never refused to operate a piece of equipment which lacked a rear view mirror, he engaged in heated arguments over the condition. He conceded that on one occasion a foreman took a truck out of service until the rear view mirrow was replaced (Tr. 60).

Mr. Jackson stated that he also complained about the D-clutch brakes on the 992 loaders, but that "nobody ever seemed to care whether they was working right or not." He believed that he would have been fired had he refused to operate equipment which he considered to be unsafe because "there's too many people out there that would run it" (Tr. 60).

On cross-examination, Mr. Jackson stated that he is physically able to go back to work. He confirmed that he sustained injuries to his back, side, and his neck as a result of the accident. He denied that he has any permanent eye impairment, but confirmed that he had to see a doctor to remove glass from his eye. He also confirmed that when he returned to the mine to pick up his pay checks he did not inform Mr. Sisney, Mr. Beck, or Mr. Turner that he had suffered any injuries as a result of the accident (Tr. 62).

Mr. Jackson stated that he was not presently experiencing any discomfort to his neck, back, or side as a result of his injuries. He confirmed that he did suffer back and eye injuries as a result of the accident. He also confirmed that he has filed a workmen's compensation claim because of ear damage "because of the overall period of running the machinery." He stated that his doctor advised him that his hearing is being impaired because of the large machinery noise to which he is exposed. When asked whether he will continue to be exposed to loud noise if he operated bulldozers and heavy equipment, he responded "that's what I do for a living" (Tr. 64). He also stated that his doctor advised him to get better ear protection. He conceded that he "sometimes" wore ear protection but could not remember whether he was wearing earplugs while operating his machine at the time of the accident (Tr. 65).

Mr. Jackson denied that he was ever stopped in the operation of his equipment by his foreman or supervisor and told to wear his hard hat or to cease operating the machine with his doors open. He admitted that he was told to wear his seat belt, and to wear his hard hat while on the job (Tr. 66).

Respondent's counsel produced a medical report from Mr. Jackson's doctor dated November 21, 1985, stating that Mr. Jackson has a 10 percent partial disability and that he is released from treatment. Counsel pointed out that the report does not state that Mr. Jackson is physically able to go back to work, and in fact states that "he will probably experience chronic reoccurring symptoms" (Tr. 71, exhibit R-3), and Mr. Jackson acknowledged the report (Tr. 75).

Respondent's counsel produced a state workmen's compensation claim filed by Mr. Jackson on September 12, 1985, based on his back and eye injuries, and "nerves and ulcer" conditions, and Mr. Jackson acknowledged that the claim is still pending and that he is represented by an attorney in that matter (Tr. 72-73; exhibit R-1).

Respondent's counsel produced a state workmen's compensation claim filed January 10, 1986, filed by Mr. Jackson claiming a hearing loss as a result of working for the respondent, and that he will continue to do so. Mr. Jackson acknowledged that he filed it (Tr. 74; exhibit R-2).

MSHA's counsel produced a February 3, 1986, statement from Mr. Jackson's doctor certifying that he has recovered sufficiently to be able to return to regular work without restrictions and by agreement of the parties it was made a part of the record as exhibit RX-4 (Tr. 76-78).

Mr. Jackson explained the "slot dozing" procedures he followed while operating his bulldozer, and he stated that he would not have been there if the highwall appeared unsafe. He also explained the condition of the wall as it appeared to him before the accident occurred (Tr. 78-83).

Mr. Jackson confirmed that Mr. Sisney, Mr. Beck, and Mr. Turner were the only individuals present during the period immediately after the accident and his discharge, and that none of them gave him any verbal reasons for his termination (Tr. 84).

Mr. Jackson stated that he was positive that his prior complaints concerning the right door of the D-10 bulldozer being inoperable for 2 weeks referred to the same bulldozer he was operating at the time of the accident. He denied that Mr. Sisney exited from the right door of the bulldozer after retrieving and giving him his personal belongings from the bulldozer involved in the accident. He claimed that Mr. Sisney exited out over the top of the rock, and that Mr. Sisney tried to get in through the right door but could not (Tr. 85).

Mr. Jackson stated that he previously operated bulldozer 817, which was an older machine, but was subsequently given a new dozer 529 approximately a month or a month and a half prior to the accident. He confirmed that the new machine had been completely rebuilt and that new tracks were installed approximately 2 to 3 weeks prior to the accident (Tr. 86).

Mr. Jackson stated that the bulldozer he was operating at the time of the accident was completely enclosed with glass, had a center mirror, and had a seat which enabled him to see to the front, back, and side (Tr. 87).

Mr. Jackson acknowledged his statement to MSHA, made on September 18, 1985, and he confirmed that no one from mine management stated that he was being fired for making safety complaints (Tr. 88). When asked why this statement does not include an allegation that he was fired for making safety complaints, Mr. Jackson responded as follows (Tr. 89-90):

> THE WITNESS: No. I always knew they wanted to fire me because I complained too much.
>
> THE COURT: Well, if the accident hadn't happened, would they have fired you?
>
> THE WITNESS: First chance they got.
>
> THE COURT: You mean to tell me that for four and a half years they couldn't find an excuse to fire you if they wanted to fire you?
>
> THE WITNESS: No, they could have fired me.
>
> THE COURT: But they didn't.
>
> THE WITNESS: No, they didn't.
>
> THE COURT: You say they were using this as some kind of an excuse, the accident as some kind of an excuse?
>
> THE WITNESS: I would say so.

Mr. Jackson confirmed that he had an ulcer condition prior to his employment with the respondent, and he acknowledged that he missed some work as a result of this condition, but continued his employment with the respondent (Tr. 91). He also acknowledged that he had some financial problems and that the respondent loaned him money to assist him in resolving these problems and kept him employed regardless of garnishment and tax levies filed against him (Tr. 91). He also acknowledged that when he requested to work overtime, the respondent allowed him to do so (Tr. 91).

In response to further questions, Mr. Jackson identified exhibits C-1 and C-2 as releases from the doctors who treated his back and neck injuries and his ulcer condition indicating that he was able to return to work. He confirmed that he obtained the statements on February 3, 1986, prior to the hearing, and that he did so at the request of MSHA's counsel (Tr. 93). He denied that any doctor has advised him that he

is incapable of performing the job of bulldozer operator, and confirmed that he discussed the matter with two doctors treating him for his hearing condition. He stated that these doctors advised him that he was able to return to work but advised him to obtain better hearing protection (Tr. 94).

Mr. Jackson stated that the respondent provided him with earplugs, but that they disintegrated when they are washed, and that he was unable to get new earplugs every day because they were not available (Tr. 95).

When asked to explain why he omitted any reference to slick bulldozer tracks when he filed his two prior statements with MSHA, Mr. Jackson responded "I just forgot about it" (Tr. 98). He also stated that he complained about other matters, but did not include them in his prior statements. He conceded that when he complained about the slick tracks and rear-view mirrors, the respondent corrected the conditions (Tr. 99).

In response to further questions concerning his termination and safety complaints, Mr. Jackson stated as follows (Tr. 101-106):

> THE COURT: Well, was it the company's position that it was your fault?
>
> THE WITNESS: Was it the company's position to say it was my fault?
>
> THE COURT: Yes. This accident, when the rocks came in on your dozer, did the company take the position that you were the one that put yourself in that situation and that you were the one that could have avoided the accident but you didn't avoid it and that, therefore, that's what they were firing you for.
>
> THE WITNESS: I guess that's probably the way they looked at it.
>
> THE COURT: And no one told you that?
>
> THE WITNESS: No, no one told me that. I mean, no one, no, they didn't.
>
> THE COURT: The gentleman that said that you were fired, Ron Sisney, didn't he tell you why he was firing you?

THE WITNESS: No. Ron Sisney said -- I asked him, I said, "Why are you firing me?" He said, "Rob told me to either fire you or he's going to fire me."

THE COURT: You didn't ask why?

THE WITNESS: Yeah, I asked why, but nobody answered me.

THE COURT: Did Mr. Turner talk to you at the time you were fired?

THE WITNESS: At the time I was fired, no. He talked to me later on, up at the pickup. Ron took me to my car probably -- Rob followed us up there, and I talked to him up there.

THE COURT: Did you ask Mr. Turner then why you were being fired?

THE WITNESS: I asked him for another chance. I was wanting my job back. I knew they had done fired me.

THE COURT: But nothing came up during that conversation that would give you any idea as to why they fired you?

THE WITNESS: No. They done said they fired me, and I was begging for my job back, is what I was doing.

THE COURT: Do you have any idea why they fired you? What did you believe? What did you speculate? You must have had -- something must have gone through your mind as to "why they are doing this to me."

THE WITNESS: They wanted to get rid of me.

THE COURT: For what reason?

THE WITNESS: Cause I complained a lot, complained a lot, and it looked like the dozer was tore up, I guess you could say. I really can't say, you know. It's my opinion.

* * * * * * *

THE COURT: Did you ever see any MSHA inspectors out at the Turner property, mine inspectors doing inspections?

THE WITNESS: Inspectors, yes. I've seen a number of inspectors out there. As far as knowing whether they were MSHA and all this, I really don't know.

THE COURT: Did you ever complain to any MSHA inspectors about any safety complaints? Ever make any complaints to them?

THE WITNESS: No.

* * * * * * *

THE COURT: Okay. Had you ever had any problems at Turner Brothers before during your employment; ever received any warnings, reprimands, or anything like that?

THE WITNESS: Never received no reprimands, no, sir.

THE COURT: Do you know any other employees at Turner Brothers that have ever been fired for making complaints?

THE WITNESS: No, sir.

Mr. Jackson stated that his ulcer condition which caused him to miss 4 days of work occurred a year and a half ago, and that his financial difficulties took place approximately a year ago (Tr. 107).

Mr. Jackson stated that his September 18, 1985, statement to MSHA contains his signature, but that he did not write it out. He stated that he could not remember who wrote it out (Tr. 110), but respondent's counsel asserted that he was informed by MSHA's counsel that Mr. Jackson's wife wrote out the statement (Tr. 122).

Mr. Jackson stated that he has not been employed since his discharge, and that his present source of income consists of $122 a month from the Veterans' administration. He confirmed that he has received a $1,700 payment on his 10 percent

disability claim, and respondent's counsel confirmed that the respondent made the payment to Mr. Jackson and that the workmen's compensation carrier will be billed for the payment. Counsel also confirmed that the payment was made pursuant to the workmen's Compensation Court claim for temporary total disability. The question of permanent disability compensation is still pending. The temporary benefits are in connection with Mr. Jackson's back and eye injuries. Mr. Jackson confirmed that he is in contact with his lawyers regarding these claims, and respondent's counsel stated that he is still awaiting medical evaluations from Mr. Jackson's attorney regarding his loss of hearing condition and that the matter will be heard in court within the next 3 or 4 weeks (Tr. 246-249).

Allen G. Howell testified that he is an MSHA District 10 senior special investigator, and he confirmed that he conducted an investigation of Mr. Jackson's complaint after obtaining his prior two statements on approximately September 28, 1985. Mr. Howell stated that he interviewed four complainant witnesses, three respondent witnesses, and three doctors. He identified the respondent's witnesses as Mr. Turner, Mr. Beck, and Mr. Sisney (Tr. 129-131). Mr. Howell stated as follows with respect to the result of his interviews, (Tr. 131-133):

Q. Whom did you interview for the respondent?

A. I interviewed Mr. Turner, Mr. Beck, and Mr. Sisney.

Q. Were you present this morning for Mr. Jackson's testimony?

A. Yes, I was.

Q. Did you hear him testify that he had been fired for making safety complaints?

A. Yes, I did.

Q. Did he tell you that he had been fired for making safety complaints?

A. Yes, he did.

Q. In the course of your investigation, did you uncover any evidence to support the allegation that he had made safety complaints?

A. Yes, I did.

Q. More specifically, did any of respondent's witnesses concur in his claim to have made safety complaints?

A. Yes, they did.

Q. Would you tell us what they said?

A. There was some inconsistency but, basically, that Mr. Jackson had made safety complaints on occasion to management. Some people said -- one of the statements was "a few times," and another one was "constantly." One of the statement was, too, that most of the complaints were founded, that there was a legitimate complaint. The other one was that 75 to 80 percent of the time his complaints was not founded, that he just didn't want to work on the machine.

A. Did you find support among the complainant's witnesses for the claimed safety complaints?

A. Yes, I did.

And, at (Tr. 136-139):

Q. What was the reason stated for the discharge of Mr. Jackson?

A. By who?

Q. By the respondent.

A. The accident.

Q. And what specifically, with respect to the accident, was the basis for the discharge?

A. The respondent contends that if anyone at the mines is involved in an accident which causes property damage to their equipment and/or delay, that that person would be discharged.

* * * * * * *

Q. (By Mr. Moncrief) Now, was it simply the fact that Mr. Jackson was involved in an accident?

A. That he caused damage to the machines. It may be any accident. I'm saying that the conclusion I drawed from the interviews was that, if a person was involved in an accident that damaged the company's property or it was his fault, that the person was discharged.

Q. That's your conclusion.

A. That's my conclusion. That's what I thought I was asked.

Q. Now, you mentioned -- well, possibly you were. I should be more careful. You mentioned the matter of fault. Were you told -- well, what were you told specifically by the three members of mine management was the company policy with respect to property damage?

A. I can't say specifically. I can tell you in general. Without reading their statements, I wouldn't want to try to quote anyone.

Q. Did it require culpability or negligence or fault?

A Yes, that would be one of their guidelines, in my opinion.

Q. Did anyone say that simply being involved in an accident would be enough, anyone from management?

A. I don't think in that words, no.

Q. Okay. This was stated to you as a policy, did you say?

A. Right.

Q. To the best of your knowledge, was this policy ever reduced to writing?

MR. PETRICK: I will so stipulate that it was not.

THE COURT: All right.

Q. (By Mr. Moncrief) It's been stipulated that there was no written statement of this policy. Can you testify from your interview with the three men that you have cited, whether their statements of this policy were consistent?

A. Yes. It was.

Q. The statement was consistent?

A. Are we talking about the respondent's witnesses?

Q. Yes.

A. Yes, their statements in regards to the policy for discharge, as far as their statements was consistent, that if the person was involved in an accident that they felt was his fault and was avoidable, it would entail a discharge.

With regard to the results of his investigation concerning the accident, Mr. Howell testified at follows (Tr. 144-147).

Q. Okay. Did you question any of these witnesses as to the cause of the accident?

A. Yes, I did.

Q. Did you get an understanding as to what caused the accident?

A. From the complainant's witnesses I've talked to, there was no abnormal mining conditions at the mines. They hadn't had any real problems with mining in that area. There was no damaged high walls or unsafe areas that anybody was aware of, and the mining was proceeding in a normal manner at the time the accident occurred.

Q. Did you find from these witnesses any -- or these individuals, did you find any indication that the fall was the result of Mr. Jackson's negligence?

A. No. To the contrary, everyone said that -- the complainant's witnesses all stated that they didn't think that he could have been aware of it prior to it falling.

Q. What was the version of the accident given you by the respondent's witnesses?

A. That Mr. Jackson was operating in the manner in which he would normally be operating. I guess to elaborate on both their statements of management is that the responsibility is up to the operator to ensure the security of the machine and his safety while in the slot. It's his judgment to do that. On the other side when talking to the complainant's witnesses, the thing that I based my conclusions on was as to whether or not they was observing anything unusual and had taken any unusual, any extra steps, and they all stated that they hadn't, but then Mr. Jackson was the only one in that slot.

Q. Did any of the people you spoke to for the respondent assess the blame for the accident?

A. Could you rephrase that? I didn't really understand.

Q. Did anyone say that Mr. Jackson was at fault in the accident that occurred?

A. Yes. Are you talking about the respondent's witnesses?

Q. Yes.

A. Yes.

Q. What did they say?

A. I think that -- not in regards to the accident. I think the main contention of Mr. Beck was that he attempted to move the dozer after

the rock had fallen on it, causing further damage; and the contention of Mr. Turner and Mr. Sisney is that he should have been more careful in observance of the high wall in the mining area to prevent an accident before it occurred.

Q. Had any of the respondent's witnesses observed the accident?

A. No, one was an eye witness to the accident.

Q. (By Mr. Moncrief) Who fired Mr. Jackson, according to your investigation?

A. Mr. Sisney.

Q. Okay. Do you know what knowledge he had when he made the decision, or announced the decision to fire Mr. Jackson, with respect to the accident and its cause?

A. Mr. Sisney said it was his decision. He told Mr. Jackson when he was taking him back to his vehicle in the truck. Conversations other than that was -- I would rather read a quote or let them tell theirself.

Q. What I'm asking you is: did he state what his decision to fire Mr. Jackson was based on?

A. The fact that he had an accident that had caused damage to the machine, and it was avoidable; it could have been an avoidable accident.

On cross-examination, Mr. Howell identified the statements he took from Mr. Beck, Mr. Sisney, and Mr. Turner during his investigation of the complaint (Exhibits R-6 through R-8). Mr. Howell confirmed that he did not ask for my information from the respondent regarding any employees who were negligent and involved in accidents but were still employed by the respondent (Tr. 178). He also confirmed that the respondent had no knowledge of Mr. Jackson's injuries until after he returned to the mine after the accident and so informed management (Tr. 181).

Respondent's Testimony and Evidence

Joseph Haberland testified that he is employed by the respondent as a D-10 bulldozer operator, and he confirmed that in August and September 1985, he operated D-10 dozer No. 529. He stated that the machine had been out of service due to a fire, but that it was completely rebuilt and assigned to him. He operated the dozer on a 4-day, 12-hour a day shift, and Mr. Jackson would operate it for the next 4-day shift.

Mr. Haberland stated that he operated the dozer on the 4-day shift immediately before the shift on which Mr. Jackson was terminated, and that both doors worked properly and he had no occasion to make any safety complaint concerning the inability of the right-hand door to be opened and closed. He confirmed that he operated the machine with the doors open and that most of the time when he arrived on his shift the doors were closed (Tr. 207-209).

On cross-examination, Mr. Haberland denied that he ever told Mr. Jackson that the right door of the machine would not work, and he denied that he was aware of any MSHA investigation or that he ever spoke with Inspector Howell. He confirmed that Mr. Sisney called him the morning of the hearing and asked him to come. He also confirmed that Mr. Sisney did not ask him about the door, and he did not know why he was asked to appear at the hearing (Tr. 210-212).

Mr. Haberland confirmed that he and Mr. Jackson operated the same D-10 dozer, but denied Mr. Jackson ever discussed the condition of the right door with him. He stated that when he next operated the machine after Mr. Jackson's discharge, the glass was out of the left door, the door was dented, and the heat shield was bent. However, the right hand door was still operating properly (Tr. 214-215). He stated that Mr. Jackson operated the machine with the doors closed and the air conditioning on, while he operated it with the doors opened and the doors swing open and latched back (Tr. 216).

Robert A. Turner, testified that he is the secretary of the corporate operator Turner Brothers, Incorporated, and that he holds a B.S. degree in civil engineering from the University of Missouri and has worked in construction and mining all of his life. He explained the "slot dozing" method of mining used at the mine, including the safety precautions expected of a dozer operator while performing his duties. He stated that the machine operator has the responsibility to watch and maintain the slopes, and when he is out

of his machine he is supposed "to inspect the area and see that everything is fine" (Tr. 217-221).

Mr. Turner stated that he was the first person to arrive at the scene of Mr. Jackson's accident. When he arrived, Mr. Jackson was standing on the bank waiting for someone to come by, and Mr. Turner looked at the machine and saw two rocks that had slid approximately 12 to 15 feet up on the machine. Material was under the rocks, and they had fallen on the machine (Tr. 221-222).

Mr. Turner stated that in his opinion the rocks came off the slope because it had not been properly maintained, and he confirmed that "slot dozing" has taken place at the mine with D-10 dozers since 1981. He gave the following reasons for Mr. Jackson's discharge (Tr. 223-224):

> Q. Would you tell us the reason, or reasons, for the termination of Mr. Jackson?
>
> A. Mr. Jackson was terminated for not doing his prescribed duties as a D-10 operator and that he had to maintain the slopes of his slot so that material would not fall on him. There was no evidence that he had ever been up on top of the slot immediately to the left of him and tried to maintain or look for rocks to protect himself.
>
> Q. You mean in the whole time that he was cutting that slot, he had not been up on top of there?
>
> A. There was no dozer tracks. There had not been any work with the dozer to prevent anything.
>
> Q. Did you look for those dozer tracks?
>
> A. Yes.
>
> Q. You did not observe any?
>
> A. There was none there.
>
> Q. Was there any other reason that Mr. Jackson was terminated other than what you just said?
>
> A. No, sir.

Q. Did the question of any safety violations even come up while you were there?

A. No.

Q. You did talk with Mr. Jackson at the time, did you not?

A. He asked me if he could have another chance.

Q. Is that the extent of the conversation you had with him?

A. And I said that he'd had his chances.

Q. Any other conversation?

A. No, sir.

On cross-examination, Mr. Turner stated that when he was interviewed by Mr. Howell, he did not tell him about the matters he has testified to in this hearing because Mr. Howell did not ask. He confirmed that he did not advise Mr. Howell that Mr. Jackson had caused the damage to the dozer because Mr. Howell asked specific questions and he answered them. Mr. Turner denied that he fired Mr. Jackson or ordered him fired (Tr. 226).

Mr. Turner stated that after Mr. Sisney arrived on the scene he looked the machine over, took Mr. Jackson's lunch box out of it, and then took him to his car and fired him (Tr. 226). Mr. Turner stated that he did not know whether Mr. Sisney looked for any dozer tracks on the slope, but that "he looked the whole area over" (Tr. 227). He also stated as follows (Tr. 227-228):

Q. So you don't know whether Mr. Sisney saw what you say is evidence to indicate that Mr. Jackson had not been maintaining the shot wall?

A. Mr. Sisney looked the whole area over.

Q. Do you know whether he looked for the dozer tracks?

A. No, sir.

Q. But you did not tell Mr. Sisney to fire Mr. Jackson?

A. No.

Q. And the way you know that Mr. Jackson was responsible for the damage to his dozer was that there were no dozer tracks on the shot wall, top.

A. And the way the rock was laying on the dozer, that because of the angle of repose and the way it was up as high as it was on the dozer, it had to fall out of the face and on to the dozer.

Q. Has it ever happened that a properly maintained shot wall has fallen?

A. I wasn't aware of any there.

Q. Does it ever happen?

A. Not if it's properly maintained and the operator looks for rocks and does his job.

Q. When is it that the operator is supposed to go up and lay down these tracks on the shot wall?

A. Well, if he is digging through the area where -- if you listened to what I said, there was different stratas of rocks, and there's one layer in there where this rock came out of that is normally blocky and hard to get through, and it is a problem, and if they -- when a guy works through that, he should, he goes by it for two or three hours while working, backing up his slope, maintaining his slope, and all that, and if he is doing his job and observing the wall, he should notice those.

Mr. Turner stated Mr. Jackson had worked the slot most of the morning prior to the accident for approximately 3 hours, and except for the time that he is out of the machine, he is supposed "to keep an eye peeled to the wall" as he is operating. He would have had to observe the slope

wall while operating the machine because in order to bring the slope down, he had to back by it constantly. Mr. Turner concluded that Mr. Jackson simply ignored a danger to himself and his equipment for some significant period of time (Tr. 230).

In response to further questions, Mr. Turner stated that Mr. Jackson never complained to him about safety matters, his equipment being inoperative, or problems with any of his equipment. He also stated that no complaints by Mr. Jackson ever came into his attention (Tr. 230).

Mr. Turner stated that he had previously observed Mr. Jackson operating his dozer, but that he was not his supervisor. Mr. Sisney supervised Mr. Jackson and Mr. Sisney advised him that he had to constantly motivate Mr. Jackson and had to remind him to use his seat belts, and to operate the machine properly while stacking materials with the dozer (Tr. 231).

Mr. Turner stated that his company policy calls for the immediate termination of an employee who causes an accident resulting in damage or injuries. An employee not at fault would not be terminated. The policy is verbally communicated to employees and it is not in writing or in the form of policy directives. He confirmed that employees are trained according to MSHA regulations. Equipment operators are constantly trained by company superintendents and foremen, and they are expected to do what they are trained to do (Tr. 232).

Mr. Turner stated that his company has about 300 employees. Payroll and training records are maintained at each mine. He confirmed that Mr. Jackson's discharge was not reduced to writing, and that employee discharges are not in writing because "we just don't need the paperwork" and "we've always done things kind of out of the seat of our pocket" (Tr. 234).

Mr. Turner stated that he believed Mr. Jackson knew Mr. Sisney discharged him for "tearing up a piece of equipment" because "it didn't take 20 minutes from the time that we knew that it happened for us to make up our mind and for Mr. Jackson to be terminated." Mr. Turner stated that Mr. Sisney fired Mr. Jackson because he is the superintendent and does the hiring and firing (Tr. 235).

Mr. Turner stated that after arriving at the scene of the accident and looking around, he concluded that Mr. Jackson was at fault. After Mr. Sisney arrived, they walked around

the machine and discussed the accident in question. He and Mr. Sisney did not collectively decide that Mr. Jackson was at fault, and that Mr. Sisney made his own judgment in this regard. Had Mr. Sisney decided not to discharge Mr. Jackson, Mr. Turner stated "I would have stood behind him" (Tr. 236).

Mr. Turner stated that other employees were fired for damaging company equipment. He stated that Charles Fraum was discharged at the Welch Mine for backing a truck into another truck and that MSHA investigated the matter. Randy Willis was discharged at the Claremore Mine for backing up a 992 into a pickup, and another employee at Claremore (first name Darell) was fired for backing a 992 into a truck (Tr. 237).

Ronald L. Sisney testified that he is employed by the respondent as the superintendent of the Claremore Mine. He stated that after Mr. Jackson's accident he crawled into the left side of the machine over the rock to look at the damage and to remove Mr. Jackson's dinner bucket and water jug. He exited the machine through the right door, and while the door was jammed or hard to open, the door latch was operable (Tr. 237-239).

With regard to Mr. Jackson's termination, Mr. Sisney stated as follows (Tr. 239-240):

> Q. Okay. Now, with regard to the termination of Mr. Jackson, did you have a conversation with him before terminating him or at the time of termination?
>
> A. Yes, I did.
>
> Q. Where was this?
>
> A. On top of the high wall behind the dozer.
>
> Q. Did the conversation continue in your pickup truck?
>
> A. Yes, it did.
>
> Q. Did you advise Mr. Jackson as to why he was being terminated?
>
> A. Yes, I did.
>
> Q. Would you tell us, give us all the reasons you gave him for terminating him?

A. Best I can remember the way I said it was, I'm firing you because you didn't maintain the slopes on that cut and let the rock come down on your tractor.

Q. Was there ever any mention of any complaints, safety violations, or anything, at that time?

A. Not at that time, no.

Q. When did you first hear about it?

A. About the --

Q. Complaint of safety violations.

A. It was after the investigation, or at the time of the investigation.

Q. By Mr. Howell?

A. By Mr. Howell.

Q. Did the safety violations or the complaints of Mr. Jackson in whatever manner have anything to do with his termination?

A. No, none at all.

Q. Was there any other reason, other than the fact that you felt at that time that he was negligent, for terminating him?

A. At that particular time, that was the only reason I terminated him.

In response to further questions, Mr. Sisney stated that he could not recall Mr. Jackson ever complaining to him about the door on his machine. He confirmed that Mr. Jackson did complain at different times about safety concerns such as the lights on his machine or cracked glass. Mr. Sisney stated that he acknowledged the complaints and tried to fix the items in question. Although he received a lot of complaints from Mr. Jackson, as well as others, he did not consider him to be a chronic safety complainer. Mr. Sisney considered most of Mr. Jackson's complaints to be legitimate, while some were not. Mr. Sisney denied that his decision to discharge

Mr. Jackson had anything to do with his safety complaints, and that he could not remember discussing these complaints with Mr. Jackson at the time he fired him (Tr. 240-242).

Mr. Sisney could not recall telling Mr. Jackson that if he didn't fire him, that someone else would have fired him (Sisney). He also denied that Mr. Turner influenced his decision to fire Mr. Jackson, and he could offer no explanation as to why the discharge was not reduced to writing (Tr. 242).

Mr. Sisney stated that he viewed the accident area about an hour and a half prior to the accident, and he concluded that the rock which struck the machine should have been removed while Mr. Jackson was cutting the slot. He agreed that Mr. Jackson could have concluded that the rock would not dislodge. Mr. Jackson simply told him that the rock "just fell in, just slid in" (Tr. 245). Mr. Sisney believed the accident could have been prevented.

The parties stipulated that the prior statements made by Mr. Sisney, Mr. Turner, and Mr. Beck to MSHA investigator Howell during his investigation may be incorporated by reference in this proceeding (Tr. 245; exhibit R-6 through R-8).

Arguments Presented by the Parties

During the course of the hearing, MSHA's counsel contended that Mr. Jackson was discharged because of his safety complaints, and that the respondent reacted and retaliated against him by discharging him. With regard to MSHA's support for its application for temporary reinstatement, counsel asserted that Mr. Yanak's supporting affidavit was based on the facts then known to the Secretary, including a summary of the statements made to special investigator Howell during his investigation of the complaint (Tr. 14-16).

Respondent's counsel took the position that Mr. Jackson was not discharged for making safety complaints, and that he was discharged for causing an accident which was his fault. Counsel asserted that the accident resulted in property damage to the respondent's equipment, and that the discharge was consistent with company policy (Tr. 16-17).

MSHA's counsel asserted that in order to support Mr. Jackson's temporary reinstatement, all that is required to be established is that the complaint has merit, and he does not have to establish that he will ultimately prevail on the merits of his complaint (Tr. 17).

Respondent's counsel agreed that the complainant must establish that his claim of discrimination has merit. However, counsel further asserted that any temporary reinstatement order must be in accord with the standard provided under the Federal Rules of Civil Procedures for temporary court orders issued pursuant to Federal Statutes. Counsel suggested that the standard to be applied in this case is whether or not the complainant can establish that there is a reasonable likelihood of success on the merits of his case (Tr. 19).

MSHA's counsel disagreed with the respondent's argument, and he asserted that the term "frivously brought" should be applied in the context of whether the complainant acted frivously in filing his complaint and not whether the complaint itself is frivolous. In the instant case, counsel asserted that the complaint has a degree of merit which establishes that it is not frivolous, but well justified and meritorious (Tr. 22-23).

At the close of MSHA's case, the respondent moved that the application for temporary reinstatement be denied on the ground that the evidence presented in support of the application is insufficient to support the complainant's temporary reinstatement (Tr. 187).

Respondent also asserted that there are compelling medical reasons for denying the complainant's temporary reinstatement. Counsel pointed out that Mr. Jackson has not demonstrated that he is physically fit and able to perform his job without subjecting the respondent to liability for additional and future injuries with respect to Mr. Jackson's hearing situation and his back, neck, body, and stomach conditions. Counsel asserted that Mr. Jackson's doctor has rated him 10 percent disabled and has also indicated in his work release report that Mr. Jackson is subject to injury in some greater degree than would normally be expected of an employee (Tr. 188). He also confirmed that Mr. Jackson's claim for permanent disability is still pending.

MSHA's counsel conceded Mr. Jackson's 10 percent permanent disability, but asserted that with the exception of his ear doctor, his other doctors have released him for work without limitation. Counsel also conceded that Mr. Jackson's disability may subject him to pain from time to time, but asserted that it would not incapacitate him or more likely subject him to injury (Tr. 190).

In response to the motion to dismiss, MSHA's counsel asserted that the testimony of Mr. Jackson and Inspector

Howell establish that Mr. Jackson was a frequent complainer about safety matters, and that he specifically complained about the unsafe condition of the right door of his bulldozer everyday for a week before his termination.

MSHA's counsel asserted that the facts related to the rock fall demonstrate that this was an unsafe condition and that Mr. Jackson was fired immediately following the accident by individuals who saw or knew anything but that there was a bulldozer with rocks on it.

MSHA's counsel did not dispute the fact that the respondent has a policy that culpable employees will be discharged in the event of property damage. However, counsel contended that this policy is followed as a matter of convenience in order to permit the respondent to terminate employees when there is only an inference of negligence on the employee's part. Counsel argued that the respondent has stated no basis for the determination that Mr. Jackson had any culpability in the damage to the bulldozer.

MSHA's counsel conceded that Mr. Jackson has a 10 percent disability as a result of the injuries sustained by the accident. However, counsel took the position that the fact that Mr. Jackson may have state workmen's compensation claims pending in connection with his loss of hearing, and certain back and eye injuries stemming from the accident, this is no basis for concluding that he is not physically able to return to the work he was performing prior to his discharge (Tr. 67-69). However, counsel stated that "the question of ear protection and the like is something that may be worth delving into" (Tr. 67). He then suggested that Mr. Jackson may be willing to go back to work wearing ear protection, and assuming he were to "undertake whatever risk is involved, perhaps he should be allowed to do so" (Tr. 68). Counsel also asserted that "Mr. Jackson didn't say he had no compunction about operating in unsafe conditions, equipment, and was quite willing to do so" (Tr. 69).

MSHA's counsel recognized that in the event the respondent can establish that it would have fired Mr. Jackson based on a reasonable belief that his negligence caused the accident which resulted in damage to the bulldozer, regardless of any protected activity, the issue of supervening motivation would have to be resolved. However, counsel maintained that the evidence produced here does not provide a basis for concluding that Mr. Jackson was culpable, and that MSHA has met its burden (Tr. 190-193). Counsel suggested that its possible that the respondent's conclusion that Mr. Jackson was

culpable may simply be a convenient basis on which to discharge a person who has made substantial safety complaints and who, operating a piece of equipment which was unsafe, was almost killed on company property (Tr. 195).

The respondent's motion to dismiss was taken under advisement (Tr. 197).

Findings and Conclusions

Although I cannot conclude from all of the evidence and testimony adduced during the reinstatement hearing that Mr. Jackson's claim of discrimination is frivolous or totally lacking in merit, I do conclude and find that the respondent has established that there is a serious question concerning Mr. Jackson's physical condition and ability to perform the duties of a bulldozer operator if he were to be temporarily reinstated pending the adjudication of the merits of his claim. I also conclude and find from the documentary evidence presented by the respondent that the temporary reinstatement of Mr. Jackson at this time will place him in a working environment where there is a real potential for further injury and exacerbation of his prior injuries and claimed existing loss of hearing.

In support of its argument that Mr. Jackson is physically unable to fully perform his job, the respondent has presented documentary evidence consisting of doctor's statements and reports, and compensation claims filed by Mr. Jackson before a state workers compensation court. Mr. Jackson has apparently retained counsel to represent him in those proceedings, and as of the reinstatement hearing, the claims were still pending for adjudication. MSHA's evidence to the contrary consists of two recently obtained statements that Mr. Jackson is free to return to work. For the reasons which follow, I have given greater weight to the statements produced by the respondent, and little weight to the "work release" forms produce by MSHA. I believe it is obvious that these forms, one of which deals with an ulcer condition, were obtained in an effort to summarily convince me that Mr. Jackson is physically able to return to work.

There is no evidence that the doctors who executed the work releases obtained by Mr. Jackson at the request of MSHA's counsel a day or so before the reinstatement hearing were even aware of his claimed loss of hearing due to equipment noise exposure, and MSHA's counsel conceded that the doctor's were probably unaware of the condition when they signed the release statements. A copy of Mr. Jackson's claim filed with the

worker's compensation court on January 21, 1986, (exhibit R-2), a week or so before the hearing, reflects that he suffers from "tennitis or ringing in the ears" as a result of loud equipment noises. In response to a question on the claim form regarding any pre-existing disabilities, Mr. Jackson answered in the affirmative and indicated that his compensation case for injuries to his "back and various parts of body" is still pending in court.

One of the work releases dated February 3, 1986, is from the doctor who treated Mr. Jackson for an ulcer condition, and a second one is from the chiropractor who treated him for his neck, shoulder and back injuries. I note that the "return to work" slip (exhibit C-1) signed by this doctor states that Mr. Jackson is able to return to work on November 5, 1985, with no restrictions. This is in direct conflict with this same doctor's discharge report of November 5, 1985, a copy of which was filed with the state workers compensation court on January 14, 1986 (exhibit R-4). That report states in pertinent part as follows:

> Mr. Jackson has suffered a severe injury of the supportive ligaments of the cervical thoracic spine, which predispose this patient to reoccuring exacerbation of symptoms and reinjury. * * * Mr. Jackson has remained temporarily and totally disabled for employment as a result of his injury which occurred on 09-09-85.

In a letter dated November 21, 1985, from the same chiropractor to Mr. Jackson's attorney, the doctor stated in pertinent part as follows:

> It is my professional opinion, from the examination findings, and this patient's severity of symptoms, that he will require periodic care for the rest of his life as a result of these injuries. He probably will experience chronic reoccurring symptoms. * * * Mr. Jackson has 10 percent permanent impairment of the whole man as the result of the injuries he sustained on the job on 09-09-85.

The testimony and evidence adduced in this case with respect to the procedure of "slot dozing" reflects that a dozer operator is constantly maneuvering his machine back and forth while cutting into the overburden, and the machine is not always on level ground. It maneuvers over grades and

slopes while controlling the materials, and the operator is obviously subjected to constant jostling, particularly if his seat belt is not fastened. In this case, the evidence establishes that at the time of the accident. Mr. Jackson was operating his machine alone and was not under observation. As a matter of fact, after the accident, he had to crawl out of his machine and wait for someone to arrive on the scene. Under these circumstances, and given Mr. Jackson's physical disability and prior injuries, I conclude that temporary reinstatement to his prior job will expose him to a real potential for further injury.

The fact that Mr. Jackson may be willing to assume the risk of further aggravating his loss of hearing, or to risk further injury to his back and neck, is no reason to discount his injuries and disabilities. Aside from Mr. Jackson's physical well being, the respondent has a right to protect itself against further liability in the event that Mr. Jackson is reinjured. Simply because Mr. Jackson may be willing to place himself in further jeopardy, or is willing to work under conditions which he knows are unsafe, is no justification for granting temporary reinstatement.

Mr. Jackson has candidly admitted that he has in the past exposed himself to unsafe work conditions, but continued to work because of his opinion that he would lose his job if he did otherwise. Respondent presented testimony that Mr. Jackson has been cautioned in the past about the use of seat belts and wearing his hard hat on the job. Under these circumstances, I believe one may reasonably assume that in the event Mr. Jackson were to be temporarily reinstated, he will again take further risks which may lead to disastrous results. Even if Mr. Jackson did not take such risks, given his disability and injuries as reflected in the medical documentation adduced during the hearing, the potential for further injury while operating a bulldozer is real and present and cannot be discounted.

Although I recognize that Mr. Jackson is not presently gainfully employed, in the event he prevails on the merits of his discrimination complaint, he will be entitled to be made whole and to receive back-pay. However, I cannot in good conscience disregard the consequences which may result from his temporary reinstatement at this time, nor can I disregard the attendant potential liability to the respondent for reinstating an employee with known physical conditions or impairments which resulted from injuries suffered in the course of his prior employment.

In view of the foregoing, MSHA's request for the temporary reinstatement of Mr. Jackson IS DENIED. A hearing on the merits of the discrimination complaint will be docketed in the near future, and the parties will be notified accordingly.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 19, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-67-M A.C. No. 20-00608-05511
v.	:	
	:	Michigan Silica Company
MICHIGAN SILICA COMPANY, FORMERLY KNOWN AS OTTAWA SILICA COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $500 for a violation of section 105(c)(1) of the Act. The respondent contested the alleged violation and proposed civil penalty, and the case was docketed for a hearing on the merits. However, the parties have now submitted a proposed settlement pursuant to 29 C.F.R. § 2700.30, and the respondent has agreed to pay $250 for the violation in question.

The violation in this case is the result of a discrimination complaint filed by MSHA against the respondent in 1981. My decision upholding the complaint was issued on June 3, 1982, 4 FMSHRC 1013, and on appeal it was affirmed by the Commission at 6 FMSHRC 516 (March 1984). On November 11, 1985, the U.S. Court of Appeals for the Sixth Circuit affirmed the Commission's decision that the respondent violated section 105(c)(1) of the Act, Secretary of Labor v. Michigan Silica Company, Formerly Known as Ottawa Silica Company, Case No. 84-3859, 6th Cir. (1985).

The parties state that they have discussed the agreed upon settlement, and I have reviewed the pleadings and am familiar with all of the facts and circumstances since I presided at the discrimination hearing and adjudicated the merits of that case. In support of the reduction of the proposed civil penalty in this case, the parties assert that they wish to settle the matter in order to avoid the additional expense of litigation. I note that the respondent has already incurred great expenses in the litigation of the case and has paid in excess of $40,000 for back wages and other benefits to the employee who was ordered reinstated to his job.

After careful and further consideration of this matter, I conclude and find that the proposed settlement is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the settlement IS APPROVED, and the petitioner's motion seeking my approval IS GRANTED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $250 for the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed. The hearing scheduled for April 10, 1986, is cancelled.

George A. Koutras
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Robert Oren, Vice President, Industrial Relations, Michigan Silica Company, P.O. Box 577, Ottawa, IL 61350 (Certified Mail)

/fb

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

March 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On Behalf of BARRY L. WEAVER, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 85-99-D Alpine No. 4/7 Mine
v.	:	Jerrett Canyon Project
ALPINE CONSTRUCTION COMPANY, Respondent	:	

DECISION AND ORDER APPROVING
SETTLEMENT AND DISMISSING PROCEEDING

Before: Judge Lasher

The parties have reached an agreement in the above proceeding, the intent of which is to settle all of Complainant's claims. Pursuant thereto, Respondent, without admitting a violation, agrees to pay Barry L. Weaver the sum of $3,746.68 as back wages and interest, Mr. Weaver waives any right to reinstatement and to reapply for employment with Respondent, and the Secretary waives assessment of a civil penalty.

The settlement appearing reasonable and just in the premises, the same is approved.

ORDER

(1) On or before 30 days from the date hereof, Respondent shall pay Barry L. Weaver the sum of $3,746.68.

(2) This proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. Barry L. Weaver, Route 5, Box 144, McAlester, OK 74501 (Certified Mail)

Jill D. Klamm, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Ed Edmondson, Esq., 416 Court Street, P.O. Box 11, Muskogee, OK 74402-0011 (Certified Mail)

Alpine Construction Company, P.O. Box 339, Stigler, OK 74462 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

March 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-123-M
	:	A.C. No. 39-00055-05551 A
v.	:	Homestake Mine
JOSEPH CRACCO, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

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

Prior to a hearing, the petitioner filed a motion seeking approval of a settlement agreement entered into by the parties.

1. The agreement reflects that at all times mentioned herein respondent was acting as master ropeman and foreman at the gold mine operated by the Homestake Mining Company in Lead, South Dakota.

2. On July 25, 1984 MSHA issued Citation 2097234 against the corporate mine operator alleging a violation of 30 C.F.R. § 57.15-5. Subsequently, the corporate operator paid a civil penalty of $8,000 for the foregoing violation.

3. Thereafter, MSHA charged respondent with having knowingly authorized, ordered or carried out the corporate mine operator's violation as an agent of said operator. A civil penalty of $1,000.00 was proposed.

4. Subsequently, respondent proposed that the case be settled for the amount of $750.

5. In mitigation petitioner states that respondent had been acting as a temporary foreman for only a short period of time. Under these circumstances and in consideration of the criteria contained in Section 110(i) of the Act I find that the proposed settlement is reasonable and in the public interest.

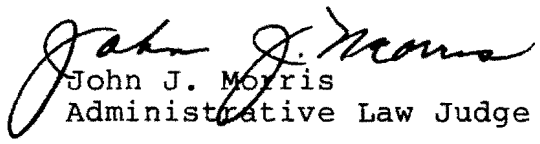
Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. The petition to assess a civil penalty is affirmed.

3. A civil penalty of $750 is assessed.



John J. Morris
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Robert A. Amundson, Esq., Amundson, Fuller & Delaney, 203 West Main Street, P.O. Box 898, Lead, SD 57754 (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

March 24, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 85-69
	:	A.C. No. 34-01404-03505
v.	:	
	:	Docket No. CENT 85-70
RICHARDS COAL COMPANY,	:	A.C. No. 34-01404-03506
and	:	
MYLU COAL COMPANY, INC., Respondents	:	Taft No. 1 Mine

SUMMARY DECISIONS AND ORDERS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondents pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of $200 for three alleged violations of certain mandatory standards found in Parts 50, 71, and 77, Title 30, Code of Federal Regulations.

The proposed civil penalty assessments were mailed to the respondents by the petitioner on May 28, 1985. However, the respondents have failed to file any answers, and subsequent orders requiring them to answer have been returned by the postal service as undeliverable.

By letter dated March 13, 1986, petitioner's counsel advised me that she was informed by the MSHA Subdistrict Office in McAlester, Oklahoma, that the Mylu Coal Company was the unsuccessful successor of the Richards Coal Company and that the mine has been abandoned since at least July, 1985. Counsel also advised that all mobile equipment has been removed from the property and the mine has been placed in a nonproducing status.

Discussion

The respondents have failed to answer the proposals for assessment of civil penalties as required by Commission Rule 29 C.F.R. § 2700.28. They have also failed to respond to the subsequent orders issued by me and by Chief Judge Merlin. Under the circumstances, I conclude and find that the respondents are in default, and that these proceedings may be disposed of pursuant to the Commission's summary disposition procedures pursuant to 29 C.F.R. § 2700.63.

ORDER

In view of the respondents default, and pursuant to the provisions of 29 C.F.R. § 2700.63(b), the respondents are jointly and severally assessed civil penalties for the violations in question, as follows:

CENT 85-69

Citation No.	Date	30 C.F.R. Section	Assessment
9947390	11/27/84	71.802	$ 106

CENT 85-70

Citation No.	Date	30 C.F.R. Section	Assessment
2218437	12/19/84	50.30(a)	$ 20
2218639	1/7/85	77.1701(a)	$ 74

The respondents ARE ORDERED to pay the civil penalties in the amounts shown above for the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of these decisions and order.

George A. Koutras
Administrative Law Judge

Distribution:

Jill Klamm, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Rick Curry, Officer in Charge of Safety and Health, Mylu Coal Company, Inc., 1218 Foxcroft Circle No. 7, Muskogee, OK 74401 (Certified Mail)

Mr. Randy Hair, Richards Coal Mine, P.O. Box 2788, Muskogee, OK 74402 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

March 24, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 85-156-M
	:	A.C. No. 02-01398-05502
v.	:	Reidhead Sand & Rock, Inc.
REIDHEAD SAND & ROCK, INC., Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administation, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Phoenix, Arizona on January 29, 1986.

Respondent failed to appear at the hearing and further failed to reply to an order to show cause issued after the hearing.

Summary of the Case

Gary Day, an MSHA supervisory mine inspector since 1975, inspected respondent on March 28, 1985 (Tr. 3).

On that occasion he observed that a 16 foot wide roadway, or ramp, lacked berms or guards. The ramp provides the only access to a dump hopper; further, it was elevated on a repose of zero to five feet (Tr. 5, 8).

A ten foot wide front-end loader travels the ramp to dump material into the hopper (Tr. 5). The loader, which weighed several tons, had a ten foot wide bucket with six foot tires (Tr. 6). The loader travels forward with the bucket elevated, then it backs down after dumping its load (Tr. 7).

The foregoing facts caused the inspector to issue Citation 2087473 for a violation of 30 C.F.R. § 56.9022. The cited regulation provides as follows:

> Berms or guards. Berms or guards shall be provided on the outer bank of elevated roadways.

Inspector Day further observed that there was no handrail to serve as a guard for the conveyor. In addition, there was no emergency stop cord device along this waist high walkway which was adjacent to the rollers of the conveyor (Tr. 9, 10). Various workers use the walkway to service and inspect the conveyor (Tr. 10).

The foregoing facts caused the inspector to issue Citation 2087474 for a violation of 30 C.F.R. § 56.9007. The cited regulation provides as follows:

> Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Discussion

The facts establish a violation of each regulation.

There were no berms or guards on the outer edges of the elevated roadway. Accordingly, the initial citation was properly issued.

Concerning the second citation: the evidence establishes that the conveyor along part of its walkway was unguarded. In addition, the walkway lacked an emergency stop device or cord.

The citations should be affirmed.

Civil Penalties

The criteria to assess civil penalties is set forth in Section 110(i) of the Act, now 30 U.S.C. § 820(i). It provides as follows:

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

Concerning the foregoing criteria: since it was favorable to respondent the judge accepted counsel's representation that the operator's history was relatively good inasmuch as the company had only two prior citations. In addition, the operator abated the violative conditions (Tr. 4). The evidence also indicates that the imposition of a penalty would not impair the operator's ability to continue in business (Tr. 8). The operator was negligent since both of the violative conditions were open and obvious. The gravity of each violation was high since a fatality could result; however, the inspector indicated that it was "reasonably unlikely" that an accident would occur.

The Secretary argues that the Commission should not be bound by MSHA's characterizations of the violations as non S & S. Therefore, it is asserted that the automatic twenty dollar penalty as proposed here is not appropriate (Tr. 13, 14).

I agree that the Commission is not bound by the MSHA formula. Sellersburg Stone Company v. FMSHRC, 736 F.2d 1147, 1152 (7th Cir. 1984). However, in this case the evidence indicates the exposure to the loader operator was minimal. The loader only traveled 25 to 30 feet to where it dead-ended into the hopper. In connection with the unguarded conveyor, I note there was a handrail which served as a guard on a portion of this walkway. Apparently only a small portion was unguarded.

On balance, I deem that the proposed penalties are appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.9022 and § 56.9007.

3. The citations and the proposed civil penalties therefor should be affirmed.

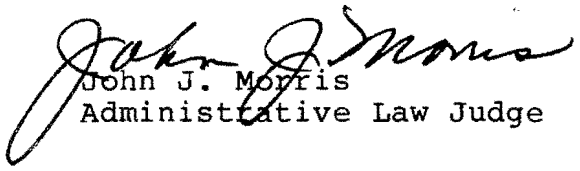
ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2087473 and the proposed penalty of $20 are affirmed.

2. Citation 2087474 and the proposed penalty of $20 are affirmed.

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



John J. Morris
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, San Francisco, CA 94102 (Certified Mail)

Reidhead Sand and Rock, Inc., Mr. Jack Zellner, General Manager, P.O. Box 7, Taylor, AZ 85938 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 24, 1986

DISCIPLINARY PROCEEDING : Docket No. D 86-1
:

DECISION

Appearances: Timothy W. McAfee, Esq., Norton, Virginia; James B. Leonard, Esq., Arlington, Virginia for the Secretary of Labor.

Before: Judge Merlin

This disciplinary proceeding is before me pursuant to order of the Commission dated January 8, 1986. A hearing was held on March 7, 1986.

The matter was initially referred to the Commission pursuant to Commission Procedural Rule 80, 29 C.F.R. § 2700.80 1/ for

---

1/ Rule 80 provides in pertinent part:

> Standards of conduct; disciplinary proceedings.
>
> (a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.
>
> (b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission....
>
> (c) Procedure. ... [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision....

29 C.F.R. § 2700.80.

disciplinary consideration by Administrative Law Judge George A. Koutras due to the failure of attorney Timothy W. McAfee to appear at a scheduled hearing on October 3, 1985, in a civil penalty proceeding under the Federal Mine Safety and Health Act of 1977.

On July 10, 1985 Judge Koutras issued a Notice of Hearing in Secretary of Labor v. White Oak Coal Company, (Docket No. VA 85-21) which was a civil penalty proceeding under the Federal Mine Safety and Health Act of 1977 The notice concluded with the following instruction:

> Any proposed settlements filed later than the ten-day period noted above will be rejected and the parties will be expected to appear at the scheduled trial of the case.

Mr. McAfee was not engaged as counsel for the operator until after July 10. But he was in the case on August 12 when he sent Judge Koutras the operator's response to the Secretary's Request for Admissions.

On August 30 Mr. McAfee and Mr. Mark R. Malecki, the Solicitor representing the Secretary of Labor, instituted a conference call with Judge Koutras. Pursuant to request of counsel Judge Koutras continued the hearing for several weeks and changed the hearing site. Mr. McAfee testified at the disciplinary hearing that prior to the conference call he was told by Mr. Malecki about the Judge's 10-day requirement (Tr. 9-10). Also at the disciplinary hearing, Mr. Malecki described the discussion of the 10-day requirement during the conference call itself (Tr. 32). On September 3 and September 24, Judge Koutras issued amended hearing orders scheduling the hearing for October 3 in Duffield, Virginia. Mr. McAfee received copies of these orders. He also received from the Judge a letter dated September 10, enclosing a letter the Judge had received from the operator. On October 2 the day before the scheduled hearing, Mr. McAfee and Mr. Malecki met in the former's office to discuss the case. On that occasion Mr. Malecki told Mr. McAfee he thought it was too late for a settlement in view of the Judge's 10-day requirement (Tr. 23, 30). Judge Koutras was mentioned by name (Tr. 30).

On the day of the hearing, October 3, at 7:30 a.m., the operator telephoned Mr. McAfee advising that he would pay the penalty of $500 proposed by the Mine Safety and Health Administration (MSHA), and would not come to the hearing. Mr. McAfee then telephoned Mr. Malecki and told him that the operator was willing to pay MSHA's proposed penalty and that in light of this he saw no need to appear at the hearing (Tr. 6, 33). Mr. Malecki said he did not know what Judge Koutras would do, but

that in light of the 10-day requirement he doubted the Judge would approve the settlement of $500 and that he might have to put on his case (Tr. 33-34). As Mr. Malecki predicted, Judge Koutras proceeded with the hearing.

On the next day, Judge Koutras issued an order directing Mr. McAfee to show cause within 10 days why he should not be referred to the Commission for disciplinary action pursuant to 29 C.F.R. § 2700.80 for his failure to appear at the hearing and for his failure to advise the presiding Judge that he would not appear. In his response filed October 17, Mr. McAfee stated that at the time the operator telephoned him on October 3 he did not have the file which reflected who the administrative law judge was and only knew where the Solicitor was staying. In the cover letter to his response Mr. McAfee asked Judge Koutras what disciplinary rule he had violated so he could further respond to the show cause order. On the same day Judge Koutras replied, citing 29 C.F.R. 2700.80(c) and giving Mr. McAfee a copy of the Commission's decision in Disciplinary Proceedings, 7 FMSHRC 623 (1985). The Judge gave Mr. McAfee an additional 10 days to respond, stating as follows:

> The purpose of the show-cause order is to afford you an opportunity to explain your failure to appear at the scheduled hearing in this matter, or to advise me that you would not appear. Upon receipt of your reply, I will then determine whether or not to refer the matter to the Commission for possible disciplinary action pursuant to its rules.

Mr. McAfee did not respond further and, as already noted, Judge Koutras referred the matter to the Commission in his decision dated December 4, 1985.

In his petition to the Commission, Mr. McAfee again stated that on the morning of October 3 he did not know the name of the Judge and asserted that any implication to the contrary was unfounded.

It is difficult to accept Mr. McAfee's assertion that on October 3 he did not know Judge Koutras' name. Between August 30 and October 3 he participated in a telephone conference call with the Judge and received two orders and a letter from him. And on the day before the hearing Judge Koutras was referred to by name in the meeting Mr. McAfee had with Mr. Malecki. But even accepting Mr. McAfee's proferred excuse and viewing this aspect of the matter in the light most favorable to him, he could have obtained the Judge's name from Mr. Malecki when he spoke to Mr. Malecki on the morning of October 3. It is clear from Mr. McAfee's testimony at the disciplinary hearing that he did not

obtain Judge Koutras' name or call him because the operator had agreed to pay MSHA's proposed penalty of $500 (Tr. 16-17). According to Mr. McAfee it did not occur to him that the Judge would have any objection to an uncontested settlement (Tr. 17). This explanation cannot be accepted as a valid excuse for not appearing at the hearing. Mr. McAfee knew about the Judge's 10-day requirement. At the meeting on the day before the hearing, Mr. Malecki told Mr. McAfee he thought it was already too late for a settlement in light of the 10-day requirement (Tr. 30). And when Mr. McAfee spoke with Mr. Malecki on the morning of October 3, Mr. Malecki expressed the view that Judge Koutras would not approve the settlement and that he would have to put on his case (Tr. 33). At this point, both counsel were speaking about a settlement of $500, MSHA's proposed penalty. Accordingly, on the morning of October 3 Mr. McAfee knew that despite the operator's willingness to pay $500, his appearance was required and a good chance existed the hearing would go forward. Nevertheless, Mr. McAfee deliberately chose to disregard the Judge's orders and did so without bothering to personally notify him.

At the disciplinary hearing, Mr. McAfee stated he was unaware that a Commission Judge does not have to accept a proposed settlement even if it is for MSHA's proposed amount (Tr. 13). This asserted lack of knowledge is rejected in view of the advice Mr. McAfee received from Mr. Malecki that the hearing would probably go on despite operator acceptance of the $500 penalty. In any event, such ignorance, even if true, cannot justify the failure to appear. As an attorney undertaking to act in cases under the Mine Safety Act, Mr. McAfee can be expected to be conversant with one of the most elementary principles governing these proceedings, i.e., the Judge's de novo authority in penalty cases. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7 Cir. 1984). In this case after the hearing at which only the Solicitor appeared, the Judge issued a decision exercising his de novo authority and assessing a penalty of $600. No appeal was taken. Of course, one does not know what would have happened if Mr. McAfee had appeared and cross-examined MSHA's witnesses. But he certainly did his client no service by his absence, leaving the Judge to decide the matter on a one-sided record.

Moreover, after being advised at the disciplinary hearing of the Judge's de novo authority in penalty cases, Mr. McAfee expressed no regret for his ignorance of applicable law or for his failure to appear, but rather stated that it was "disturbing" to him that a Judge would act the way Judge Koutras did. Mr. McAfee consistently has denied any responsibility and has instead criticized the Judge. In his petition to the Commission, Mr. McAfee asserted that Judge Koutras was incorrect in stating that he failed to respond. At the disciplinary hearing it was explained to Mr. McAfee that Judge Koutras was not

referring to the show cause order dated October 4 but to his subsequent letter of October 17. Mr. McAfee then stated:

> "I had already answered the man. And, he wanted me to answer him more and I didn't have any more to tell him" (Tr. 19).

Mr. McAfee's criticism of the tone of Judge Koutras' orders and letter is unfounded (Tr. 19). If the orders and letter indicate anything, it is that the Judge was giving Mr. McAfee every chance to explain his failure to appear. Insofar as "tone" is concerned, Mr. McAfee's written responses and oral testimony demonstrate irritation and impatience.

As an attorney appearing before a Commission Judge, Mr. McAfee was bound not to disregard any of his orders or rulings. Disciplinary Rule 7-106 of the Code of Professional Responsbility. But far from showing any sense of obligation to comply with the Judge's orders Mr. McAfee's lack of respect is evident from his statement at the disciplinary hearing:

> "Well, I'll be happy to submit this to the Virginia State Bar and allow them to discipline me as they see fit. But I don't feel like I've violated any disciplinary rule or any ethetical [sic] consideration" (Tr. 20).

In addition to his refusal to acknowledge his professional obligations, Mr. McAfee also fails to understand that this Commission like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it. Polydoroff v. I.C.C., 773 F.2d 372 (D. C. Cir. 1985). It would be impossible for the Judges of this Commission to function if, as in this case, their orders were ignored with impunity and they themselves were held in such low regard by attorneys who practice before them.

In addition, Commission Judges travel at public expense to hearing sites convenient to the parties 29 C.F.R. § 2700.51. That is what the Judge did in this case and Mr. McAfee knew it. But this factor obviously meant nothing, and as the record of the disciplinary hearing discloses, still means nothing to Mr. McAfee (Tr. 17-18).

The mere fact of counsel's absence from the hearing would not warrant disciplinary action if the absence resulted from good cause or excusable neglect. Thyssen Inc. v. S/S Chuen On, 693 F.2d 1171 (5 Cir. 1982). In light of the circumstances set forth herein, I find that there was no good cause or excusable neglect. Mr. McAfee intentionally failed to appear although he knew his presence was required, had not been excused and that the case might well proceed in his absence.

I am aware that this is the first Commission case in which Mr. McAfee has appeared and that this circumstance could be considered in mitigation. Disciplinary Proceedings, 7 FMSHRC 623 (1985). However, I conclude this is not an appropriate case for mitigation of disciplinary action. Mr. McAfee's inexperience was taken into account at the disciplinary hearing where applicable law was explained to him at length. But even then, he did not apologize or express regret either for his lack of knowledge or for his failure to appear. Throughout, his attitude toward this Commission and the Judge has been one of contempt and defiance.

In light of the foregoing, attorney Timothy W. McAfee is hereby REPRIMANDED and is hereby SUSPENDED from practicing before this Commission for a period of 60 days for unprofessional conduct in deliberately failing to appear at a hearing duly scheduled pursuant to orders of an Administrative Law Judge of the Commission.

Paul Merlin
Chief Administrative Law Judge

Distribution:

James B. Leonard, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

Mark R. Malecki, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

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Mr. Jerry Deel, Route 2, Box 54, Haysi, VA 24256 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 85-129-M A.C. No. 41-03217-05505
	:	Docket No. CENT 86-14-M
WHITNEY SAND & GRAVEL INCORPORATED, Respondent	:	A.C. No. 41-03217-05506 Whitney Sand & Gravel Incorporated

DECISIONS

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
John E. Agnew, Esq., Carter, Jones, Magee, Rudberg & Mayes, Dallas, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977. The petitioner seeks civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations, and one violation of the reporting requirements 30 C.F.R. § 50.30(a).

The respondent filed timely answers to the petitioner's proposals, and a hearing was conducted in Dallas, Texas. The parties waived the filing of posthearing arguments or briefs, but I have considered any oral arguments made on the record.

Issues

The primary issue presented is whether or not the respondent violated the cited safety standards, and if so, the appropriate civil penalties which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The respondent agreed that its plant is a "mine" within the meaning of the Act, and it agreed that the plant and the company are subject to MSHA's enforcement jurisdiction, and to the jurisdiction of the Mine Safety and Health Review Commission.

Discussion

Docket No. CENT 85-129-M

Section 104(a) "S&S" Citation No. 2240701, February 14, 1985, cites an alleged violation of 30 C.F.R. § 56.12025, and the condition or practice is stated as follows: "The wet process screening plant was not grounded in that there was no low impedance path back to the electrical source which supplies power to all plant drive motors. Employees are required to come in contact with the plant equipment during operation."

Section 104(a) "S&S" Citation No. 2240702, February 14, 1985, cites an alleged violation of 30 C.F.R. § 56.12028, and the condition or practice is stated as follows: "Continuity and resistance of grounding systems test has not been performed at this plant."

Docket No. CENT 86-14-M

Section 104(a) "S&S" Citation and 107(a) imminent danger Order No. 2241058, August 15, 1985, cites an alleged violation of 30 C.F.R. § 56.9003, and the condition or practice is stated as follows: "The Allis-Chalmers Loader, Co. # 514 was not provided with operable foot brakes that would stop the

unit on level ground. Loader is used to load truck and perform clean-up in the plant area. Moderate foot and truck traffic is present in the working area."

Section 104(a) Citation No. 2241214, September 9, 1985, cites an alleged violation of 30 C.F.R. § 50.30(a), and the condition or practice is described as follows: "The operator had failed to submit Form 7000-2 Quarterly Employment and Production Reports for the First and Second Quarters of FY 1985 as required."

Testimony and Evidence Adduced by the Petitioner

Docket No. CENT 85-129-M

MSHA Inspector Michael Sanders testified as to his background, training, and experience and he confirmed that he has been employed as an inspector since 1977. He confirmed that he conducted inspections at the respondent's plant on February 14, and August 11, 1985. He described the respondent's operation as a sand processing plant. He stated that sand is mined from an open pit by use of a drag line. The sand is loaded and processed through a series of conveyors and it is screened, washed, sized, and stockpiled for later transportation. The plant employs approximately seven to nine people and operates 5 or 5-1/2 days a week, and one daily 8-hour shift.

Mr. Sanders identified exhibits P-1 through P-6 as photographs of the plant and some of the equipment which he took a week or so prior to the hearing. He stated that the source for all electrical power for the plant is depicted in exhibit P-2, and that the electrical lines are routed to the electrical control center shown in exhibit P-1. This control center serves as the "electrical nerve center" for the electrical equipment such as conveyor drive motors, screens, shakers, and conveyor belts.

Mr. Sanders stated that all of the electrical boxes for the plant equipment are located in the control center shed. The plant was down at the time of his inspection, and he determined that the plant was not properly grounded by simply opening the electrical boxes and observing the absence of a ground wire providing a low impedance electrical path back to the eletrical source. He did observe a properly grounded water pump which had recently been installed.

Mr. Sanders stated that none of the plant equipment or motors in question were battery operated, and he confirmed

that they were all operated from the electrical sources shown in the photographic exhibits. Mr. Sanders stated that he did not physically check each motor, and that his determination that the plant was not properly grounded could readily be observed by opening the electrical boxes and visually observing the lack of a low impedance ground wire.

Mr. Sanders stated that the plant and the equipment is primarily of steel construction and that it normally operates on 440 volts of power. He believed that the lack of proper grounding posed a hazard of electrical shock. In the event of an electrical short circuit in the plant wiring, there is a potential for "live circuits." In the event someone touched the equipment or otherwise contacted it, he could receive a shock. The lack of proper grounding, the presence of standing water, and the fact that the number 1 and 2 screens are always wet increased the potential shock hazards.

Mr. Sanders stated that the plant operator, as well as two or three other employees, would be exposed to the hazard of shock or electrocution. He also stated that when the plant was originally installed and wired, it was not wired correctly. He conceded that prior MSHA inspections did not result in any prior violations for the lack of proper grounding.

Mr. Sanders confirmed that the respondent did not originally install or wire the plant equipment, and it took over the operation of the plant from a previous owner in March, 1984. He also confirmed that it took him 15 to 30 minutes during his inspection to detect the violation, and that the respondent eventually corrected the condition by completely rewiring the plant and installing ground wires on all equipment and motors. This was a major project, but he did not know how much it cost to properly wire the plant.

Mr. Sanders stated that he issued Citation No. 2204070l because of the lack of proper grounding for the plant wiring. He used no testing devices to support the violation, and relied on his visual observations of the control boxes.

On cross-examination, Mr. Sanders stated that the "other equivalent protection" language provided for in section 56.12-25, could be the isolation of the electrical circuits. Although wire insulation provided a measure of protection, he did not believe that the use of such insulation in and of itself could serve as "equivalent protection."

Mr. Sanders confirmed that there were no reported accidents concerning the lack of grounding, and he could not state why previous inspections did not result in the issuance of any violations for the condition. He also confirmed that the condition could have been abated earlier by the respondent, and that his abatement was made after he later visited the plant and found that the condition had been corrected.

Mr. Sanders stated that a ground fault interceptor circuit could serve as "equivalent protection," but that such an alternative was not installed or in use at the time he viewed the cited conditions.

Citation No. 2240702

Inspector Sanders testified that he issued the violation after determining that the respondent had not conducted any grounding tests for its plant electrical equipment as required by mandatory standard section 56.12-28. He stated that plant foreman Murphy had no knowledge that the test had been done and he could not produce the test records when asked.

Mr. Sanders stated that the hazards resulting from the failure to conduct the required tests are the same as those resulting from the previous violation No. 2240701. Had the test been conducted annually as required by the standard, the lack of proper grounding would have been detected.

Mr. Sanders stated that the violation was abated after the respondent retained a knowledgeable independent contractor to conduct the test, and after the records of the test were retained at the plant office. Mr. Sanders confirmed that he reviewed the test results and was satisfied that compliance had been achieved. He also confirmed that he left written instructions with foreman Murphy as to how to conduct the required ohm resistance test.

Docket No. CENT 86-14-M

Citation No. 2241058

Inspector Sanders testified that he issued the violation after finding inadequate foot brakes on an Allis-Chalmers front-end loader being operated at the plant. The loader was used to clean up and load materials, and other trucks were operating in the vicinity of the loader. Mr. Sanders stated that he asked the loader operator to drive the loader in a

forward motion and to apply the foot-brake, and when he did, the loader would not stop.

Mr. Sanders believed that the inadequate brake condition presented a hazard to those employees on foot and to the other vehicles operating near the loader. He confirmed that there was one employee on foot near the loader, and that he and the foreman were also there. He also believed the loader was operated on ramps and elevated roads.

Mr. Sanders believed that the loader was removed from the property and replaced by a new one, and he confirmed that he issued a combination 104(a) citation and 107(a) imminent danger order in order to insure the removal of the loader from service.

On cross-examination, Mr. Sanders confirmed that plant foreman George Hart informed him of the inadequate brake condition on the loader prior to his inspection of the vehicle. He stated that Mr. Hart told him that he had limited the operation of the loader to level ground and that it could be stopped by use of the parking or hand brake. Mr. Hart also advised him that he had requested a mechanic to perform maintenance on the truck. Mr. Sanders stated that he observed the loader stopping and loading trucks (Tr. 7-77).

Citation No. 2241214

The respondent conceded and admitted that it failed to file the first and second quarter FY 1985 reports as required by mandatory reporting regulation 30 C.F.R. § 50.30(a). Under the circumstances, the inspector who issued the violation was not called to testify (Tr. 79).

Respondent's Testimony and Evidence

Citation No. 2241214

Wayne Roberts, testified that he is employed by the respondent as its controller, and he confirmed that it was his responsiblity to file the quarterly reports in question. He stated that he delegated this responsibility to one of his secretaries who was subsequently fired for not doing her job. He later learned that the secretary had not filed the reports, and the un-filed forms were found among her unfinished work on her desk. After he discovered that they had not been filed, he filed them immediately.

Mr. Roberts stated that prior reports had always been timely filed and that the respondent has not been previously cited for failure to file the reports (Tr. 79-83).

Citation No. 2241058

George K. Hart, plant foreman, testified that he informed Inspector Sanders about the lack of adequate foot brakes on the front-end loader before he began his inspection. Mr. Hart stated that the brakes had "gone bad" 2-days prior to the inspection and that he had reported the condition to a mechanic who was supposed to repair them.

Mr. Hart stated that the loader operator was an experienced operator, and he instructed him to operate the loader on level ground and to restrict its operation to the stock pile area loading sand on the trucks. Mr. Hart stated further that the loader was the only one available at the plant and that its use with inadequate foot brakes was only a temporary measure. There was no foot traffic in the area where the loader was operated, and Mr. Hart estimated that it operated at a speed of 1 or 2 miles an hour. He stated that the loader could be stopped by means of the hand brake or parking brake, and that during the time it was operated with inadequate foot brakes, no harm or damage was done.

Mr. Hart stated that he told Inspector Sanders about the condition of the loader so that he would know that the loader was needed to be used until a replacement loader was received. A replacement loader had been ordered and it arrived a day or two after the citation was issued.

On cross-examination, Mr. Hart stated that the loader was fueled once a day at the end of the shift. He also believed that oil would be added at least once a day. The fueling and oiling took place at the storage shack area, and he indicated that the loader would be driven around the sand stock pile areas and not on the main plant road. He also indicated that the loader operator would park the loader approximately 30 minutes before the other plant employees ended their shift, and he denied that anyone on foot was exposed to any hazard.

Mr. Hart stated that the loader operator and other employees were notified about the condition of the loader, and he believed that it could be safely operated under the controlled circumstances under which it was operated (Tr. 84-104).

J. R. Marriot, respondent's operating officer, testified that he first became aware of the brake condition on the front-end loader on the day after the inspection. Had it been brought to his attention earlier, both the machine and plant would have been shut down because only one loader was available. He stated that the respondent was in the process of ordering a new loader, and that the maintenance operation and mechanic who worked on the equipment were located in Dallas. The mechanic had to travel to the plant site to perform maintenance, and Mr. Marriot did not know whether the mechanic had been informed about the conditions of the brakes (Tr. 105, 107). He stated that it is not company policy to operate equipment without operable foot brakes because "it's against the law" and "a danger to everyone" (Tr. 106, 107).

Mr. Marriot stated that the electrical wiring system for the plant has been in place since approximately 1983, when he purchased the operation from S&S Sand and Gravel. He stated further that he has experienced no problems with the system, but that after the grounding citation was issued substantial work was performed to install ground wires at an approximate cost of $4,000 to $5,000, and compliance was achieved within the next month of the issuance of the citation (Tr. 109).

Mr. Marriot stated that he has instituted procedures for making employees aware of MSHA's compliance requirements, and that he issues internal citations to employees who violate safety regulations. After three citations, an employee is subject to discharge. He also stated that he has begun a system of personal inspection of the operation to insure that all safety regulations are complied with (Tr. 109-110).

In response to further questions, Mr. Marriot stated that there were problems with the loader in question and that the new loader was ordered because of these problems (Tr. 111).

Inspector Sanders was recalled as the Court's witness, and he testified that he had no reason to question Mr. Hart's assertions that he was aware of the loader brake condition and had instructed the operator to use it under "controlled conditions." Mr. Sanders conceded that he was aware of this when he issued the citation (Tr. 114). He confirmed that at the time of his inspection he did not speak with the loader operator, nor did he determine how much vehicular traffic was in the area where the loader was operating (Tr. 115).

Mr. Sanders stated that he considered the loader citation to be "S&S" because the brakes were inoperable and it

was the only loader available. In the event of an emergency situation where the loader would be needed in other areas of the plant, he believed that there would have been no hesitancy by the respondent to use the loader in those other areas. He also believed that had he not been there on an inspection, the loader would have been used with faulty brakes until the new one was placed in service (Tr. 116-117).

Findings and Conclusions

Docket No. CENT 85-129-M

Citation Nos. 2240701 and 2240702 - Fact of Violation

The respondent conceded that the plant was not grounded in accordance with the requirements stated in mandatory standard 30 C.F.R. § 56.12025 (Tr. 125). Although the respondent suggested that the insulation on the plant wiring provided an "alternative" means of compliance and provided an equivalent means of protection, no credible testimony or evidence was produced to establish this as a defense. Accordingly, this argument is rejected.

Mandatory standard 30 C.F.R. § 56.12025, requires that all metal enclosed or encased electrical circuits be grounded or provided with equivalent protection. In this case, the evidence established that the cited drive motors in question were not grounded in accordance with MSHA's requirements pursuant to section 56.12025, nor is there any credible evidence that equivalent protection was provided. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and Citation No. 2240701 IS AFFIRMED.

Mandatory standard 30 C.F.R. § 56.12028, requires that the electrical grounding system in question be tested immediately after installation, and annually thereafter. Inspector Sanders testified that he issued the citation after finding no evidence that the system had ever been tested. The plant foreman had no knowledge as to whether any of the required tests had ever been made, and the respondent produced no records to establish that any tests had ever been made. While it is true that the system was in place when the respondent acquired the plant from the previous owner in 1983, there is no evidence that it ever conducted any annual tests subsequent to that time as required by the standard. Under the circumstances, I conclude that a violation has been established, and Citation No. 2240702, IS AFFIRMED.

Docket No. CENT 86-14-M

Citation No. 2241214 - Fact of Violation

The respondent conceded and admitted that it failed to file the reports required by 30 C.F.R. § 50.30(a) (Tr. 79). I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2241058 - Fact of Violation

The respondent conceded that the cited loader was operated with inadequate foot brakes (Tr. 119), and the evidence establishes that the respondent was aware of the fact that the foot brakes were inoperable. The respondent's defense is that the loader was only operating in a "controlled environment," and that a new loader was on order to replace the one that was cited. Respondent also asserted that a mechanic was scheduled to repair the cited loader the day after the citation was issued, but did not appear (Tr. 118).

Mandatory standard 30 C.F.R. § 56.9003, requires that all powered mobile equipment be provided with adequate brakes. The evidence in this case established that the foot brakes on the cited loader would not stop the machine when tested on level ground. I conclude and find that the brakes were not adequate and that the petitioner has established a violation by a preponderance of the credible testimony and evidence adduced at the hearing. Accordingly, the violation IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The record establishes that the respondent is a small mine operator employing approximately seven to nine people in the operation of a sand processing plant. I conclude and find that the civil penalties assessed by me for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Exhibits G-8, are two computer print-outs reflecting the respondent's prior compliance record for the periods August 15, 1983 through August 14, 1985, and February 14, 1983 through February 13, 1985. The citations listed on the second print-out are also included on the first one. Accordingly, I have considered only the first listing which

reflects that the respondent was served with 26 section 104(a) citations and two section 107(a) orders. Two of the citations listed (2240701 and 2240702) are the subject of the instant proceedings. The print-out reflects that the respondent has been assessed civil penalties in the amount of $4,589, for the listed violations, and that it has made civil penalty assessment payments in the amount of $2,188 through August 14, 1985.

During the course of the hearing, Inspector Sanders stated that the respondent has been previously charged with "many more" violations for defective brakes on its equipment (Tr. 122). Mr. Sanders stated that it was his "recollection" that he issued two additional orders for defective brakes at the time of his inspection, but since he did not bring his file to the hearing, he could not substantiate this (Tr. 123). The print-out reflects two prior section 107(a) orders for violations of mandatory standard section 56.9003, for which the respondent paid $1,200 in civil penalty assessments ($600 for each order). Mr. Sanders believed that these prior violations concerned a different loader and a haul truck (Tr. 124).

I conclude and find that the respondent's overall compliance record is not such as to warrant any additional increases in the civil penalty assessments made by me in these proceedings. However, in view of the two prior imminent danger orders for inadequate brakes on its mobile equipment, I believe that the respondent needs to pay closer attention to its equipment maintenance program, particularly with respect to the brakes on its mobile equipment. I have taken these prior violations into account in assessing the civil penalty for the brake violation which has been affirmed in Docket No. CENT 86-14-M.

Good Faith Abatement

I conclude and find that all of the violations were subsequently abated in good faith by the respondent.

Gravity

I conclude and find that reporting violation (No. 2241214) was non-serious. I conclude and find that the grounding citation (No. 2240701) and the testing violation (No. 2240702) were both serious violations. Failure to ground the electrical circuits in question presented a shock hazard to mine personnel. Had the respondent conducted the required tests, there is a strong probability that it would have detected the lack of grounding and thus avoided the hazard.

With regard to the inadequate brake violation (No. 2241058) I conclude and find that this was a serious violation. Even though the respondent may have instructed the loader operator to operate the machine on level ground and in an area where there was little foot or vehicular traffic, and the loader could be stopped by means of the hand brake or parking brake, the lack of inadequate foot brakes presented an accident and injury hazard. The loader had been operated with inadequate foot brakes for at least 2-days prior to the inspection.

Negligence

I conclude and find that the grounding, testing, and reporting violations all resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

With regard to the braking violation, the evidence establishes that the plant foreman was aware of the fact that the loader foot brakes were inadequate and that the machine was in operation with inadequate brakes for at least 2-days prior to the inspection. Under the circumstances, I conclude and find that the violation resulted from a high degree of negligence on the part of respondent bordering on gross negligence. However, in mitigation, I have considered the fact that the removal of the loader from operation would have effectively shut down this small operator's operation, that the hand brakes and parking brakes could stop the loader on level ground, and that the foreman instructed the loader operator to restrict the operation of the loader to an area with the least possible exposure to accident or injury and so advised the inspector at the time the violation was issued.

Significant and Substantial Violations

Inspector Sanders testified that the plant and equipment were constructed primarily of steel materials and that the plant operated on a 440 volt electrical system. He believed that the lack of proper grounding posed a hazard of electrical shock. In the event of a short circuit in the system, and in view of the wet plant conditions, someone contacting a "live circuit" resulting from a short in the system could be shocked or electrocuted. In addition, the record establishes that the plant wiring had been in place for some time without proper grounding or testing. Under the circumstances, I conclude and find that the testing and grounding conditions presented a reasonable likelihood of an accident or injury of a

reasonably serious nature. Accordingly, I conclude and find that Inspector Sanders' "significant and substantial" findings with respect to Citation Nos. 2240701 and 2240702, are fully supported, and they ARE AFFIRMED.

With regard to the inadequate brakes violation, the record establishes that the loader was operated in that condition for at least 2-days prior to the inspection. Inspector Sanders believed that it would have been operated for a longer period of time had he not been at the mine for an inspection, and while he acknowledged that it may have been operated in a "controlled environment," he was concerned that it would have been operated until some unspecified time pending the arrival of a new one.

Although the respondent asserted that a new loader was on order, the fact is that its maintenance shop was in Dallas and the mechanic had to travel to the plant for maintenance. Respondent asserted that the loader was not repaired before the inspection because the mechanic did not show up as scheduled. Since the respondent had a new loader on order, I believe one can reasonably assume that it would not expend money for a brake job given the fact that a new one was on order. I believe that there is a strong inference in this case that the respondent intended to use the loader with inadequate foot brakes until the new one was placed in operation. Since the loader with inadequate brakes was the only one available at the plant, I further believe that the inspector's concern that it would have been used if necessary in areas outside the "controlled environment" was real and reasonable. Under the circumstances, I conclude and find that the inadequate brake condition constituted an accident and injury hazard, and had an accident occurred, I believe it is reasonably likely that disabling injuries would have resulted. Accordingly, the inspector's "S&S" finding with respect to Citation No. 2241058, IS AFFIRMED.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate and reasonable for the violations which have been affirmed.

Docket No. CENT 85-129-M

Citation No.	Date	30 C.F.R. Section	Assessment
2240701	2/14/85	56.12025	$213
2240702	2/14/85	56.12028	$213

Docket No. CENT 86-14-M

Order/ Citation No.	Date	30 C.F.R. Section	Assessment
2241058	8/15/85	56.9003	$1,250
2241214	9/9/85	50.30(a)	$ 20

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon the receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 25, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-138-M
	:	A.C. No. 41-00010-05502
	:	
	:	Capitol Cement Plant
CAPITOL AGGREGATES, INC., Respondent	:	

DECISION

Appearances: James L. Manzanares, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Richard L. Reed, Esq., Johnston, Ralph, Reed & Cone, San Antonio, Texas, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, subpoenas were issued, and pursuant to notice the case was heard in San Antonio, Texas, on February 25, 1986.

Issue

The issue in this case is whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties which should be assessed for the violations in question. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties agreed that the respondent's Capitol Cement Plant is a "mine" as that term is defined by the Act, and that the respondent and the plant in question are subject to MSHA's enforcement jurisdiction as well as the jurisdiction of the Mine Safety and Health Review commission.

The parties agreed that at all times relevant to this proceeding the respondent's plant worked 277,985 annual man-hours, and that the corporate entity controlling the operation of the plant worked 607,510 annual man-hours.

The parties agreed that the assessment of the proposed civil penalties for the citations in question will not adversely affect the respondent's ability to continue in business.

The parties agreed that the respondent abated the citations in question in good faith.

Exhibit P-1 is an MSHA computer print-out reflecting the respondent's prior history of violations. The information provided reflects that for the period February 21, 1983 to February 20, 1985, the respondent had three assessed violations for which it paid civil penalties totaling $60. For the period prior to February 21, 1983, respondent had seven assessed violations, and paid a civil penalty assessment of $98 for one of the violations.

Discussion

The alleged violations in this case were all issued after an MSHA fatality investigation at the respondent's plant. The facts show that an intoxicated laboratory technician employed by the respondent intentionally misused and inhaled nitrous oxide gas which resulted in his death. The alleged violations which were issued are as follows:

Section 104(a) "S&S" Citation No. 2231659, February 21, 1985, cites an alleged violation of 30 C.F.R. § 56.20-1, and the condition or practice is stated as follows:

> A fatal accident occurred November 24th, 1984, at about 0200 hours, when an employee was found on the floor, unconscious, in the main room of the laboratory. The employee was pronounced dead at the hospital approximately 1 hour later. The autopsy report showed 0.171 alcohol in the blood and nitrous oxide in the bile due to intentional inhalation by the employee.

Section 104(a) "S&S" Citation No. 2241817, March 13, 1985, cites an alleged violation of 30 C.F.R. § 56.18-2, and the condition or practice is stated as follows:

> A fatal accident was experienced on November 24, 1984. The operator had failed to cause safety and health hazard inspections of all work areas to be conducted each shift. No persons were designated to conduct these inspections and record these findings. Conductance of such inspections would have acted as a deterrent to the apparent abuse of the industrial gas, Nitrous Oxide, and the presence of workers under the influence of alcohol at the mine site.

Section 104(a) "S&S" Citation No. 2241818, March 13, 1985, cites an alleged violation of 30 C.F.R. § 56.20-11, and the condition or practice is stated as follows:

> A fatal accident occurred on November 24, 1984. There had been no signs posted at the exterior laboratory industrial gas supply and service area, or within the laboratory to warn employees of the nature of the hazards involved and the protective action required. Highly combustable, explosive and asphyxiating gases were being routinely used in these areas.

Findings and Conclusions

Citation No. 2231659 - Fact of Violation

30 C.F.R. § 56.20-1, provides as follows: "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job."

The respondent denied that it permitted any person under the influence of alcohol or narcotics on the job, or that intoxicating beverages and narcotics were permitted by the respondent, or used in or around its mine.

The inspector who issued the citation on February 21, 1985, subsequently modified it on April 23, 1985, and his modification states as follows:

> The negligence * * * is reduced from low to none. The company had done all that would be reasonably expected of them to be required and not allow alcohol on the property or drug useage by publishing safety rules which were printed and signed as to being read by the victim.

Petitioner's counsel moved to withdraw Citation No. 2231659, on the ground that the evidence will not support a violation of the cited mandatory safety section 56.20-1. Counsel stated that the petitioner cannot establish that the respondent permitted the use of intoxicating beverages or narcotics on the job.

Petitioner's motion to withdraw its proposal for assessment of a civil penalty for Citation No. 2231659, February 21, 1985, 30 C.F.R. § 56.20-1 IS GRANTED, and the citation IS VACATED.

Citation No. 2241817 - Fact of Violation

30 C.F.R. § 56.18-2, provides as follows:

> (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

The parties proposed to settle this violation by the respondent agreeing to pay a civil penalty assessment in the amount of $168. The initial proposed "special assessment" was in the amount of $500.

In support of the reduction of the proposed civil penalty assessment, petitioner's counsel took into consideration the fact that the respondent could not have reasonably foreseen that the employee would have intentionally and voluntarily inhaled the nitrous oxide kept in the plant laboratory for the respondent's legitimate business needs. Although counsel believed that he could support a finding of high negligence because a daily examination may have acted as a deterrent, he also believed that the gravity of the violation is less than originally assessed because such an examination would not likely have prevented the employee from intentionally inhaling the nitrous oxide.

Petitioner's counsel confirmed that the intentional act of the employee in question endangered only himself and no other miners, and that the respondent has taken appropriate action to insure or preclude future incidents of this kind.

After careful consideration of the arguments presented in support of the proposed settlement of the violation, I conclude and find that it is reasonable and in the public interest, and IT IS APPROVED. The citation IS AFFIRMED.

The respondent's counsel stated that in agreeing to settle the violations in question and to pay the agreed upon civil penalty assessments the respondent does not agree to liability for the alleged violations, but has taken into consideration the cost of further litigation.

Citation No. 2241818 - Fact of Violation

30 C.F.R. § 56.20-11, provides as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and protective action required."

The respondent agreed not to contest the citation further, and agreed to make full payment of the proposed civil penalty assessment of $168. I have considered this proposal as a settlement proposal, and with the agreement of the petitioner, and after consideration of the six statutory criteria found in section 110(i) of the Act, I conclude it is in the public interest, and IT IS APPROVED. The violation IS AFFIRMED.

ORDER

In view of the foregoing, Citation No. 2231659, IS VACATED, and the petitioner's civil penalty proposal IS DISMISSED. The respondent IS ORDERED to pay a civil penalty in the amount of $168 for Citation No. 2241817, and a civil penalty in the amount of $168 for Citation No. 2241818. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this case is dismissed.

George A. Koutras
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
DENVER, COLORADO 80204

March 25, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-19-M A.C. No. 05-01054-05501
v.	:	San Aroya Mine or San Aroya Pit
WALSENBURG SAND AND GRAVEL COMPANY, INC., Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, for the Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), arose from inspections of the respondent's sand pit near Walsenburg, Colorado on March 3 and March 7, 1983. On those dates, federal mine inspectors issued a total of 13 citations for violations of various safety standards promulgated by the Secretary of Labor pursuant to the Act. The respondent, Walsenburg Sand and Gravel Company, Inc. (Walsenburg), contested the Secretary's petition for imposition of civil penalties. The case was heard at Pueblo, Colorado, with both parties presenting evidence. Neither party wished to file briefs or other post-hearing submissions.

GENERAL BACKGROUND

The undisputed evidence shows that Walsenburg's San Aroya Pit, where the inspections occurred, is located in an old river-bed. Sand is extracted from the surface with front-end loaders. It is washed, screened, and stored in large piles at the site until needed. It is then loaded and trucked away. The company actually extracts and processes sand during warm-weather months only; frozen ground surfaces prevent removal during the remainder of the year. Sand is trucked away from storage piles throughout the year, however, as construction demands dictate.

On March 3, 1983, when the Secretary issued the first citation in this case, the plant or processing machinery was not in operation. The gates at the site were open, however, and two employees were engaged in loading sand and trucking it away.

On March 7, 1983, the Secretary's representatives returned to the site again. At that time, the processing plant was in operation. Walsenburg employees were testing out the conveyors and other machinery preparatory to the beginning of production.

Walsenburg concedes that its activities affect commerce within the meaning of the Act.

REVIEW AND DISCUSSION OF THE EVIDENCE RELATING TO ALLEGED VIOLATIONS

Citation No. 2098376

On March 3, 1983, Jake DeHerrera, a federal mine inspector, visited Walsenburg's San Aroya pit. On that occasion he observed approximately 150 feet of an electrical power line lying on the ground at the site. Closer inspection revealed that some of the poles intended to support the line had collapsed, and that the 220-volt line was energized. The last standing supporting pole for the line was immediately adjacent to a 500-gallon diesel fuel tank where respondent's front-end loader was refueled. The inspector issued a citation to Walsenburg charging a violation of the mine safety standard published at 30 C.F.R. § 56.12-30. That standard provides:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Walsenburg does not deny that the inspector correctly described the condition. It did, however, deny that its management knew of the condition, and also asserted that the line was the responsibility of a local power company. Louis P. Vezzani, who described himself as "co-owner" of the sand and gravel company, further testified that the line had supplied power to a trailer home once situated on the pit site at the instance of the lessor of the site, and that it therefore served no purpose related to his company's operation.

I must conclude that the facts nonetheless establish a violation of the cited standard. The undisputed evidence shows that the last standing power pole to which the 220-volt line in question was attached also furnished 110 volts of power to the pump for the diesel tank. (See photograph, petitioner's exhibit 1.) Thus, the power distribution system in question was not totally divorced from that supplying the Walsenburg operation. Even were this not so, however, the downed 220-volt line lay on the Walsenburg site and presented a hazard to its employees. The evidence shows that the two Walsenburg miners present at the time of the inspection, one operating a truck, the other operating a loader, had unrestricted access to the area where the line lay. There were no warning signs or barricades to restrict their approach or to give warning. Moreover, the downed line was partially covered by snow - an indication

that the line had been on the ground for some time (Tr. 27). It was Walsenburg's duty to notice the hazard presented by the line and to take the necessary steps to correct it. This was in fact easily accomplished shortly after the citation was issued. Walsenburg simply notified the San Isabel Electric Company, whose employees de-energized the line.

Citation No. 2009814

On his March 3, 1983, inspection, Mr. DeHerrera was accompanied by Inspector Elmer E. Nichols. Inspector Nichols testified that the 110-volt electrical outlet on the power pole near the diesel fuel tank and pump was not grounded. He therefore issued a citation charging a violation of the safety standard published at 30 C.F.R. § 56.12-25. That standard, as pertinent here, provides:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.

According to Inspector Nichols, he plugged an outlet tester into the receptacle on the pole. It showed that the energized outlet was not grounded. Terrance D. Dinkle, an electrical engineer from the staff of the MSHA Denver Technical Support Center, testified at length concerning hazards involved in this and other citations alleging electrical violations. Mr. Dinkle asserted that fuses or circuit breakers on circuits which lack proper grounding will not prevent electrical shock to persons coming into contact with the circuit, should there be an electrical fault.

Walsenburg presented no evidence on this citation. The evidence of record establishes the violation alleged.

Citation No. 2098378

Inspector DeHerrera visited Walsenburg's San Aroya Pit again on March 7, 1983. On that occasion he observed that the electrical service to the fuel pump at the 500-gallon diesel tank was not an "explosion type." He therefore charged Walsenburg with a violation of the safety standard published at 30 C.F.R. § 56.12-2. That standard provides:

> Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed.

In his testimony Inspector DeHerrera indicated that the electrical connections lacked proper bushings, featured Romex cable rather than an "explosion type," and that the cable lacked a grounding wire.

I find no violation. The standard in question is quite specific: it applies only to switches and controls. The Secretary's evidence dealt with devices and equipment other than switches or controls. The inspector spoke of cables and bushings. Perhaps the bushings referred to were on a switch box or other control enclosure. The evidence, however, was unclear. The Secretary bears the ultimate burden of proof, and failed to carry it in this instance.

Citation No. 2098379

During the inspection on March 3, 1983, Inspector DeHerrera observed that the opening where electrical wires entered the breaker box on the service to the diesel fuel pump lacked bushings. He therefore issued a citation charging violation of the standard published at 30 C.F.R. § 56.12-8. That standard provides:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

DeHerrera testified that the box was fastened to the power pole near the pump at about 5 to 5-1/2 feet above ground level. The standard requires that the openings be bushed, he asserted, for two reasons. First, without bushings, the metal edges of the openings may wear away the insulation on the wires, thus creating a short or fault where bare wire contacts the box. Second, the wires must be bushed to provide "strain relief." Without the bushings, he indicated, any pulling or other exterior strain on the wires could loosen them from their terminal connectors within the box, thus creating a fault. Mr. Dinkle, the Secretary's electrical expert, supported the inspector's testimony. The evidence shows that should an employee touch the box, once a fault had occurred, he could receive an electrical shock. Dinkle also testified that where a fault occurs in a circuit, a circuit breaker or fuse does not provide any assurance that a person coming in contact with the circuit will not receive a significant shock. (This particular observation was directed to all citations involving electrical fault hazards.) (Tr. 258).

Walsenburg presented no testimony concerning the citation. The Secretary's evidence establishes a clear violation of the standard.

Citation No. 2098380

This citation concerns another alleged defect at the diesel fueling station. During his visit to the San Aroya site on March 7, 1983, Inspector DeHerrera noted that the 500-gallon diesel fuel tank rested on a foundation of wooden timbers. DeHerrera believed this condition violated the safety standard published at 30 C.F.R. 56.4-4. That standard, as pertinent here, provides:

> Flammable liquids shall be stored in accordance with standards of the National Fire Protection Association or other recognized agencies approved by the Mine Safety and Health Administration.

According to DeHerrera, The National Fire Protection Codes (published by the National Fire Protection Association) provide at chapter 30, section 2-5.1, that timbers may not be used as a foundation for a flammable liquids tank. The pertinent portion of the section declares:

> Tanks shall rest on the ground or on foundations made of concrete, masonry, piling or steel.

DeHerrera testified that the timbers constituting the foundation appeared to be soaked with diesel fuel, thus posing a fire hazard.

I have a major difficulty with the Secretary's case. I am not certain that the standard in question absolutely forbids the use of timbers in foundations. The Secretary's position appears to be predicated upon that belief. I note that the N.F.P.A. publication allows tank foundations made of "piling." "Webster's Third New International Dictionary (1976)" defines a pile as "a long slender member usu. of timber, steel or reinforced concrete driven into the ground to carry a load, to resist a lateral force, or to resist water or earth pressure." (Emphasis added.) It also offers the first definition of "piling" as follows: "pile driving: the formation of (as of a foundation) with piles."

I am thus unable to conclude, as the Secretary would have me do, that the N.F.P.A. altogether proscribes the use of timbers in foundations. On the contrary, timber pilings are apparently welcome. Similarly, for tank supports above a foundation, timbers may also be used in some instances. Chapter 30, section 2-5.2 of the Code, which pertains to such supports for tanks storing flammable liquids, provides in part:

> Single wood timber supports (not cribbing) laid horizontally may be used for outside aboveground tanks if not more than 12 inches high at their lowest point.

No evidence in the present case clearly describes the function of the timbers which caused the inspector's concern. The inspector said only that the tank was not on a foundation that complied with the N.F.P.A. requirement because it was on "[t]imbers - wooden timbers" (Tr. 90).

Study of the photograph of the tank and its surroundings (respondent's exhibit 1) is not helpful. It shows that the pump adjacent to the tank is on a shadow-obscured platform of some sort, but the foundation of the tank itself is not visible. The tank appears to rest upon the ground.

Absent evidence that the timbers referred to were not pilings driven into the earth, I cannot hold that the Secretary proved a violation here. The citation will be vacated.

Citation No. 2098581

On March 7, 1983, Inspector DeHerrera noted that the drive flywheel on Walsenburg's sand classifier machine lacked an adequate guard. He cited this condition as a violation of the safety standard published at 30 C.F.R. § 56.14-1. That standard provides:

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

According to DeHerrera, the 36-inch flywheel was located about 3 to 5 feet above the ground. He acknowledged that the rim of the wheel was properly guarded. The face of the wheel and the shaft, however, were not protected. DeHerrera maintained that as the classifier was in operation with two employees in the vicinity, the unguarded portion of the flywheel presented a hazard to those employees. Specifically, he believed that an employee checking the operation of the machine, or simply walking by, could stumble into the exposed, rotating parts and suffer injury.

For Walsenburg, Mr. Louis P. Vezzani testified that the center of the large flywheel was 7 feet above the ground, and that the operator's station was a considerable distance away. When the operator was not at his panel, Vezzani said, he would shut down the machine and thus could not be endangered. He did acknowledge, however, that there was some possibility that employees could come in contact with the wheel (Tr. 110).

The credible evidence establishes that although the hazard was not great, Walsenburg violated the guarding standard. Whereas the wheel did not present a great threat of injury, neither could it be said that it was sufficiently guarded by the rim guard, or that it needed no guard because of an inaccessible location.

Citation No. 2098582

Inspector DeHerrera, on his March 3, 1983, inspection, observed that the 220-volt electrical services to the feed conveyor and classifier 1/ drive motor were not protected by bushings where the wire or cable left the junction box. He also found that the box lacked a cover and was not weatherproof. He therefore issued a citation charging a violation of the safety standard published at 30 C.F.R. § 56.12-8. The text of that standard has been previously set forth in this decision in the discussion of citation no. 2098379. It requires power cables and wires to be "insulated adequately where they pass in and out of electrical compartments." It similarly provides that cables shall enter compartments or other enclosures only through "proper fittings." Finally, it requires that "insulated wires other than cables" must be "substantially bushed with insulated bushings" where they pass through holes in metal frames.

For the reasons which follow, I must hold that no violation was proven. The cited standard makes a clear distinction between insulated wires and cables. It requires bushings for wires but not for cables. For cables it merely requires "proper fittings."

The evidence describing the lines in question was confusing. The inspector himself repeatedly referred to them as "cables." Mr. Vezzani also spoke of them as cables and insisted they were encased in conduit. Upon the record made, I must conclude that the Secretary did not establish that the lines were "wires" rather than "cables." Thus, the bushings violation was not proved.

That the junction box lacked a cover was undisputed. The only part of the standard which could conceivably apply to that defect, however, is that part which declares that cables "shall enter ... electrical compartments only through proper fittings." Rather plainly, the provision applies only to that part of an enclosure through which the cable enters. I do not read it to impose requirements concerning other construction features of the box itself. Perhaps this provision would have had relevance had it been shown that the cable entered the box through the space left open by the missing cover, rather than through the bottom, top, or side. There was no such evidence, however.

I have the same problem with whether the box was "weatherproof." The Secretary's electrical engineer, Mr. Dinkle, made out a convincing case of the need for weatherproofing in such an installation (Tr. 242-244). He indicated that the box was not of an "approved design" because of the lack of full enclosure of

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1/ Ultimately, the inspector acknowledged that the classifier was not involved (Tr. 128).

connections and rubber gaskets to keep out moisture. His testimony, however, was directed to citation no. 2098378, earlier discussed in this decision, which involved 30 C.F.R. § 56.12-2. That is a standard which speaks to "approved design and construction" (Tr. 245-246). Perhaps the term "proper fittings" referred to in the instant standard is a term of art among electrical experts, one broad enough to encompass weatherproofing. I doubt it, however. If it is, the record lacks expert testimony sufficient to demonstrate such a meaning. As the record stands, no violation is proved because the cited standard appears inapposite.

Citation No. 2098583

This citation also arose out of Inspector DeHerrera's visit to the pit on March 7, 1983. His inspection of the drive unit for the feeder conveyor revealed several pinch-points which were not guarded. Specifically, the drive chain and sprockets lacked any guarding. Also, the feeder mechanism itself - two large moving arms on an eccentric wheel - was unguarded. Finally, the tail pulley on the feed conveyor was unguarded. DeHerrera cited these conditions as violations of 30 C.F.R. § 56.14-1. That standard, requiring guarding of moving parts of machinery, is set out in the discussion of citation No. 2098581.

Mr. Vezzani, for Walsenburg, pointed out that guarding in the form of barrier-railings was available for the cited areas. The railings, however, were unbolted and lying on the ground (Tr. 140-141). The inspector agreed that the railings (which were later installed to abate the alleged violations) would have been adequate guards (Tr. 139).

The evidence shows that Walsenburg violated the standard as alleged. The equipment was in operation and two employees of the operator were in the general vicinity. Some of the moving parts were partially guarded by virtue of their locations with respect to metal frames or other parts of the equipment. Such partial guarding by location, however, is not the equivalent of the full guarding required by the standard. There was a small but nevertheless realistic possibility that employees could have been injured.

Citation No. 2098584

On March 7, 1983, Inspector DeHerrera cited a grounding defect in the 110-volt service furnishing electric power to the diesel pump at the fueling station described earlier in this decision. The citation alleged a violation of the grounding standard set out at 30 C.F.R. § 56.12-25. The standard is set out in full in the discussion of citation no. 2009814 in this decision.

According to Inspector DeHerrera, only two conductors went into the motor makeup box. The cable in question had a third or "ground" wire, but it was not attached to the motor frame to complete the ground. Presence of a circuit breaker, he testified, did not furnish protection equal to a proper grounding arrangement.

Walsenburg presented no evidence directed to this citation.

The Secretary's evidence clearly establishes the violation charged. The circuit had no ground as required by the standard, and the presence of a circuit breaker does not provide electrical fault protection equivalent to a ground.

Citation No. 2009968

On March 7, 1983, MSHA electrical specialist Larry J. Day found that the electric cable providing power to five 220-volt three-phase motors included an energized wire insulated with a green covering. Green wires, he testified, are universally used for noncurrent-carrying ground wires. Anyone familiar with electrical practice, according to Mr. Day, would, during maintenance, assume the green line was nonconductive. Since it was energized, however, a repair person could receive a severe shock. This would most likely occur should the green wire be attached to the equipment frame, as is the common practice. Mr. Dinkle, the Secretary's electrical engineering expert, supported Mr. Day's analysis.

The citation charged a violation of the standard published at 30 C.F.R. § 56.12-30. That is the standard, discussed in connection with citation no. 2098376, which requires correction of "potentially dangerous conditions" in wiring or equipment.

Gary M. Vezzani, who described himself as an electronics engineer with three associate degrees in electronics, testified for Walsenburg. He agreed that it was improper to use the green wire. He suggested, however, that a careful repairman would not rely on the color of the wire, but would routinely test all wires to determine which were energized. He also appeared to suggest that if the energized green wire was mistakenly attached to the equipment frame, the repairman would be saved from injury by the circuit breaker. He disagreed with certain statements by the government's Mr. Nichols concerning grounding. Grounding, however, was not mentioned in the citation and is not an issue here.

I must conclude that the evidence establishes the violation charged. Walsenburg admits that the green wire was improperly used. I do not find credible the notion that repairmen would not rely on the color-coding of electrical wires. For the reasons discussed earlier in this decision, neither do I accept the proposition that circuit breakers can protect workers from electrical shocks from circuit faults. Such faults could develop from handling the energized green wire in the belief that it was a ground.

Citation No. 2009970

On March 7, 1983, MSHA electrical specialist Larry Day issued a citation charging a violation of the safety standard published at 30 C.F.R. § 56.12-4. That standard, as pertinent here, provides:

> Electrical conductors exposed to mechanical damage shall be protected.

According to Day, a three-wire Romex cable attached to the side of a power pole was exposed to damage from vehicles. He testified that he saw cuts on the cable covering, and that protection from impact should have been provided by running the exposed lower 8 feet of the cable through a rigid pipe or flex pipe. If the wires were laid bare by an impact, he maintained, a fault could result which could energize the ground wire or cause a fire. This could endanger the two employees in the area.

Walsenburg presented no testimony on this citation. The evidence establishes that the respondent violated the standard in the manner alleged.

Citation No. 2009972

Day also cited respondent with a violation of the guarding standard, 30 C.F.R. § 56.14-1, for an unguarded drive pulley powering the belt drive operating the shaker screen. He was unable to recall the height of the pulley from the ground, but could recall that it was accessible to persons in the area. The pulley had no guarding, he testified, and could therefore catch the clothing, hands or fingers of any worker who might happen by.

Walsenburg furnished brief testimony on this citation by Louis Vezzani. He asserted that the drive pulley was ordinarily 8 feet above the ground, and thus above the reach of workers. He admitted, however, that on March 7, 1983, the day of the inspection and citation, excess sand accumulations near the shaker screen had raised the ground level sufficiently to put the pulley within reach of persons standing near the equipment.

The evidence shows that the standard was violated as alleged.

Citation No. 2009973

Day, on the March 3, 1983, inspection, also cited what he described as a guarding violation on the tail pulley of the shaker belt. The belt was moving and carrying material at the time he observed it. He maintained that the lack of a guard on the pulley constituted a violation of 30 C.F.R. 56.14-1, the guarding standard discussed several times previously in this decision. He recalled the height of the tail pulley to be 6 to 8 inches above the ground. The two employees who were running the plant, he testified, were exposed to the hazard created by this unguarded pinch-point.

For Walsenburg, Louis Vezzani testified that the part in question was not a tail pulley, but a roller which was best described as a mere shaft. Moreover, he contended that the end of the roller was 6 inches inside the frame of the conveyor, and was thus guarded by the frame. Day disputed this, claiming that despite the frame a worker walking by could catch loose clothing between the roller and belt and thus suffer injury. Vezzani did acknowledge that this could occur (Tr. 235-236).

Plainly, the violation here was minor, but there was nevertheless a foreseeable possibility of some injury. The citation must be affirmed.

SIGNIFICANT AND SUBSTANTIAL ISSUE

The Secretary contends that one of the 13 violations alleged in this case should be considered "significant and substantial," as that term is used in the Act. The charge is made in connection with citation no. 2098376, which involved the downed 220-volt electric line.

The Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), set out the test for determining whether a violation, in the words of the statute, "... could significantly and substantially contribute to the cause and effect ... of a mine safety or health hazard." Such a violation, the Commission held, is one where there exists "... a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

For the reasons which follow, I conclude that the violation established does not rise to the "significant and substantial" level. The evidence shows that the energized 220-volt line, some of whose supporting poles had collapsed during the winter, did lie on the ground within the pit area. The evidence also shows, however, that its path did not take it close to any fixed machinery locations or other likely work places. It was attached to a pole next to the diesel fueling station, but that pole was still standing. Thus, the only likely exposure would occur if a loader operator should drive his vehicle over the downed portion of the line.

Mr. Dinkle, the Secretary's principal electrical expert, pointed out that rubber tires, contrary to common belief, have some conductive properties because of their high carbon content. He also explained, however, that the shock received from a driver's running over the downed line would likely amount to no more than a "tingle" (Tr. 256). That slight shock might be enough to cause a driver to lose control of the vehicle, which could lead to further physical harm, he testified.

This witness also indicated that a pedestrian close to the downed wire on damp earth could experience a minor shock (Tr. 255). On the other hand, if a person should absorb the full 220-volt load of the line, he would likely be electrocuted.

I find Mr. Dinkle's testimony credible. In the context of the other evidence, however, it does not tend to demonstrate that any likely encounter with the wire would "... result in an injury of a reasonably serious nature." On the contrary, it tends to show that injury, if any, would likely be transient and mild. It must be remembered that the sand processing plant was not yet in seasonal operation when the inspector issued his citation (March 3, 1983). Only two employees were on the grounds, and they were merely loading and trucking away sand from distant storage piles. It is not probable that they would have had occasion to be near the line at all. Had one of the workers approached it, it is overwhelmingly likely that he would merely have driven across it in a rubber-tired vehicle and have received, at most, a mild shock. The chance that a momentary loss of control of the vehicle from the shock would have resulted in an injury accident was remote. In the area of the pit where the line lay, there were really no objects to run into.

It is surely true that if a person were to absorb the full 220-volts carried by the line he would, as Mr. Dinkle said, be electrocuted. No witness, however, explained how this might happen. The evidence shows that most of the insulation was intact. Presumably, a severe or lethal shock could occur should a person decide for some reason to handle the line at a spot where the insulation was defective. I must note, however, that such an incident would have been most unlikely in view of the limited loading activity in progress at the time in question. One could, after all, conceive of similar unlikely possibilities for each of the other electrical violations in this case which the Secretary chose not to cite as "significant and substantial."

DETERMINATION OF APPROPRIATE PENALTIES

Except for the single citation alleged to have been "significant and substantial," (citation 2098376), the Secretary proposes a civil penalty of $20.00 for all violations. For that single exception, the proposal is for $68.00.

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence shows that the Walsenburg operation was quite small. It further shows that the operator achieved speedy abatement of all the violative conditions. The operator had no history of prior violations. No evidence was presented concerning the effect

of payment on the proposed penalty on Walsenburg's ability to remain in business. I must agree with the Secretary that there were no significant differences in the degree of negligence present in each of the violations for which the $20.00 penalties were sought. I conclude that the negligence in each instant was in the low-to-moderate range. I also agree that the gravity of each of those violations was similiar and was not deserving of a weighty penalty. In each instance only the same two employees were exposed to the hazard, and their exposure was in terms of access to the dangerous conditions. Actual contact with the unguarded parts of equipment, or with the defective electrical wiring or fixtures was not likely. For these reasons I conclude that a modest penalty of $20.00 is appropriate for each of those violations for which that sum was proposed.

That leaves for determination citation no. 2098376, for which the Secretary proposed the $68.00 penalty. As previously indicated, I am not convinced that the 220-volt distribution line which had fallen to the ground constituted a "significant and substantial" violation under the Act. I must now go further and declare that that violation neither involved more operator negligence nor more gravity than the other violations proved by the Secretary. While the line did cross the grounds of the worksite, it was unlikely that any worker would encounter it unless he should drive across it in a rubber-tired vehicle. The probability that the vehicle operator would receive more than a mild electrical shock was quite remote. Consequently, the appropriate penalty for that violation is also $20.00.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the factual determinations contained in the narrative portion of this decision, the following conclusions of law are made:

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

(2) The respondent, Walsenburg, violated the mandatory safety standard published at 30 C.F.R. § 56.12-30 as alleged in citation no. 2098376.

(3) The violation was not "significant and substantial" within the meaning of section 104(d) of the Act.

(4) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.12-25 as alleged in citation no. 2009814.

(5) Walsenburg did not violate the mandatory safety standard published at 30 C.F.R. § 56.12-2 as alleged in citation no. 2098378.

(6) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.12-8 as alleged in citation no. 2098379.

(7) Walsenburg did not violate the mandatory safety standard published at 30 C.F.R. § 56.4-4 as alleged in citation no. 2098380.

(8) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.14-1 as alleged in citation no. 2098581.

(9) Walsenburg did not violate the mandatory safety standard published at 30 C.F.R. § 56.12-8 as alleged in citation no. 2098582.

(10) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.14-1 as alleged in citation no. 2098583.

(11) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.12-25 as alleged in citation no. 2098584.

(12) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.12-30 as alleged in citation no. 2009968.

(13) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.12-4 as alleged in citation no. 2009970.

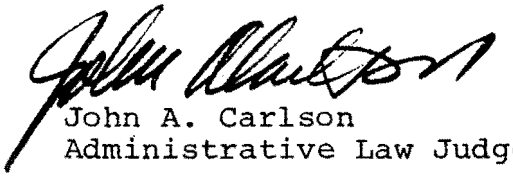
(14) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.14-1 as alleged in citation no. 2009972.

(15) Walsenburg violated the mandatory safety standard published at 30 C.F.R. § 56.14-1 as alleged in citation no. 2009973.

(16) The reasonable and appropriate civil penalty for each of the violations affirmed in this case is $20.00.

ORDER

Accordingly, citations numbered 2098378, 2098380 and 2098582 are ORDERED vacated; all other citations are ORDERED affirmed; and Walsenburg is ORDERED to pay the Secretary of Labor a civil penalty totaling $200.00 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

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

March 26, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-79-M A.C. No. 05-03920-05501
v.	:	Vezzani Pit Mine
WALSENBURG SAND & GRAVEL COMPANY, INC., Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, for the Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), arose from an inspection of respondent's gravel pit on December 5, 1984. On that day a federal mine inspector issued a single citation for the violation of a mandatory safety standard promulgated by the Secretary of Labor pursuant to the Act. The respondent, Walsenburg Sand & Gravel Company, Inc. (Walsenburg), contested the Secretary's petition for imposition of a $20.00 civil penalty. The case was heard at Pueblo, Colorado, with both parties presenting evidence. Both parties waived the filing of briefs or other post-hearing submissions.

REVIEW AND DISCUSSION OF THE EVIDENCE

On December 5, 1984, two federal mine inspectors, Ralph E. Billips and Carl Baron, visited Walsenburg's gravel pit in Huerfano County, Colorado. In the course of inspecting the company's heavy equipment, they observed a fluid leak from the rear differential of a Hough 70 Series front-end loader. The leak was on the right side of the differential, and the fluid was present on the exterior of the right-rear wheel.

The four-wheeled loader was dumping rock into the rock crusher at the time of the inspection. The two inspectors knew that the loader had drum brakes in the rear, and feared that the leaking differential fluid - they believed it came from a defective seal - would reduce the efficiency of the right-rear wheel brakes, or render them wholly inoperable. This, they reasoned, would endanger the operator of the loader.

Inspector Billips stopped the loader operator and questioned him about the brakes. According to Billips, the operator replied that the leaking fluid "... was definitely affecting the right-rear brakes of the loader" (Tr. 8-9). Later, Billips testified that the loader operator said that the right-rear brakes were "completely inoperable" (Tr. 15). Inspector Baron, who was present during the conversation, indicated that the operator said "... he was having problems with the right-rear brake" (Tr. 36).

Based upon this information, Inspector Billips issued a citation charging Walsenburg with violation of the mandatory safety standard published at 30 C.F.R. § 56.9-2. That standard provides:

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

Mr. Louis Vezzani testified for Walsenburg. He indicated that he is the "owner and operator" of the company. Vezzani acknowledged that the rear differential was leaking some fluid. He testified, however, that he and a mechanic pulled the right-rear wheel and examined the brakes after Billips issued the citation. The bands and drums, he claimed, were wholly free of fluid and were in proper working order. He said that the seal itself was not leaking; but he found that the plate upon which the seal was seated had a small "ding" which accounted for the escape of differential oil. He found nothing which would impair the effectiveness of the brake. He and his helper repaired the "ding," and replaced the seal, but did nothing more (Tr. 22-24).

Moreover, according to Mr. Vezzani, no employee had reported to him any difficulty with the loader's brakes.

It is clear from the inspectors' testimony that they did not contend that the mere presence of differential fluid on the exterior of the rear wheel was a defect "affecting safety" under the cited standard. Otherwise they would not have gone on to explain the hazards of brake failure associated with the fluids reaching the interior of the wheel and specifically the bands or drums. Put another way, the presence of the fluid raised in their minds a possibility that effective braking was jeopardized. They found confirmation for that suspicion in the admission of the operator of the loader that the right-rear brake was defective.

Counsel for Walsenburg maintained that the declarations of the loader operator should be excluded as hearsay. The statements of the operator were clearly admissible, however, under 80(d)(2)(D) of the Federal Rules of Evidence as statements of an agent concerning a matter within the scope of his employment. Such statements are not hearsay under the Rule. While the employee's statements were admissible, the question confronting us here is one of testimonial weight.

Mr. Vezzani testified that he inspected and tested the brakes and found no defect. Mr. Vezzani was a forthright witness, and I found his testimony convincing. I do not doubt that the loader operator spoke as the inspector said he did. Unlike Vezzani, however, who was present and subject to cross-examination, neither the accuracy of the operator's observations or his possible motives or biases were open to courtroom scrutiny.

I therefore conclude that the Secretary has failed in his proofs. The citation must be vacated.

CONCLUSIONS OF LAW

Upon the entire record herein, and in accordance with the factual findings contained in the narrative part of this decision, the following conclusions of law are made:

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

(2) Walsenburg did not violate the standard published at 30 C.F.R. § 56.9-2 as alleged.

ORDER

Accordingly, the citation in this case is ORDERED vacated and this proceeding is dismissed.

John A. Carlson
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
DENVER, COLORADO 80204

March 28, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 84-70-M
	:	A.C. No. 02-01918-05501
v.	:	Gravel Pit Mine
GENERAL ROCK & SAND, Respondent	:	

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for the Petitioner.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Phoenix, Arizona on January 28, 1986.

Procedural Matters

At the commencement of the hearing the Secretary moved for dismissal of the respondent's notice of contest on the grounds that the operator had failed to appear at the hearing.

The judge denied the motion and directed that the Secretary proceed with his proof. Subsequently, the judge issued an order to show cause directed to respondent. The respondent failed to reply to the order.

Summary of the Case

Colby Lumpkins, Jr., an MSHA inspector and a person experienced in mining, inspected respondent on December 14, 1983.

The inspector found that the conveyor was not provided with a stop cord or barrier. A tension cable could have been used (Tr. 6).

There were two or three workers operating the plant and employees would be in this area for maintenance purposes.

In the inspector's opinion the hazard in this situation was that it would not have been possible to stop the conveyor if a worker became entangled in the equipment.

The foregoing facts caused the inspector to issue Citation 2088144 for the violation of 30 C.F.R. § 56.9-7. The regulation provides as follows:

> Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Inspector Lumpkins further observed that the wires connecting to the junction box lacked a bushing connection. A bushing serves to hold the cable steady as well as secure. It also prevents the cable from being pulled out. The junction box itself was attached to a drive motor on a shaker screen. Its position subjected it to vibration.

In the inspector's opinion this violative condition could cause the insulation to wear through. Electrical shocks could result if this occurred (Tr. 8,9).

The foregoing facts caused the inspector to issue Citation 2088145 for the violation of 30 C.F.R. § 56.12-8. The cited regulation provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Lumpkins further observed an unguarded tail pulley section. In his opinion both sides of the tail pulley should have been guarded. Employees could be caught in the unguarded pulley (Tr. 12).

The foregoing facts caused the inspector to issue Citation 2446500

for the violation of 30 C.F.R. § 56.14-1. The cited regulation provides as follows:

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

Discussion

The record establishes a violation of each of the contested citations. They should be affirmed.

Proposed Civil Penalties

The statutory criteria for assessing civil penalties is contained in 30 U.S.C. § 820(i) which provides as follows:

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

The record establishes that the operator has no previous adverse history. In addition, the operator must be considered to be small inasmuch as it only employs two or three workers. The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I find that the payment of penalties will not cause respondent to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974). The operator was negligent since the violative conditions were open, obvious and known to the operator from a prior inspection. The gravity of the violations was high since severe injuries could have resulted from these conditions. To the operator's credit was its rapid abatement of the violations.

After considering the statutory criteria, I deem that the proposed penalties are appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered.

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.9-7, § 56.12-8 and § 56.14-1.

3. The contested citations and the proposed civil penalties therefor should be affirmed.

ORDER

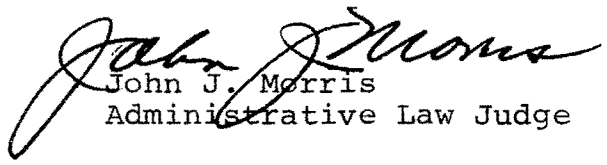
Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2088144 and the proposed penalty of $20 are affirmed.

2. Citation 2088145 and the proposed penalty of $20 are affirmed.

3. Citation 2446500 and the proposed penalty of $54 are affirmed.

4. Respondent is ordered to pay the sum of $94 within 40 days of the date of this decision.



John J. Morris
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
DENVER, COLORADO 80204

March 28, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 85-165
	:	A.C. No. 42-01697-03540
v.	:	Bear Canyon No. 1 Mine
CO-OP MINING COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Carl E. Kingston, Esq., Co-op Mining Company, Salt Lake City, Utah, for the Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits commenced in Salt Lake City, Utah on February 11, 1986.

At the hearing the parties stated that they had reached a settlement agreement. No person objected to the proposal.

The citations, the standards allegedly violated, the original assessments and the proposal dispositions are as follows:

Citation Number	Standard C.F.R., Title 30	Assessment	Settlement
2501153	§ 77.205(a)	$1000	Vacate
2501155	§ 48.7(c)	2000	Vacate
2501157	§ 48.5(a)	400	Vacate
2072270	§ 77.209	5000	$5000
2072271	§ 77.1710(g)	4000	3000
2072272	§ 48.5(a)	2000	Vacate

Discussion

In support of his motion to vacate Citations numbered 2501155, 2501157 and 2072272 the Secretary states that the alleged violations of the training requirement involved a single miner. It is further indicated that the miner in question received such training but that fact was improperly recorded.

In support of his motion to vacate Citation numbered 2501153 the Secretary states the citation is redundant and such alleged violations are within the allegations contained in Citation numbered 2072270.

I have reviewed the proposed settlement and I find it is in order and in the furtherance of the public interest.

Accordingly, I enter the following:

ORDER

1. Citation 2501153 and all penalties therefor are vacated.

2. Citation 2501155 and all penalties therefor are vacated.

3. Citation 2501157 and all penalties therefor are vacated.

4. Citation 2072270 and the proposed penalty of $5,000 are affirmed.

5. Citation 2072271 and the penalty, as amended, in the amount of $3,000 are affirmed.

6. Citation 2072272 and all penalties therefor are vacated.

John J. Morris
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
DENVER, COLORADO 80204

FEB 27 1986

HAROLD J. ATKINS, Complainant	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. WEST 84-68-DM
v.	:	MD 82-82
CYPRUS MINES CORPORATION, Respondent	:	Cyprus Northumberland Project

DECISION

Appearances: Mary Gray Holt, Esq., Jolles, Sokol & Bernstein, Portland, Oregon, for Complainant;
John F. Murtha, Esq., Woodburn, Wedge, Blakey & Jeppson, Reno, Nevada, for Respondent.

Before: Judge Morris

Complainant Harold J. Atkins, (Atkins), brings this action on his own behalf alleging he was discriminated against by his employer, Cyprus Mines Corporation, (Cyprus), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act).

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

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits took place in Reno, Nevada on June 19, 1985.

The parties filed post-trial briefs.

Issues

The issues are whether complainant was discriminated against by respondent in violation of the Act. If such discrimination occurred, then what damages should be awarded.

Summary of the Evidence
Complainant's Evidence

Harold J. Atkins, 43 years of age and inexperienced in mining, was hired by Cyprus on July 9, 1981. His initial duties included utility work and cleaning the leach pads. His activities also involved work in the ADR 1/ unit where the utility crew helped mix cyanide and haul water. The water, dumped into a preholding tank, feeds the boiler (Tr. 34-37, 41).

After three months Atkins transferred to the pit as a grater operator where he remained about 2 1/2 to 3 months (Tr. 37).

About October 1, 1981, because of higher pay, Atkins transferred to the ADR plant as an operator (Tr. 38). He had no previous experience and the foreman trained him to run the mill (Tr. 39). The work process in the ADR was described as follows: material containing gold and precious metals enters a preg pond from the leach pads. The material then goes into the ADS circuit. Solution is filtered through and captured in the carbon (Tr. 39).

After a time the material is moved into a preheat holding tank and later transferred to a strip tank. The solution is then heated by a boiler and it then goes to electrowind where the gold is removed (Tr. 40). The procedures include stripping, reclaiming and preheating. The stripping process was almost continuous (Tr. 40, 42).

After two or three weeks in the ADR plant Atkins experienced a "nuisance" from the ammonia released in the stripping process. He had headaches; in addition, his nose was dry and bothering him. Since he felt the condition was minor he did not see a doctor at that time (Tr. 41, 42).

Atkins was elected to the mine safety committee and attended his first meeting in February 1982. The Committee discussed first aid, inadequate ventilation and communications in event of emergencies. When Atkins applied for the foreman's position he was told he could not remain as a member of the committee if he received the promotion (Tr. 42-44, 48).

1/ ADR: an acronym for absorption, deabsorption and refining (Tr. 254).

Atkins first became concerned about mercury because of workers Eagle, Legace and Bowers. Worker Eagle pointed out that the mercury (which could be seen) was accumulating in ADR tank No. 1. Legace spoke to Atkins about his dizziness and other problems which he related to the ADR work (Tr. 44, 45, 235).

Atkins thought Legace's physical problems and symptoms might be relevant to a worker in the ADR because of the carbon, the open tanks and the refining process (Tr. 46, 47). Atkins thought he was also exposed to mercury. Legace said it should be checked out. He further recommended that Atkins and anyone else in the ADR contact a doctor. This was the reason Atkins sought medical attention (Tr. 47).

Sometime in April, about the time of the discussions with Legace, Atkins thought he had a physical problem. The buildup of the ammonia was progressing to a point where he knew he should have his sinuses checked. His nose was dry all of the time and he was having breathing problems. Additional symptoms included headaches, dizziness and blurred vision. Neither food nor coffee tasted right (Tr. 49-51).

Most of the time during his stay in the ADR, Atkins' main problem and concern was exposure to ammonia fumes (Tr. 120; Ex. R23, pg. 2). MSHA did not issue any citations for excessive levels of ammonia (Tr. 121).

Atkins visited Dr. Horgan on April 24, 1982. A quantitative test for mercury showed a level of 65. Industrial guidelines indicate an acceptable level is under 150. A toxic level is above 150. Atkins wasn't satisfied with the doctor's answers (Tr. 193-196; Ex. R5).

On April 29, 1982, Atkins had a quantitative test from Dr. Andrews. The doctor stated that 65 was high and he indicated the State level was 150 milligrams. Atkins knew Legace was experiencing problems with a level of 86 or 87 (Tr. 49-53).

Atkins was the day foreman when MSHA inspector Frank B. Seale came on the premises on May 4, 1982. A 3M tag was used to test for mercury. There were no fans and the inspector, according to Atkins, was "staggered" at some of the readings (Tr. 60, 61, 221).

Atkins was not aware of the later MSHA visit on June 14. But in the interim Cyprus had taken corrective measures: these included warning signs, fume surveys, mercury testing and respirators (Tr. 223, 224, 318).

Within two or four days of the violation Atkins stopped at Seale's office to talk about the testing equipment. He was also interested in seeing the MSHA books. Seale gave Atkins copies of

the Cyprus citation (Tr. 61-63). The citations had not been posted in the mine (Tr. 63). Atkins later received a full documentation from the MSHA Arizona office (Tr. 64).

There was probably more concern in the plant for ammonia than for mercury. There was no ventilation and you could feel the ammonia instantly (Tr. 64, 65).

After the MSHA inspection the company took care of the problem to a large degree (Tr. 65).

On June 9, 1982, Atkins visited Dr. Andrews, a pulmonologist. Complaints to Andrews included chemicals, ammonia, cyanide fumes and exposures to mercury. Complete blood and urine tests failed to confirm mercury poisoning. The blood mercury level was identified as less than 1. The reference range is less than 2.6; the level is potentially toxic if it is over 2.6 (Tr. 202-204; Ex. R14).

On June 10, 1982, Dr. Givens, a company doctor, gave Atkins a general physical examination. The symptoms exhibited by Atkins, which all occurred about June 10, included nausea, colitis and split vision. The doctor was more interested in writing than in listening so Atkins did not tell him all of his symptoms (Tr. 54, 69, 70). Atkins showed Dr. Givens the quantitative test. He stated that things were "alright" (Tr. 55). Dr. Givens also told Atkins that his health was generally excellent. Dr. givens did not comment on the symptoms (Tr. 55).

On June 29, 1982, Atkins saw Dr. Badshah, his family physician, to whom he also showed the quantitative test. Dr. Badshah diagnosed Atkins' condition as colon colitis. He also had a lower and upper G.I. performed as well as a rectal examination. The blood tests forwarded to Dr. Badshah by Dr. Andrews were normal (Tr. 55-58, 65, 215).

Atkins was concerned about his health and he mentioned to superintendent Leveaux that he would like to temporarily leave the ADR because of his health. Leveaux said management would need a doctor's statement to that effect (Tr. 65-67, 238). Atkins believed that the severity of the colon problem was worsening, and the condition was playing on his nerves. Atkins felt the ADR was unsafe for him because his medical problems started there and they were not clearing up. He was having split vision, mostly in the right eye. This occurred four times in a 30 day span just after he started going to Dr. Badshah (Tr. 68, 69, 242). Badshah had suggested Atkins contact Dr. Schonders, an ophthalmologist. The specialist, in turn, suggested that Atkins go to the University because the problem was complicated (Tr. 69, 213). Dr. Schonders, as well as Doctors Horgan, Andrews and Givens failed to confirm mercury poisoning. But Dr. Badshah said it was possible (Tr. 214, 220).

Atkins returned to Dr. Badshah on July 9, 1982, where he related the same symptoms; namely, exposure to chemicals including ammonia, cyanide and fear of mercury exposure. Dr. Badshah gave Atkins a note which stated:

> To whom it may concern: Jim Leveaux. This patient is having cramping, abdominal pains, nausea. On exam there is marked spasticity of the colon. He is advised to avoid exposure to chemicals which are likely to aggravate this condition. (Tr. 71, 72, 215, 216; Ex. R23).

Leveaux looked at the doctor's note and stated it would be necessary to talk to Appelberg, the Cyprus personnel manager (Tr. 73, 74). Appelberg told Atkins he would transfer him to utility but cut his pay. In the ensuing discussion Atkins claimed this was a medical situation and his miner's rights guaranteed that he keep his foreman's pay in the utility job. Appelberg agreed to the transfer (Tr. 73-79). Atkins went to utility thinking he would retain his foreman's pay (Tr. 126-127).

The next day Appelberg told him his pay was cut. He could either go back into ADR, leave the property, or be fired. Rather than be fired Atkins returned to the ADR. Atkins also stated he returned to utility the next day (Tr. 73-79).

One day before he was terminated Atkins explained the ultimatum and medical situation to MSHA inspector Frank Seale at the MSHA office. The next day (July 15) Atkins was told to work in the ADR or be fired (Tr. 78-81).

Before July 15th, between the two MSHA inspections, Atkins had told management that it was unsafe to work in the ADR. On the day he was terminated he did not say it was unsafe because he was more concerned about getting a note from the doctor than in closing down the ADR (Tr. 243).

Atkins also told Appelberg that he needed to get out of the ADR. It was unsafe for him (Tr. 238).

Atkins confirmed the contents of the typewritten note given to him by Appelberg when he was terminated and as well as his handwritten reply requesting an additional examination by a company doctor before he would return to the ADR (Tr. 112, 117, 118, 119; Ex. C21, R24).

Atkins was fired on July 15 as he refused to work in the ADR. The evidence contains a two page medical report, dated July 16, 1982, from Dr. Nur Badshah. The report states, in part, as follows:

> IMPRESSIONS:
>
> 1. Loss of central vision of right eye, due to optic neuritis of the right eye, etiology most probably toxic neuritis due to metallic poisoning.

2. Occult lower GI bleeding, probably due to gastro-enteropathy related to metallic poisoning.

3. Spastic colitis.

So far, I have not received the copies of the report from the pulmonologist. I recommend that patient needs to be further evaluated by a neurologist, because metallic poisoning can cause nervous system changes affecting especially the cerebellar system. This should be thoroughly evaluated by a neurologist. I also recommend that the patient should be thoroughly evaluated by a gastroenterologist for his gastrointestinal symptoms. Until he is further evaluated by a neurologist and gastroenterologist, patient is advised to avoid contact with chemicals and he has been given a note to that effect on 7-9-82. (Exhibit C14).

Atkins believed he suffered mercury poisoning in 1982. His quantitative test was 65. He could not state whether the ADR was a safe place to work in July 1982. When he discussed termination with Appelberg on July 15, 1982, he may not have claimed that it was unsafe to work in the ADR. But at the time of that discussion he believed the levels were close to acceptable and it could have been perfectly safe in the ADR (Tr. 109). Atkins would go back in the ADR today (Tr. 109-110). Further, he would have gone back if there hadn't been a problem (Tr. 124).

Before Atkins moved from Round Mountain he would have accepted a job in the ADR if it had been offered to him. He would not have gone back to work in the ADR in August or September 1982 because of a possible NIC medical evaluation (Tr. 99-100).

Atkins last hourly wage at Cyprus was $10.35 or $11.47 as the ADR foreman. If he had not been fired he would have earned $36,000. After being laid off in two months, Atkins found employment with Ray Dickinson earning $5 an hour. He worked there two and one-half months (Tr. 80-85). He was also employed at Teague Motor Company in 1984 earning $800 per month. In addition, he had a county job for three months earning $800. After the county job Atkins received unemployment compensation. He has not worked since that time except about eight months ago he occasionally played in a band on weekends. This part-time work pays $80 a weekend (Tr. 80-85, 94, 97, 98; Ex. C21, C27, C28). Atkins "guesses" that he has earned $300 playing in the band since he was terminated by Cyprus (Tr. 94).

The 1040 U.S. income tax returns for 1981 and 1982 show, respectively, wages of $12,924 and $15,639 (Tr. 89; Ex. C25, C26).

Atkins' trailer had been gutted before he acquired it in 1972 or 1973. At that time he paid $4,000 for it. He fixed it and estimated its value at $8,000. He sold it for $4,000 because there was pressure on him to leave the company property (Tr. 87, 93, 94).

After he sold the trailer Atkins moved back to Oregon three and one-half months after he was terminated. There were two trips involved which cost him $800 to $900 for trailer rentals (Tr. 88, 109-110).

Atkins acknowledges that he received a written notice of having had eight absences in the previous twelve months (Tr. 114; Ex. R22).

Mrs. Atkins testified that her husband's health problems began in 1982. He complained and became irritable. Additional symptoms were mostly abdominal cramping and nasal headaches. She related his ill health to conditions in the mine because he had been in good health before working there (Tr. 250-252).

Respondent's Evidence

William Hamby, James Appelberg, Frank Seale and Sharon Badger testified for Cyprus.

William Hamby, the plant superintendent and metallurgist, indicated that Cyprus was closing down its operation in September 1985. He did not expect to be employed at the end of 1985 (Tr. 253, 254, 296, 297).

Hamby and Atkins were in daily contact when Atkins began working as an operator in the ADR in October 1981. Atkins had successfully bid on the operator's job. As an ADR operator Atkins' duties included monitoring the pump, reagent mixing, and reagent determinations for strength, advancing carbon and mixing it (Tr. 256-261).

In February 1982, Cyprus learned of mercury problems in the ADR. The mercury, which came as a surprise to Cyprus, was detected by monitoring with a 3M 3600 Model badge type dosimeter (Tr. 265, 266).

In March 1982 Cyprus ordered and installed a 98,000 C.F.M. fan in the ADR (Tr. 296).

When Atkins became safety representative he voiced his concerns about the plant environment, the mercury and the quality of the air. He also complained about ammonia (Tr. 261). There were four leaky pipes about the plant but, for the most part, ammonia in the atmosphere occurred when an operator would leave a hatch open. That would be the major source of the ammonia smell

(Tr. 262). When Atkins complained about the ammonia Hamby instructed them to keep it out of the atmosphere (Tr. 262). Prior to March 1982 Cyprus was not certain what was "going on" in relation to the possibility of mercury being in the plant (Tr. 262).

Hamby wasn't sure of the circumstances but Atkins told him that he believed it was unsafe or hazardous to work in the ADR (Tr. 262-263).

In April 1982 Atkins was promoted to working foreman. The position opened because Cyprus went to full production. Hamby, Leveaux and three other working foremen thought he was best qualified for the position (Tr. 263). Because of the direct line between management and foreman it was suggested to Atkins that he might want to relinquish his duties as safety representative (Tr. 264).

Hamby denies that he ever threatened Atkins' job. Once he told him he was shooting his mouth off. In a handwritten note, dated April 23, 1982, he recorded that he told Atkins to keep his opinions to himself about possible contamination by mercury. Further, some of the people were complaining that he didn't know what he was talking about and it was upsetting them. Atkins replied that he would "cool it" (Tr. 282, 283; Ex. R4).

On April 27 Hamby, in a letter to plant personnel, sought to bring all employees together with the plant hygienist and company doctor to discuss mercury (Tr. 269; Ex. R7).

The company considered mercury to be a problem because of the hazards associated with it. Before May 4 the company had taken steps to discover the source of the mercury levels by using a Bacharach MB-2 sniffer. On May 4, 1982, the new equipment was not operating properly. It had been inoperative for a week (Tr. 267-269).

On May 4 MSHA inspector Frank B. Seale inspected the ADR. On that day he issued five citations. They allege Cyprus failed to post warning signs concerning health hazards in the ADR; atmospheric concentrations of mercury vapor exceeded the excursion limit for an eight hour TWA coupled with a failure to use respiratory protection; failure to conduct fume surveys; failure to use shielding during arc welding and failure to guard a chain sprocket. The foregoing citations were subsequently abated by Cyprus (Tr. 171-179; Ex. R9).

On the day of the inspection 3M badges were placed on employees Herrera, White and Atkins. The 3M badges were analyzed. The analysis indicated the three refinery workers had been exposed to mercury fumes. The TWA rates for Herrera, White and Atkins were, respectively, .081, .084 and .168 (Mg/M3). Atkins'

dosimeter badge was 3.36 times the TLV. Further, it was twice the TLV of the other two employees. Citation No. 2008502 was issued by inspector Seale on July 20, 1982, for the exposure to the mercury fumes to Herrera, White and Atkins that occurred on May 4, 1982 (Tr. 171, 172, 189, 190; Ex. R9). The delay of over three months was caused in part by the time required to analyze the exposure (Tr. 171, 172, 189, 190; Ex. R9). On August 10, 1982, Citation 2008502 was terminated when it was found that the TLV for mercury complied with the standard (Tr. 184; Ex. R27).

Witness Seale also testified generally converning the meaning of the TLV and TWA for mercury (Tr. 164-167; Ex. R6).

Hamby and Atkins discussed the TLV's. Atkins was always trying to convert the TLV's to parts per million. But there is no relationship between the two (Tr. 282).

After the MSHA inspection Cyprus continued to test for mercury by using 3M badges, sniffer equipment, as well as urine and blood sampling. Hamby discussed rules and practices with employees and instructed them to wear respirators (Tr. 268, 270-273, 285; Ex. R10, R11). The purpose was to address the mercury problem and protect the employees (Tr. 272). On one occasion Atkins was not wearing his respirator and Hamby advised him of the company policy (Tr. 174, 273; Ex. R11).

To alleviate the mercury problem Cyprus also hired D'Appalonea, a mercury clean-up company. They used sulfur dust, an industrial vacuum cleaner and sponges to clean-up the ADR in June (Tr. 280; Ex. R12).

In June 1982 Cyprus also ordered a new ventilation system. It was installed in the ADR in August 1982 (Tr. 296).

In a performance report of July 6, 1982, Hamby rated Atkins unsatisfactory in hygiene, safety, housekeeping, willingness to work, dependability, attendance and initiative (Tr. 275, 277; Ex. R13).

Concerning attendance, it was company policy to advise an employee when he had accrued six absences. After missing eight days the employee receives a written warning stating that termination is possible on the tenth absence. Atkins was given a written warning on July 8, 1982, for his eighth absence. Atkins refused to sign the notice because of a disagreement over what constituted an excused absence (Tr. 276; Ex. R22).

Atkins' doctor said he couldn't be exposed to chemicals so he couldn't be placed back in the ADR (Tr. 289).

On July 15, 1982, Atkins refused to go into the ADR. He wanted a doctor's approval to return to work (Tr. 263, 290). He was terminated because he refused to work in the ADR (Tr. 289, 290). Hamby claimed the ADR was a safe place to work (Tr. 289, 290).

James M. Appelberg, the supervisor of office services for Cyprus, participated in the decision to fire Atkins (Tr. 299, 301).

According to Appelberg, Atkins requested a transfer to utility from ADR because mercury contamination and ammonia vapors were causing him diminished sight in one eye, sinus and nose problems, as well as inflammation of the lungs (Tr. 301). They had several conversations regarding the transfer. Dr. Badshah's note indicated he should not work in a chemical environment (Tr. 301, 302, 312). Atkins was unwilling to take a cut in pay. An MSHA representative recommended that Atkins be kept at his present level of pay (Tr. 301-304).

Atkins worked on the utility crew for three days then he went back to the ADR for a day shift. He returned to the ADR because the Cyprus supervisor in Denver stated Atkins would have to take an appropriate cut in pay if he remained on utility work (Tr. 303). In the period of July 13th to July 15th Appelberg expressed his opinion to Atkins that the ADR had not been determined to be a hazardous place to work. Atkins concern was to get himself out of the ADR because of the chemical vapors (Tr. 304, 305).

On July 15, Appelberg advised Atkins in a typed note that he (Atkins) had been given a physical exam on June 10th by Dr. Givens and approved to work in the ADR plant. The note further stated that since he continued to refuse to do his assigned work "you leave us no alternative but to terminate your employment" (Tr. 305; Ex. R24). Atkins' final options were to go on disability, NIC (Nevada Industrial Commission), or remain as ADR plant foreman. Appelberg indicated it would not be a job related illness (Tr. 304, 313, 316). Atkins replied something to the effect of "OK, fire me" (Tr. 305).

At the time of the termination Atkins wrote on the termination notice that he would work in the ADR if the company doctor would examine him and state in a letter that he was physically able to work in the mill atmosphere (Tr. 305, 306; Ex. R24). In his handwritten reply Atkins further referred to the letter of June 30, 1982, and stated that his doctor (Badshah) had found colon colitis and further found that chemicals were aggravating his condition. In addition, he could not stand the smell of ammonia in the ADR. The ammonia smell and the mercury in the plant had not been corrected (Ex. R24).

Appelberg replied that Atkins had been cleared for work by a company doctor five weeks before. Further, MSHA had abated the citations in the ADR, so there was no proven health problem (Tr. 305, 306). Prior to the termination Appelberg had received a note (1 July 1982) from Dr. Givens stating, in part, that he had not advised Atkins to consult outside medical help. Further, he told Atkins that the company would assume no financial obligation for his self procured medical attention (Tr. 306; Ex. R20).

Dr. Givens, in a telephone conversation, told Appelberg that he did not find that Atkins had been contaminated by mercury. In addition, Atkins should be able to perform his duties as plant working foreman (Tr. 307).

During conversations between July 1st and 15th Atkins claimed he had miner's rights in that he would not have to take a pay cut if he was transferred to utility. An MSHA representative said the easiest approach was to transfer him to utility at his current pay (Tr. 307, 308). According to Appelberg, Atkins assertion of his miner's rights did not enter into the decision to terminate him (Tr. 308).

Atkins was earning $11.97 an hour as a working foreman compared with $9.33 as a utility worker (Tr. 309, 310).

Appelberg testified that Joseph Legace had worked in the ADR for about two months. He filed a workmen's compensation claim alleging mercury contamination. The claim was disallowed (Tr. 310).

Sharon Badger, chief of benefit services for the State of Nevada Industrial Insurance System, indicated the state agency accepted Atkins' claim on September 17, 1982. On that day Atkins was placed on temporary total disability that was back dated to July 9, 1982. Atkins received travel benefits and, in addition, he was paid $8,226.16 ($38.44 a day x 214 days). He was also sent to Parnassus Heights Disability Consultants for a comprehensive integrated workup by medical specialists. The consultants were paid $6,753.23 for their services (Tr. 155-159).

The disability evaluation by the Parnassus Consultants including psychological, neuropsychological and psychiatric examinations, "revealed that the patient's clinical picture warranted a diagnosis of Schizophrenia, Paranoid type. This type of illness is considered virtually independent of environmental etiology and is, therefor, not industrial in origin." (Ex. R32).

Atkins status under temporary total disability was terminated on the basis of the Parnassus report. NIC's last payment was February 7, 1983 (Tr. 80-81, 153-159; Ex. R32).

For various reasons Atkins doubts the Parnassus diagnosis. A portion of the medical examination was not completed. Specifically, the small bowel series was never performed by Parnassus. Atkins felt he should have facts, not opinions (Tr. 131-138).

Atkins agrees he had some difficulty expressing his medical symptoms to the Parnassus doctors. But this difficulty occurred because he had driven directly to San Francisco from Oregon (Tr. 139-141, 149).

Atkins lacks medical or related training but in his opinion his symptoms had to be related to chemicals (Tr. 135, 143).

In the Parnassus report one of the physicians stated that "although the vision became poor after employment, he had not sought earlier consultation for this problem because of job threats" (Tr. 146; Ex. R32, pg. 19). Atkins states he was threatened by Hamby over a conversation concerning the manifold inside the ADR. Hamby also told him to mind his own business and to pickup his pay check (Tr. 146). Hamby stated he didn't like the idea of Atkins talking to miners about mercury problems (Tr. 147).

On August 10, 1982, MSHA inspector Seale reinvestigated the Cyprus plant. The investigation was caused by a letter dated July 18, 1982, identified in the exhibit index as an "Atkins to Fraser" letter. The letter refers to certain unhealthy conditions in the ADR. Inspector Seale failed to find any violative conditions. Specifically, he found that the alleged hazards did not exist, or it did not present a condition of imminent danger, or that it was not a violation of the Act or a violation of a mandatory standard (Tr. 180-184; Ex. R26, R27).

Discussion

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event 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, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

The vast majority of cases arising under Section 105(c) of the Mine Act concern matters of safety. However, the Commission applied the above legal analysis in Rosalie Edwards v. Aaron Mining, Inc., 5 FMSHRC 2035 (1983), a case involving unsanitary toilet facilities.

In his post-trial brief Atkins asserts that his request for a transfer was a protected activity within the meaning of Section 101(a)(7) of the Act; further, that he had a reasonable good faith belief that the conditions in the ADR plant constituted a threat to his safety or health; finally, that Cyprus' termination of Atkins was motivated by Atkins' protected activity.

We will initially consider whether a request for a transfer is a protected activity. In this regard Atkins relies on Section 101(a)(7) of the Act which provides as follows:

> (7) Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions safe use or exposure. Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and intervals, and in such manner so as to assure the maximum protection of miners. In addition, where appropriate, any such mandatory standard 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. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education and Welfare. The results of examinations or tests made pursuant to the preceding sentence shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the miner, to his designated physician.

Atkins' particularly relies on the underlined portion of Section 101(a)(7).

Atkins states there has not been any standard published pursuant to Section 101(a)(7). However, he argues that the only applicable standard in this factual situation is the threshold limit value (TLV) for mercury adopted in 1973 by the American Conference of Governmental Industrial Hygienists as contained in 30 C.F.R. § 55.5-1 (now recodified at 30 C.F.R. 56.5001).

Atkins has misconstrued the scope of the Mine Act. By its very terms under § 105(c) the miners particularly protected are those miner's that are the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101. There are no medical evaluations or potential transfers now contemplated within the terms of the TLV for mercury, 30 C.F.R. § 56.5001. Accordingly, the above regulation cannot be held applicable.

The Commission recently ruled that a miner may state a cause of action under Section 105(c)(1) if he is the subject of medical evaluations and potential transfers under such a standard published by the Secretary. Goff v. Youghiogheny and Ohio Coal Company, 7 FMSHRC 1776 (November 1985). But there was no indication in the decision that the Commission intended to extend the doctrine any further than to encompass those situations where the Secretary specifically addressed, by his rulemaking authority, the issues of medical evaluations and transfers. Compare the Secretary's extensive standards at 30 C.F.R., Part 90 involving miners who have evidence of the development of pneumoconiosis as involved in Goff.

Atkins' brief further asserts that the statutory right to a transfer combined with his good faith reasonable belief that the conditions in the ADR plant constituted a threat to his safety or health. Atkins claims that he was suffering ill-effects to his health due to mercury contamination in the ADR plant. This conclusion is urged on the basis of certain facts:

First, coworkers Legace and Bowers had been diagnosed as having mercury poisoning in the Cyprus refinery. Further, Legace had described his symptoms in detail to Atkins.

Secondly, Atkins' quantitative urinalysis, taken at Legace's suggestion, revealed a level of 65 mcg/24 hours. Atkins was alarmed because 0-20 mcg/24 hours is considered normal but 65 mcg is still within the state's guidelines.

Thirdly, Atkins knew the atmospheric conditions in the ADR violated the MSHA TLV standards for mercury. Atkins had been with the MSHA inspectors when he monitored the mercury levels in the ADR. Atkins had seen the mercury in the tanks. He also knew the citations issued by Inspector Seale were not posted by Cyprus, hence, he knew the company was not being candid with its employees.

Fourth, Atkins' family doctor, Dr. Badshah, examined and treated him for his headaches, sinus and breathing problems, gastroenteropathy and spastic colon. Dr. Badshah told Atkins he thought the health problems were related to exposure to mercury vapor in the Cyprus mine. Dr. Badshah subsequently wrote a note for the plant manager, Jim Leveaux. Atkins then based his request for transfer to the utility crew on Dr. Badshah's advice.

Atkins' claim lacks merit. The first four incidents he relies on occurred several months before he was terminated. Specifically, the Legace/Bowers conversations took place in April 1982. The quantitative urinalysis was in the same month. The TLV excursion for mercury was in May 1982. The Badshah medical reports relate to previous alleged exposures.

Atkins certainly may have had a reasonable basis of concern for his health. But the pivitol issue is whether he had a reasonable good faith belief that the work he refused to do on July 15, 1982, was hazardous to his health at or about that time. Bush v. Union Carbide, 5 FMSHRC 993 (1983).

A careful study of the record causes me to conclude that no credible evidence supports Atkins' reasonable belief that the ADR was hazardous on or about July 15, 1982.

On the contrary, Atkins' evidence establishes that the ADR was safe. Particularly, Atkins indicated that corrective measures were taken by Cyprus between May 4 and June 15. These measures included fume surveys, mercury testing of the atmosphere, and the use of respirators (Tr. 223, 224). Further, after the MSHA citations the company attempted to cleanup the plant and, according to Atkins, Cyprus took care of the problem "to a great degree" (Tr. 65). In addition, on June 9, 1982, complete blood and urine tests failed to confirm mercury poisioning (Tr. 202-204).

When he was asked about the conditions in the ADR on July 15, 1982, Atkins said that he "believed the levels were close to acceptable." Further, the ADR "could have been perfectly safe at that time" (Tr. 108, 109).

Finally, Dr. Badshah's note of July 9, 1982, written for Atkins, addresses his physical conditions. It does not establish the conditions in the ADR at or about mid-July.

On his termination notice (Ex. C21, R24) Atkins wrote that he would work in the ADR if the company doctor said he was physically able to work in the mill atmosphere. His stated reason was that he could not stand the smell of ammonia. In addition, he asserts the ammonia and the merc (mercury) had not been corrected (Ex. R24).

I do not find the statements concerning the mercury to be credible. At the hearing, when speaking of Exhibit R24, Atkins stated "[t]he mercury was not a problem" (Tr. 112, 113).

For the foregoing reasons Atkins refusal to work was not a protected activity.

Cyprus at all times asserted that the ADR was a safe place to work at or about July 15th. But, since Atkins was not engaged in an activity protected by the Act, it is not necessary to examine respondent's evidence.

Briefs

Counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs, However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law:

1. The Commission has jurisdiction to decide this case.

2. Respondent did not discriminate against complainant in violation of Section 105(c) of the Act.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

The Complaint of discrimination filed herein is dismissed.

John J. Morris
Administrative Law Judge

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