

MARCH 1989

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MARCH 1989

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

Secretary of Labor, MSHA v. Westmoreland Coal Company, Docket No. VA 89-17. (Judge Fauver, February 3, 1989. Westmoreland stated case was paid by mistake).

Westwood Energy Properties v. Secretary of Labor, MSHA, Docket No. PENN 88-42-R, etc. (Judge Broderick, January 26, 1989).

Emery Mining Corporation/Utah Power & Light Co., v. Secretary of Labor, MSHA, Docket No. WEST 87-130-R, etc. (Judge Morris, August 30, 1989 Order).

Secretary of Labor, MSHA v. Birchfield Mining, Inc., Docket No. WEVA 87-272. (Judge Melick, February 2, 1989).

Review was not granted in the following cases during the month of March:

Lindia Sue Frye v. Pittston/Clinchfield Coal, Docket No. VA 88-55-D. (Judge Weisberger, February 1, 1989).

Rivco Dredging Corporation v. Secretary of Labor, MSHA, Docket No. KENT 88-25-R. (Judge Maurer, February 16, 1989)

Robert Buelke v. Thunder Basin Coal Company, Docket No. WEST 86-192-D. (Judge Cetti, February 16, 1989).

Wilfred Bryant v. Winchester Coals, Docket No. WEVA 85-43-D. (Judge Broderick, February 16, 1989).



COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 1, 1989

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket No. VA 89-17  
WESTMORELAND COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge William Fauver issued a Decision Approving Settlement on February 3, 1989. After noting that Westmoreland Coal Company ("Westmoreland") had paid the civil penalty proposed for the violation in issue, the judge granted a dismissal request from the Secretary of Labor and dismissed the proceeding. Subsequently, the judge received from counsel for Westmoreland letters stating that Westmoreland had mistakenly paid the civil penalty and requesting, in effect, that the judge's decision be vacated and the matter be reopened for further proceedings. We deem these letters to constitute a petition for discretionary review and, for the following reasons, we vacate the judge's decision and remand for further proceedings.

On November 9, 1988, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Westmoreland, at its Prescott No. 2 underground coal mine, a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of mandatory safety standard 30 C.F.R. § 75.203. 1/ On December 16, 1988,

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1/ Section 75.203(a), a mandatory safety standard for underground coal mines, provides:

The method of mining shall not expose any person to hazards caused by excessive widths of rooms,

the Secretary filed with the Commission a Petition for Assessment of Civil Penalty proposing an \$85 penalty for the alleged violation. Westmoreland subsequently filed an Answer contesting the penalty and underlying violation. The matter was assigned to Judge Fauver, who issued a Prehearing Order on January 26, 1989, directing the parties to confer by February 21, 1989, for the purposes of discussing any possible settlement or stipulations.

By letter to Chief Administrative Law Judge Paul Merlin, dated January 26, 1989, and received by the Commission on January 30, 1989, counsel for the Secretary stated:

The operator in this case has paid the full amount of the penalty that was assessed, \$85. As far as we are concerned, the case may now be dismissed.

On February 3, 1989, Judge Fauver issued his decision dismissing the case. He stated: "Petitioner has moved to dismiss the case based upon full payment of the proposed civil penalty. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act."

By letters to Judge Fauver dated February 1 and February 7, 1989, and received by the Commission on February 3 and February 9 respectively, counsel for Westmoreland stated that the civil penalty in question had been paid in error and requested that the matter not be dismissed and remain on the Commission's docket.

The judge's jurisdiction in this matter terminated when his decision issued on February 3, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2)(A)(i), 29 C.F.R. 2700.70(a). Here, Westmoreland's letters are a request for relief from the judge's decision, and we will treat them as a petition for discretionary review.

A civil penalty under the Mine Act is predicated upon the existence of a violation. An operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. Therefore, the Commission has held that an operator's payment of a civil penalty proposed for a violation extinguishes the operator's right to contest the fact of violation. Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985). The Commission has also expressly noted, however, that where a civil penalty has been paid by genuine mistake, the operator's right to contest the violation may not be lost. Old Ben Coal Co., 7 FMSHRC at 210 n.6.

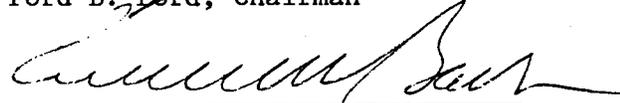
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crosscuts and entries, or faulty pillar recovery methods. Pillar dimensions shall be compatible with effective control of the roof, face and ribs and coal or rock bursts.

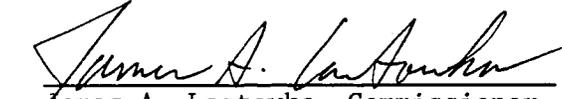
The record does not contain sufficient information to permit us to determine whether Westmoreland's penalty payment was a "genuine mistake." Further proceedings may be necessary to address Westmoreland's assertions and for the judge to determine what relief, if any, is appropriate.

Accordingly, the judge's decision is vacated, and the matter is remanded for proceedings consistent with this order.

  
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
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James A. Lastowka, Commissioner

  
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L. Clair Nelson, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 22, 1989

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket Nos. WEST 86-113-R  
WESTERN FUELS-UTAH, INC. : WEST 86-114-R  
WEST 86-245(A)

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

The issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), is whether supervisors who meet the training certification requirements for supervisory personnel under a state program approved by the Department of Labor's Mine Safety and Health Administration ("MSHA") must be given task training prior to performing work for which non-supervisory miners would be required to have task training. 1/ MSHA cited Western Fuels-

1/ Section 115(a) of the Mine Act, 30 U.S.C. § 825(a), provides a comprehensive scheme for miner training. In general, section 115(a) requires training for new miners, annual refresher training, and task training. With regard to task training, section 115(a) provides in relevant part:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary.... Each training program approved by the Secretary shall provide as a minimum that--

\* \* \*

(4) any miner who is reassigned to a new task in which he has had no previous work

Utah, Inc. ("Western Fuels") for a violation of section 115(a) of the Mine Act, 30 U.S.C. § 825(a), and 30 C.F.R. § 48.7 for failing to task train one of its section foremen in the operation of a roof-bolting machine prior to his using that machine. In proceedings before Commission Administrative Law Judge Roy J. Maurer, Western Fuels argued that the foreman was exempt from the task training requirements by virtue of 30 C.F.R. § 48.2(a)(1)(ii), which excludes from coverage by section 48.7 "[s]upervisory personnel subject to MSHA approved State certification requirements...." 2/ Judge Maurer concluded that task

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experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task.

The Secretary of Labor's regulations implementing section 115(a) are set forth at 30 C.F.R. Part 48. With regard to task training for miners working in underground coal mines, section 48.7(a) in pertinent part states:

Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed....

2/ The provisions of Subpart A of 30 C.F.R. Part 48 (30 C.F.R. §§ 48.1-48.12) set forth the training requirements applicable to "miners working in underground mines." 30 C.F.R. § 48.1. Sections 48.2(a)(1) and 48.2(a)(1)(ii) state:

(a)(1) "Miner" means, for purposes of §§ 48.3 through 48.10 of this Subpart A [Training and Retraining of Underground Miners], any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular, basis. Short term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under § 48.6 (Training of newly employed experienced miners) of this Subpart A may, in lieu of subsequent training under that section for each new employment, receive training under

training of the foreman was required because the exemption contained in section 48.2(a)(1)(ii) applies only to a supervisor actually and primarily engaged in supervision and not to one engaged in the extraction and production process. 9 FMSHRC 1355 (August 1987)(ALJ). Because this conclusion cannot be squared with the plain, unambiguous language of section 48.2(a)(1)(ii), we reverse.

On February 3, 1986, Carson Julius, a miner at Western Fuels' Deserado Mine, an underground coal mine located in Rangely, Colorado, was promoted to section foreman. The criteria applied by Western Fuels in selecting a section foreman required that the person have the ability to operate face equipment in order to properly direct the work force in its operation, have on-the-job experience in underground operation of a coal mine, have supervisory skills, and be certified by the State of Colorado as a mine foreman. 3/ Julius had been certified as a mine foreman by the State on May 15, 1980, and in Western Fuel's opinion met the other selection criteria.

On February 28, 1986, Julius was in charge of a production crew assigned to the East Mains working section of the mine. In that section, roof was being bolted under Julius' supervision. The machine being used to bolt the roof was a Lee Norse TD-43-5-4F roof bolting machine. 4/ That morning, Sky Havens was operating the right hand boom of the roof bolting machine and Austin Mullens was operating the left hand boom. Julius instructed Havens to go to lunch, and Julius took his place as the operator of the right hand boom while Mullens continued to operate the left hand boom.

After Julius and Mullens had installed one row of bolts, Mullens, contrary to Julius' repeated instructions, walked under unsupported roof to raise an end of a metal roof mat that had fallen to the floor. 5/ Mullens was killed when a large piece of the mine roof fell and struck

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§ 48.11 (Hazard training) of this Subpart A. This definition does not include:

\* \* \*

(ii) Supervisory personnel subject to MSHA approved State certification requirements....

3/ The State of Colorado certification requirements for supervisory personnel are approved by MSHA.

4/ The Lee Norse machine is double boomed and is normally operated by two miners, one on each side of the machine, who simultaneously install the bolts. Julius had operated the Lee Norse machine briefly on prior occasions. Julius had also operated other roof bolting machines in the past.

5/ Metal roof mats were part of the roof support system used at the mine.

him. 6/

During a subsequent investigation of the accident, MSHA Investigator Theodore L. Caughman found that prior to the accident Julius had not received task training in the use of the roof bolting machine. 7/ Caughman issued an order of withdrawal pursuant to section 104(g)(1) of the Mine Act, 30 U.S.C. § 814(g)(1), requiring Julius' removal from the mine on the grounds that Julius had not received the requisite task training. Caughman subsequently modified the order to allege that Western Fuels' failure to task train Julius was a violation of section 115(a) of the Act. In addition, Caughman issued a citation to Western Fuels pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging that Julius' lack of task training was a violation of 30 C.F.R. § 48.7. Caughman further found that Julius' lack of training was of such nature as to significantly and substantially contribute to a mine safety hazard although it did not contribute to the cause of the accident. Western Fuels abated the order and citation by providing Julius with training in the operation of the roof bolting machine.

In his decision, the judge concluded that Julius was required to be task trained prior to operating the roof bolting machine and that Western Fuels violated section 115(a) of the Act and section 48.7 by failing to train Julius. 9 FMSHRC at 1365. The judge noted that section 48.2(a)(1)(ii) "on its face purports to except supervisory personnel subject to MSHA approved State certification requirements from the definition of 'miner', and therefore from the task training requirements of [section] 48.7." 9 FMSHRC at 1361. The judge focused his decision upon the question of whether the exemption applied to Julius.

The judge described the Secretary's position with regard to the language of section 48.2(a)(1)(ii) as follows: "[The Secretary] maintains that a person is 'supervisory' only so long as he 'supervises.' Once that person diverts from supervising to running mining machinery, that person is no longer 'supervisory' but rather is a 'miner' regardless of his job title." 9 FMSHRC at 1361. The judge found that Julius, "while engaged in operating the roof bolting machine was primarily engaged in a nonsupervisory task in the extraction and production process although he nominally retained his role as a 'supervisor,' i.e., a section foreman, throughout the period of this incident." 9 FMSHRC at 1363-64.

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6/ This accident also led to the issuance to Western Fuels of another citation alleging that a violation of 30 C.F.R. § 75.200 occurred when Mullens proceeded under unsupported roof. This violation was at issue in another proceeding and was upheld by the Commission. Western Fuels-Utah, 10 FMSHRC 256 (March 1988), pet. for review filed, No. 88-1313 (D.C Cir. April 22, 1988).

7/ The training plan then in effect at the mine, required under section 115(a) of the Mine Act and approved by an MSHA district manager, does not require supervisors to take task training but does require task training for roof bolters.

The judge noted that the Secretary's interpretation of the term "supervisory personnel" had previously been set forth in a series of MSHA documents and accepted her interpretation as reasonable. 9 FMSHRC at 1361-62, 1364. The judge further held that the Secretary's interpretation of the exception was in accord with the statutory objectives of the Act pertaining to training, was consistently applied by MSHA, and was noticed to the industry. 9 FMSHRC at 1364-65. The judge concluded that the exception "must be limited to those supervisors who are actually engaged primarily in supervision" and that since Julius was "primarily engaged in operating the roof bolting machine, not supervision," Julius was required to have been task trained on the machine before undertaking its operation. 9 FMSHRC at 1365. Accordingly, the judge determined that Western Fuels violated section 48.7 and section 115(a) of the Mine Act. Id. The judge also found that the violation was significant and substantial in nature, and accordingly he affirmed the order of withdrawal and citation and assessed Western Fuels a civil penalty of \$180 for the violation. 9 FMSHRC at 1366-1367.

On review, Western Fuels does not dispute that, prior to the accident, it had not provided Julius with task training in the operation of the Lee Norse roof bolting machine. Rather, Western Fuels argues that the language of section 48.2(a)(1)(ii) excludes "supervisory personnel" subject to MSHA approved State certification from the task training requirements of Part 48 and that Julius comes within this exception. Western Fuels asserts that the Secretary's interpretation of section 48.2(a)(1)(ii), adopted by the judge, is an unlawful attempt by the Secretary to amend the regulation outside the rulemaking requirements of the Mine Act. 8/

We agree with Western Fuels that the language of section 48.2(a)(1)(ii) means what it says, that supervisory personnel subject to MSHA approved State certification requirements are exempt from the 30 C.F.R. §§ 48.3 through 48.10 training and retraining requirements. The parties stipulated that at the time the violations were cited Julius was a mine foreman certified by the State of Colorado, which program was MSHA approved. We hold that as such he was exempt from the task training requirements of section 48.7.

We find the relevant regulations to be clear and unambiguous in this regard. Sections 48.3 through 48.10 set forth the requirements for

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8/ The Secretary's argument with respect to the validity of the withdrawal order, which cited section 115(a), and the citation, which cited section 48.7, is the same. The regulations in Part 48-Subpart A, including sections 48.2(a)(1)(ii) and 48.7, set forth the requirements for training and retraining of underground miners and were promulgated pursuant to section 115 of the Act. No issue is presented in this case concerning the general validity of a supervisory exception to the training regulations. The parties accept the exception as valid but differ as to the meaning of the language of section 48.2(a)(1)(ii). The judge's decision was based on his analysis of this language as well. Therefore, in deciding this case, we focus only upon the meaning of the exception.

submitting and obtaining approval of programs for training and retraining miners working in underground mines, the requirements for the training of new miners, the training of newly employed experienced miners, the training of miners assigned to a task in which they have had no previous experience, the requirements for annual refresher training of miners, and the requirements for record keeping and compensation. Section 48.2 expansively defines a "miner" for purposes of sections 48.3 through 48.10 as:

any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods ... includ[ing] the operator if the operator works underground on a continuing, even if irregular basis.

However, after defining the "miners" who are subject to the requirements of sections 48.3 through 48.10, section 48.2(a)(1)(ii) expressly states that among those who are not included in the definition of miner are "[s]upervisory personnel subject to MSHA approved State certification requirements." It is not in dispute that the State of Colorado certification requirements are approved by MSHA.

The exclusion of "supervisory personnel" from the definition of "miner" in section 48.2(a)(1)(ii) has a plain meaning apparent from any reasonable reading of the regulation. The term "supervisory personnel" means individuals who are supervisors. Supervisors are persons having authority delegated by an employer to supervise others. Webster's Third New International Dictionary (Unabridged) 2296 (1986 ed.). Nothing in the regulation expressly suggests that the Secretary intended the term "supervisory personnel" to mean anything other than those persons who have been certified under an MSHA approved state plan and have been accorded supervisory status by their employers. Nothing in the regulation implies that "supervisory personnel" are vested with or divested of that status by virtue of the particular task they perform at any given moment. Nothing in the regulation hints that supervisory status is functionally distinctive, and that it contemplates a distinction between those supervisory personnel attending to supervisory tasks and those attending to production tasks.

It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." Old Colony R.R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932). When the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. Old Dominion R.R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932); see Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986). Thus, if an operator delegates to a miner authority to supervise, the

miner is "supervisory personnel." If he is also subject to MSHA approved State certification, then by the terms of section 48.2(a)(1)(ii) he is excluded from the training requirements of sections 48.3 through 48.10, including the task training requirements of section 48.7.

Despite the plain meaning of the regulation, the Secretary argues that her interpretation of the supervisory personnel exception to the definition of "miner" is reasonable and must be accorded deference. We have carefully considered the Secretary's arguments in this regard but find no basis upon which we may give weight to the Secretary's arguments in this case.

While the Secretary's interpretations of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulation. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965)(quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)). Nor does it weigh in the Secretary's favor when the Secretary has not offered reasonable interpretations of the standards. See Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1145 (D.C. Cir. 1987). The Mine Act does not contemplate that the Commission merely "rubber-stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.

The language of the supervisory personnel exception is unambiguous. It exempts supervisory personnel subject to MSHA approved State certification requirements. Further, the Secretary's contemporaneous construction of her training regulations indicates no intent to distinguish between those supervisory personnel engaging in supervisory tasks and those attending to production tasks. In a preamble titled "Supplemental Information," published during promulgation of the final training regulations, the Secretary specifically stated that "supervisory personnel subject to an approved State certification program" would be excluded from Part 48 training requirements and that MSHA approved state certified training of supervisors was an "alternative to the training requirements" of Part 48:

Training of Supervisors. The final rule retains the exclusion from these training requirements of supervisory personnel subject to an approved State certification program. Some commenters were not aware of State certification requirements of supervisory personnel. Presently, certification programs are generally administered by coal producing states and are used by operators when complying with the training requirement for certified personnel found in §§ 75.160, 75.160-1, 77.107 and 77.107-1, Title 30, Code of Federal Regulations. MSHA will approve or evaluate the State certification programs to assure that such

programs provide sufficient training as an alternative to the training requirements of subparts A and B; no formal approval process is contemplated. Commenters questioned why only those supervisors certified by approved State programs should be exempt from the training requirements. State certification programs are administered according to specific criteria, which helps insure that supervisors will receive adequate training.

43 Fed Reg. 47454, 47458 (October 13, 1978) (emphasis added).

This preamble to the final rule represents the Secretary's contemporaneous interpretation of the exemption and contains nothing to suggest that "supervisory personnel" fall within or without it depending upon the nature of a task they momentarily undertake. To the contrary, the Secretary's commentary suggests that Part 48 training (which would include task training) for "supervisory personnel" was to be accomplished pursuant to approved State certification programs. In sum, what the Secretary now states she intended the words "supervisory personnel" to mean was not expressed in the training regulations during promulgation.

The Secretary also points to several MSHA policy statements, issued subsequent to promulgation of the training regulation, enunciating her view of the limited nature of the supervisory personnel exception. These include a document entitled Q-A Memorandum (February 24, 1982) addressed to district managers, sub-district managers and field office supervisors and stating that "a state certified supervisor performing the work of a miner would be required to be trained under Part 48" (Exh. G-6); a 1984 MSHA Policy Memorandum stating that the supervisory personnel "exception applies only to the extent that supervisory work is being performed" (Exh. G-7); <sup>9/</sup> and a portion of the 1985 MSHA Administrative Manual stating that "if a supervisor operates mining equipment, or performs extraction, production and maintenance work, that supervisor is a 'miner' when performing this work and must have been given task training under section 48.7." Exh. G-8.

While the Commission has recognized that there may be situations where MSHA policy memorandums, manuals or similar MSHA documents may "reflect a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in [the Commission] according it legal effect," it has declined to do so where the

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<sup>9/</sup> The 1984 MSHA Policy Memorandum also states:

When supervisors perform or are expected to perform mining tasks, they are "miners" under Part 48 and must receive the required training. For example, if a supervisor operate mining equipment ... that supervisor must have completed task training as specified by [section] 48.7.... Exh. G-7 at sheet 2.

interpretation or policy statement is inconsistent with the language of the standard. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). See also United States Steel Corp., 5 FMSHRC 3, 6 (January 1983). In those instances, the Commission has concluded that "the express language of a ... regulation 'unquestionably controls.'" King Knob, 3 FMSHRC at 1420. Here, where the Secretary's interpretation, as expressed in policy statements, flies in the face of the language of the rule itself, it is owed no deference. See also Daviess County Hosp. v. Bowen, 811 F.2d 338, 345 (7th Cir. 1987); Union of Concerned Scientists v. Nuclear Reg. Com'n, 711 F.2d 370, 381 (D.C. Cir. 1983). 10/

Thus, we do not view the commentaries on the supervisory personnel exclusion contained in the MSHA memoranda and manual as genuine interpretations or general policy statements; rather, they are an invalid attempt to amend the regulation to require the training of supervisory personnel on the basis of functional distinctions, a requirement not found in the adopted training regulations. 11/ As such, they represent a substantive modification of section 48.2(a)(1)(ii), not merely an interpretative gloss.

Section 101(a) of the Mine Act, 30 U.S.C. § 811(a), requires all rules concerning mandatory health or safety standards to be promulgated in accordance with section 553 of the Administrative Procedure Act

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10/ The present situation is in stark contrast to that involved in Secretary on behalf of Bushnell v. Cannelton Industries, Inc., No. 88-1229, \_\_\_ F.2d \_\_\_ (D.C. Cir. February 14, 1989), where the court concluded that the Commission failed to extend due deference to the Secretary's interpretation of her regulation. In Bushnell, the Court noted that there was no "plain meaning" manifest on the face of the regulation; that the Secretary's interpretation was a reasonable one consistent with the language of the regulation; and that the preamble to the final rule strongly supported the Secretary's reading. Slip op. 14-15. We find that all of these factors are not present here.

11/ The Secretary argues that an industry representative on the advisory committee appointed by the Secretary to assist her in the development of the training regulations accepted MSHA's position that Part 48 training would be required for supervisors performing nonsupervisory work. S. Br. 8. We do not find this argument to be persuasive. To give weight to the unpublished remarks of one advisory committee member is entirely unwarranted in view of the unambiguous language in the regulation and the Secretary's statement during promulgation of the final rule that State certification programs for supervisory personnel are "an alternative to the training requirements of Subparts A and B [of Part 48]." 43 Fed. Reg. at 47454. See generally Monterey Coal Co. v. FMSHRC, 743 F.2d 589, 595-596 (7th Cir. 1984). Administrative history, like legislative history, cannot be used to create doubt where the language of the regulation is plain on its face. See United States v. Oregon, 366 U.S. 643, 648 (1961); Matala v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir. 1981).

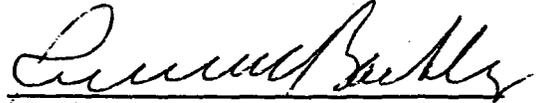
("APA"), 5 U.S.C. § 553. Further, section 101(a)(2) of the Act, 30 U.S.C. § 811(a)(2), requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation (emphasis added). Section 553 of the APA requires that to the extent a rule is more than an interpretation or general statement of policy, it is subject to the APA's notice and comment requirements. Because the Secretary's commentaries attempt to modify section 48.2(a)(1)(ii) and were not promulgated in accordance with applicable requirements, they lack the force and effect of law and section 48.2(a)(1)(ii) must stand as written. See King Knob, 3 FMSHRC at 1420-21.

Finally, a regulation subjecting an operator to enforcement action under the Mine Act must give fair notice to the operator of what is required or prohibited and "cannot be construed to mean what an agency intended but did not adequately express." Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982). Here, we conclude that the plain language of 30 C.F.R. § 48.2(a)(1)(ii) did not notify Western Fuels of the functional distinction proffered by the Secretary in this proceeding -- that supervisory personnel subject to MSHA approved state certification must be task trained pursuant to section 48.7 if they engage in what MSHA regards as non-supervisory, production activities.

In sum, we hold that section 48.2(a)(1)(ii) means what it says and that supervisory personnel subject to MSHA approved State certification are excluded from the mandatory training regulations of sections 48.3 through 48.10. Since Julius was a supervisor certified by the State of Colorado, an MSHA approved state program, we conclude that he was not required to be task trained on the Lee Norse roof bolting machine prior to operating it, and that the order and citation cannot be upheld.

Accordingly, we reverse the decision of the judge and vacate the order, the citation, and the penalty assessment.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 31, 1989

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEST 86-1-M  
 :  
UNION OIL COMPANY OF :  
CALIFORNIA :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY Ford, Chairman; Backley, Doyle and Nelson, Commissioners:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (1982)("Mine Act" or "Act"), we are asked to decide whether a violation of 30 C.F.R. §§ 57.5001/.5005 involving overexposure to vanadium fume was of such nature as could significantly and substantially contribute to the cause and effect of a mine health hazard. 1/ A hearing on the merits was held

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1/ 30 C.F.R. § 57.5001 states in part:

Exposure limits for airborne contaminants.

Except as permitted by § 57.5005 --

(a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made

before Commission Administrative Law Judge John A. Carlson. Following Judge Carlson's death, the case was reassigned for decision to Commission Administrative Law Judge Michael A. Lasher, Jr., who, without objection from the parties, decided the case on the record developed before Judge Carlson. Judge Lasher determined that Union Oil Company of California ("Unocal") violated sections 57.5001/.5005 but that the violation was not of a significant and substantial nature. He assessed a civil penalty of \$75.00 for the violation. 9 FMSHRC 282 (February 1987)(ALJ). We granted the Secretary's petition for discretionary review challenging the judge's finding that the violation was not significant and substantial, and we heard oral argument. For the

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a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

\* \* \*

(c) Employees shall be withdrawn from areas where there is present an airborne contaminant given a "C" designation by the Conference and the concentration exceeds the threshold limit value listed for that contaminant.

30 C.F.R. § 57.5005 states in part:

Control of exposure to airborne contaminants.

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. ...

The airborne contaminant at issue in this case is vanadium fume. Definitions of vanadium and vanadium pentoxide, a toxic form of vanadium, are provided below; the Threshold Limit Value for vanadium is also discussed below.

reasons that follow, we affirm.

I.

Unocal operates the Parachute Creek Mine, an underground oil shale mine, located near Parachute, Colorado. On May 14, 1985, during an inspection of the mine, Inspector Michael T. Dennehy of the Department of Labor's Mine Safety and Health Administration ("MSHA") learned that hard surface arc welding was being performed at the mine's secondary crusher and that the welders were using welding rods containing vanadium. 2/ The inspector decided to sample the welders for exposure to vanadium fume. Vanadium in the form of either dust or fume is one of the airborne contaminants subject to sections 57.5001/.5005. The Threshold Limit Value ("TLV") for vanadium fume, as set forth in a 1973 publication of the American Conference of Governmental Industrial Hygienists' incorporated by reference in section 57.5001, is .05 milligrams of vanadium per cubic meter of air (mg/m<sup>3</sup>). 3/

2/ Vanadium, a metallic element, is described as follows:

A gray or white, malleable, ductible, polyvalent metallic element in group V of the periodic system. It is resistant to air, sea water, alkalies, and reducing acids except hydrofluoric acid. It occurs widely but mainly in small quantities in combination in minerals (such as vanadinite, patronite, carnotite, and roscoelite), in the ashes of many plants, in coals, in petroleums, and in asphalts. Usually obtained in the form of ferrovandium or other alloys, or in almost pure metallic form containing small amounts of oxygen, carbon, or nitrogen by the reduction of ores, slags, or vanadium pentoxide (V<sub>2</sub>O<sub>5</sub>). Used chiefly in vanadium steel.

Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 1195 (1968) ("DMMRT").

3/ The publication incorporated in section 57.5001, Threshold Limit Values for Chemical Substances in Workroom Air Adopted by the American Conference of Governmental Industrial Hygienists (ACGIH) for 1973 ("ACGIH TLVs"), provides the following TLVs for vanadium:

Substance	ppm a)	mg/M <sup>3</sup> b)
Vanadium (V <sub>2</sub> O <sub>5</sub> , as V Dust	---	0.5
C Fume	---	0.05
	*	*

a) Parts of vapor or gas per million parts of contaminated air by volume at 25°C and 760 mm. Hg.

On May 15, 1985, having obtained proper sampling equipment, Dennehy went to the crusher area, where four welders were working, and equipped each welder with a sampling cassette and pump. At issue in this proceeding is sample number MD-1 (Exh. P-2). This sample was from one of the employees engaged in welding, and was obtained on the basis of the employee's having worn the pump and filter during the entire shift from 7:24 a.m. to 2:45 p.m. (with one 30-minute interruption while the inspector took a short-term sample). Tr. 24, 67. During the first part of the sampling period, the exhaust fan at the crusher system was turned off. The fan was restarted during the afternoon of the sampling day, and the judge found that, had it been operating, the welder would not have been overexposed to vanadium fume. 9 FMSHRC at 285. During the testing period the employee was not wearing personal protective equipment to protect him from exposure to welding fumes.

After collecting the sampling equipment at the end of the day shift, the inspector took the samples to an MSHA field office and they were then sent to the MSHA Technological Center in Denver, Colorado, for

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pressure.

b) Approximate milligrams of substance per cubic meter of air.

ACGIH TLVs at 31.

"V<sub>2</sub>O<sub>5</sub>" in this TLV refers to vanadium pentoxide (hereafter referred to as "V<sub>2</sub>O<sub>5</sub>"), a toxic oxidized compound of vanadium. V<sub>2</sub>O<sub>5</sub> is described as follows:

Yellow to red; orthorhombic; ... toxic; melting point, 690°C; decomposes at 1,750°C before reaching a boiling point; slightly soluble in water; soluble in acids and alkalis; and insoluble in absolute alcohol. Used in ceramics and as a catalyst. ... Also used as a glass colorant....

DMMRT 1196. Although the specific toxic substance with which the vanadium TLV is concerned is V<sub>2</sub>O<sub>5</sub>, the TLV is expressed in terms of vanadium either as a dust or fume. 9 FMSHRC at 285; Tr. 100-02, 140-41, 168, 208-10. See also Secretary's Brief on Review at 2-3 & n.2. When MSHA samples for exposure to vanadium under this TLV, the sample result is described in terms of a concentration of vanadium. Id.

The "C" designation for vanadium fume in the ACGIH TLVs refers to a "Ceiling limit," which is a level of exposure that is not to be exceeded. A C limit is different from a "Time-Weighted Average" limit ("TWA"); which contemplates the possibility of temporary incursions beyond the limit. See section 57.5001(c)(n.1 supra); see also ACGIH TLVs 3-4.

With respect to the arc welding procedure involved in this case, heat applied to a metal welding rod containing vanadium vaporizes the vanadium and produces vanadium fume. Vanadium fume contains vanadium and V<sub>2</sub>O<sub>5</sub>. 9 FMSHRC 287-89; Tr. 99-100. See also DMMRT 698 (definition of "metallurgical fume").

analysis. The subsequent report of results indicated that the sample in question contained 47.4 microns of vanadium. From this number, the inspector calculated that the concentration of vanadium fume to which the welder had been exposed was .0678 mg/m<sup>3</sup>.

Based on these test results, the inspector determined that the exposure of the sampled welder was above the allowable TLV for vanadium fume, and he issued to Unocal a citation, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of sections 57.5001/.5005. The citation states in relevant part:

The welder was exposed to .0678 mg/m<sup>3</sup> of Vanadium fume whereas Vanadium fume has a ceiling limit of .05 mg/m<sup>3</sup> and should not be exceeded. Personal respiratory protection was not being worn by the employee while he was welding....

Subsequently, the inspector modified the citation by designating the violation as involving a significant and substantial contribution to a mine health hazard. <sup>4/</sup> Unocal contested both the citation alleging a violation of section 57.5001/57.5005 and the associated significant and substantial finding. In particular, Unocal argued that MSHA's vanadium fume sampling and analysis procedures were defective and that, therefore, the Secretary had not proven the violation.

In his decision, Judge Lasher concluded that the operator had violated sections 57.5001/.5005 by exceeding the TLV for vanadium fume during the cited welding operation. 9 FMSHRC at 285-94. Preliminarily, the judge noted that the form of vanadium at which section 57.5001 is directed under the incorporated ACGIH TLVs is V<sub>2</sub>O<sub>5</sub> although the TLV is expressed, and sampled for, in terms of vanadium. 9 FMSHRC at 285-86. The judge further noted that the "violation created" by section 57.5001 in this respect is "for exceeding the TLVs for Vanadium fume or Vanadium dust." Id. The judge found that the application of heat to the vanadium welding rods during welding vaporizes the vanadium and that, if the vaporous vanadium is mixed with air, V<sub>2</sub>O<sub>5</sub> results. 9 FMSHRC at 287.

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<sup>4/</sup> The "significant and substantial" finding is drawn from section 104(d)(1) of the Mine Act, which provides in relevant part:

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... he shall include such finding in any citation given to the operator under this chapter....

30 U.S.C. § 814(d(1)).

Based on the testimony of MSHA's witness Richard L. Duran, an MSHA industrial hygienist, the judge found, inter alia, that the presence of vanadium in vanadium fume necessarily implies the presence of vanadium pentoxide in the fume; that the oxide is heavier than the element; that the vanadium fume TLV of .05 mg/m<sup>3</sup> is equivalent to a V<sub>2</sub>O<sub>5</sub> reading of two and one-half times such level; and that the sample value of .0678 mg/m<sup>3</sup> in this case would indicate an exposure to V<sub>2</sub>O<sub>5</sub> at two and one-half times that amount. 9 FMSHRC at 286-87; Tr. 102, 168. 5/

The judge related in detail how Inspector Dennehy had tested for and obtained the vanadium fume sample. 9 FMSHRC at 286-87. The judge accepted the inspector's calculation of a .0678 mg/m<sup>3</sup> exposure value for vanadium fume, some 35 percent in excess of the TLV ceiling level of .05 mg/m<sup>3</sup> for the fume. 9 FMSHRC at 287-88. The judge found that the inspector had used the correct testing equipment and procedures and rejected an extensive Unocal challenge that the inspector's fume samples were contaminated with vanadium dust. 9 FMSHRC at 287-94. Given these findings, the judge concluded that an overexposure violation had been established. 9 FMSHRC at 294.

Having found a violation of sections 57.5001/.5005, the judge addressed the issue of whether the violation was significant and substantial. Citing the general Commission test for determining a significant and substantial violation as set forth in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981), Mathies Coal Co., 6 FMSHRC 1 (1984), the judge found that the violation of sections 57.5001/.5005 contributed to a "measure of danger" to health. 9 FMSHRC at 295. The judge defined the crucial issue as "whether the Secretary established that there existed a reasonable likelihood that the hazard contributed to would result in an injury (illness)." Id.

The judge then summarized Duran's testimony to the effect that overexposure to vanadium "could" create serious health hazards; that bronchial irritation, possible pneumonia or asthma could occur; that an overexposed employee could become sensitized after repeated doses; and that exposure to a level of .0678 mg/m<sup>3</sup> could cause a cough, sore throat, breathing difficulty and other flu-like symptoms. 9 FMSHRC at 296; Tr. 105-111. The judge described Duran's testimony as to the likelihood of illness or injury as being of a "speculative complexion." 9 FMSHRC at 296.

The contrary testimony of Unocal's expert witness, Paul Ferguson, a Ph.D in toxicology, was summarized by the judge as concluding that ".0678 exposure to vanadium fume would not cause an injury resulting in

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5/ At oral argument in this matter, counsel for the Secretary stated that any constant correlation of two and one-half times for the respective values of vanadium and V<sub>2</sub>O<sub>5</sub> in vanadium fume could not be made "on the basis of what we have in the record," and that the Secretary was willing to rest, in general, upon the factual premise that "the expression of the measurement of vanadium is going to be less than the expression of the measurement as vanadium pentoxide." Tr. Or. Arg. 5, 8-9.

lost work days; that there was not a reasonable likelihood that such an exposure would result in an illness; and that there was not a reasonable likelihood that any resulting illness would be of a reasonably serious nature." 9 FMSHRC at 296; Tr. 215-17. The judge accepted Ferguson's testimony that ".1 milligrams per cubic meter is the lowest level" at which any symptoms such as coughing or slight irritation appear, and the ".05 limit includes a safety factor that to the best of our knowledge, would provide no symptoms." Id. Crediting Ferguson's testimony, the judge stated:

Dr. Ferguson's opinion that there was not a reasonable likelihood of an injury (illness) occurring at the level of exposure detected by Inspector Dennehy is, in view of its positive and convincing tenor and supportive rationale, accepted.

9 FMSHRC at 297.

The judge also concluded that the presumption of a significant and substantial health violation announced by the Commission with respect to violations of the standard covering respirable dust in coal mines in Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd, 824 F.2d 1071 (D.C. Cir. 1987) ("Consol" decision), did not apply to the vanadium overexposure violation involved in this case. Id. Accordingly, the judge determined that the violation was not of a significant and substantial nature. Id.

Unocal did not seek review of the judge's determination that a violation occurred, but the Secretary sought and was granted review of the judge's significant and substantial findings. The Secretary asserts before us that a violation of sections 57.5001/.5005 is presumptively significant and substantial and that the judge failed to apply properly the Commission's decision in Consol, supra. Closely related to this argument is the Secretary's contention that by placing a C limit on the vanadium fume TLV, the Secretary has made a regulatory determination that violative exposures above that limit are, per se, of a significant and substantial nature. The Secretary also argues that, in any event, the evidence of record does not support the judge's finding that the violation was not of a significant and substantial nature. We disagree.

## II.

We first discuss the proper test for determining whether the violation at issue was of a significant and substantial nature. In National Gypsum, supra, the Commission announced its general test for determination of significant and substantial violations:

[A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. Consonant with the Mine Act's significant and substantial phraseology and the Act's overall enforcement scheme, we also stated:

[A] violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial.

3 FMSHRC at 827 (footnote omitted). See also U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984); Consolidation Coal Co., 6 FMSHRC 34, 37 (January 1984); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Thus, the violation must be a major cause of a danger to safety or health.

In Mathies Coal Co., supra, we further discussed the elements that establish, under National Gypsum, whether a violation of a mandatory safety standard is significant and substantial:

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

6 FMSHRC at 3-4 (footnote omitted). In Consol, supra, we applied the Mathies framework to violations of mandatory health standards:

Adapting this test to a violation of a mandatory health standard ... results in the following formulation of the necessary elements to support a significant and substantial finding: (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health--contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

8 FMSHRC at 897.

In employing this test in Consol with respect to a violation of section 70.100(a), the mandatory standard addressing respirable dust in coal mines, we recognized that proof of the third element -- a reasonable likelihood that the health hazard contributed to will result in an illness -- would be somewhat elusive as to the development of insidious, progressive lung disease as a consequence of a single overexposure. 8 FMSHRC at 898-99. However, taking into account the

Mine Act's "fundamental purpose" in preventing pneumoconiosis and related lung diseases caused by overexposure to respirable dust in coal mines, we held that in all cases where a violation of 30 C.F.R. 70.100(a) is proved, "a [rebuttable] presumption that the violation is significant and substantial is appropriate." 8 FMSHRC at 899. This holding was based upon the overwhelming evidence in the record of the debilitating health hazard associated with overexposure to respirable dust, upon extensive reference to the pertinent legislative history, and upon Congress' stated goal in limiting miners' exposure to respirable dust in coal mine atmospheres. 8 FMSHRC at 895-99. The United States Court of Appeals for the District of Columbia Circuit agreed that once "the Commission had determined on the basis of medical evidence that any violation of the respirable dust standard should be considered significant and substantial, it would be meaningless to require that the same findings be made in each individual case in which a violation occurs" and affirmed the decision. 824 F.2d at 1084.

The Secretary argues that a Consol-type presumption is appropriate here and that the C limit applicable to vanadium fume requires the same legal result. This specific argument was not made at the hearing level and, except for good cause shown, no assignment of error by a party may rely upon any question of fact or law upon which the judge has not been afforded an opportunity to pass. 30 U.S.C. § 823(d)(2)(A) (iii). The Secretary has not shown any cause why this argument was not made to the judge. Furthermore, our holding in Consol was made in the specific context of respirable dust in coal mines. As discussed in Consol (8 FMSHRC at 895-99), the presumption that violations of the respirable dust standard are of a significant and substantial nature was established based on the pertinent legislative history and on the evidence adduced in that case.

In contrast, the legislative history is silent as to vanadium fume. Nor is there evidence in the record of this case regarding equivalent effects of overexposure to vanadium fume. MSHA's industrial hygienist, Duran, stated that impairment from overexposure to vanadium fume is transitory. Tr. 107. Ferguson's testimony that there is no disease associated with overexposure to vanadium fume (unlike overexposure to respirable dust in coal mines) was not rebutted by the Secretary. Tr. 214. Further, it is undisputed that the results of exposure are not cumulative, but are reversible upon removal from exposure. (The parties stipulated that overexposure to vanadium fume does not result in permanently disabling illness or injury. Tr. 156.)

In sum, we do not find a requisite basis in either the present record or the legislative history to hold that when the Secretary proves a violation of sections 57.5001/.5005 based upon overexposure to vanadium fume, a presumption arises that the violation is of a significant and substantial nature. 6/

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6/ We emphasize that our conclusions with respect to a presumption are based on the record developed in this case. We do not intimate that the Secretary may not, in the future, be able to adduce proof sufficient to establish a presumption that a violation with respect to overexposure

The Secretary also argues that the assignment of the C limit to vanadium fume constitutes a regulatory determination that any exposure over the .05 mg/m<sup>3</sup> limit creates a reasonable likelihood of illness that is not subject to challenge. As with her argument with respect to a presumption, this argument was not made at the hearing level and the Secretary has shown no good cause why it was not made.

Therefore, as the judge concluded, the appropriate test in this case for determining whether the violation is of a significant and substantial nature is the analytical framework set out in National Gypsum and Mathies, and subsequently extended to violations of mandatory health standards under Consol.

### III.

The primary question on review, accordingly, is whether the judge correctly applied the Mathies/Consol elements of proof. There is no dispute on review with the judge's finding that the violation occurred (the first element) and that a measure of danger to health was posed by the violation (the second element). The third element, a reasonable likelihood that the health hazard contributed to will result in an illness, was resolved by the judge adversely to the Secretary. 9 FMSHRC at 296-97. We conclude that substantial evidence supports that determination.

It bears re-emphasis that the Secretary has the burden of proof as to the significant and substantial nature of the violation in issue. The Secretary's case at hearing rested upon the testimony of Duran. Unocal relied upon the testimony of Ferguson. Judge Lasher did not have the opportunity to observe personally the demeanor of these witnesses, but his decision summarizes and evaluates their testimony. As the judge noted, Duran, when testifying regarding possible illness caused by an exposure to vanadium fume of .0678 mg/m<sup>3</sup>, consistently referred to symptoms of illness that "could" or "might" occur. 9 FMSHRC at 296; Tr. 102-11. Thus, Duran testified that bronchial irritation, as well as possibly pneumonia or asthma, "could" occur as a result of overexposure to vanadium. Tr. 106. Another "possible" effect of vanadium overexposure, depending on the individual, could be "sensitization" -- meaning that after being exposed on one occasion, an individual might experience more severe symptoms with the next exposure at the same or even lower concentration. Tr. 106-11. Duran indicated that the sampled incursion of 35 percent over the TLV would be an exposure of a "moderate" level. Tr. 106-10. Duran further indicated that, while symptoms would vary from person to person, an employee exposed to vanadium at a certain level "might" develop symptoms. Tr. 110. He testified that an employee exposed to .0678 milligrams per cubic meter of vanadium "could" develop a cough, sore throat and have trouble breathing and could also develop symptoms similar to those encountered with the flu. Tr. 110-11.

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to vanadium fume or to any other particular airborne contaminant with a C limit is significant and substantial. Our point is that no such basis for a presumption has been demonstrated in this case.

We agree with the judge (9 FMSHRC at 296) that Duran did not consistently testify that any of the symptoms to which he referred were reasonably likely to occur at the sampled overexposure level of .0678 mg/m<sup>3</sup>. Like the judge, we find that Duran's testimony is "speculative" and that it does not ineluctably lead to an inference that a reasonable likelihood of illness would be associated with the overexposure at issue.

The Secretary would have us reverse the judge's factual findings largely on the basis that neither Unocal's expert, Ferguson, nor the judge himself, comprehended the distinction between vanadium and V<sub>2</sub>O<sub>5</sub> and the consideration that any concentration of vanadium in vanadium fume necessarily implies an even greater concentration of V<sub>2</sub>O<sub>5</sub> in the fume. The Secretary vigorously asserts on review that the .0678 mg/m<sup>3</sup> sample of vanadium at issue implied a concentration of V<sub>2</sub>O<sub>5</sub> above those levels of V<sub>2</sub>O<sub>5</sub> noted in scientific and medical literature as likely to produce symptoms of illness.

However, both the witness, Ferguson, and the judge understood the distinction between vanadium and V<sub>2</sub>O<sub>5</sub> and the general quantitative correlation between the element and its oxide. See 9 FMSHRC at 285-86; Tr. 206-17, 223-27. While it is true that Ferguson did not explain fully the specific level of exposure to V<sub>2</sub>O<sub>5</sub> implied by the .0678 mg/m<sup>3</sup> sample of vanadium obtained in this case (see, e.g., Tr. 223-27), nevertheless, he clearly stated his opinion that this particular sample level of vanadium did not reflect a level of exposure reasonably likely to result in an illness. Tr. 215-16. Further, as the Secretary's counsel's statements at oral argument before us indicated (see n.5 supra), the precise correlation between vanadium and V<sub>2</sub>O<sub>5</sub> in vanadium fume is simply not clear on the existing trial record -- either from the exhibits accepted into evidence at the hearing or from the testimony of any of the witnesses. Despite a measure of uncertainty associated with this consideration, it was the Secretary, not Unocal, who bore the burden of establishing through probative evidence the significant and substantial nature of the violation. Based on our review of the evidence properly before us, we are satisfied that neither Duran's largely speculative testimony alone nor his testimony considered together with what may be regarded as any ambiguity or incompleteness in Ferguson's testimony amounts to the level of proof necessary to make out the Secretary's case in this respect.

On review, the Secretary also argues that a 1967 study conducted by Zenz and Berg, a brief, excerpted summary of which was received into evidence as Exhibit R-3, demonstrates that the exposure to vanadium fume encountered in this case was reasonably likely to result in an illness. 7/ Essentially, that summary of the Zenz-Berg study indicates

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7/ Exhibit R-3 states in relevant part:

Zenz and Berg, in studying the effects of exposure to respirable V<sub>2</sub>O<sub>5</sub> dust in five human volunteers, found severe upper respiratory tract irritation in the form of persistent productive cough at an

that two subjects in a controlled experiment, following an eight-hour exposure to vanadium dust at a level of  $0.1 \text{ mg/m}^3$ , developed delayed cough and increased mucus. Left unestablished by this excerpt of a summary of the study or any other evidence of record is a showing of the asserted relationship between that scientific experiment involving, in relevant part, two subjects, and the violation at issue -- which involved exposure to vanadium fume, not dust, for an unspecified amount of time during the sampling period. We also note that Inspector Dennehy, who conducted the vanadium exposure testing, testified that no symptoms of illness were observed or complained of on the day of the overexposure (Tr. 71, 73-74), nor did the Secretary, at hearing, allege that any symptoms of illness subsequently developed. It was incumbent upon the Secretary to explain and establish any asserted relationship between the Zenz-Berg results and the violation in question through expert testimony or other corroborating evidence, and this, we conclude, the Secretary failed to do. Accordingly, we are unable to find that the information contained in Exhibit R-3 is sufficient to establish the third element of proof of a significant and substantial violation.

Our decision affirming the judge's conclusion that the cited violation is not a significant and substantial contribution to a mine health hazard rests, as it must, upon the record developed in this case at trial. Having failed at the hearing to prove the significant and substantial nature of the violation, the Secretary, in her brief on review, presents detailed arguments and conclusions based upon scientific publications and studies, the contents of which were not admitted into evidence or otherwise incorporated into the record by the judge. 8/

At the hearing, the trial judge took official notice only of pages 1-54 of the 1973 ACGIH TLVs. Tr. 7. The only study reference received into evidence by the judge was the three-paragraph summary of the Zenz-

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average concentration of  $0.2 \text{ mg/m}^3$  during a single eight-hour exposure. No systematic complaints were evident. Exposure of two previously unexposed volunteers at a level of  $0.1 \text{ mg/m}^3$  was still productive of a delayed cough and increased mucus.

8/ At the hearing, counsel for Unocal asked the judge to take official notice of the contents of the NIOSH criteria and nine other publications. Tr. 217. The judge properly refused, admitting the list only to show the publications that Ferguson had read. Tr. 217, Exh. R-5. Official notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. However, such notice cannot extend to the acceptance as fact of scientific publications and studies, the truth of whose contents is the subject of reasonable dispute by the opposing parties. See McCormick on Evidence, 3rd Ed. §§ 329, 330 (pp. 923-927, 1028-1032); Fed. R. Evid. 201. We note that the Secretary made no effort to have the studies themselves admitted into evidence, nor did she raise any issue in her petition for review with respect to the judge's refusal to take official notice of the contents of the studies.

Berg experiments discussed above. During his testimony, Duran cited "a Patty set of books on industrial health including toxicology" (Tr. 127), the ACGIH TLVs, 1980 TLV publications, and "a study by Zenz and Berg, I believe, in 1967" as material that he had "reviewed and read." (Tr. 151.) Duran did not discuss or evaluate the relevant substantive contents of these various materials. Based solely on these limited references to what Duran had read, the Secretary on review has premised much of her argument upon her counsel's interpretation of material found throughout the NIOSH Criteria for A Recommended Standard ... Occupational Exposure to Vanadium (1977) and the other sources mentioned in passing by Duran. See, e.g., S. Br. at 3, 4, 9, 16, 17; and S. Reply Br. 5-7, 9-13, 15-16.

At oral argument, counsel for Unocal has argued that the Commission should not base its decision upon materials whose content was not included in the record or accept opposing counsel's interpretations and evaluations of scientific information and toxicological studies that were not presented to the judge through expert witnesses subject to cross-examination. Unocal asserts that such materials are outside the expertise of either counsel or the Commission to evaluate adequately and independently without the assistance of such trial testimony. Tr. Oral Arg. 23-29. We concur.

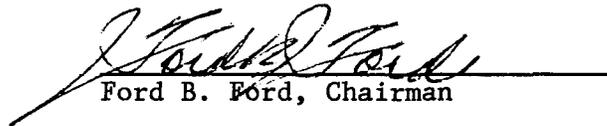
As we have noted with respect to the Secretary's presumption and C limit arguments, the Mine Act expressly provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on a question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). Similarly, section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 826(d)(2)(C), states in relevant part that the record on review of a judge's decision consists of "the record upon which the decision of the judge was based...." The Commission has made clear that these provisions "evinced Congress' view that the adjudication process is best served if the administrative law judge is first given the opportunity to admit and examine all the evidence before making his decision." Climax Molybdenum Co., 1 FMSHRC 1499, 1500, (October 1979). In short, it is the obligation of parties to prove their case before the judge, not on review by reference to detailed material not presented to the judge and not subject to the rigors of cross-examination. This rule of procedure under the Mine Act accords with settled principles of administrative and general law limiting the record on review to the record developed before the trier of fact. See, e.g., Melong v. Micronesian Claims Comm'n, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980).

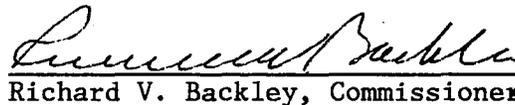
Accordingly, we decline to consider the copious scientific literature presented by the Secretary for the first time in this case on

review. As we have emphasized, our conclusion is based solely on the record developed before the judge. In light of our determination that substantial evidence supports the judge's finding that the Secretary failed to establish the third Mathies/Consol criterion, we conclude that the judge properly determined that the violation was not of a significant and substantial nature. We do not reach the fourth criterion as to whether an illness would have been of a reasonably serious nature.

IV.

For the foregoing reasons, the decision of the Administrative Law Judge is affirmed.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

I agree with the majority's ultimate conclusion that substantial evidence supports the administrative law judge's finding that the violation at issue was not of a significant and substantial nature. I disagree, however, with their affirmation of the judge's finding that the Secretary failed to establish the third element of the test for significant and substantial health violations as set forth in Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd, Consolidation Coal Co. v. FMSHRC, 824 F. 2d 1071 (D.C. Cir. 1987), i.e., that "there was not a reasonable likelihood of an injury (illness) occurring at the level of exposure detected." 9 FMSHRC at 297 (ALJ). I believe that the record establishes that the pivotal evidence relied on by the judge and the majority in support of their finding is flawed and that a proper reading of the record establishes that the overexposure to vanadium pentoxide at issue was reasonably likely to result in an illness.

Nevertheless, I concur in the conclusion that the violation was not significant and substantial on the separate ground that the Secretary failed to establish the fourth element of the Consolidation Coal Co. test, i.e., the Secretary failed to prove that any illness caused or contributed to by the overexposure to vanadium pentoxide in the present case would be of a reasonably serious nature.

It is not disputed that a miner was exposed to a level of vanadium pentoxide in excess of the limit set in the applicable mandatory standard. To establish that this violation was of a significant and substantial nature, however, three additional elements must be proved: a discrete health hazard contributed to by the violation; a reasonable likelihood that the health hazard contributed to will result in an illness; and a reasonable likelihood that the illness in question will be of a reasonably serious nature. Consolidation Coal Co., supra. As the majority notes, the judge found and it is not disputed on review that the Secretary proved that the violation posed a discrete danger to health. Majority opinion at 10. Thus, the next inquiry is whether a reasonable likelihood that the hazard contributed to would result in an illness was established.

The judge found that a reasonable likelihood of resulting illness was not established and the majority agrees. The basis for their conclusion is that the testimony of the Secretary's chief witness, Duran, is "speculative" (9 FMSHRC at 296; Majority op. at 11), and "does not ineluctably lead to an inference that a reasonable likelihood of illness would be associated with the exposure at issue." Majority op. at 11. In contrast, they accept the testimony of Unocal's chief witness Ferguson, credited by the judge, as supportive of the finding of no reasonable likelihood. 9 FMSHRC at 297; Majority op. at 7, 10.

My colleagues reject the Secretary's arguments on review that a fundamental premise of Ferguson's testimony concerning the exposure level at issue and the likely consequences thereof was plainly flawed by a failure to consistently distinguish between vanadium ("V") and vanadium pentoxide (" $V_2O_5$ "). Despite their characterization of Ferguson's testimony as "ambigu[ous]" and "incomplete[]" (Majority op. at 11), they nevertheless conclude that both Ferguson and the judge "understood" the distinction between vanadium and vanadium

pentoxide and their "general quantitative correlation". Majority op. at 11. They further decline the Secretary's invitation to consider various scientific studies and reports referenced by the Secretary in support of her position, but not entered into the record below. They state:

[I]t is the obligation of parties to prove their case before the judge, not on review by reference to detailed material not presented to the judge and not subject to the rigors of cross-examination.... Accordingly, we decline to consider the copious scientific literature presented by the Secretary for the first time in this case on review. As we have emphasized, our conclusion is based solely on the record developed before the judge.

Majority op. at 13 (emphasis in original).

I must respectfully disagree with my colleagues' rationale for upholding the administrative law judge's finding of no reasonable likelihood of an illness. First, I believe that it is apparent on the face of the record, as the Secretary asserts, that Ferguson made a fundamental misstatement in contradiction of other parts of his own testimony, and that this mistaken testimony forms the basis for the finding challenged by the Secretary. Second, despite the majority's protest, review of copious scientific literature outside the record is not necessary in order to determine that a reasonable likelihood of an illness was established by the Secretary. Quite to the contrary, that there is a reasonable likelihood of an illness resulting from the exposure level at issue is supported by the evidence of record, particularly Ferguson's own testimony.

I agree with the majority that the judge properly found "that the form of vanadium at which section 57.5001 is directed...is  $V_2O_5$  [vanadium pentoxide] although the TLV [threshold limit value] is expressed, and sampled for in terms of vanadium [V]. 9 FMSHRC at 285-86 ." Majority op. at 5-6. As the majority further notes, the judge found based on the record that for the sample at issue there would have been two and one-half times as much vanadium pentoxide as vanadium. 9 FMSHRC at 287; Majority op. at 6; Tr. at 102. It is this relationship between vanadium and vanadium pentoxide that Ferguson apparently did not account for in the crucial part of his testimony relied on by the judge and excused by the majority.

In light of the 2.5 to 1 relationship testified to by Duran and found as a fact by the judge, the air sample at issue indicating an exposure level of 0.0678 mg vanadium (V)/ $m^3$  indicates a corresponding level of 0.1695 mg vanadium pentoxide ( $V_2O_5$ )/ $m^3$ . (The parties apparently have rounded this 0.1695 figure down to 0.1 mg (Sec. Br. at 17; Unocal Br. at 4) and I will hereafter do the same. In this regard, I note that Unocal attached to its brief on review portions of the NIOSH Criteria For A Recommended Standard...Occupational Exposure To Vanadium (1977). Unocal states that this document "is clearly the type of scientific document of which the Commission may take official notice." Unocal Br. at 4 n.3. Accordingly, I note that this document indicates that an exposure level of .06 mg vanadium/ $m^3$  equals an exposure of 0.1 mg vanadium pentoxide/ $m^3$ . See NIOSH Criteria Document at 73, Attachment 3 to Unocal's brief).

Both Duran and Ferguson testified at the hearing as to the landmark study by Zenz and Berg entitled "Human Responses to Controlled Vanadium Pentoxide Exposure", 14 Arch Environ Health 709 (1967). In fact, not only did Ferguson expressly list this study as one of the references supporting his testimony (Exh. R-5), but Unocal introduced into evidence at the hearing a summary of the study. Exh. R-3. This summary of the Zenz-Berg study states:

Zenz and Berg, in studying the effects of exposure to respirable  $V_2O_5$  dust in five human volunteers, found severe upper respiratory tract irritation in the form of persistent cough at an average concentration of  $0.2 \text{ mg/m}^3$  during a single eight-hour exposure. No systemic complaints were evident. Exposure of two previously unexposed volunteers at a level of  $0.1 \text{ mg/m}^3$  was still productive of a delayed cough and increased mucus. The authors concluded that the recommended TLV of  $0.5 \text{ mg/m}^3$  should be revised.....In light of the above reports, especially the findings of Zenz and Berg, a TLV of  $0.05 \text{ mg/m}^3$  for respirable  $V_2O_5$  is recommended.

Exh. R-3 at 426 (emphasis added). Thus, Unocal's Exh. R-3 indicates that the single exposure to vanadium pentoxide at issue would cause a delayed cough and mucus production.

The next question that arises is whether such a human response to exposure to vanadium pentoxide constitutes an "illness". On this specific question, the evidence in this record is in the affirmative. Dr. Ferguson himself testified as follows:

Based on the scientific literature, .1 milligrams per cubic meter is the lowest level where we see symptoms. They're not debilitating symptoms, but an individual will have a slight irritation and have some coughing. That can be defined as an illness. We don't want to allow our workers to be exposed to levels -- how minor do cause symptoms. There are no specific scientific literature that tested men and women at .05. That lowest level is really a .1 in a controlled experimental condition by Zenz and Berg is what the TLV is based on and they have that as a safety factor.

Tr. 237-38; see also Tr. 110-11, 209-13. Here, it is important to stress that the 0.1 exposure level in the Zenz-Berg study referenced by Ferguson involves vanadium pentoxide exposure. As discussed previously, the 0.0678 vanadium exposure level in this case, when expressed in terms of vanadium pentoxide, exceeds the 0.1 level identified in Zenz-Berg as producing adverse health effects. Thus, although Ferguson later testified that no illness would result from the 0.0678 vanadium exposure in this case (Tr. 216), it is apparent that Ferguson mistakenly believed that this exposure level was less than the 0.1 vanadium pentoxide exposure level documented in Zenz-Berg when, in fact, it exceeded the Zenz-Berg level.

Given Ferguson's testimony that the human response to vanadium pentoxide exposure at a 0.1 level "can be defined as an illness" (Tr. 237), and Duran's testimony that at this level illness was likely to be the result (Tr. 111, 160),

the judge's finding of no reasonable likelihood of illness, resting as it does on Ferguson's flawed testimony, is without adequate foundation as is the majority's affirmance of this finding.

Nevertheless, it is important for me to stress the limits of my own conclusion in this case. The question of what constitutes an "illness" may seem relatively straightforward, but it is not. The Secretary's mine safety standards define an "occupational illness" as "an illness or disease ... which may have resulted from work at a mine or for which an award of compensation is made" (30 C.F.R. 50.2(f)), but the standards contain no special definition of "illness". But see 30 C.F.R. 50.20-6(b)(7)(i-vii)(listing some examples of occupational illnesses). Further, there often is dispute even within the medical profession as to whether a particular condition or human response is merely a symptom of a possible illness or an illness itself.

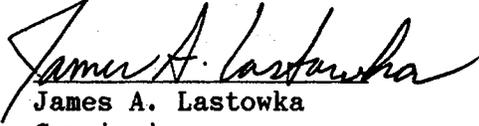
Apart from the direct impact on the affected individual, whether a condition is an "illness" has important ramifications under the Mine Act particularly concerning compliance with the reporting requirements imposed by the Secretary in 30 C.F.R. Part 50, "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment, and Coal Production in Mines". In this regard, I note the Secretary's ongoing inquiry into the need for improving illness, injury and accident reporting under both the Mine Safety Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. See, e.g., 10 BNA Mine Safety and Health Reporter at 97, 244-45 (July 22 and September 16, 1988). Among the concerns of this effort is the need for clarifying precisely what constitutes an "occupational illness". See "The Keystone National Policy Dialogue On Work-Related Illness and Injury Recordkeeping", January 31, 1989, The Keystone Center, Keystone, Colorado, at 57-71.

This ongoing effort to improve the reporting of illnesses and injuries is indicative of the complexity of the challenge of properly categorizing and reporting illnesses and cautions against making broadly applicable conclusions on the basis of a record as limited as the one before us in the present case. Nevertheless, because the expert testimony in this case characterized the human response to the overexposure to vanadium pentoxide at issue as an "illness", I have no basis for drawing any other conclusion. For the above reasons, I must disagree with the majority's affirmance of the judge's finding that the third element of the test for significant and substantial violations was not established.

Proceeding to the fourth and final element of the test, i.e., whether the illness caused or contributed to by the violation was of a reasonably serious nature, I find insufficient evidence addressing whether the coughing and mucus formation caused by the level of overexposure in this case indicates an illness of a reasonably serious nature. Most of the Secretary's evidence was focused on demonstrating the potential serious consequences of either long-term exposure or brief exposures to very high concentrations of vanadium or vanadium pentoxide. Little effort was directed at establishing whether the coughing and mucus formation likely to result from a single overexposure to a level of 0.0678 mg vanadium/m<sup>3</sup> are considered indicative of an illness of a reasonably serious nature. See Tr. 111. Nor was there any evidence that the involved miner had

suffered or was likely to suffer continued overexposure to vanadium or vanadium pentoxide. Thus, I find an insufficient basis in this record for concluding that the Secretary established the final element of a significant and substantial violation.

Accordingly, I concur in the majority's affirmance of the judge's vacation of the significant and substantial finding.

  
James A. Lastowka  
Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 24, 1989

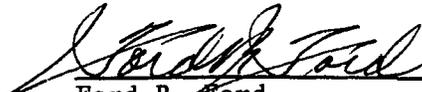
EMERY MINING CORPORATION :  
and UTAH POWER & LIGHT :  
COMPANY, MINING DIVISION :  
 :  
v. : Docket Nos. WEST 87-130-R, et al.  
 :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
and :  
 :  
UNITED MINE WORKERS OF :  
AMERICA (UMWA) :

ORDER

Counsel for the cross-petitioners Secretary of Labor and Utah Power and Light Company, Mining Division ("UP&L") have filed a joint motion seeking a stay of briefing and further proceedings before the Commission in this matter until after final disposition by the Commission administrative law judge of related proceedings below involving Emery Mining Corporation ("Emery"). The motion states that it is possible that review by the Commission in the present matter may be rendered unnecessary by the final resolution of the proceedings below involving Emery.

Upon consideration of the motion, it is granted and briefing and other proceedings in this matter are stayed until further notice of the Commission. The hearing on the merits involving Emery is scheduled to commence before the judge on May 16, 1989, and the parties are directed to provide the Commission with a written notification concerning the procedural status of those proceedings no later than May 31, 1989.

For the Commission:

  
Ford B. Ford  
Chairman

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ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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MAR 3 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 88-197  
Petitioner : A.C. No. 46-01455-03699  
v. :  
 : Osage No. 3 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania for the Petitioner;  
Michael R. Peelish, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania for the  
Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Consolidation Coal Company (Consol) with two violations of regulatory standards. The general issue before me is whether Consol violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Order No. 2944627 issued pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the mine operator's Methane and Dust Control Plan, the "Plan", under the regulatory standard at 30 C.F.R. § 75.316, and charges as follows:<sup>1/</sup>

<sup>1/</sup> Section 104(d) of the Act provides as follows:

- (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the

At the 4 Butt belt drive head roller there is no water spray at the belt to belt transfer point. There was no operating spray for the top belt at any location along this belt.

The relevant provisions of the Plan (See Exhibit G-3 page 2) provide that at belt to belt transfer points dust control practices are to be "fresh air and water sprays." Inspector Spencer Shriver, an Electrical Engineer for the Federal Mine Safety and Health Administration (MSHA), was conducting a spot electrical inspection on January 7, 1988, at Consol's Osage No. 3 Mine when he noted that a violation previously cited in the 4 Butt belt drive area for failure to have operable water sprays had apparently not been abated. Company Safety Inspector Dan

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cont'd fn. 1/

cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Serge stated that water sprays presumably for the coal on the belt had been installed two blocks inby the transfer point but had not yet been hooked up. Inspector Shriver observed that the sprays had been installed as stated but were indeed not hooked up and that the inside of the pipe was dry. He also observed that the belt was operating and that the top of the belt was completely dry. While Shriver could not recall whether coal was being transported on the belt Inspector-Trainee Michael Kalich who accompanied Shriver, did not see any coal on the belt or coal being dumped at the transfer point.

Consol does not dispute that it did not have operable water sprays for the coal on the beltline as charged but argues that a spray located 25 to 40 feet from the section tail-piece directed to the underside of the top belt was sufficient to meet the Plan's requirements. It is clear from the plain language of the Plan, however, that the requirement for water sprays at "belt to belt" transfer points is in addition to the specific requirements in the Plan for sprays directed to the "underside of the belt". These are separate and distinct requirements and each must be independently complied with (See Exhibit G-3 p.2). Clearly water sprays that do not spray the coal being transported on the beltline would not meet the need to assure that such coal is sufficiently wet to prevent the accumulation of respirable dust and float coal dust. The violation is accordingly proven as charged.

Inspector Shriver opined that without water sprays functioning in accordance with the Plan there was a possibility of generating respirable dust and accumulating float coal dust. He noted that float coal dust could lead to an explosion resulting in lost time injuries. He thought that the hazards were "reasonably likely". There was already some dust in the area according to Shriver although not sufficient to constitute a violation. Shriver found the area to be "neither too wet nor to dry."

On the other hand William Kun, the Safety Supervisor at the Osage No. 3 mine, testified that he arrived at the cited area within 1 1/2 hours of being notified of the order and found the roof and ribs in the area to be white with rock dust and damp.<sup>2/</sup> He found no float coal dust. He also observed that there had been no problem with float coal dust at this transfer point. He opined that there was no hazard existing as a result of the cited conditions. Kun also observed that there had been a spray located 150 feet inby the transfer point but it had been taken out more than a week before the order was issued because it made the coal "overwet".

<sup>2/</sup> Inspector-Trainee Kalich agreed that the area around the belt was in fact damp.

Greg Yanak, Consol's Regional Supervisor for Respirable Dust and Noise Control also testified that he had taken coal samples from the cited area and concluded, based on those samples, that additional water sprays were not needed at the cited transfer point. The evidence also shows that the coal itself is moist when extracted and may still be wet at the cited transfer point obviating the need for additional water sprays. Indeed subsequent to the issuance of the order at bar the Plan was modified and approved by the Secretary to allow operator discretion as to the need for water sprays upon the coal at belt to belt transfer points.

In light of this evidence, the contradictory testimony regarding the source of any coal dust and the apparent absence of coal on the beltline at the time of the violation from which it could be determined whether, indeed, the coal was dry and dusty or sufficiently wet to prevent the spread of coal dust, I cannot find that the Secretary has met her burden of proving that the violation was "significant and substantial". See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). For the same reasons the Secretary has failed to prove that the violation was anything but of low gravity.

However in light of the undisputed testimony that a violation of the same nature had been cited the previous November and in light of the evidence that requirements of the Plan for water sprays near belt to belt transfer points was discussed with mine officials at that time, it is clear that the violation was caused by an aggravated failure to act amounting to more than ordinary negligence and therefore by the "unwarrantable failure" of the operator to comply. See Youghioghney and Ohio Coal Co., 9 FMSHRC 2007 (1987). More specifically the evidence shows that following the November 17, citation for the same type of violation, Shriver had discussed with management the need for a belt spray at all the transfer locations. Six weeks had thereafter elapsed however and no appropriate functional sprays were in place. Since it has been stipulated that there were no intervening clean inspections between the issuance of the precedential section 104(d)(1) order and the order at bar it is clear that the order must be sustained as an order under section 104(d)(2) of the Act. See fn.1 supra, Secretary v. United States Steel Corporation, 6 FMSHRC 1908 (1984). In addition, considering all of the criteria under section 110(i) of the Act I find that a civil penalty of \$300 is appropriate.

Order No. 2944628, also issued pursuant to section 104(d)(2) of the Act, alleges a violation of the standard at 30 C.F.R. § 75.810 and charges as follows:

At the 5 Butt construction power center the 7,200 volt energized cable was found to contain a damaged area that was not properly repaired. The cable [sic] outer jacket was cut back for a distance of 18 inches exposing the ground shielding and phase conductors. One phase conductor was damaged exposing the bare conductor and the ground shielding was partially broken....

At the conclusion of the Secretary's case-in-chief, Consol moved for a directed verdict on the grounds that the Secretary's evidence did not support a violation of the cited standard. The Motion for Directed Verdict (See Fed. R. Civ. P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R § 2700.1(b)) was granted at hearing and the decision supporting that ruling is set forth below with only non-substantive corrections:

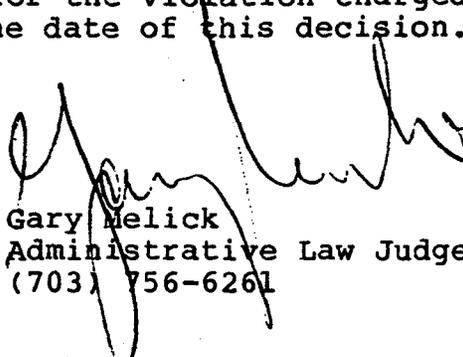
The motion to amend is too late. The motion for directed verdict has been filed. That is the matter that is before me and clearly from the undisputed evidence presented by the government there is no violation of the cited standard, the standard with which we have been hearing evidence throughout the government's case and upon which the operator has been conducting its cross-examination.

The cited standard 30 C.F.R. § 75.810, reads as follows: "In the case of high-voltage cables used as trailing cables temporary splices shall not be used and all permanent splices shall be made in accordance with section 75.604. Terminations and splices in all other high voltage cables shall be made in accordance with the manufacturer's specifications."

The evidence in this case is that the cable at issue was neither spliced nor terminated. Clearly then the standard cited is not applicable to these proceedings and there has been no violation of that standard based on the evidence presented. The Motion for Directed Verdict is therefore granted.

ORDER

Order No. 2944628 is vacated. Order No. 2944627 is affirmed as a "non-significant and substantial" order issued under section 104(d)(2) of the Act. The Consolidation Coal Company is directed to pay civil penalties of \$300 for the violation charged in Order No. 2944627 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge  
(703) 756-6261

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 3 1989

DONALD F. DENU, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. LAKE 88-123-D  
AMAX COAL COMPANY : VINC CD 88-08  
Respondent : Ayrshire Mine

DECISION

Appearances: Donald F. Denu, Rockport, Indiana,  
pro se;  
D. C. Ewigleben, Esq., Amax Coal Company,  
Indianapolis, Indiana for Respondent

Before: Judge Melick

This case is before me upon the complaint by Donald F. Denu 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 that Amax Coal Company (Amax) discriminated against him on February 27, 1988, in violation in section 105(c)(1) of the Act, after he refused to work under conditions he considered to be unsafe.<sup>1/</sup> More specifically Mr. Denu maintains that he suffered unlawful interference when Amax Electrical Supervisor Vernon Knight threatened to discipline him for insubordination and when Brent Weber, another Amax Supervisor, threatened him by stating that his actions could result in his discharge. It appears that Mr. Denu is also complaining that he suffered discrimination because he was instructed to attend a meeting concerning possible disciplinary action. He was told at this meeting that no disciplinary action would be taken for his work refusal.

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<sup>1/</sup> 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

In order to establish a prima facie violation of section 105(c)(1) Mr. Denu must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that he suffered adverse action that was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). A miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F2d 194 (7th Cir. 1982); Robinette, supra. Proper communication of a perceived hazard is also an integral component of a protected work refusal and the responsibility for the communication of a belief in a hazard underlying a work refusal lies with miner. See Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (1987).

The evidence shows that the Complainant was an experienced electrician, having 20 years practice in the field with nine years as an electrician in the mining industry. He also holds training certificates from the Department of Labor, Federal Mine Safety and Health Administration (MSHA) for high and medium voltage electrical work at underground and surface mines. On February 27, 1988, Mr. Denu was working the 4:00 p.m. to 12:00 midnight shift at the Ayrshire Mine and at around 6:00 p.m. was preparing with

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cont'd fn 1

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 or 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.

another electrician, Harrison Key, to disconnect and move the power cable, running about 1,000 feet between the 6,900 volt substation and the 6,900 volt switch box, to allow the dragline to tram north along the bench (See Exhibit R-2).

According to Denu, he and Key proceeded to the 6,900 volt substation in preparation to pull the power from the cable and to disconnect the cable head. They were waiting for the dragline to move close to the cable and then for instructions from the electrical supervisor Vernon Knight or the second shift superintendent Brent Weber or from the dragline crew before killing the power. Vernon Knight then called on the two-way radio and told them to wait at the bench and that he was bringing two other employees, Don Kozar and Don Gehlhausen, to kill the power. Shortly thereafter Knight radioed again and directed Key and Denu to return to the bench to disconnect the cable head at the 6,900 volt switch box. During this conversation Denu apparently asked Knight if he would be allowed to make a "visual disconnect" of the cable at the substation and Knight responded that he would not.

Denu later radioed Knight advising him that in order for him to disconnect the cable at the switch box he would need to verify that the cable was disconnected and "locked out" at the substation. Denu claims he then told Knight that he was refusing to unplug the cable at the switch box. Knight apparently then radioed Weber and told Denu to meet them at the bench. When Knight and Weber arrived at the bench Knight told Denu that he would have to discipline him for insubordination. Knight explained that he had been directed to do so by Chief Electrician, Larry Ashby. Weber then apparently asked Denu if he knew the consequences of his actions. Weber disputes Denu's claim that this was stated in a threatening manner.

Denu testified that it was around this time that either Weber or Knight then radioed Kozar and Gehlhausen directing them to disconnect the cable at the 6,900 volt substation. Denu testified that after they performed the disconnect Kozar called and said "the head is out and lying on the ground". There is no dispute that Kozar's statement indicated that the subject cable had not only been disconnected but that the cable head that connects the cable to the substation was lying on the ground.

According to Denu, Knight again asked if he would unplug the head from the switch box. Denu again refused stating that he felt that it was unsafe and not according to proper

lockout procedures.<sup>2/</sup> Knight again informed Denu that he would have to discipline him for insubordination. Weber also again asked Denu "do you know what the consequences are of your actions?" Denu again refused to perform the task and Knight then instructed Harrison Key to disconnect the cable from the switch box. Key, who testified that he did not find the procedure to be unsafe, complied. After the disconnect Denu put on a pair of "hot gloves" and assisted in moving the cable. Shortly thereafter Weber purportedly told Denu to meet with Larry Landes the Human Resources Manager the next day at 4:00 p.m. to determine if any disciplinary action would be taken.<sup>3/</sup>

Denu testified that he had also requested that a safety committeeman be present when he refused to disconnect the cable from the switch box but one was not immediately provided. Later at approximately 10:00 p.m. Bob Lee, the second shift Safety Committeeman, along with Knight and Weber met in the shop area. Weber again asked if Denu knew the consequences of his actions. Denu asked what the consequences were and Weber purportedly responded "up to and including discharge". Knight apparently also repeated that he would have to discipline Denu for insubordination. Following the meeting with Landes and others, Landes informed Denu there would be no discipline for his actions.

Under the specific facts of this case I find that Denu did in fact entertain a reasonable, good faith belief that a hazardous condition existed at the time he was directed to

2/ While it appears from the credible evidence that Denu, at the time of his work refusal, communicated what he believed to be the hazard with only the generalized explanation that he needed to make his own "visual disconnect" at the substation before disconnecting the cable at the switch box, it is clear from the preceding history that Amax officials clearly knew the scope of Denu's position, including the need for him to perform his own lockout of the cable at the substation. It is not disputed that on several occasions over the previous weeks Denu had discussed his position in this regard with Knight and that Knight had thereafter discussed the matter with his supervisor. Under the circumstances it is clear that the "communication" requirement has been met.

3/ There is some disagreement over the precise date of this meeting. However, for purposes of this decision the precise date of that meeting is immaterial.

disconnect the power cable at the 6,900 volt switch box. There is no dispute that it would have been extremely hazardous and likely to result in severe burns and/or electrocution to have disconnected the cable at the switch box if the cable had remained connected and energized at the substation or had been reconnected and reenergized. There is, similarly, no dispute that Denu was aware of these hazards. Not only was Denu an experienced electrician but as a safety committeeman was also aware through MSHA "Fatalgrams" of the potentially fatal consequences in similar if not identical situations.

Denu explains that unless the same person who disconnects the cable at the switch box is the same person who deenergizes, disconnects and locks out the cable at the substation with his own lock he cannot be assured that the cable will remain deenergized at the switch box. Indeed even if the cable has been disconnected at the substation if it has not been properly locked out it could be intentionally or unintentionally reconnected. The evidence is undisputed that attempting to disconnect a 6,900 volt energized cable at the switch box would likely result in severe burns and electrocution.

While, under the circumstances of this case, the chances may not have been great that at the time Denu was directed to disconnect the cable at the switchbox the cable had not been deenergized, disconnected and not reconnected, the danger of serious injury or electrocution was a near certainty if the cable at the substation had been inadvertantly reconnected and reenergized. Particularly considering these extreme consequences I conclude that Denu did entertain a reasonable, good faith belief in a hazard. Indeed in issuing a subsequent directive to miners on disconnect procedures at the mine it is apparent that Amax itself recognized some of the same hazards that concerned Mr. Denu.

In reaching my conclusion herein I have not disregarded the evidence that Denu had been told by MSHA Inspector Deuel almost a year earlier that "visual disconnects" were not in his opinion in violation of the law. However Inspector Deuel also apparently told Denu that he nevertheless would not want to perform the noted procedure without a visual disconnect and lockout of the cable. I have also not disregarded the

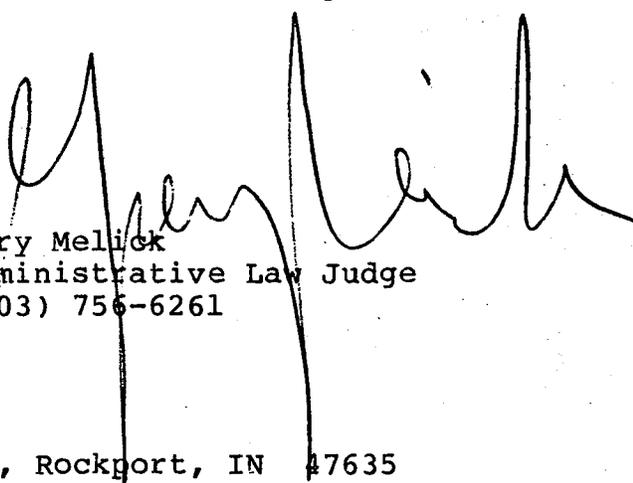
evidence that Denu knew that only one cable exited the substation and that it is likely that he also knew that this, was the same cable running to the switch box. Nor have I disregarded the evidence that Denu knew that two miners, Kozar and Gelhausen, were at the substation for the purpose of making the disconnect and through direct radio communication from Kozar was told that the cable exiting the substation had been disconnected. Denu admits that he was told by Kozar that "the head is out and lying on the ground". However the serious hazards, previously discussed, are not significantly diminished by these considerations.

Don Kozar, also testified that when the cable is disconnected at the substation the lights on the equipment in the pit and on the bench, including lights on the switch box itself, are extinguished. More specifically, Kozar recalled that on the occasion at issue when he and Gelhausen disconnected the power at the substation he saw the lights go out on the switch box. Kozar conceded however that the extinguishment of the light is not a certain method of determining whether the cable is completely deenergized. The evidence shows that liquid switches such as used at this substation have been known to malfunction allowing a cable to remain energized even after the switch has apparently been disengaged. It is apparent from the record that Denu was also aware of this problem at the time of his work refusal.

Thus under all the circumstances I conclude that Mr. Denu did in fact entertain a reasonable, good faith belief in a hazard at the time of his work refusal. Amax argues however that even assuming the validity of Denu's work refusal, Denu suffered no related discrimination or interference within the meaning of section 105(c)(1). Amax points to the statement by its human resources manager, Larry Landis, at the conclusion of the disciplinary meeting that no action would be taken against Denu. I find however that threats of disciplinary action and discharge directed to a miner exercising a protected right clearly constitute unlawful interference under section 105(c)(1), whether or not those threats are later carried out. Such threats place the miner under a cloud of fear of losing his job. In addition, while under such threats, a miner would be even less likely to exercise his protected rights when future situations might clearly warrant such an exercise. Indeed Denu opined that because of threats to other miners under similar circumstances in the past, Amax had coerced those miners into performing unsafe tasks. Such threats therefore clearly run counter to the objectives of Section 105(c). Accordingly, Mr. Denu has met his burden of proving his complaint of discrimination.

ORDER

The Complaint of Discrimination is GRANTED. The parties are hereby directed to confer regarding the amount of costs and damages and report to the undersigned on or before March 15, 1989, as to whether such costs and damages can be stipulated.



Gary Melick  
Administrative Law Judge  
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER  
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DENVER, CO 80204

MAR 6 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 87-189-M  
Petitioner : A.C. No. 42-00768-05502  
v. : Small Fry Mine  
WESTERN KEY ENTERPRISES, :  
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Kent W. Winterholler, Esq., Parsons, Behle &  
Latimer, Salt Lake City, Utah,  
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the operator of a small uranium mine, the Small Fry Mine, with five violations of certain mandatory regulatory standards found in 30 C.F.R.

The operator filed a timely appeal contesting the existence of the alleged violations, and the appropriateness of the proposed penalties.

Pursuant to notice an evidentiary hearing was held at Salt Lake City, Utah on November 16, 1988. Both oral and documentary evidence was presented, post-hearing briefs filed and the case submitted for decision on January 8, 1989.

Stipulations

The parties agreed to the following stipulations:

1. The size of the operator's business is small.
2. The operator is engaged in mining and selling of uranium in the United States. Its mining operation affect interstate commerce. The operator of the mine is subject to the "Act".

3. This Administrative Law Judge has jurisdiction to hear and decide this matter.

4. On November 6, 1986, Rex Ebon Scharf a miner employed by respondent was fatally injured by a fall of ground accident at the Small Fry Mine. There were no eye witnesses to the accident.

5. The subject citations were properly served by duly authorized representative of the Secretary upon an agent of the respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance.

6. The exhibits offered by the Respondent and the Secretary are stipulated to be authentic.

7. Each violation that is established is properly characterized as significant and substantial.

8. The printout of the Assessed Violations History Report is a true and accurate history for the Small Fry mine and admissible in evidence in this matter.

9. The operator demonstrated good faith by timely abatement of each of the alleged violations by permanently closing the mine.

#### Law and Motion

At the hearing, counsel for the Secretary moved to vacate Citation No. 2646365 which alleges a 104(a) violation of 30 C.F.R. § 57.3020 and Order No. 2646495 which alleges a violation of 30 C.F.R. § 57.3022. The Secretary's counsel stated for the record that in analyzing the evidence in preparation for trial it was found that Citation No. 2646365 was duplicitous with Order No. 2646363. There was no objection to the Secretary's motion. The motion to vacate Citation No. 2546365 was granted.

The Secretary's motion to vacate Order No. 2646495 was also based on the fact that on review and analysis of the evidence in preparing for trial it was found that the citation was duplicitous and on the additional ground that there was insufficient evidence to establish the violation. There was no objection to the motion. The motion to vacate Order No. 2646495 was granted.

#### The Regulation

The three remaining violations, Order No. 2646363 and Citation Nos. 2646366 and 2646496 each allege a violation of 30 C.F.R. § 57.3022 which provides as follows:

§ 57.3022 Examination of ground conditions and ground control practices

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.

Admissions

At the hearing respondent admitted on the record that it had violated the provisions of the above quoted 30 C.F.R. § 57.3022 as alleged in Order No. 2646363 and Citation Nos. 2646496 and 2646366. Thus, respondent admitted that the roof of the mine was not properly examined and that loose roof was not removed or adequately supported. Respondent also stipulated that each of the admitted violations was properly characterized significant and substantial and that the gravity of each of the admitted violations was serious, leaving in issue, however, the appropriate penalties, including the negligence of the operator and the effect of the proposed penalties on the operator's ability to continue in business.

The Violations

The three remaining violations, discussed below, were cited by MSHA following the inspection of the Small Fry mine on November 6th, the day after the fatal fall of ground accident.

Order No. 2646363

This citation was issued for a violation of 30 C.F.R. § 57.3022 because loose ground in the 1600 South heading had not been taken down or supported. The citation states that on November 6, 1986 at 2:00 p.m. a fatal ground fall accident occurred in the 1600 South heading. A slab approximately 27 feet long by 15 feet wide and 1 to 2 feet thick fell. Reportedly the victim was drilling the second round in this heading on this shift and had two holes to drill when the slab fell. Ground support was not used in this area where the accident occurred.

The Secretary at the hearing moved to amend its proposed penalty for the violation so as to increase the amount of the proposed penalty from \$2,000 to \$8,000.00. Over the objection of respondent, the motion was granted. Counsel for petitioner stated for the record that the penalty for this violation should

be increased since it was the violation alleged in this citation that contributed to the fatal accident rather than the violation alleged in Citation No. 2646365 which was vacated.

Citation No. 2646496

This citation alleges a section 104(a) violation of 30 C.F.R. § 57.3022 because the supervisor did not make a daily examination of the ground conditions in the area where the pillars were being extracted. The Secretary's proposed a \$2,000 penalty for this violation.

Citation No. 2656366

This is a 104(a) citation that alleges a failure to remove loose roof in another area of the mine. The Secretary was permitted to amend the amount of the proposed penalty from \$1,000 to \$500.00.

Penalty

The only remaining issue is the appropriate penalty for each of the admitted violations. With respect to this issue the parties presented oral and documentary evidence primarily on the degree of the operator's negligence and the effect of the penalty on the operator's ability to continue in business. The stipulations of the parties with respect to the other four penalty criteria set forth in section 110(i) of the Act are accepted as established fact.

Both parties agree that the operator was negligent but differ as to the degree of negligence. The respondent's position with respect to these three citations is that the degree of negligence was low or at most moderate rather than high, as urged by the Secretary of Labor. Both parties agreed at the hearing to rely upon the depositions that had been taken in this action and to make a post-hearing submission setting out those areas of the depositions where testimony was given which relate to the negligence issue, and upon which that party relies.

Respondent in support of its position that the degree of negligence is low or moderate rather than high submitted as its exhibits excerpts from the following depositions: (A) MSHA inspector Larry J. Day who inspected the Small Fry mine the day after the fatal ground fall accident (B) deposition of Robert Shumway one of the owners of the mine, (C) deposition of MSHA inspector Ronald L. Beeson who inspected the Small Fry mine the day after the ground fall accident and (D) deposition of Jerry Cowan one of the supervisors at the mine.

The sworn testimony in the depositions indicated that the miners did examine and test the roof, face, and ribs of their working places at the beginning of each shift and frequently thereafter; that supervisors examined the ground conditions during daily visits to ensure that proper testing and ground control practices were being followed; and that loose ground was taken down prior to any of the work being done. There was testimony that the miners had barred down the area where the accident occurred immediately prior to the time the accident occurred.

It is respondent's position that the degree of negligence should be moderate, or low, as opposed to high as urged by the Secretary of Labor, for the reason that the ground control practices which were employed by respondent in this mine, to protect against an unintended roof fall, substantially met with the requirements of the standard, and were all that could be expected given the circumstances prevailing in this mine, and the mine operator's experience in this mine.

The excerpts from the depositions received into evidence indicates that this operator sounded and barred down the roof prior to the time of the accident and that this was standard operating procedure and practice; that this operator had no indication that there was bad roof and no indication that an unintended roof fall would occur. The depositions indicate that the reason for the unintended roof fall in this mine was because of a mud seam above the slab that fell which neither the operator, nor any of the operator's employees, could have detected by visual means or other means at their disposal. Petitioner contends that the bad back or roof, in this mine, was not known to this operator and could not have been known under the circumstances.

The Secretary's assessment of negligence as stated in her post-hearing submission is primarily based upon the following facts. During an earlier inspection, nine months before the November 6, 1986 accident, the same supervisory personnel, Mr. Cowan and Mr. Beck, had been told by MSHA Inspector Benson that he found roof support timber that had fallen and loose roof that had developed in the main haulage and in some drifts. As a result of this earlier inspection Benson issued roof control citations and warned Cowan and others that they needed to take better care of the roof. He warned that if they did not start barring down someone would be fatally injured.

On review of all the evidence on the issue of negligence I find that the violations affirmed resulted from the operator's failure to exercise reasonable care which constitutes ordinary or moderate negligence.

The only evidence presented on the issue of the effect of the proposed \$10,500.00 penalties on petitioner's ability to continue in business was the un rebutted testimony of Gary Shumway at the November 16, 1988 hearing. Mr. Shumway testified that he was president of Western Key and has been employed by both Western Key and W.K. Enterprises for approximately four or five years. The witnesses stated that both organizations were established for the convenience of the same owners, the Shumway family. He testified that the proposed high penalties would seriously jeopardize the ability of both organizations to continue in business as a uranium mining company.

The Solicitor, on the other hand, understandably presented no evidence on the issue of the effect of the proposed penalty on petitioner's ability to continue in business but points out that the proposed \$10,500.00 penalty represents less than 3 percent of respondent's gross income and slightly more than 6 percent of the outstanding operating loan. Petitioner concedes however, that uranium operators have suffered declines which adversely affect their income.

#### CONCLUSION

Having considered the stipulations and the evidence presented in this case I find that based upon the six criteria set forth in section 110(i) of the Act that the appropriate penalty for each of the admitted violations is as follows:

Citation No. 2646363 involving a violation of 30 C.F.R.  
§ 57.3022, \$3,500.00.

Citation No. 2646366 involving a violation of 30 C.F.R.  
§ 57.3022 \$500.00.

Citation No. 2646496 involving a violation of 30 C.F.R.  
§ 57.3022 in another part of the mine \$1,000.00.

I believe the amount of these penalties should be sufficient to deter future violations of mandatory safety standards while not unduly hampering the ability of this small operator to remain in business.

#### ORDER

Citation No. 2646363, 2646366 and 2646496 are affirmed and Citation Nos. 2646365 and 2646495 are vacated. Western Key Enterprise is directed to pay a civil penalty of \$5,000.00 within 30 days of the date of this decision.

  
August F. Cetti  
Administrative Law Judge

**Distribution:**

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**Kent W. Winterholler, Esq., Parsons, Behle & Latimer, 185 South State Street, Salt Lake City, UT 84147 (Certified Mail)**

**/bls**

**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 6 1989**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 88-13  
Petitioner : A. C. No. 18-00621-03615  
v. :  
: Mettiki Mine  
METTIKI COAL CORPORATION, :  
Respondent :  
:

DECISION

Appearances: Mark D. Swartz, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Susan E. Chetlin, Esq., Crowell & Moring,  
Washington, DC, for Respondent.

Before: Judge Weisberger

Statement of the Case

On April 6, 1988, the Secretary (Petitioner) filed a petition for Assessment of Civil Penalty for alleged violations by the Respondent of 30 C.F.R § 75.200, 30 C.F.R. § 75.400, 30 C.F.R. § 77.205(b), and 30 C.F.R. § 77.202. Respondent filed its Answer on May 5, 1988. Subsequent to a Prehearing Order issued May 17, 1988, requiring the Parties to confer for the purposes of discussing settlement, exchange exhibits which may be endorsed at a hearing, and lists of witnesses who may testify, the Parties engaged in prehearing discovery.

Pursuant to notice, the case was scheduled and heard in Pittsburgh, Pennsylvania, on November 15 - 16, 1988. Phillip Martin Wilt, Steven Polce, Stanley A. Martin, Barry Lane Ryan, Thomas Andrew Reed, and Horace Joseph Theriot testified for Petitioner. Timothy Clay Rush, Joseph Eugene Peck, Carl Randall Johnson, Alan B. Smith, William Allen Hartman, Horace Joseph Theriot, and Thomas Andrew Reed testified for Respondent. At the hearing Petitioner indicated that Order No. 2943340 issued on November 9, 1987 was vacated on November 2, 1988, and that Petitioner has withdrawn its petition for assessment of civil penalty with regard to the violation alleged in Order No. 2943340.

Proposed Findings of Fact, Conclusions of Law, and Briefs were filed by Petitioner and Respondent on January 25, 1989 . Reply Briefs were filed by Respondent and Petitioner on February 3 and February 6, 1989, respectively.

Both Parties, on January 25, 1989, filed Motions to Correct the hearing Transcript. The Respondent's Motion incorporates all the corrections noted by Petitioner in its Motion, and includes additional corrections. Respondent indicated that Petitioner does not object to Respondent's Motion. Accordingly, these Motions are granted.

### Stipulations

The following stipulations were submitted by the Parties at the hearing:

1. The Respondent, Mettiki Coal Corporation, has owned and operated the Mettiki Mine at all times relevant to these proceedings.

2. The Mettiki Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject orders were properly served by a duly authorized representative of the Secretary of Labor upon authorized agents of the Respondent at the dates, times, and places stated in the orders.

5. The assessment of civil penalties in these proceedings will not affect Respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the following production tonnage information:

a. That production tonnage of 2,525,216 at the Mettiki Mine in 1986, and

b. Production tonnage of 9,225,921 at all of Respondent's mines in 1986.

7. Mettiki Mine's history of previous violations with respect to the orders in this case is as follows:

With respect to Orders Nos. 2944821 and 2944822, which were issued on November 16, 1987, there is a history of 441 assessed violations in the 24 month period from November 16, 1985

to November 15, 1987, and then with respect to Order No. 2944834, which was issued on December 8, 1987, there is a history of 450 assessed violations in the 24 month period from December 8, 1985 to December 7, 1987.

8. Respondent has demonstrated good faith in abating the violations alleged in Orders Nos. 2944821, 2944822, and 2944834.

9. Mettiki Mine was issued Order No. 2701558 on May 30, 1986. There was no intervening clean inspection from May 30, 1986 through December 8, 1987. Therefore, the Mettiki Mine was on a section 104(d)(2) cycle or chain at all times relevant to these proceedings.

10. On December 8, 1987, the Mettiki Mine was in the 15 working day spot inspection program for methane as specified in section 103(i) of the Act.

11. In terms of specific dates, November 16, 1987, was a Monday; December 8, 1987, was a Tuesday.

12. The Parties stipulated to the authenticity and admissibility of Order Nos. 2944821, 2944822, and 2944834.

#### Order No. 2944834

Order No. 2944834 issued on December 8, 1987, alleges a violation of 30 C.F.R. § 75.400 in that:

Combustible materials, loose coal, some very fine and dry is accumulated under, and around the drive, and take-up rollers to the B-mains No. 3 conveyor belt, the drive roller had been permitted to turn in the materials, also there is loose coal deposited on the mine floor along and under the bottom belt on the left side beginning at the drive rollers and extending inby to the tail rollers, a distance of approximately 1,000. The bottom belt and rollers had been permitted to turn in the materials in several locations. Also there was fine dry coal accumulated on the two 200 PLO HP energized electrical motors to the conveyor drives. Alan Smith, Company Safety Director, is the responsible person.

#### Findings of Fact and Discussion

##### I.

Phillip F. Martin Wilt, a MSHA Coal Inspector, testified, in essence, that when he inspected Respondent's Mettiki Mine on December 8, 1987, at approximately 8:20 a.m., he observed damp

coal along the belt line for approximately 1000 continuous feet. He indicated that he also observed loose dry fine crushed coal at an estimated depth of 2 to 6 inches in the area of the take up rollers, and around the drive. Wilt was accompanied by Barry Lane Ryan, a MSHA Field Office Supervisor, who corroborated Wilt's testimony with regard to the depth of the coal dust of approximately 2 to 6 inches at the base of the motors. In contrast, Joseph Eugene Peck, Respondent's Shift Supervisor, indicated that there was "some small accumulations" of coal by the motor, which he indicated was maybe a couple of inches (Tr. 209). He also indicated that in some places the accumulation was to a depth of a few inches, and there were possibly 3 to 4 inches under the rollers. He described the material in the belt areas as containing rocks and large material. Alan B. Smith, Respondent's Safety Director, indicated that on December 8, 1987, there was coal accumulation on the motors, drive rollers, and under the take up unit.

Based upon the above testimony, I conclude that when observed by Wilt, on the morning of December 8, 1987, there was indeed an accumulation of coal dust and loose coal which had not been cleaned up in the area of the No. 3 belt, which is an "active workings." As such, I conclude that it has been established that Respondent herein violated 30 C.F.R. § 75.400.

## II.

In essence, according to Wilt, the coal that had accumulated in the belt area was damp i.e., containing moisture, but not saturated. The accumulation in the area of the drive and the take-up rollers was described as having a fine texture and being loose and dry. Wilt's testimony in this regard was essentially corroborated by Ryan, who also indicated that he observed coal dust in the air as the consequence of persons kicking it up while walking. Both Wilt and Ryan indicated essentially that, based upon their experience, dry fine coal dust can be combustible. According to Wilt, the belt bottom had been turning in the material, and the belt rollers could cause friction rubbing against the coal dust possibly causing it to ignite. Wilt also indicated that there was an electrical current in the lighting system above the belt starter box, and that a possible short in a motor or electrical system could cause an ignition. He indicated that if the coal would ignite there would be a fire and that the resulting smoke could cause injuries. It was also Ryan's uncontradicted testimony that the mine in question liberates more than 2 million cubic feet of methane in a 24 hour period.

Joseph Eugene Peck, Respondent's Shift Supervisor, testified that he touched the material along the belts as he gathered some of the rocks by hand. He indicated that some of the material was probably wet enough so that "possibly" water could have been squeezed out of it (Tr. 215). He said some of the material was

damp i.e., not absolutely wet but not dry. Carl Randall Johnson, Respondent's Section Foreman, indicated, in essence, that in the take up area that he cleaned, the material that he shoveled was wet and that it stuck to the shovel. He also described the material under the rollers as being wet and that it soaked into the clothing although he did not touch it. Alan B. Smith, Respondent's Safety Director, indicated that he saw the Inspector put his stick in some of the coal that had accumulated, and there was wetness on it. Essentially he described the area in question as very damp to wet, but indicated that the drive area was drier than the balance of the area. Based on the above, I find the testimony of Wilt and Ryan to be uncontradicted in that in the area of the drive and take-up rollers, the accumulated coal dust was dry. I accept the description of the material as contained in the testimony of Wilt and Ryan inasmuch as they both touched the material at these areas. Although the material in the area of the belt was clearly damp, and Johnson and Peck described some of the material as wet, I accept the testimony of Wilt and Ryan that the material was not wet or saturated, inasmuch as both testified that they actually touched the material. Furthermore, I find persuasive Ryan's testimony, as it was not contradicted, that in order for the water content of coal dust to be a barrier to an explosion, the coal dust must have the "consistency of catsup" (Tr. 126). He specifically indicated that none of the coal along the left side of the belt had this consistency, and none of Respondent's witnesses adduced testimony to establish that any of the material in question had such a consistency.

Accordingly, I conclude that on the date in question there had been an accumulation of dry coal dust. Based on the uncontradicted testimony of Wilt and Ryan, I conclude that dry fine coal dust can be combustible. Smith indicated essentially that the hazard of a fire would be somewhat negated by the facts that the cables in proximity to the accumulated coal dust were insulated and grounded, circuit breakers were in operation, the motors were grounded, a fire suppresser system was on the belt line, and the belting was MSHA-approved fire resistant. Respondent also cites the lack of evidence of methane at the time, and the fact that the belts were not running at the time of the inspection. However, no evidence was adduced which contradicted Wilt's statement that the belt bottom had been turning in the accumulated material, and the belt roller could cause friction which could serve as an ignition source for the accumulated dry coal dust.<sup>1/</sup> I also note that although Smith

<sup>1/</sup> On redirect examination Johnson estimated that there were 3 to 4 feet between the rollers and the accumulation of coal. However, I did not place much weight in this testimony as Johnson had previously, on cross-examination, admitted that he did not clean the rollers, and did not see the coal around the drive rollers (Tr. 230).

indicated he had seen "numerous" methane spot inspections at the A & B Portals, in which methane was not detected, none of Respondent's witnesses contradicted Ryan's statement with regard to fact that the mine in question liberates 2 million cubic feet of methane over a 24 hour period. Also, there was no contradiction of the testimony of Ryan and Wilt that should a fire occur, it would result in serious injuries due to the presence of smoke. Employees exposed to this hazard would be those conducting examinations in the area and those assigned to clean the area. Taking these factors into account, I conclude that the violation herein contributed to the hazard of an explosion or fire, with a reasonable likelihood of this hazard resulting in injuries of a reasonably serious nature. As such, the violation herein was significant and substantial.<sup>2/</sup> (Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)). I do not find Mettiki Coal Corp., 8 FMSHRC 1768, (November 1986), cited by Respondent in its Brief, to be relevant to the case at bar. In Mettiki, supra, Judge Melick stated that he could not find the violation therein to be significant and substantial in light of the inspectors admission that "there was little likelihood of an explosion." (8 FMSHRC 1768, supra at 1770). In contrast, in the case at bar, Wilt opined that the fine texture of the coal around the drive and take up rollers could have been ignited by friction.

### III.

It is Petitioner's position that the violation herein resulted from Respondent's unwarrantable failure. In this connection, Wilt testified, in essence, that the accumulation was easily observed. Wilt's testimony in this regard was corroborated by Ryan, who termed the condition "very obvious," (Tr. 127). Further, Wilt testified that he felt the accumulation around the motors and it felt warm to the touch, and was "baked like" (Tr. 43). Accordingly, he concluded that the accumulation had been in existence "for a period of time" (Tr. 42), to permit a drying out process. Smith, in essence, opined that it would take 45 minutes to an hour to dry coal out on the motors. I do not place much weight on Smith's opinion in this regard, as although he had touched the coal, he did not describe its dryness. In contrast, Wilt handled the coal and described how it felt (Tr. 43).

<sup>2/</sup>In this connection I note that Smith, Respondent's Safety Director, agreed that the violation herein was significant and substantial.

According to Polce, Rush, and Smith, due to the mining conditions around the date in question, water from the coal seam being mined frequently ran back along the belt knocking coal off the belt. According to Peck, the violative condition looked recent, and due to water from the longwall, accumulations can occur in a matter of minutes. I give more weight to the testimony of Wilt, as his testimony was not contradicted, with regard to the conditions specifically at the drive and take up rollers. In addition, I find his description credible, inasmuch as he actually had touched the material. Also, his testimony, that the observed condition was obvious, as corroborated by Ryan, has not been contradicted. Also, Smith, while indicating that the accumulation on the belt line could have occurred in 5 or 10 minutes, opined that the coal in the belt area was there for several hours, and on the motors for 45 minutes to an hour. Also, Government Exhibit 2, EXAMINATION OF BELT CONVEYORS, indicates that on all three shifts on the day prior to the date of the inspection, it was reported that on the belt in question the head and take up "needs cleaned and dusted." (Sic.) In this connection, I find purely speculative testimony by Polce and Stanley A. Martin, Respondent's Fire Boss, that, in essence, the reported conditions could have been cleaned up and then reoccurred. I do not find support in the record for Respondent's position, as articulated in its Post Hearing Brief, that the cited condition was extraordinary and occurred after the preshift and last regularly scheduled cleanup. None of Respondent's witnesses presented any testimony, based on personal observations, as to when the accumulations in question actually occurred, and as to whether the conditions cited in the EXAMINATION OF BELT CONVEYORS on the day prior to the day in question, were actually cleaned up. Smith indicated that the conditions he observed on the day in question were "much more severe" than when recorded in the EXAMINATION OF BELT CONVEYORS (Tr. 251). I do not place much weight on this conclusion, as there is no evidence that Smith had personal knowledge of the nature of the conditions cited in the EXAMINATION OF BELT CONVEYORS. Similarly, Timothy Clay Rush, a miner engaged by Respondent who fire bosses the second portion of the shift, indicated, in essence, that the condition described in the Order in question is not consistent with what was reported in the preshift examination. I do not find this probative in establishing that the violative condition occurred subsequent to, and was in excess of, the condition found on preshift examinations, as his testimony does not establish he had personal knowledge or recollection of the conditions existing at the preshift examination (Tr. 173). Nor does it appear that he had any personal knowledge of the conditions existing at the time of the Order in question. Inasmuch as the evidence fails to establish that the cited condition occurred after one preshift examination and before another, as asserted by Respondent in its Brief, I find that the

case at bar, is distinguished from Freeman Coal Mining Co., 3 IBMA 439 (1979), and Target Industries Inc., 10 FMSHRC 161 (1988), cited by Respondent. In both Target Industries supra, and Freeman Coal Mining Co., supra, the violative conditions occurred after one preshift examination and before another.

I thus find, based upon all the above, that the accumulation of coal dust herein was obvious, and in existence for a time period longer than that immediately prior to the inspection. I also find that the coal accumulation, in the area in question, was reported to management on three successive shifts immediately prior to the shift in question in which the violation was observed. I also find there was insufficient evidence to conclude that Respondent either cleaned up the reported accumulative coal or made any effort to do so. Based upon all the above, I conclude that the violation herein resulted from Respondent's aggravated conduct and thus constitutes an unwarrantable failure (See, Emery Mining Corp., 9 FMSHRC 1197 (December 1987)).

#### IV.

The testimony of Smith and Respondent's other employees who testified, would appear to indicate that the accumulation of coal herein was not caused by Respondent's negligence, but rather inherent in the normal mining conditions, and operations on the date in question. However, based on the rationale set forth in III. above, infra, I conclude that the Respondent herein was negligent to a high degree in not clearing the obvious accumulation once it occurred. Taking into account the presence of dry fine coal dust, as testified to by Wilt and Ryan, in the area of the rollers and drive, along with the possibility of friction from the belt rollers, and the history of methane production in the mine as testified to by Ryan, I conclude that the ignition of the coal dust was likely, and consequently find the gravity of the violation herein to be moderately high. Taking these matters into account, as well as the remaining factors in section 110(i) of the Act, as stipulated to by the Parties, I conclude that a civil penalty of \$1000 is proper for the violation found herein.

#### Order No. 2944821

Order No. 2944821 alleges as follows:

The cat-walk leading from the ground level to the top of the raw coal silo which is a distance of approximately 500 feet in length is not being kept free of stumbling and slipping hazards, because with the exception of two isolated areas of distances of approximately 20 feet each, the entire length of the walkway

is obstructed with loose coal and rock averaging from 2 to 6 inches deep and 20 to 24 inches wide. Jody Theriot, company, and miner representative is the responsible person.

I.

On November 16, 1987, at approximately 8:55 a.m., Wilt, in the presence of Horace Joseph Theriot, Respondent's Safety Coordinator, climbed up to a catwalk that ran approximately 700 feet connecting a metal building to a coal silo and providing access to the top of the coal silo. He observed that, with the exception of two isolated areas of approximately 20 feet in length, the balance of the approximately 700 foot long by 24 inch wide catwalk was generally covered with loose coal and rocks. He described the catwalk as being totally obstructed, with the exception of the two isolated areas, and indicated that the depth of the material was measured to be an average of 2 to 6 inches. In essence, he testified that although he could have walked on the material without a rail, he used a rail as he considered the material on the catwalk to constitute a stumbling hazard as it would tend to turn one's feet when walking on it.

Thomas Andrew Reed, an employee of Respondent, who has the responsibility for clearing the middle portion of the catwalk, testified, in essence, that when he was on the catwalk at approximately 1 to 2 a.m., on November 16, 1987, there were only some lumps on the catwalk, but not a lot of material. He also indicated that when he left his shift, there was no coal in the approximately 400 feet that he had cleaned. Theriot, who was with Wilt at the time of the inspection, indicated that he did not have any difficulty walking on the catwalk. Also, William Allen Hartman, an employee of Respondent, who was cleaning the catwalk at approximately 9:30 in the morning on November 16, indicated that he could walk on the material on the catwalk.

Although there was a vertical ladder providing access to the silo, there was no evidence contradicting Wilt's testimony that the catwalk in question does provide access to the top of the silo. According to Wilt's uncontradicted testimony, an electrical motor and a gear reduction unit are located in an enclosed area at the top of the silo. As such, the catwalk would be a means of an access to this area to service and repair such equipment. Also, it appears from Wilt's testimony that the belt line is parallel to the catwalk at the same level, and without any separation between them. Respondents's employees, who clean and grease the belt line would apparently have access to it by way of the catwalk. Also, William Allen Hartman, who was responsible for cleaning the uppermost portion of the catwalk, would have to walk along the catwalk from the steps to reach his area of responsibility. Therefore, I find that the catwalk is a travel way or a means of access to areas

where persons are required to travel or work, and as such is within the purview of 30 C.F.R. § 77.205(b). Although Reed indicated, in essence, that there was not a lot of coal on the catwalk when he observed it at 1 or 2 a.m., on November 16, I find that, essentially, Wilt's detailed description of the extent, depth, and description of the material that had accumulated on the catwalk, was not contradicted. Although essentially Reed, Theriot, and Hartman indicated that they did not have any difficulty walking on the material, I conclude, based upon Wilt's description of the material, its extent, and depth, along with evidence of the slope of the catwalk, as depicted in Exhibit R-2, that the accumulated coal and rocks constituted a stumbling hazard. As such, I conclude that Respondent herein did violate 30 C.F.R. § 77.205(b).

## II.

In essence, Wilt testified that it was his opinion that, taking into account the size and shape of the material that had accumulated on the catwalk, as well as its slope, and considering the difficulty that he himself experienced walking on the catwalk, it was highly likely that the accumulation could contribute to an injury to one person by causing that person to slip and fall, resulting in broken bones, sprains, or lacerations. In contrast, neither Theriot, who walked on the material along with Wilt, nor Reed, who walked on the material a few hours prior to Wilt, nor Hartman, who walked on the material shortly after Wilt, experienced any difficulty walking. Clearly the extensive presence of coal and rock accumulations on the sloped catwalk did present a hazard of stumbling and falling. However, I note that the catwalk had a rail, and Wilt who used the rail in traversing the catwalk did not specifically testify to the degree of hazard when using the rail. Hence, I conclude that it has not been established that the presence of the rail would not have minimized the likelihood of one stumbling or falling. As such, I conclude that, although it was certainly possible for one traversing the catwalk to have stumbled and fallen and suffered a reasonably serious injury, it has not been established that the hazard of falling and suffering a serious injury was reasonably likely to have occurred. (c.f. Mathies Coal Co., supra). As such, I conclude that the violation herein was not significant and substantial. (Mathies Coal Co., supra).

## III.

According to Wilt, the extensive amount of material present on the catwalk indicated to him that it had been permitted to continue for "some time" (Tr. 337). He also indicated that he observed two areas on the catwalk that had been cleaned, four shovels, and foot prints in the material on the catwalk above him towards the silo. He thus concluded that Respondent knew of the condition.

Steven Polce, Respondent's employee who has supervisory responsibilities over the catwalk, indicated essentially that three men are assigned to clean a portion of the catwalk, and that he never told them to clean another section aside from their own. William Allen Hartman, who was assigned to clean the upper portion of the catwalk, indicated that when the day shift ended on Friday, November 13, 1987, he walked the catwalk, and it was clean top to bottom. Thomas Andrew Reed, Respondent's employee who is responsible for the middle portion of the catwalk, indicated that on the last shift on Friday, November 13, when he left, his area was "fairly clean" (Tr. 384). (When called as a witness for Respondent, Reed described his areas as "clean" at the end of that shift (Tr. 428)). He also indicated that on the shift from 11 p.m., November 15 to 7 a.m., November 16, he spent 3 1/2 to 4 hours cleaning, but only cleaned his area and when he left there was no coal in his area and the area was clean. He said he told Hartman, who had the responsibility of cleaning on the next shift, that there was a little bit of binder and coal on the catwalk. Reed indicated that, in general, Respondent does not have any policy requiring the catwalk cleaners to call for help to clean up the catwalk, and they are not required to inform management of any coal accumulation on the catwalk when they leave their shift. Reed also indicated that in October/November 1987, the catwalk was covered with material completely 2 to 3 times a week, and that material could accumulate in less than 15 minutes after it was cleaned. (Hartman indicated, in essence, that an accumulation in these conditions could occur in 5 minutes).

I have taken into account Wilt's opinion with regard to the existence of the material for a period of time, but conclude, based on the uncontradicted testimony of Hartman, that in actuality, as observed by him, there was no accumulation of coal on the catwalk at the end of the day shift on Friday, November 13. However, based on Reed's testimony, I conclude that at least as early as the 11 p.m. to 7 a.m shift November 15 to November 16, there was an accumulation of coal and rocks on the catwalk, and that this condition was known to Reed. Inasmuch as Respondent did not have any procedures requiring the belt cleaners to report to management when there was an accumulation of coal they could not clean up, and inasmuch as only one employee per shift was assigned to clean only one third of the catwalk,<sup>3/</sup> I conclude

<sup>3/</sup>Hartman indicated that he did help clean other areas, although he did not have any such direct order. Although this action is commendable, it does not exonerate Respondent's conduct in assigning only one employee per shift to clean only one third of the catwalk.

that the existence of the coal accumulation observed by Wilt on the morning of November 16, resulted from Respondent's aggravated conduct. Thus, I conclude that the violation herein was the result of Respondent's unwarrantable failure (See, Emery Mining Corp., supra).

#### IV.

The extensive presence of coal and rocks to a depth of 2 to 6 inches on the sloped catwalk clearly presented a stumbling hazard. However, due to the presence of a rail, I conclude that the gravity of the violation herein was only moderate. Inasmuch as Respondent did not provide for more than one employee per shift to clear more than one third of the catwalk, and inasmuch as Reed knew of the accumulation of coal in the night shift between November 15 and November 16, I conclude that the failure of Respondent to clean the accumulated coal on the catwalk constituted a high degree of negligence. Taking these factors into account, as well as the remaining statutory factors in section 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty of \$500 is appropriate for the violation found herein.

#### Order No. 2944822

Order No. 2944822 reads as follows:

Loose coal, including fine dry coal, and coal dust is accumulated between the top, and bottom moving conveyor belt leading from the mine portal to the top of the raw coal silo, these conditions exist the entire length of the conveyor which is approximately 500 feet in length. The accumulations are such as to permit numerous top rollers and belt to run in the materials, also due to the accumulations several to rollers are frozen and will not turn. Also when the conveyor reaches the ground level near the belt portal there is accumulation of coal from 2 to 5 feet in thickness, for a distance of 60 feet, the distance was measured with a tape rule. Jody Theriot, Company, miner representative is the responsible person.

#### I.

At approximately 9:05 a.m., on November 16, 1987, Wilt observed coal and coal dust in the pan, which is a structure separating the top and bottom of the belt which runs alongside the catwalk. He described the material in and around the rollers as being fine, dry, and dusty. He said that several of the belt

rollers were turning in the material. He described the material that the belt had been running in as fine, dry, and dusty. In contrast, Reed was asked on cross-examination whether the coal was wet on the night shift of November 15 - 16, and he indicated that he touched it in the process of cleaning and indicated that it was wet. Hartman, who worked on cleaning up the belt on November 16, at approximately 10 to 10:30 a.m., described the coal on the pan line as "definitely wet," (Tr. 440). and said that he did not see coal dust or dry coal on the belt. Also, Theriot, who accompanied Wilt, indicated that he did not see dust in the pan and did not recall dust being there.

I place most weight on Wilt's testimony as to what he actually observed in the specific area of the rollers. Neither Reed nor Hartman, who described the material as being wet, nor Theriot contradicted the testimony of Wilt, as neither of them presented testimony specifically as to the area in and around the rollers. Also, although Hartman indicated that he did not see coal dust or dry coal on the belt, it is noted that he observed this area approximately an hour and a half after it was cited and after clean up had already begun. Thus, based upon Wilt's testimony, I conclude that on approximately 9:05 a.m. on November 16, there was coal dust around the rollers. I accept Wilt's testimony, as it was not contradicted, with regard to the description of the pan, and conclude that it was a structure within the purview of 30 C.F.R. § 77.202.

However, in order for a violation of section 77.202, supra, to occur, the coal dust must exist "in dangerous amounts." In The Pittsburgh & Midway Coal Mining Co., 6 FMSHRC 1347 (May 1984), aff'd 8 FMSHRC 4 (January 1986), Commission Judge Broderick interpreted the phrase "in dangerous amounts" as follows: "Whether an accumulation is dangerous depends upon the amount of the accumulation and the existence and location of sources of ignition. The greater the concentration, the more likely it is to be put into suspension and propogate (sic.) an explosion." (Pittsburgh v. Midway Coal Mining Co., supra, at 1349). I adopt this interpretation.

At best, as argued by Petitioner in its Brief, the record contains Wilt's observations as to rollers turning in accumulated materials and rollers being frozen in place by accumulated materials. There is no evidence with regard to the specific amounts of the accumulation such as its color, depth, or measurement of the area it covered. Also the record is devoid of evidence with regard to the location and existence of sources of ignition. Thus I conclude that it has not been established that the coal dust present in the mine existed "in dangerous amounts." As such, it has not been established that a violation of 77.202, supra, occurred, and Order No. 2944822 must accordingly be dismissed.

ORDER

It is ORDERED that Respondent, within 30 days of this Decision, pay \$1,500 as Civil Penalties for the violation found herein. It is further ORDERED that Order No. 2944821 be amended to reflect the fact that the violation therein is not significant and substantial. It is further ORDERED that Order No. 2944822 be DISMISSED.



Avram Weisberger  
Administrative Law Judge

Distribution:

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

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dcp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 10, 1989

GARY SMITH, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 89-4-D  
: BARB CD 88-55  
: :  
SOUTHERN HILLS MINING, : Mine No. 2  
Respondent :  
:

ORDER OF DISMISSAL

Before: Judge Merlin

On October 11, 1988, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On December 23, 1988, a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.

  
Paul Merlin  
Chief Administrative Law Judge

Distribution:

Mr. Gary Wayne Smith, P. O. Box 171, Hazard, KY 41701  
(Certified Mail)

Southern Hills Mining Company, Inc., P. O. Box 730, Hindman, KY  
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/gl

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

**MAR 10 1989**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 88-268  
Petitioner : A.C. No. 36-00906-03695  
v. :  
: Gateway Mine  
GATEWAY COAL COMPANY, :  
Respondent :

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania for the Petitioner, Secretary of  
Labor (Secretary);  
David Saunders, Safety Director, Gateway Coal Co.,  
Prosperity, Pennsylvania, for Respondent (Gateway).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 75.200 charged in an order issued under section 104(d)(2) of the Act on May 3, 1988. Gateway concedes that the violation occurred and does not contest the finding that it was significant and substantial. It does contest the finding that it was caused by Gateway's unwarrantable failure, and the amount of the proposed penalty.

Pursuant to notice, the case was heard on January 10, 1989, in Washington, Pennsylvania. Glenn Stricklin and Russell Knight testified on behalf of the Secretary. William Wilson, Stephen Strange and David Saunders testified on behalf of Gateway.

FINDINGS OF FACT

1. Gateway is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Gateway Mine. The mine produces coal which enters interstate commerce and its operation affects interstate commerce.

2. On May 3, 1988, Federal coal mine inspector Glenn Stricklin issued a section 104(d)(2) withdrawal order charging that Gateway failed to comply with its approved roof control plan in the No. 2 entry at the No. 42 crosscut, 9 butt section. This was one crosscut outby the face. The order states that the diagonal distance of a four way intersection measured 66 feet and that a clay vein was present. Supplemental supports were not installed. Respondent concedes these facts. The order was issued at 10:00 a.m.

3. The approved roof control plan for the subject mine provides that where the diagonal distance in an intersection exceeds 60 total feet, supplemental supports in the form of posts or cribs must be set.

4. As he approached the intersection, Inspector Stricklin saw an obvious clay vein which extended into the intersection. Slate was flaking from the roof at the clay vein. The inspector tested the roof by the sound and vibration method using his solid wooden walking stick. He found the roof very drummy. Russell Knight, the UMWA safety committeeman who accompanied the inspector, confirmed that the roof sounded drummy. A drummy or hollow sound is a sign of a bad roof condition. Respondent argues that because the inspector did not have a metal cap on his testing rod, the test was invalid. I reject this contention. Inspector Stricklin has been a coal mine inspector for 19 years, and worked 20 years in the mines prior to becoming an inspector. Mr. Knight has worked in the subject mine for over 12 years and has been a safety committeeman for 7 years. They certainly are able to recognize a dangerous roof condition. The record does not indicate that Respondent's representatives made any test of the roof. I find that the area of the roof near the clay vein was drummy and dangerous.

5. The clay vein was evident. Respondent was aware of it and had installed extra roof bolts and larger plates in the intersection involved in this proceeding. The excessive diagonal distance in the intersection was evident, and Respondent should have been aware of it. Respondent has frequently been cited for having excessive diagonal distance in intersections. There is no evidence that Respondent was aware of the slate flaking from the roof, but it should have been aware of it by visual observation of the area.

6. At the time of the inspection, the area was not being mined. Respondent was advancing the beltline. However, the area was a well travelled area. It is required to be inspected prior to each shift, and the section foreman normally passes the area frequently during each shift.

7. Respondent had experienced two unintentional roof falls during the development of this area--both involving clay seams.

8. Respondent abated the condition by setting four posts in the intersection, one next to the clay seam, and three on the opposite side. The condition was abated and the order terminated at 11:15 a.m.

#### ISSUES

1. Whether the violation of 30 C.F.R. § 75.220 was caused by Respondent's unwarrantable failure to comply with the safety standard?

2. What is the appropriate penalty for the violation?

#### CONCLUSIONS OF LAW

##### JURISDICTION-VIOLATION

Respondent is subject to the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

Respondent has conceded that the violation cited in the contested order occurred, and that it was significant and substantial.

##### UNWARRANTABLE FAILURE

The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997, 2004 (1987). The violation in Emery involved 4 roof bolts in a haulageway between crosscuts which had "popped" their bearing plates at least a week before the inspection. The Commission held that the failure of preshift or onshift examiners to detect and correct this condition was not such aggravated conduct in view of the extraordinary efforts by Emery to support the roof adequately. See also Quinland Coals, Inc., 10 FMSHRC 705 and The Helen Mining Company, 10 FMSHRC 1672 (1988).

In the instant case, Gateway was aware of the clay seam and the danger it created: additional roof bolts were installed. It was aware that two unintentional roof falls had occurred in the vicinity of other clay seams. It should have been aware of the fact that the intersection in question exceeded the size which under the roof control plan would require the setting of posts or cribs. It should have been aware of the drummy condition of the

roof in the vicinity of the clay seam. It should have been aware of the flaking of slate from the roof in the vicinity of the clay seam. The violation charged here was not, as in Emery, the failure to adequately support the roof. It was the failure to comply with a specific roof control plan requirement: when the total diagonal distance of an intersection exceeds 60 feet, posts or cribs shall be set. Gateway's failure to comply with this requirement was, in my judgment, aggravated conduct, constituting more than ordinary negligence. Gateway should have been aware of the excessive distance in the intersection. This fact, coupled with its awareness of the clay seam, the violations of the same roof control provision previously cited by MSHA, the previous roof falls, and the condition of the roof, made compliance with the requirement for setting posts imperative, even urgent. Failure to comply was aggravated conduct.

#### PENALTY

Gateway is a large mine producing in excess of one million tons of coal annually. It is the only mine operated by Respondent. Its history of prior violations is moderate. Its negligence with respect to the violation found is high. The violation was serious. Gateway exhibited good faith in promptly abating the violation. I conclude that \$1000 is an appropriate penalty for the violation considering the criteria in section 110(i) of the Act.

#### ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 3093167 issued May 3, 1988, is AFFIRMED including its findings that the violation was significant and substantial and was caused by Respondent's unwarrantable failure to comply with the standard.
2. Respondent shall within 30 days of the date of this order pay the sum of \$1000 as a civil penalty for the violation found.

  
James A. Broderick  
Administrative Law Judge

**Distribution:**

**Nanci A. Hoover, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)**

**Mr. David Saunders, Safety Director, Gateway Coal Co., Box 107, R.D. 2, Prosperity, PA 15329 (Certified Mail)**

**slk**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 14 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 88-54-M  
Petitioner : A.C. No. 40-02968-05501  
vs. :  
: Moltan Company Mine  
MOLTAN COMPANY, :  
Respondent :

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Edward J. Lucas, Plant Superintendent, Moltan  
Plant, Middleton, Tennessee, for the Respondent.

Before: Judge Maurer

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., hereinafter the "Act".

Pursuant to notice, a hearing on the merits was held on November 18, 1988, at Jackson, Tennessee.

The parties stipulated that the Moltan Company was subject to regulations promulgated under the authority of the Act and that this Commission and this Administrative Law Judge have jurisdiction to hear and decide this case. They further stipulated that payment of the penalties assessed in this proceeding would not adversely affect the operator's ability to continue in business.

Citation No. 3252463

This non-S&S citation charges the respondent with a violation of the mandatory standard found at 30 C.F.R. § 56.14001 1/ for the following alleged condition:

The head pulley pinch points are not guarded on the inclined belt conveyor that feeds the shuttle belt conveyor in the clay shed. The exposed pinch point is approximately one foot to the right of and approximately one foot to the rear of the conveyor's drive motor electrical disconnect cabinet. The pinch point is approximately forty-eight inches above the plane of the walkway alongside the conveyor.

MSHA Inspector Don B. Craig issued this citation on March 9, 1988, when he observed the above-referenced pinch point unguarded, even though he deemed it unlikely that any employee would get into this pinch point. He clarified this somewhat by stating that it may be contacted by a person, but it's just unlikely that it would be.

The plant superintendent, Mr. Lucas, testified that this inclined belt is only operated in daylight hours and in fair weather. This is significant in that because of the fair weather only operation and the way the transfer point is designed, there is no clay buildup on the belt which can be deposited on the head pulley which would in turn require cleaning of the head pulley.

Mr. Lucas further testified that in an effort to see what position a man would have to get into in order to reach that pinch point, he found that a man would have to either reach in and back behind his back with his right arm, or use his left hand and reach in through and around a corner through the structure to get to the pinch point itself---but he would have to squat down to do it.

On cross-examination, Mr. Lucas reiterated that in the seven years he has been at the plant, this head pulley has never required cleaning. Further, any maintenance that would be required on the head pulley would require that the unit be shut down and locked out. He flatly stated that there would be no maintenance that you could perform on the head pulley with it in operation.

1/ 30 C.F.R. § 56.14001 provides as follows:

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

In summary, Mr. Lucas acknowledges that this pinch point was not guarded with a "guard", but was guarded nonetheless by its location. He contends that there was no violation due to the fact that it could not reasonably be contacted by accident or inadvertence. I agree and this citation will be vacated.

Citation No. 3252464

This non-S&S citation charges the respondent with a violation of the mandatory standard found at 30 C.F.R. § 56.20003(a) 2/ for the following alleged condition:

The walkway alongside the shuttle conveyor in the clay shed building is cluttered with channel iron, angle iron, wood boards, bars, grease containers and clay spillage. This condition is a slip and fall hazard to employees using the walkway.

Inspector Craig issued this citation on March 9, 1988, when he observed clutter in the walkway alongside the shuttle conveyor in the clay shed. This clutter consisted of angle iron, wood, grease containers, etc., and was in the opinion of the inspector a slip and fall hazard. This walkway was the only access to that belt and was the only walkway alongside the belt conveyor.

Mr. Lucas testified that the clutter was the result of maintenance personnel who had been working in the area failing to clean-up after recent repairs. He admits, however, that the materials were on the walkway. He disagrees that they constituted a tripping hazard or a violation.

I don't have any trouble finding that a "walkway" is synonymous with the "passageway" cited in the pertinent section of the regulations and that the condition observed by the inspector on this occasion is a violation of that regulation. Therefore, Citation No. 3252464 will be affirmed and a civil penalty of \$20 assessed, as proposed by the Secretary.

Citation No. 3252465

This non-S&S citation charges the respondent with a violation of the mandatory standard found at 30 C.F.R. § 56.12030 3/ for the following alleged condition:

2/ 30 C.F.R. § 56.20003(a) provides as follows:

At all mining operations -- (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

3/ 30 C.F.R. § 56.12030 provides as follows:

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

The 480 volt, 3 phase Cutler-Hammer starter cabinet for the primary clay shredder has a defective operating handle safety mechanism. The defective mechanism allows the cabinet doors to be opened while the starter is energized and the operating handle is in the on position. Reportedly this cabinet is never entered by anyone except an electrician.

Inspector Craig issued this citation on March 9, 1988, when he found that the safety handle on this cabinet did not trip the power when the cabinet door was opened, as it was designed to do. The regulation requires that when a potentially dangerous condition is found, it shall be corrected before the equipment is energized. In the opinion of the inspector, the inoperative safety device had the potential to make the cabinet dangerous and that is why he wrote the citation.

The inspector spoke to both the superintendent and the plant engineer to satisfy himself that the cabinet was entered by electricians only, but what he specifically was citing here was the fact that the cabinet could be opened by anyone without it being de-energized.

I find that this malfunctioning latch should have been found by the operator and repaired and the failure of the respondent to do so constitutes a violation of the cited regulation. Before the inspector left the property on March 11, the safety mechanism was repaired and tested and found to be functioning normally. This meant that the cabinet could not be opened unless the operating handle was placed in the off position, de-energizing the cabinet. Citation No. 3252465 will be affirmed and a civil penalty of \$20 assessed, as proposed by the Secretary.

Citation No. 3252468

This non-S&S citation charges the respondent with a violation of the mandatory standard found at 30 C.F.R. § 56.4603(b) 4/ for the following alleged condition:

4/ 30 C.F.R. § 56.4603(b) provides as follows:

"To prevent accidental release of gases from hoses and torches attached to oxygen and acetylene cylinders or to manifold systems, cylinder or manifold system valves shall be closed when

\* \* \* \* \*

(b) The torch and hoses are left unattended."

The oxygen cylinder containing approximately 800 pounds pressure and the acetylene cylinder containing approximately 50 pounds pressure was found unattended in the clay shed building. The cylinder valves were open and the hoses were spread out across the floor where maintenance personnel had been performing repairs before going to lunch.

Inspector Craig issued this citation on March 9, 1988, when he observed an oxygen cylinder and an acetylene cylinder with the pressure gauges, regulating gauges, valves and hoses hooked up to the cylinders with the cylinder valves in the open position and no one in attendance. The employees using this equipment had gone to lunch.

The respondent attempts to defend here by arguing that the front end loader operator was in the general area and he was, in effect, "attending" the cylinders. The inspector didn't think too much of this defense and neither do I. Just because he was in the same building with the cylinders does not equate to being in "attendance". Those employees who had been working with those cylinders were not in the area and the inspector did not observe any other employees in the immediate area that could conceivably be responsible for those cylinders. Accordingly, I find and conclude that the cited standard was indeed violated as alleged and Citation No. 3252468 will be affirmed. A civil penalty of \$20 will also be assessed, as proposed by the Secretary.

Citation No. 3252469

This non-S&S citation charges the respondent with a violation of the mandatory standard found at 30 C.F.R. § 56.11012 5/ for the following alleged condition:

Two sections of mid-rail are missing from the handrail on the number two mill scrubber fan platform. This condition could allow an employee to fall through the openings to the ground level which is approximately twenty feet below. The openings are approximately five feet long and approximately thirty-six inches high on each.

5/ 30 C.F.R. § 56.11012 provides as follows:

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

Inspector Craig issued this citation on March 9, 1988, when he found the midrails missing on the number 2 mill scrubber platform handrail. This left two openings, each approximately 30 inches high by 5 feet long on both sides of a corner post on this platform. In the opinion of the inspector, these openings were such that a person could have fallen through. The area is depicted on Respondent's Exhibit Nos. 4 and 5, photographs of the No. 2 mill fan work platform as the respondent calls it. The openings described were caused by the removal of a midrail for maintenance. There was a top rail and a toeboard in place at the time the citation was written, but the inspector believed that the openings were still such that an employee could have fallen through to the ground level, approximately twenty feet below.

The respondent contends that the area cited was not a travelway, but in fact, was a "work platform". I find this to be a matter of semantics; a distinction without a difference, and I conclude that the Secretary has met her burden of proof concerning this citation and violation. Accordingly, the citation will be affirmed and a civil penalty of \$20 assessed, as proposed by the Secretary.

Citation No. 3252470

This non-S&S citation charges the respondent with a violation of the mandatory safety standard found at 30 C.F.R. § 56.20003(a) for the following alleged condition:

The walkway at the number two mill scrubber platform is cluttered with angle iron, channel iron and grease containers. This condition is a trip and full hazard compounded by the fact that the ground level is approximately twenty feet below.

Inspector Craig issued this citation on March 9, 1988, when he observed angle iron, channel iron and grease containers laying on the walkway in the same area cited above for the missing midrail. In fact, the inspector testified that this angle iron was the missing midrail. It was also a slip, trip and fall hazard. This walkway was, as stated previously, approximately twenty feet above a concrete floor area. A slip, trip and fall through that opening would mean that a person could fall twenty feet to a concrete floor.

I find and conclude that the violation of the cited standard is established. Citation No. 3252470 will be affirmed and a civil penalty of \$20 assessed, as proposed by the Secretary.

Citation Nos. 3252472 and 3252474

These two non-S&S citations charge that the respondent violated the mandatory safety standard found at 30 C.F.R. § 56.11012 at two different locations at its facility. The citations are for all practical purposes identical except for their location. Citation No. 3252472 refers to the Number 2 mill building, while Citation No. 3252474 refers to the Number 1 mill building. The common allegation is that:

Two irregular shaped openings appear beside the walkway on the elevated platforms in the two mill buildings. One opening is between the stair step first handrail post and the structures diagonally installed brace member. This opening is in the shape of a triangle and is approximately thirty-six inches high and approximately thirty-six inches long. The opening to the right of the structure brace is also in the shape of a triangle and is approximately the same size. The openings are approximately twenty-five feet above the concrete floor below.

Inspector Craig issued these citations on March 9-10, 1988, when he found the two elevated walkways without a handrail, approximately twenty-five feet above a concrete floor. The area is depicted in photographs marked and received into evidence as Respondent's Exhibit Nos. 6 and 7.

It is clear from the pictures and the testimony that although there was no handrail or midrail installed at the time the citation was written, there was a connecting brace bisecting the opening at these locations which formed two triangles of open space with maximum dimensions of 36 inches on each side, tapering down to zero at the point of intersection with the walkway.

The plant superintendent agreed with the inspector that it was unlikely that anyone would fall through these openings. I agree, and although I believe the current installation is superior and safer than the one cited, I also believe the cited condition was not in violation of the standard. I find the bisecting brace was in substantial compliance with the mandatory standard and was a sufficient railing/barrier. Therefore, Citation Nos. 3252472 and 3252474 will be vacated.

Citation Nos. 3252475 and 3252476

These two non-S&S citations charge that the respondent violated the mandatory safety standard found at 30 C.F.R. § 56.14001 at two different pump installations at their facility. The citations are identical in all respects except No. 3252475 refers to the No. 1 or South water pump and No. 3252476 refers to the No. 2 or North water pump. The common allegation is that:

The shaft flanges containing bolt heads on each side of the rubber centered "Dodge" brand coupling between the motors and the water pumps are not provided with a guard. The coupling is approximately ten inches in diameter and the shaft center line is approximately twelve inches above the motor/pump mounting frame. Employees service this pump by removing the lubricant sight gauge and adding lubricant while the motor is in operation. While doing so, their hands are within approximately twelve inches of the moving parts.

Inspector Craig issued these citations on March 10, 1988, when he observed that the Dodge couplings between the motor and the pump shaft were not guarded on either the No. 1 or No. 2 water pump. He testified that there were bolt heads or cap screws projecting from the flanges on each side of the coupling that somebody could come into contact with and incur a disabling injury. He believed it was a significant and substantial violation because he thought it was reasonably likely to occur and if someone came into contact with this moving part, the injury resulting could be permanently disabling.

Mr. Lucas, on behalf of the operator, argues that the pump, motor and coupling were all purchased as a unit from a single manufacturer and it (the assembly) came from the manufacturer without a guard. Furthermore, he states that the Dodge coupling is one of the safest couplings made and it doesn't need a guard.

Mr. Lucas does not deny that the condition exists, but rather asserts that it has always been that way, a guard has not previously been required, the manufacturer makes it that way, it is a safe coupling and such a guard is not needed. However, with regard to the fact of violation, I credit the inspector's expertise on the issue of whether a guard would enhance the safety of this pump assembly.

Conversely, with regard to the special finding of "significant and substantial", I find in favor of the respondent that the likelihood of an injury resulting from this violation is so remote as to be "unlikely" as opposed to "reasonably likely". Therefore, Citation Nos. 3252475 and 3252476 will be affirmed as non-S&S citations only and a civil penalty of \$20 for each one assessed.

ORDER

1. Citation Nos. 3252463, 3252472 and 3252474  
ARE VACATED.
2. Citation Nos. 3252464, 3252465, 3252468,  
3252469, 3252470, 3252475 and 3252476  
ARE AFFIRMED.
3. The operator is ordered to pay a civil  
penalty of \$140 within 30 days of the date  
of this decision.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

G. Elaine Smith, Esq., U.S. Department of Labor, Office of the  
Solicitor, 2002 Richard Jones Road, Suite B-201, Nashville,  
TN 37215 (Certified Mail)

Mr. Edward J. Lucas, Plant Superintendent, Moltan Company, P.O.  
Drawer 9, Middleton, TN 38052 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 15 1989

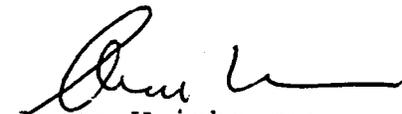
MIKE E. AMMERMAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 89-79-D
	:	
PEABODY COAL COMPANY,	:	MADI CD 88-19
Respondent	:	
	:	Camp No. 2 Mine
	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

On March 6, 1989, Complainant filed a statement indicating as follows: "I am writing this letter to inform you I wish to withdraw the 105c complaint. (Docket number Kent 89-79-D) that I filed against Peabody Coal Co. in order that this matter may be settled."

Accordingly, based on the Complainant's request, the Complaint is DISMISSED.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

Mr. Mike E. Ammerman, Route 3, Box 108, Sturgis, KY 42459  
(Certified Mail)

Eugene P. Schmittgens, Jr., Esq., Peabody Coal Company, 301 North Memorial Drive, P. O. Box 373, St. Louis, MO 63166 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 16 1989

TOMMY MEADE, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. VA 89-9-D  
NEW WORLD MINING COMPANY, : NORT CD 88-07  
Respondent :  
: No. 1 Strip Mine  
:

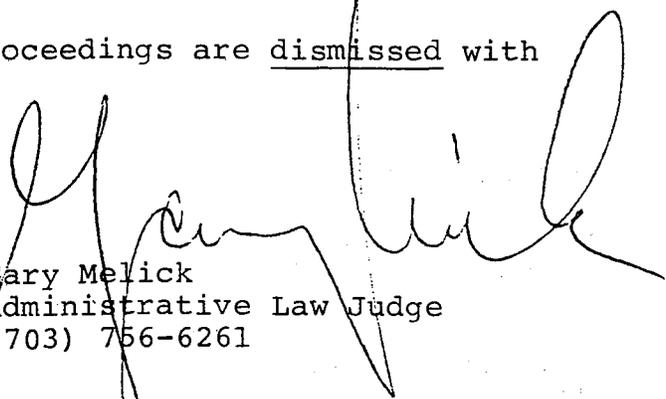
ORDER OF DISMISSAL

Before: Judge Melick

On March 2, 1989, an order was issued to the Complainant to show cause on or before March 10, 1989, why this case should not be dismissed for failure to comply with the Prehearing Order herein.

On March 9, 1989, the office of the attorney for the Complainant, Berlin Skeen, Esq., called advising this office that the Complainant did not wish to pursue this case. In addition, Complainant has failed to respond to the Show Cause Order.

Wherefore the captioned proceedings are dismissed with prejudice.

  
Gary Melick  
Administrative Law Judge  
(703) 756-6261

Distribution:

Joe H. Roberts, Esq., P.O. Box 1438, Wise, VA 24293  
(Certified Mail)

Berlin W. Skeen, Jr., Esq., Nottingham Avenue, P.O. Box 3139,  
Wise, VA 24293 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

MAR 16 1989

KENNETH A. McCOOL AND OTHERS, : COMPENSATION PROCEEDINGS  
Complainants :  
 : Docket No. CENT 87-71-C  
v. :  
 : No. 6 Mine  
O C & W COAL COMPANY, :  
Respondent :

DECISION

Appearances: No appearance was made for Complainants;  
John Stephenson, Minority Stockholder,  
O C & W Coal Company, Tulsa, Oklahoma,  
for the Respondent;

Before: Judge Morris

1. Complainant Kenneth A. McCool, appearing pro se, brought this action against respondent seeking compensation for himself and others 1/ pursuant to Section 111 of the Federal Mine Act, 30 U.S.C. § 801 et seq.

2. The file contains a copy of a voluntary petition under Chapter Eleven showing the debtor as "Oklahoma, Colorado and Wyoming Corporation." The petition shows a filing date of October 7, 1987, as Case No. 87-01159 in the United States Bankruptcy Court for the Eastern District of Oklahoma.

3. This compensation case was originally set for a hearing in Tulsa, Oklahoma on August 9, 1988. Complainant McCool and respondent were advised of said hearing by certified mail.

4. On August 9, 1988, no party appeared at the hearing (Transcript, August 9, 1988).

5. On August 11, 1988, the judge issued an order to show cause addressed to Complainant McCool.

6. By letter dated August 21, 1988, McCool stated he was working in Texas and he stated "(M)aybe we can get another time appointed."

7. After correspondence it was indicated an agreeable site for Complainant McCool would be Amarillo, Texas.

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1/ The "others" are identified only by name; the file does not contain any addresses for complainants other than McCool.

8. On September 21, 1988, a notice of hearing was issued setting the case in Amarillo, Texas. The parties were advised by certified mail.

9. Subsequently, after a conference call with representatives of the parties, it was agreed a more convenient hearing site would be Tulsa, Oklahoma. On November 28, 1988, the parties were advised by certified mail that the hearing in Amarillo, Texas was cancelled. Further, the same notice provided that the case was reset for February 14, 1989, in Tulsa, Oklahoma. A return receipt by U.S. Mail indicated McCool was served with the notice of hearing.

10. On February 14, 1989, Complainant Kenneth A. McCool failed to appear for the hearing. John Stephenson, Minority Stockholder, appeared for respondent (Transcript, February 14, 1989).

11. The judge has not been advised of any reason or excuse why Complainant McCool failed to appear at the second hearing.

In view of the foregoing I conclude that Complainant McCool does not intend to prosecute this case.

Accordingly, the case is dismissed.

  
John J. Morris  
Administrative Law Judge

Distribution:

Mr. Kenneth A. McCool, P.O. Box 95, Bokoshe, OK 74930  
(Certified Mail)

Mr. John Stephenson, O C & W Coal Company, 1603 South Boulder,  
Tulsa, Oklahoma 74106 (Certified Mail)

Mr. Charles Ashcraft, President, O C & W Coal Company,  
4 Pourtales, Colorado Springs, CO 80906 (Certified Mail)

/ot

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 17 1989**

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, (MSHA), : Docket No. KENT 88-194-D  
on behalf of : BARB CD 88-30  
RONALD D. ELLIOTT,, :  
Complainant : No. 5 Mine  
v. :  
STERLING ENERGY INC., :  
Respondent :

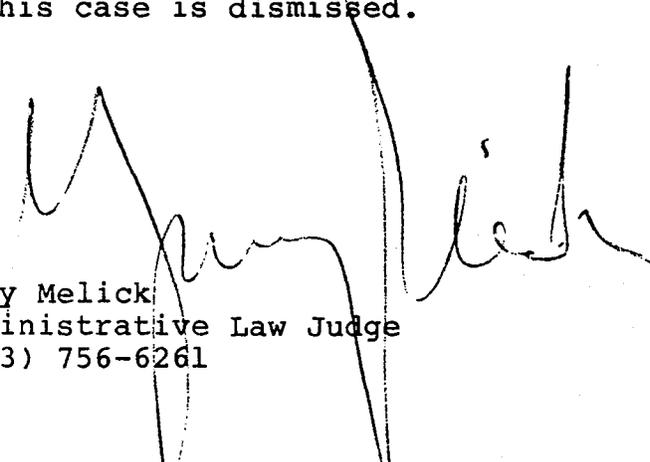
ORDER OF DISMISSAL

Appearances: W. F. Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee  
for Complainant;  
Kenneth Krushenski, Esq., 210 West Central  
Avenue, LaFollette, Tennessee for Respondent.

Before: Judge Melick

At hearings on March 15, 1989, the parties agreed upon a  
settlement. The complete terms of the settlement were filed  
at hearing and approved by the individual Complainant  
Ronald Elliott.

Under the circumstances this case is dismissed.

  
Gary Melick  
Administrative Law Judge  
(703) 756-6261

Distribution:

W. F. Taylor, Esq., Office of the Solicitor, U.S. Department  
of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN  
37215 (Certified Mail)

Kenneth Krushenski, Esq., 210 West Central Avenue, P. O. Box  
139, LaFollette, TN 37766 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

MAR 20 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 88-304-M  
Petitioner : A.C. No. 05-03985-05509  
: :  
v. : El Jay  
: :  
SKELTON INCORPORATED, :  
Respondent :

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner.

Before: Judge Lasher

This matter arises upon the filing of a proposal for penalty by the Secretary of Labor on September 30, 1988, seeking assessment of a \$20 penalty against Respondent for a violation of 30 C.F.R. Section 50.30, which standard provides:

"(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA form 7000-2 in accordance with the instructions and criteria in Section 50.30-1, et cetera.

(b) Each operator of a coal mine in which an individual worked during any day of a calendar quarter shall report coal production on Form 7000-2."

At the hearing in Denver, Colorado, on February 13, 1989, Petitioner, as above noted, was represented by counsel. Respondent, although receiving actual and legal notification thereof, did not appear at the hearing or notify the presiding Judge or counsel of Petitioner of its intent to be absent therefrom.

Petitioner submitted the testimony of Inspector Roy Trujillo, who issued the subject Citation No. 2640273 on June 6, 1988, and presented documentary evidence which established its position as to the occurrence of the violation and the mandatory penalty assessment criteria set forth in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 815 (1977). (Based thereon, this bench decision was issued at close of hearing).

Inspector Trujillo, a 15 year veteran with MSHA, testified that the subject El Jay Mine of Respondent was, to his knowledge, in operation at the time the citation was issued, and that after examining computer data on June 6, 1988, he determined that the required form had not been filed by Respondent. He then called Ruth Gray, Respondent's secretary, and advised her that he would have to issue a citation.

It appeared that the report in question ultimately arrived, but that the same arrived late. Since Section 50.30 requires the same to be filed within 15 days after the end of each calendar quarter, this constitutes the violation which is here found to have occurred.

Based on evidence of record, and disclosed on the face of the citation it is further found that Respondent is the operator of a mine located in San Miguel County, Colorado, with a history (Exhibit P-1) of six previous violations during the pertinent two-year period preceding June 6, 1988. Four of the total of thirteen prior violations committed by Respondent prior to 1986 were record keeping violations. The proposed penalty of \$20 is found appropriate and is here assessed on the basis that this violation is determined to involve only a "low" degree of negligence, is not serious, and since there is no contention that Respondent did not proceed in good faith to promptly abate the same upon notification thereof.

The burden of establishing inability to pay a penalty at a given monetary level is on the Respondent mine operator in a penalty proceeding and there is no such evidence in this record. In any event, in view of the token penalty of \$20 being assessed here and opinion evidence from the Inspector that such a penalty would not jeopardize Respondent's ability to continue in business, it is concluded that there is no economic basis for reduction of the penalty sought.

ORDER

Citation No. 2640273 is affirmed in all respects.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days the sum of \$20 as and for a civil penalty herein.

*Michael A. Lasher, Jr.*  
Michael A. Lasher, Jr.  
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

MAR 20 1989

CYPRUS EMPIRE CORPORATION, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. WEST 88-250-R  
Order No. 3225480; 5/24/88  
SECRETARY OF LABOR, : Docket No. WEST 88-251-R  
MINE SAFETY AND HEALTH : Citation No. 3225501; 5/24/88  
ADMINISTRATION (MSHA), :  
Respondent : Eagle No. 5 Mine  
Mine ID 05-01370  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 88-331  
Petitioner : A.C. No. 05-01370-03578  
v. : Eagle No. 5 Mine  
CYPRUS EMPIRE CORPORATION, :  
Respondent :

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,  
Pittsburgh, Pennsylvania,  
for Contestant/Respondent;  
Edward H. Fitch, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent/Petitioner.

Before: Judge Morris

These consolidated cases are before me 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 an order and a citation charging Cyprus Empire Corporation ("Empire"), with a violation of the regulatory standard published at 30 C.F.R. § 75.202(a).<sup>1/</sup>

After notice to the parties a hearing on the merits was held on November 21, 1988, in Denver, Colorado. The parties filed post-trial briefs.

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<sup>1/</sup> WEST 88-250-R is the contest of Order No. 3225480; WEST 88-151-R is the contest of the subsequent Citation No. 3225501; WEST 88-331 is the civil penalty proceeding.

Summary of the Cases

Order No. 3225480, contested in WEST 88-250-R, states as follows:

Loose, broken roof was present in the tailgate entry of the 16 East longwall working section. The loose, broken roof (coal roof) was 6 feet in length and 6 feet 10 inches in width. The affected area was between two wooden cribs installed within 3 feet of the tailgate face shield (No. 126). A violation of 75.202(b). <sup>2/</sup> The operator had already endangered off the tailgate entry at the longwall face.

Citation No. 3225501, contested in WEST 88-251, states as follows:

Loose, broken roof was present in the tailgate entry of the 16 East longwall section. The coal roof between two previously erected wooden cribs was broken and some roof had fallen to the mine floor. Two previously installed resin grouted rods with bearing plates were protruding downward about 16 inches. The roof coal had fallen from around the rods and the bearing plates. The affected area was 6 feet in length and 6 feet 10 inches in width.

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2/ At the commencement of the hearing, on the Secretary's motion, the order and citation were amended to allege a violation of 30 C.F.R. § 75.202(a).

Subparts (a) and (b) of § 75.202 provide as follows:

§ 75.202 Protection from falls of roof, face and ribs.

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

(b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

This condition was one of the factors that contributed to the issuance of Imminent Danger Order No. 3225480 dated 05-24-88; therefore, no abatement time was set. 3/

### Stipulation

The parties have stipulated as follows:

One: the Eagle No. 5 Mine is owned and operated by Cyprus Empire Corporation.

Two: the Administrative Law Judge has jurisdiction over these proceedings; further, Cyprus Empire Corporation and the Eagle No. 5 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

Three: the annual production of the Eagle No. 5 Mine is approximately 1.7 million tons. The operator is properly described as a large operator.

Four: the authenticity of the exhibits offered in hearing is stipulated, but no stipulation is made as to the facts asserted in such exhibits.

Five: the subject order and citations, modifications thereto and terminations were properly served by a duly authorized representative of the Secretary of Labor upon agents of Cyprus Empire Corporation on the date or dates stated therein, and may be admitted into evidence for the purposes of establishing their issuance and not the truthfulness or relevancy of any statement asserted therein.

Six: the history of violations in the 24 months preceding the subject order and citation was 74 violations in 320 inspector days. The parties have agreed that this constitutes a good history.

Seven: the imposition of a penalty by the Administrative Law Judge will not affect Cyprus Empire Corporation's ability to continue in business. Cyprus Empire does not stipulate to the appropriateness of the imposition of any penalty.

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3/ Order No. 3225480 and Citation No. 3225501 recite slightly different facts but it is agreed that both refer to the identical area.

Eight: the longwall retreated 16 and one half feet between the time the area was dangered off on May 20th and May 24th, the date the inspector issued his order.

Nine: Various dates are involved in these cases. The pertinent week days are as follows:

May 20, a Friday  
May 21, a Saturday  
May 22, a Sunday  
May 23, a Monday  
May 24, a Tuesday

#### Summary of the Evidence

This litigation arose when Phillip R. Gibson, an MSHA inspector experienced in mining, inspected Empire's Eagle No. 5 coal mine. At the tailgate end of the 16 East longwall section he observed a yellow ribbon in place as a danger sign. As he closely observed the nearby roof he saw the condition he later described in the order and citation.

He saw the roof was broken and unstable. Coal had fallen from it around two previously installed resin-grouted roof bolts. The bearing plates were about 16" below the roof line.

There were two wooden cribs along the longwall face. The space between the two wooden cribs measured 6' x 6'10". The cribs had been placed about 3' from the last face shield (Shield No. 126) (Tr. 30, 31).

The travelway along the face of the 16 East longwall would exit into this exposed area (Tr. 30-32; Joint Ex. 1).

Even though the operator had placed a danger tape across the walkway, the inspector nevertheless felt the condition involved imminent danger and a violation of the regulation.

The roof appeared to be so unstable that it could fall at any time. If it fell it could cause serious physical harm, or even death (Tr. 30-32; Ex. G-9).

The area cited by the inspector is an area where miners would normally work or travel. But no miner was observed entering the dangered off area (Tr. 33).

The inspector went to the surface, called his superior and discussed what action should be taken. They concurred that the best approach would be to allow mining to continue. He then modified the citation so as to permit the mining cycle to resume. The mining progressed beyond the loose broken roof to where wooden cribs contained the roof (Ex. G-2, G-3).

Empire's witnesses Pobirk, Moss and Cario testified for the operator.

ROBERT POBIRK, in charge of the shift, is experienced in mining and longwall equipment (Tr. 80-87).

On May 20th the foreman learned the mine roof had deteriorated. Upon observing the condition he was not worried about a roof fall; rather, he was concerned about heaving in the area. He considered his options and added two cribs, a roof jack and two timbers. However, he did not support the 6' x 6'10" area in the roof because it was heaving and rolling. He felt it was too dangerous to support the 6' x 6'10" area. He would only support that area "as a last resort" (Tr. 88, 99).

Pobirk also instructed that the area be dangered off between the walkway and the bad top. In addition, the fire boss put danger tape considerably outby the hazard.

The bad top extended on the tailgate side and it was within eight to ten feet of the shield.

On the 24th (Tuesday) the roof and 6' x 6'10" area was not in immediate danger of collapsing. On the 25th (Wednesday) the supplemental supports were adequate.

CHARLES J. MOSS, section foreman and a person experienced in mining, was responsible for installing the cribbing.

On May 20th Moss observed the cracks and squeezing and also saw that extra supports were necessary. He did not support the 6' x 6'10" area because it would expose a miner to the hazardous condition of the roof. Moss put up the yellow ribbon from rail to rail on the walkway.

In the longwall section over Monday (May 23) and Tuesday (May 24) the roof got worse but Moss didn't recall any roof falling down. On Tuesday night Moss scaled down the area.

In Moss' view the best way to handle the 6' x 6'10" area was to mine past it. This was done.

SAMUEL L. CARIO, Empire's longwall coordinator, inspected the longwall on the 20th and concurred in the views of Pobirk and Moss. Further, the operator's roof supports in this area exceeded the requirements of its roof control plan (Tr. 119-123).

#### Discussion

These cases involve longwall mining issues with a focus on the 107(a) withdrawal order and the roof control regulations. Specifically, the issues concern whether the withdrawal order was appropriate; further, was the order based on a condition of imminent danger and, finally, did the Secretary establish a violation of 30 C.F.R. § 75.202(a).

The withdrawal order in contest here was issued by virtue of Section 107(a), 30 U.S.C. § 817(a), which provides as follows:

If, upon any inspection or investigation of a coal or other mine, which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The term "imminent danger" is found in the Federal Coal Mine Health and Safety Act of 1969 and amendments to the 1977 Act. The term means:

(T)he existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. 30 U.S.C. § 802(j).

Historically, the first tests for determining whether an imminent danger exists were set forth in Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), and Eastern Associated Coal Corp., 2 IBMA 128, 80 I.D. 400 (1973), aff'd, Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals et al, 491 F.2d 277 (4th Cir. 1974). In Eastern the Board of Mine Operations Appeals, formerly a division of the Interior Department's Office of Hearings and Appeals, herein "BMOA", held that:

... an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area before the dangerous condition is eliminated; thus, the dangerous condition cannot be divorced from the normal work activity.  
2 IBMA at 129.

In Freeman the BMOA elaborated on its decision in Eastern and held that the word "reasonably" as used in the definition of imminent danger necessarily means that the test of imminence is objective and that the inspector's subjective opinion is not necessarily to be taken at face value. The Board also gave this test of "imminent danger":

... would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. (Emphasis added)  
2 IBMA at 212.

The United States Court of Appeals for the 7th Circuit in Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (1974), while quoting BMOA's definition of "imminent danger," went on to add its own:

An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one. (Emphasis added)  
504 F.2d at 745.

The Commission, in Pittsburg & Midway Coal Mining Company v. Secretary of Labor, 2 FMSHRC 787 (1980), also set a course for approaching imminent danger questions:

... we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. (Emphasis added)  
2 FMSHRC at 788.

In the enactment of the 1977 Act, the Senate Committee on Human Resources stated as follows:

The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time.

It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. S. Rep. No. 95-181, 95th Cong., 1st Sess. \_\_\_\_\_ (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

The facts in this case establish MSHA Inspector Gibson observed that a 6' x 6'10" area of the roof was broken and unstable; coal had fallen from two roof bolts (Tr. 30). The roof in this area was slanted downward and fractured. Any size piece of coal could fall out of the area. <sup>4/</sup> The bad roof was between two ribs and two roof bolts (Tr. 45).

The inspector expressed the credible opinion that the roof condition was imminently dangerous if a miner was exposed to it (Tr. 31).

Empire's witnesses did not fully embrace the inspector's opinion concerning imminent danger but their actions do. When Pobirk, the foreman, observed the roof on the 20th (four days before the inspector) <sup>5/</sup> he was concerned about the heaving. He then installed two cribs together with roof jacks and two timbers (Tr. 88-90). He also had the area between the walkway and the bad top dangered off with tape (Tr. 92). Pobirk also concluded no additional support should be put in the 6' x 6'10" area because that area was heaving. It was too hazardous to support the area (Tr. 94, 99).

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<sup>4/</sup> On Friday, May 20th, a different portion of the roof collapsed and the tailgate of the longwall was impassible (Tr. 37, 46, 47; Ex. G-6, G-7). However, the Solicitor disavows that these cases involve a blocked tailgate as prohibited in § 75.215 (Tr. 24, 25).

<sup>5/</sup> The inspector at one time indicated the 6' x 6'10" area of the roof could have been supported on the 20th but not when he issued his order four days later. However, no evidence supports that contention and I reject it. On the 20th I conclude the roof was as described by witness Pobirk.

As provided by the Mine Act and the case law, the expectancy of death or serious injury to a miner is necessary to support a condition of imminent danger. Such an expectancy existed here: Inspector Gibson testified the longwall was operating normally (Tr. 33). In addition, under normal circumstances, the tailgate end of the longwall would allow a miner to come directly off of the longwall into the return entry. In addition, as Inspector Gibson testified, the danger ribbon neither supports the roof nor takes it down (Tr. 35).

The Solicitor admits that no miner walked under the area of the bad roof and no one went through the area while it was endangered off (Tr. 11, 12). However, actual exposure to a miner to the hazardous condition is not required to find that a condition of imminent danger exists.

Empire contends that § 75.202(a) limits its scope to "areas where persons work or travel." Therefore, the order must be vacated because entry into the area was prohibited by the installation of the danger tape. I disagree. The purpose of a 107(a) order is not only to cause the withdrawal of miners, but to insure that they remain out of the affected area until the condition is corrected. Further, it is clear that there were miners in the vicinity of the defective roof. The Valley Camp Coal Company, 1 IBMA 243, 248 (1972); Rio Algom Corporation, 2 FMSHRC 187 (1980).

Empire further argues its interpretation of the regulation is correct, otherwise a violation of the standard would exist every time roof is exposed and not immediately supported. Specifically, Empire cites 30 C.F.R. § 75.208 and 30 C.F.R. § 75.222(e) to support its position that the regulations contemplate the existence of unsupported roof.

I concur the regulations contemplate the existence of unsupported roof. However, such unsupported roof cannot be located where a miner could come directly off the longwall into the return entry which is the situation here.

In support of its view Empire cites Beth Energy, Inc., 10 FMSHRC 804, 808 (1988) (Melick, J); Cambridge Mining Corporation, 1 FMSHRC 987 (1979) (Commission), and Helen Mining Co., 6 FMSHRC 529 (1984) (Koutras, J).

The cases relied on by Empire are not inapposite the views expressed herein. In Beth Energy Judge Melick found that a mine examiner traveled a weaving course between three entries to avoid the bad roof.

In Cambridge the Commission affirmed a violation of 30 C.F.R. § 75.200. Cambridge does not control the factual situation here. As the Commission noted the operator "had made the decision to have the men work in another entry until this [roof support] was done", 1 FMSHRC at 987.

Helen Mining is not controlling. Judge Koutras observed the pertinent prohibition of the regulation was that "no person shall proceed beyond the last permanent support unless adequate temporary support is provided," 6 FMSHRC at 567. In short, Judge Koutras' decision involved a regulation that was similar to the present § 75.202(b). The Secretary's evidence in the instant case does not support a violation of § 75.202(b). In short, subpart (a) is broader in scope than (b) as it encompasses hazardous areas which might endanger miners in the immediate vicinity.

The final principal issue concerns whether Empire violated the roof control regulation, 30 C.F.R. § 75.202(a).

The present regulation was adopted January 27, 1988. The regulation, in its relevant part, provides that where hazards exist the "roof ... shall be supported or otherwise controlled ...."

Historically, it appears that taking down loose roof by barring it down constitutes a form of control as contemplated by the current regulation. In this case section foreman Charles Moss scaled down the area on Tuesday night. His scaling down efforts were done from the end of the walkway (Tr. 112). However, I am unable to conclude that Moss' efforts at scaling down the roof constituted compliance with the regulations. Specifically, Moss' attempt was on Tuesday night and it is not established if his activities were before or after the MSHA order was issued. Further, there is no evidence in the record as to what, if anything, the scaling down effort accomplished. Scaling down could not constitute compliance unless it was effective. The key ingredient of effectiveness is not shown in this case.

Finally, in construing § 75.202(a), what interpretation should be placed on the words that the roof must be "supported or otherwise controlled."

The Secretary argues that "otherwise controlled" is alternative language to "supported" and must constitute some form of physical restraint of the roof (Brief 11, 12). On the other hand Empire argues that barring down, the installation of yellow danger tape and continued mining beyond the defective roof constituted "control" within the meaning of § 75.202(a).

In considering these issues I conclude that compliance with § 75.202(a) can be accomplished in several ways. Initially, as the regulation provides, the area can be supported. In the alternative, the area may be barred down. The alternative of barring down a defective area is contained in the statute and it has been a control historically used. If support and barring down are not effective (the situation here) then the regulation requires effective control. I agree with the Secretary's view that some form of physical restraint of the defective area is required.

There is no evidence in the instant case whether the long-wall equipment itself constituted an effective form of physical restraint of the defective roof and thus was a "control" within the meaning of § 75.202(a).

Empire further objects to the Secretary's amendment of her order and citation so as to allege a violation of § 75.202(a) in lieu of § 75.202(b). Empire observes that the citation was issued on May 24, 1988. A month before the hearing the Solicitor verbally advised Empire's counsel he was considering asking leave to allege a violation of Section 75.202(a) (Tr. 12, 13). The modification was accomplished the morning of the hearing (Tr. 10, 11).

Empire's objections are without merit. Only the legal theory was changed, not the facts as alleged by the Secretary. Further, I agree with Empire that it cannot readily argue that the modification resulted in surprise (Tr. 13). In the absence of surprise, I reaffirm the ruling made at the hearing.

The cases cited by Empire in opposing the Secretary's amendment are not inapposite the views expressed herein.

A ruling concerning amendments to the pleadings is largely discretionary. See Rule 15(a), Fed. R. Civ. P.

For the foregoing reasons the imminent danger order and the citation should be affirmed.

#### Civil Penalty

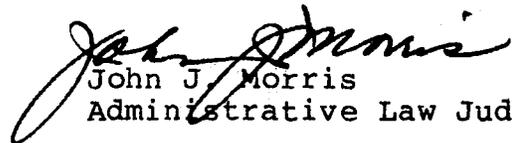
The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, 30 U.S.C. 820(i).

The stipulation indicates the operator has a favorable history of prior violations; further, the proposed penalty is appropriate since it will not affect the ability of this large operator to continue in business. The gravity of the violation is high since death or serious injury could occur if a miner was struck by the defective roof. The Secretary overestimated the operator's negligence but I conclude it was low since the area was dangered off and no miners entered the area. The operator is to be credited with statutory good faith in abating the order even though it was by continuing the mining cycle. On balance, a civil penalty of \$200 is appropriate.

For the foregoing reasons, I enter the following:

ORDER

1. In WEST 88-250-R: the contest of Order No. 3225480 is dismissed.
2. In WEST 88-251-R: the contest of Citation No. 3225501 is dismissed.
3. In WEST 88-331 Citation No. 3225501 is affirmed and a civil penalty of \$200 is assessed.

  
John J. Morris  
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
COLONNADE CENTER  
ROOM 280, 1244 SPEER BOULEVARD  
DENVER, CO 80204

MAR 20 1989

RANDY G. DAVIS, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. WEST 89-21-DM  
 :  
 : MD 88-38  
PHELPS DODGE CORPORATION, :  
Respondent :

ORDER OF DISMISSAL

Before: Judge Morris

1. On October 21, 1988, Complainant Randy G. Davis filed his complaint of discrimination herein.

2. With his complaint he filed a note reading, in part, "We are in the process of looking for an attorney, we will supplement this appeal in the near future."

3. In January 1989 complainant, in a telephone call, told the judge that he desired to drop his case against respondent. The judge directed complainant to confirm his request in writing. No such written request was filed.

4. On February 6, 1989, the judge issued an order to show cause directing complainant to write to the judge and indicate whether he desired to pursue his claim. Further, the order indicated that if the judge received no correspondence he would dismiss the case.

5. The above order was served on complainant by certified mail and complainant has failed to comply with the order.

For the foregoing reasons, the complaint of discrimination filed herein is dismissed.

  
John J. Morris  
Administrative Law Judge

Distribution:

Mr. Randy G. Davis, 123 Verbena, Morenci, AZ 85540 (Certified Mail)

G. Starr Rounds, Esq., Linda H. Miles, Esq., Evans, Kitchel & Jenckes, P.C., 2600 North Central Avenue, Phoenix, AZ 85004-3099 (Certified Mail)

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 20 1989

ARNOLD SHARP, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 88-165-D  
: MSHA Case No. PIKE CD 88-10  
BIG ELK CREEK COAL COMPANY, :  
Respondent : No. 5 Surface Mine

DECISION

Appearances: Arnold Sharp, Bulan, Kentucky, pro se, for the  
Complainant;  
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs,  
Louisville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a pro se discrimination complaint filed by Mr. Sharp on July 18, 1988, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. In a statement executed by Mr. Sharp on April 13, 1988, on an MSHA complaint form, he made the following allegation of discrimination:

On 4-4-88, I told Harlan Couch, Foreman, Night Shift, that I would be off from work on 4-11-88 to be in court in Lexington. I again reminded him on 4-9-88. He said it would be fine. On 4-12-88, an inspector wrote 15 violations on the mine. I was told I would have to prove I was in court on 4-11-88 or I would be fired. I feel I am being harassed. I request that the Foreman stop harassing me.

The Secretary of Labor, Mine Safety and Health Administration (MSHA), conducted an investigation of Mr. Sharp's complaint, and by letter dated July 8, 1988, advised Mr. Sharp that on the basis of the information gathered during the course of its investigation, MSHA concluded that a violation of section 105(c) of the Act had not incurred. Mr. Sharp was

advised of his right to pursue his claim further with the Commission, and his pro se complaint was received and docketed by the Commission on July 18, 1988.

The respondent filed an answer to the complaint denying that it had discriminated against Mr. Sharp, and it takes the position that any personnel actions taken against Mr. Sharp were for reasons unrelated to any protected safety activities on his part. A hearing was convened in Pikeville, Kentucky, on January 4, 1989, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this case. I have also considered all oral arguments and representations made by the parties on the record during the course of the hearing.

### Issues

The issues in this case are (1) whether or not Mr. Sharp's section foreman Harlan Couch harassed Mr. Sharp by requesting him to produce an excuse for a day's absence from his job, (2) whether or not Mr. Couch's request for such an excuse was motivated by his alleged belief that Mr. Sharp had called an MSHA inspector and informed him about certain violative mine conditions which resulted in an inspection and issuance of citations against the respondent; and (3) whether the respondent's decision to treat Mr. Sharp's absence from work as an unexcused absence was made to retaliate against him for past discrimination claims filed against the respondent, or to harass him or otherwise retaliate against him for calling the inspector.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### Complainant's Testimony and Evidence

Arnold Sharp, the complainant, stated that on April 4, 1988, he informed Mr. Harlan Couch, his day shift foreman, that he had to be off work of April 11, 1988, because he had to be in court in Lexington on that day, and that Mr. Couch "said fine." Upon his return to work after his court appearance, Mr. Sharp stated that Mr. Couch informed him that he had

to provide proof showing where he was at on April 11, "because the federal had been there and wrote them up citations, and I was the one report them" (Tr. 16). Mr. Sharp asserted that he was harassed because the mine inspector was at the mine and "wrote them up." He also stated that "everytime a mine inspector comes on the job I'm harassed" (Tr. 17).

Mr. Sharp explained that his court appearance was in connection with a consumer complaint that he had filed with the Better Business Bureau against an automobile dealer who had failed to make certain repairs to an automobile which he had purchased. Mr. Sharp produced copies of certain documents concerning his complaint, and one of the documents is a Notice of Hearing dated April 5, 1988, from the Better Business Bureau of Central Kentucky, Inc., informing Mr. Sharp that he was to appear before an arbitrator at 11:00 a.m., April 11, 1988, in Lexington, Kentucky, when the complaint would be heard. Mr. Sharp confirmed that he appeared at the hearing on April 11, and did not go to work. He also stated that he had also reminded Mr. Couch on April 9, that he would be in court and not at work, and that Mr. Couch responded that "it would be fine."

Mr. Sharp stated that Mr. Mike Cornett took over as boss of the day shift on April 11, the day that he was off, and that when he returned to work on the evening of April 12, Mr. Couch accused him of calling the MSHA inspectors and reporting the conditions which resulted in the issuance of citations that same day. Mr. Sharp stated that Mr. Couch told him that "we think you called" the inspectors, and informed him that unless he could produce proof as to his whereabouts on April 11, he would be fired (Tr. 20).

Mr. Sharp admitted that when Mr. Couch asked him to produce some proof that he was in court, he did not show him the documents from the Better Business Bureau because Mr. Couch did not "ask him right." Mr. Sharp stated that "if he had asked right, I would have gladly showed him" (Tr. 21). Mr. Sharp stated that instead of informing him that he needed to see proof of his court appearance, Mr. Couch accused him of calling in the mine inspectors, and that is why he did not show the documents to Mr. Couch (Tr. 21-22). Mr. Sharp confirmed that he subsequently contacted the inspectors and obtained copies of their "mine inspection reports" in order to prove that they issued citations on the day he was allegedly harassed by Mr. Couch. Mr. Sharp confirmed that he had not called in the inspectors or reported any violations, but that he did tell Mr. Couch that this was the case. When asked why he failed to tell Mr. Couch that he had not reported anything

to the inspectors, Mr. Sharp responded "It doesn't do any good to tell him. I didn't see any use in it, I was being accused of it" (Tr. 22-23).

Mr. Sharp confirmed that his allegation of harassment is based on the fact that Mr. Couch threatened to fire him if he could not produce proof that he was in court, and the fact that the respondent resents him since he prevailed in a prior discrimination case. Mr. Sharp stated that he is harassed every day when he is at work, and he produced a notebook with his notes which he claimed were examples of instances of harassment. He also produced "a piece of a rain suit" which he claims he was required to wear while steam-cleaning equipment, and he cited this as an example of harassment by the respondent (Tr. 25-27).

Mr. Sharp produced a notebook containing personal notes which he kept, and he offered them to the court as "examples" of acts of harassment by the respondent. He was given an opportunity to review the material and to cite any instances of harassment which may be documented by these materials (Tr. 28-30).

Mr. Sharp produced some notes dated April 30, and May 4, 1988, dealing with the failure of two individuals named "Allan" and "John" to produce doctor's excuses for days they missed work. Mr. Sharp implied that they were not asked to provide proof to Mr. Couch that they missed work, and that he is the only person who is required to show such proof (Tr. 31).

Mr. Sharp produced a copy of a memorandum dated July 26, 1988, addressed to him, which stated "This is to serve notice that you have been warned verbally about stopping work and leaving the job site prior to the end of the shift on July 20 and 26, 1988." Mr. Sharp denied that he left work early on these days, and he asserted that the respondent attempted to get other miners to sign and make false statements against him to support management's claim that he left work early (Tr. 32-33).

Mr. Sharp confirmed that he was not laid off or disciplined in any way by Mr. Couch as a result of taking off work for his consumer complaint appearance (Tr. 35, 38-40). Mr. Sharp asserted that the respondent has attempted to have miners make false statements against him because "they are trying to set me up to fire me, because they resent me because I beat them in the first case. They started from day one when I went on the job from Judge Fauver's decision. It started

the first day I started to work . . . and the notes tell everything they have done" (Tr. 35).

When asked why he had not given his notebook and notes to MSHA when he filed his complaint on April 13, 1988, Mr. Sharp responded as follows (Tr. 41).

JUDGE KOUTRAS: And another question I would have is, why wasn't all this given to MSHA when you went there on April the 13th to file this complaint? Why didn't you give the complaint examiner that pile of paper there?

THE WITNESS: It was give to him.

JUDGE KOUTRAS: And what did they do?

THE WITNESS: Nothing, because MSHA is in with the company.

JUDGE KOUTRAS: Oh, okay. The judge is in with the company, and MSHA is in with the company, right?

THE WITNESS: I ain't saying the judge is.

JUDGE KOUTRAS: Well, okay.

THE WITNESS: But I'm saying MSHA is.

JUDGE KOUTRAS: MSHA is.

THE WITNESS: They won't take nothing against Big Elk Creek Coal.

JUDGE KOUTRAS: Okay.

THE WITNESS: I don't care what kind of proof you give them. I've given them all kinds of proof.

On cross-examination, Mr. Sharp stated that his conversation with Mr. Couch on April 12, 1988, concerning his consumer complaint appearance took place on the mine parking lot prior to his starting work at 6:00 p.m., and he described the conversation which took place as follows (Tr. 52-53):

Q. Was there anybody close enough to overhear what was being said?

A. No, but he told it on the C.B.

Q. Okay, I'll get to that in a minute.

Now, if you would, tell me as best you can recall it word for word what you said, and what Harlan Couch said on that occasion on April the 12th.

A. I come up, I parked, got out of my truck, started walking over towards the other men. He stopped, said where's the proof that you were in court yesterday.

I said, what do you mean. I told you I was out. He said, well, the mine inspector has been up there, and we think you reported us. We got wrote up. You've got to show proof where you was at or you're fired on account of it.

Q. What did you say?

A. Didn't say nothing, except I didn't bring proof because if they'd have asked it right --

Q. Now, what did you say? Did you say anything in response to his statement.

A. No, not that I can recall.

Q. Was that the end of the conversation?

A. As far as I can recall, yes.

Q. Did Mr. Couch say anything else?

A. Not that I can recall.

Mr. Sharp denied that he ever told Mr. Couch that he would be off work on April 11, 1988, because he was going to court against the respondent in Lexington. He also denied that he ever told Mr. Couch that he was going to court in Lexington to sue the respondent for \$150,000 or "a lot of money" (Tr. 54-55).

In response to further questions, Mr. Sharp stated that some of his fellow miners, including Mr. Ronnie Ball, told him

that they heard Mr. Couch state on the C.B. radio at the mine that he was going to require him to prove that he was in court on April 11, or he would fire him "because they got wrote up" (Tr. 58). Mr. Sharp confirmed that he did not personally hear Mr. Couch make the statements over the C.B. (Tr. 57).

Mr. Sharp confirmed that he simply told Mr. Couch that he had to be in court in Lexington, and did not further explain what the proceeding was all about (Tr. 78).

NOTE: Prior to the convening of the hearing on the record, Mr. Sharp advised me that he had subpoenaed mine employee Ronnie Ball to appear on his behalf, and he furnished me with a copy of the subpoena certifying that he served the subpoena on Mr. Ball. However, Mr. Ball failed to appear.

After confirming that Mr. Ball was in fact employed by the respondent, respondent's counsel was requested to ascertain Mr. Ball's whereabouts and to instruct him to come to the hearing. Respondent's counsel advised me that he requested respondent's management representative, who was present in the courtroom, to locate Mr. Ball and to instruct him to come to the hearing. Mr. Ball was subsequently contacted, and instructed to come to the hearing (Tr. 86). The hearing proceeded, and the parties were informed that Mr. Ball would be given an opportunity to testify when he arrived (Tr. 6).

Mr. Sharp asserted that Mr. Ball would testify that he was "set up and fired" by the respondent because he would not sign a false statement against him, and that he has turned this information over to "the Federal," and that Mr. Ball will be subpoenaed to appear in Federal court with regard to this matter. Mr. Sharp stated that he has turned the matter over to the U.S. Attorney in Lexington for prosecution (Tr. 37).

Mr. Sharp stated further that Mr. Ball would also testify that he heard Mr. Couch state over the mine C.B. radio that he would fire Mr. Sharp if he did not provide proof that he was in court (Tr. 38).

Mr. Sharp later confirmed that he served the subpoena on Mr. Ball on December 31, 1988, on the mine parking lot (Tr. 56-57).

Mr. Sharp also testified that the respondent attempted to have Mr. Ball and another miner, Stanley Boggs, sign false statements that he (Sharp) had threatened to kill Harlan Couch, Mike Cornett, and M. C. Couch, and that Mr. Ball was subsequently fired for damaging a truck. Mr. Sharp stated

that after Mr. Ball was fired, he discussed the matter with him, and Mr. Sharp advised him to file a complaint with MSHA. Mr. Ball filed a complaint on June 23, 1988, but he was subsequently reinstated by the respondent after signing a release and dropping his complaint (Tr. 58-60).

Ronnie Ball was called to testify, and he denied that he was served with any subpoena appear at the hearing (Tr. 111-114).

Mr. Ball denied that he ever heard Mr. Harlan Couch announce over the mine C.B. radio that he would fire Mr. Sharp if he could not prove that he was in court on April 11, 1988 (Tr. 115-116). Mr. Ball stated further that he has no information or evidence with respect to any alleged acts of harassment by the respondent against Mr. Sharp, and that he has never discussed with Mr. Sharp any of the complaints he has initiated against the respondent (Tr. 118).

Mr. Ball confirmed that he was discharged by the respondent in June, 1988, after a rim on a truck he was driving was broken, and that his dismissal was for "a few days until they found out that I was not the cause of the rim being busted." He confirmed that he had filed a discrimination complaint with MSHA several days after his discharge, but later agreed to dismiss the complaint after he returned to work. Mr. Ball stated that during MSHA's investigation of his complaint, the MSHA special investigator who interviewed him stated in his report that he had been fired because "I did not go for the company against Arnold Sharp and that was a false statement, so, I dropped charges" (Tr. 118-122).

#### Respondent's Testimony and Evidence

Harlan Couch, respondent's night shift foreman, testified that he has worked for the respondent for approximately 1 year, and that in April of 1988, 19 miners worked on his shift. Mr. Couch stated that on April 4, 1988, Mr. Sharp requested to be off work on April 11, 1988, because "he had to go to court with the company. I told him okay." Mr. Couch stated that he assumed Mr. Sharp had some action against the company. Mr. Sharp asked him again on April 11, 1988, and Mr. Couch told him "fine." At that time, Mr. Couch stated that he asked Mr. Sharp if his court appearance was still with the company, and that Mr. Sharp replied "yes, concerning \$150,000 worth" and Mr. Couch replied "that's okay" (Tr. 64-66).

Mr. Couch confirmed that Mr. Sharp was off work on April 11, 1988, and that when he (Couch) asked day shift foreman Mike Cornett about the trial, Mr. Cornett advised him that the respondent was not in court with Mr. Sharp. Upon Mr. Sharp's return to work on April 12, Mr. Couch stated that he discussed the matter with Mr. Sharp, and he explained the conversation which took place as follows (Tr. 67-68):

A. Yeah. I asked him for an excuse because he had been in court. I told him it was a company policy to have an excuse. I also told him he'd lied to me, because he said he was going to court with the company, and he'd never done it.

Q. What did he say, anything?

A. He said, I don't have to have no excuse. That's what he said.

Q. Did you ever take any action against him because of that?

A. No, sir.

Q. Did you ever threaten to discharge him because he didn't have an excuse?

A. No, sir, I didn't.

Q. Did you talk on the C.B. radio about the situation?

A. No, sir.

Q. Did you mention anything about a federal mine inspection to Mr. Sharp?

A. No. They get them on the day shift ever now and then and they pull a night shift on me. That's the ones I would know about.

Q. And you testified you didn't know about this mine inspection?

A. No, sir. He comes on days. That's Mike Cornett's department on days. He takes care of all of that.

Q. Mike Cornett takes care of federal mine inspections that happen on day shift?

A. That's right.

Q. As far as you know, have you treated Mr. Sharp in this situation any differently than you would anybody else?

A. No, sir.

During his cross-examination of Mr. Couch, Mr. Sharp produced copies of an MSHA computer print-out showing the respondent's history of civil penalty assessments. This document reflects civil penalty assessments for 14 alleged violations which are included in 14 section 104(a) citations served on the respondent on April 12, 1988. Mr. Sharp also produced copies of the citations which reflect that they were served on Foreman Mike Cornett on the morning of April 12, 1988 (Tr. 70-71).

Mr. Couch denied any knowledge of the violations, and he denied that he accused Mr. Sharp of calling in the MSHA inspector who issued the citations, or that he had any knowledge that Mr. Sharp had in fact called in the inspector (Tr. 74-75). Mr. Couch also denied any knowledge of making any announcement over the C.B. radio that he would fire Mr. Sharp if he failed to present an excuse for his court appearance (Tr. 77).

Mr. Couch denied that he ever accused Mr. Sharp of calling in MSHA, or that he ever threatened to fire him for not having an excuse for his court appearance. Mr. Couch stated that he advised Mr. Sharp that it was company policy to have an excuse for such an absence, but that Mr. Sharp never presented such an excuse. Although Mr. Sharp violated company policy for not presenting an excuse for his absence from work, Mr. Couch stated that he did not discipline Mr. Sharp because he purportedly filed a complaint with MSHA. Mr. Couch stated further that he simply reported the matter to M. C. Couch, the mine superintendent, and according to mine policy, any decision to discipline Mr. Sharp was within the discretion of the respondent (Tr. 81-84).

Mr. Couch stated that the company policy concerning excuses for absences was in effect before he came to work for the respondent, and that Mr. Sharp was aware of it (Tr. 84-85).

In response to further questions, Mr. Couch confirmed that he believed Mr. Sharp's failure to produce an excuse for

his absence from work on April 11, 1988, was an unexcused absence (Tr. 86). Mr. Couch reiterated that Mr. Sharp had lied to him when he said that he would be in court against the respondent, and that he simply turned the matter over to the mine superintendent. Mr. Couch reviewed the documents offered by Mr. Sharp with respect to his consumer complaint, and he confirmed that he had never previously seen the documents, and that Mr. Sharp never showed them to him or offered any explanation as to why he was not at work other than his statement that he was in court (Tr. 87-88).

Marcus Couch, Jr., mine surface superintendent, stated that he has worked for the respondent for approximately 5 years and that he is not related to Harlan Couch. Mr. Couch confirmed that he was aware of an MSHA inspection which took place on April 12, 1988, during which citations were issued, and he characterized the inspection as a routine quarterly mine inspection. He denied that mine management was "upset" with Mr. Sharp because of this inspection, and he also denied blaming Mr. Sharp for the inspection (Tr. 90-92).

Mr. Couch confirmed that no adverse action was taken against Mr. Sharp for his unexcused absence of April 11, 1988, and that he did not treat the absence as unexcused because Mr. Sharp has previously filed complaints with MSHA's, or as a means of retaliating against him (Tr. 93).

On cross-examination, Mr. Couch stated that Mr. Sharp has not been treated any differently from other employees with respect to the respondent's excused or unexcused leave policy. Mr. Couch stated further that employees other than Mr. Sharp have been "written up" for unexcused absences and absenteeism, and that company records will attest to this fact (Tr. 94-95). Mr. Couch explained the procedures for documenting such absences, and stated that other employees have in fact been cited for unexcused absences. He confirmed that after two unexcused absences, an employee is subject to discharge (Tr. 97).

Mr. Couch was shown copies of the documents produced by Mr. Sharp with respect to his consumer complaint and appearance at the hearing, and he stated that "this is the first time I've ever saw this" (Tr. 104). Mr. Couch confirmed that he would probably have accepted these documents as an excuse for Mr. Sharp's absence of April 11, 1988, but since Mr. Sharp did not present them or document his absence, his absence from work was treated as unexcused (Tr. 105).

## Findings and Conclusions

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 (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, \_\_\_ U.S. \_\_\_, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the

[protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

### Protected Activity

Section 105(c)(1) prohibits a mine operator from discharging a miner, or otherwise discriminating against him for making safety complaints to MSHA or to mine management. That section also prohibits a mine operator from discriminating against a miner, or otherwise interfering with any of his statutory rights under the Act. A miner is protected against any retaliatory action by the respondent because of any safety complaints he may have made to MSHA or to mine management. He is also protected against retaliation for exercising his section 103(g) right to request an inspection of the mine by MSHA when he has reasonable grounds to believe that violations exist in the mine.

Further, I believe that section 105(c)(1) is broad enough to protect a miner against retaliation for threatening to contact or inform mine enforcement agencies about perceived safety violations in the mine.

#### Mr. Sharp's Complaint

In the case at hand, Mr. Sharp alleges that his section foreman Harlan Couch harassed him on April 12, 1988, when he asked him to produce some proof of his absence from work on that day. Mr. Sharp claims that Mr. Couch had previously given him permission to be away from work, and that the request to provide proof of his whereabouts was motivated by Mr. Couch's belief that he had called an MSHA inspector to the mine for an inspection which resulted in several citations being issued to the respondent.

#### The MSHA Inspection of April 12, 1988

The evidence establishes that the inspection in question took place during the day shift, and that the citations were issued to the day shift foreman and not to Mr. Harlan Couch. Mr. Couch denied any knowledge of the inspection when he confronted Mr. Sharp about his absence on April 12, and superintendent Marcus Couch confirmed that he considered the inspection to be routine and that he was not upset about it. He also confirmed that he had no reason to believe that Mr. Sharp initiated the inspection, and he denied that the inspection had anything to do with his decision to treat Mr. Sharp's absence as unexcused. Insofar as foreman Harlan Couch is concerned, the record establishes that he took no action against Mr. Sharp for the unexcused absence, and simply informed Marcus Couch that Mr. Sharp could not produce any excuse for his purported court appearance.

Given the history of ongoing confrontations between Mr. Sharp and mine management, and Mr. Sharp's proclivity for filing discrimination claims, I have serious doubts that foreman Harlan Couch would directly accuse Mr. Sharp of calling in an MSHA inspector or openly announce over the mine C.B. radio that he would fire Mr. Sharp for causing the inspection which resulted in the issuance of the citations. With regard to this purported announcement, Mr. Sharp admitted that he did not personally hear Mr. Couch make the statement, and his own witness Ronnie Ball denied that he ever heard Mr. Couch make the statement. Further, Mr. Sharp produced no other witnesses or any evidence to support his allegation in this regard.

In view of the foregoing, I find no credible or probative evidence to support any conclusion that the MSHA inspection of April 12, played any role, either directly or indirectly, in the respondent's decision to treat Mr. Sharp's absence of April 11, 1988, as an unexcused absence. Further, even assuming that the respondent suspected Mr. Sharp of initiating the inspection, I find no credible or probative evidence to establish that the respondent's consideration of Mr. Sharp's absence as unexcused was made to retaliate against Mr. Sharp or to harass him for any protected activities.

### The Respondent's Leave Policy

The respondent produced credible probative evidence with respect to its established absenteeism policy, including the requirement that employees must document or present excuses for all unexcused absences. Foreman Harlan Couch testified that the policy requiring employees to produce proof for an absence from work which may be considered unexcused has been in effect for over a year, that it was in effect when he came to work for the respondent, and that Mr. Sharp was aware of the policy. Mr. Sharp did not deny that he was aware of the policy, but claimed that it is not enforced against anyone but him.

Superintendent Marcus Couch explained the respondent's leave policy, including the procedures requiring employees to document all absences which are considered as unexcused, and he confirmed that after two unexcused absences, an employee may be discharged. Mr. Couch also confirmed that other employees have been cited for unexcused absences, and that he treated Mr. Sharp no differently from other employees in concluding that his absence on April 11, was unexcused. Indeed, Mr. Couch confirmed that had Mr. Sharp produced or shown him the documents which he had in his possession with respect to his consumer complaint, he would have considered Mr. Sharp's absence as excused leave. However, since Mr. Sharp failed or refused to present this documentation, or to further explain his court appearance, and since he was unaware of these documents and saw them for the first time at the hearing, Mr. Couch confirmed that he considered Mr. Sharp's absence as unexcused and contrary to the respondent's leave policy.

Having viewed Harlan and Marcus Couch during the course of the hearing, I find them to be credible witnesses and I find no credible evidence to support any conclusion of any disparate treatment of Mr. Sharp. Mr. Sharp's contentions that the respondent's leave and absenteeism policy was not enforced against other employees, and that he was singled out

by the respondent, are rejected as unsupported by any credible or probative evidence. Although Mr. Sharp mentioned the names of several employees who he contended were allowed to miss work without excuses, he failed to produce any witnesses or other credible evidence to support his claim.

#### Mr. Sharp's Absence of April 11, 1988

The evidence establishes that on two occasions prior to April 11, Mr. Sharp informed his foreman Harlan Couch that he would be off work that day because he had to be "in court" in Lexington, and that Mr. Couch gave his tacit approval to Mr. Sharp when he replied "it would be fine." Mr. Couch testified that Mr. Sharp advised him that his court appearance was in connection with a legal action he filed against the respondent, and Mr. Sharp denied that he made such a statement to Mr. Couch.

Harlan Couch further testified that when he learned on April 12, upon Mr. Sharp's return to work, that he had not been in Court in a case against the respondent, he concluded that Mr. Sharp had lied to him and he asked him to produce proof that he was in fact in court on April 11. When Mr. Sharp could not produce such proof, Mr. Couch reported the matter to mine superintendent Marcus Couch, and took no further action against Mr. Sharp.

Mr. Sharp testified that his "court" appearance was in fact an appearance before the Better Business Bureau in Lexington in connection with a consumer complaint that he had filed against an automobile dealer who had failed to make certain repairs to an automobile which Mr. Sharp had purchased. Mr. Sharp produced copies of several documents concerning his appearance, including a copy of a notice of hearing dated April 5, 1988, instructing him to appear before an arbitrator for a hearing on his complaint, and a copy of the arbitrator's decision in Mr. Sharp's favor.

Harlan and Marcus Couch both testified that they were unaware of the fact that Mr. Sharp's "court" appearance was in connection with his consumer complaint, and they confirmed that they had not previously seen the documentation produced by Mr. Sharp for the first time during his discrimination hearing of January 4, 1989. They also confirmed that Mr. Sharp had not previously offered any explanation or details concerning his purported "court" appearance. I find Harlan and Marcus Couch's testimony to be credible, and it is corroborated by

Mr. Sharp himself who confirmed that he did not show the documents to Harlan Couch or offer any further explanation as to his whereabouts on April 11.

The evidence establishes that Mr. Sharp's purported "court" appearance on April 11, was not in fact an appearance before a court of record, but rather, an appearance before an arbitrator in connection with a consumer complaint. I take note of the fact that the Better Business Bureau notice of hearing received by Mr. Sharp informing him to appear at the hearing on April 11, is dated April 5, a day after Mr. Sharp's first notification to Harlan Couch that he would be in Court on April 11. Although Mr. Sharp could not recall when he actually received notification of the hearing, at page 4 of his brief, he acknowledges that he was initially informed of the hearing by telephone on April 4.

It seems clear to me from the documentation produced by Mr. Sharp that he was in fact at the hearing in Lexington on April 11, in connection with his consumer complaint. It is also clear that Mr. Sharp had at least two opportunities to show the April 5 Notice of Hearing to Harlan Couch. One opportunity was on March 9, when Mr. Sharp had the notice of hearing in his possession and reminded Mr. Couch that he would be in "court." A second opportunity presented itself on April 12, when Mr. Sharp returned to work and was confronted by Mr. Couch who asked him for an explanation as to his purported "court" appearance.

Although Mr. Sharp may not have had any reason to show Harlan Couch the notice of hearing on April 9, when Mr. Couch informed him that his absence from work "would be fine," I find that Mr. Sharp's refusal on April 12, to show Mr. Couch the notice of hearing regarding his hearing appearance, or to otherwise offer an explanation to Mr. Couch was inexcusable. Given the respondent's leave and absenteeism policy, Mr. Couch's doubts concerning Mr. Sharp's appearance in court, valid or otherwise, and the fact that Mr. Couch was Mr. Sharp's supervisor, I believe that Mr. Couch was entitled to some explanation, and that Mr. Sharp's refusal to provide proof of his whereabouts placed him at risk of being charged with an unexcused absence. Mr. Sharp's unreasonable refusal to explain his whereabouts to Mr. Couch obviously triggered management's decision to treat the absence as unexcused.

I conclude that had Mr. Sharp shown Harlan Couch the hearing notice concerning his consumer complaint appearance,

Mr. Couch may not have had any legitimate reason for concluding that Mr. Sharp's absence from work was an unexcused absence. As a matter of fact, superintendent Marcus Couch, the individual who made the decision that Mr. Sharp's absence was unexcused, confirmed that had Mr. Sharp presented the documentation which he deliberately withheld and refused to supply, he would have treated Mr. Sharp's absence from work as excused.

In view of the foregoing, I conclude and find that Harlan Couch's request of Mr. Sharp for some proof of his asserted court appearance was a legitimate and reasonable request, notwithstanding his previous approval to Mr. Sharp, and that the inquiry by Mr. Couch was not made to harass Mr. Sharp or to otherwise retaliate against him for any protected activity. I also conclude and find that the only action taken by Harlan Couch against Mr. Sharp was to report the matter to superintendent Marcus Couch, and that Harlan Couch's reporting of the matter was a legitimate and reasonable exercise of his supervisory authority.

With regard to Marcus Couch's determination that Mr. Sharp's absence from work was unexcused, I conclude and find that given the fact that Mr. Sharp refused to provide an explanation which was readily in his possession and at his disposal, Mr. Couch's decision was a justifiable and reasonable exercise of his authority as the mine superintendent. I also conclude and find that Mr. Couch's determination was not made to harass Mr. Sharp or to otherwise retaliate against him for any protected activities.

I further conclude and find that Mr. Sharp has failed to present any credible or probative evidence to support his claim of discrimination and that he has failed to establish a prima facie case.

#### ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Sharp has failed to establish that the respondent has

discriminated against him or has otherwise harassed him or retaliated against him because of the exercise of any protected rights on his part. Accordingly, Mr. Sharp's complaint IS DISMISSED, and his claims for relief ARE DENIED.

  
George A. Koutras  
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

**MAR 21 1989**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 85-47  
Petitioner : A.C. No. 33-02929-03505  
v. :  
WILMOT MINING COMPANY, : North Mine  
Respondent :

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,  
U.S. Department of Labor, Cleveland OH, for  
Petitioner;

Thomas G. Eddy, Esq., Eddy & Osterman, Pittsburgh,  
PA, for Respondent.

Before: Judge Fauver

On May 17, 1988, the United States Court of Appeals for the Sixth Circuit reversed the assessment of a civil penalty of \$2,000 for a violation of 30 C.F.R. § 77.403a(a) and remanded the case to the Commission for reconsideration of the penalty. The Commission remanded the matter to me on June 20, 1988.

On July 5, 1988, the Court recalled its mandate pending the company's decision whether to file a petition for a writ of certiorari with the Supreme Court of the United States.

On January 25, 1989, the Court, through its Deputy Clerk, advised the Commission that no application has been made for writ of certiorari.

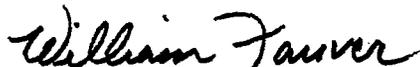
The matter is now before me on remand by the Commission for reconsideration of the penalty of \$2,000.

In my original decision, I found gross negligence by the company and imputed gross negligence of the deceased foreman, John D. Schrock, to the company. Since the court has reversed both findings, I will reassess the civil penalty assuming that the ROPS violation did not involve negligence by the company.

Considering all the criteria for a civil penalty under § 110 (i) of the Act, I find that a civil penalty of \$200 is appropriate for this violation.

ORDER

Respondent shall pay a civil penalty of \$200 within 30 days of this Decision.

  
William Fauver  
Administrative Law Judges

Distribution:

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Thomas G. Eddy, Esq., Eddy & Osterman, 2600 Grant Building, Pittsburgh, PA 15219 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

MAR 22 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 88-44-M  
Petitioner : A.C. No. 04-01937-05503  
 :  
v. : Docket No. WEST 88-45-M  
 : A.C. No. 04-01937-05502  
 :  
SANGER ROCK & SAND, : Docket No. WEST 88-116-M  
Respondent : A.C. No. 04-01937-05504  
 :  
 : Sanger Pit & Mill

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor,  
U.S. Department of Labor, San Francisco, California,  
for Petitioner;  
Mr. J. F. Baun, President, Sanger Rock and Sand,  
Sanger, California,  
pro se.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges the operator of Sanger Rock and Sand with 7 violations of mandatory safety standards found in 30 C.F.R., Part 56 and seeks civil penalty assessments for the alleged violations.

Respondent filed a timely appeal contesting the violations on grounds petitioner lacked jurisdiction and raising additional issues of due process of law, the existence of a violation, and the amount of the penalty as to certain citations.

Jurisdiction

At the outset of the hearing respondent orally renewed its previously filed written motion to dismiss the citations on the grounds of lack of jurisdiction. It is respondent's contention that Sanger Rock and Sand a mine located in Sanger, Fresno County, California is located outside of the territorial or geographical jurisdiction of the United States. Respondent argues that there is no such thing as a jurisdiction without geo-

graphical boundaries, that Federal jurisdiction is very limited and covers only mines and people located in Washington, D.C. or in a federal enclave within states, or in the territories or possessions. Respondent contends that all mines located in other areas, including Sanger Rock and Sand in Fresno County, California, is not subject to the jurisdiction of United States.

Respondent's contention is rejected. It is contrary to well established prevailing law.

Respondent's sand and gravel operation is a mine within the meaning of section 3(h)(1) of the Act. Its employees are engaged in extracting minerals, (rock and sand) from their natural deposits in nonliquid form and is therefore a "mine" as defined in section 3(h)(1) of the Act. Respondent admits that the products it excavates and mills are sold commercially within the State of California. In the performance of the work at the site inspected, respondent's employees handle, use, or otherwise work with machinery and equipment which is manufactured or purchased outside of the State of California. (Exhibit P-8).

Section 4 of the Act provides as follows:

"Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine, shall be subject to the provisions of this Act."

Congress by its use of the phrase "which affect commerce" in Section 4 of the Act, indicates its intent to exercise the full reach of its constitutional authority under the commerce clause. See Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB, 322 U.S. 643 (1944) Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

Even though no evidence was presented to show that the products respondent produced for sale in California to contractors was or was not used solely intrastate, nevertheless it may reasonably be inferred that even intrastate use of the gravel would have an affect upon the interstate market. The United States Supreme Court has ruled that a farmer growing wheat solely for his own needs affects interstate commerce. The Court stated that while the farmer's contribution to the demand for wheat may be insignificant by itself accumulative affect of all such production by others similarly situated is significant and has an impact on interstate commerce. Fry v. United States, 421 U.S. 542, 547 (1975).

In response to petitioner's request for admissions respondent admitted that its employees "handle, use, or otherwise work with machinery and equipment which is manufactured or produced outside the State of California." (Exhibit P-8). It has been held that the use of equipment that has been moved in interstate commerce "affects commerce". See United States v. Dye Construction Co., 510 F.2d, 78, 82 (1975).

The Mine Act as well as the Act's Legislative History clearly shows the Congressional determination that all mining related accidents and disease unduly burden and impede interstate commerce. Section 2(f) of the Act states:

[T]he disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce.

The United States Supreme Court in Donovan v. Dewey, 452 U.S. 594, 602 (1981) stated "As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statutes, congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant dilatorius effects on interstate commerce."

Respondent's operations clearly "affect commerce" within the meaning of section 4 of the Act. Congress is empowered under the commerce clause of the Federal Constitution to regulate even intrastate sales. See Wickard v. Filburn, 317 U.S. 111, 128, (1942). In a more recent case Andrus v. P-Burg Coal Co., Inc., 644 F.2d 1231, 1232 (1981). The Court reiterated that Congress is empowered to regulate a mining operation that produces coal solely for intrastate sale. The Court adopted the District Court's determination that intrastate producers compete with interstate producer, and that intrastate sales have a cumulative effect on commerce.

It is concluded that under prevailing law the operations of Sanger Rock & Sand are clearly subject to the provisions of the Act.

Citation No. 3074995

Citation No. 3074995 is a 104(a) citation alleging a violation of section 103(a) of the Act. The citation reads as follows:

J.F. Baun - Pres at this mine today interfered with, hindered and delay the inspection of the mine by refusing to cooperate when asked for records that the inspector was required to see. Upon further argument and calling the inspector a liar for the second time after being warned that he was interfering, hindering, and delaying the inspection, the inspection was stopped and this citation issued.

Section 103(a) of the Act in relevant part provides as follows:

"Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines.... In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided. ...[and the authorized representatives] shall have a right of entry to, upon, or through any ... mine."

On August 14, 1987, Inspector Alvarez accompanied by trainee Inspector Henze arrived at Sanger Rock & Sand to complete their inspection which they started the day before. The mine inspectors needed to look at certain company records which they are required by law to verify when making a mine inspection. When they asked the foreman for the records, he indicated that they were kept in the office of Mr. Baun, the President of Sanger Rock & Sand. The inspectors as required by law wanted to look at a copy of the mine's legal ID, the accident reporting forms, the quarterly employment reports, and the grounding continuity records. They introduced themselves to Mr. Baun and told him why they were there. They explained the kind of records they needed to look at and asked him for them. Mr. Baun questioned the authenticity of their ID cards. He stated that anyone could manufacture the ID cards. He declined to act on their suggestion that he call the MSHA District Office or their supervisor to verify their identity as MSHA inspectors. When the inspector asked for certain records Mr. Baun pulled out a manila type folder, held it up, thumbed through it, and said "well the information is ok" and started to put the folder back away in his cabinet. When the inspector told him "that won't do", that he needed to "verify the report", Mr. Baun threw the folder at him across the desk. The folder fell off the desk and fell in a pile on the floor. Inspector Alvarez had to reach down and pick up the file and put it back together to look at it. The latest report in the file was dated 1981.

MSHA Inspector Alvarez testified that half way through the inspection Mr. Baun got up and called him a "liar". The inspector then gave Mr. Baun this warning "We're here, we're being very polite to you and civil. But if you persist in

obstructing and hindering the inspection, I will be forced to call off the inspection, stop it, and I will cite you for hindering and interfering with the inspection." Mr. Baun seemed to calm down and sat down while the inspectors proceeded with the paperwork. However, when Inspector Alvarez told him that he was going to have to cite him for not having the required records on ground and continuity tests, Mr. Baun became quite upset and told Mr. Alvarez that he, "lied to him twice". Mr. Alvarez then told Mr. Baun "I have had enough. The inspection is over." The inspector told Mr. Baun "I am going to cite you for interfering and hindering the inspection." The inspectors then went to their car and left.

On cross examination Inspector Alvarez testified that the inspection was not completed at the time he felt compelled to stop the inspection. He still needed to have a closeout discussion on the citations issued since Mr. Baun had not gone with the inspector at any time during the inspection. The inspector needed to sit down and explain to Mr. Baun why the citations were issued and what his options were. The inspectors also wanted to make Mr. Baun aware of his 10 day conference rights.

Inspector Alvarez testified that when he returned to respondent's premises on the 25th of August for the abatement inspection Mr. Baun and his employees were cooperative.

I credit the testimony of Inspector Alvarez. Since Mr. Baun was quite upset and twice called the mine inspector a "liar", it was reasonable for the inspector to stop the inspection and leave Mr. Baun's office. MSHA inspectors are not required to subject themselves to harassment or verbal abuse in order to complete an inspection. See Secretary v. Calvin Black Enterprise, 7 FMSHRC 1151 (August 22, 1985), at 1157; U.S. Steel Corp., v. Secretary of Labor, 6 FMSHRC 1423 (June 26, 1984). The violation of section 103(a) of the Act was established. Citation No. 3074995 is affirmed.

With respect to assessing the appropriate penalty there is undisputed evidence that Mr. Baun with some delay did make available to the mine inspector before they left all the records the inspector requested that were available at the premises inspected. The evidence also established that Mr. Baun and his employees were cooperative when the inspectors returned 10 days after the inspection to check on abatement. Taking this into consideration, along with all the statutory criteria set forth in section 110(i) of the Act, I find upon independent review and evaluation that \$35.00 rather than the proposed \$200 is the appropriate penalty for this violation under the facts and circumstances established at the hearing.

## Due Process

Sanger Rock and Sand contests Citation Nos. 3074991, 3074992 and 3074993 on the ground that MSHA's review process under 30 C.F.R. § 100.6 was a denial of due process of law and was merely a " ... rubber stamp."

Under 30 C.F.R. § 100.6 all parties are allowed to request a conference with the appropriate MSHA District Manager to review Citations. Subsection (c) of this section provides that it is within the sole discretion of MSHA to grant a request for a conference and to determine the nature of the conference.

Mr. Baun, respondent's president, was given the conference allowed by the regulation. His testimony shows that he discussed the merits of the citation with the District Manager until Mr. Baun believed it was "fruitless".

Due process of law does not require the conference provided by 30 C.F.R. § 100.6. It is the hearing provided by the Federal Mine Safety and Health Review Commission under 29 C.F.R. § 2700 et seq. which is the due process of law hearing required by the U.S. Constitution. The Act and the Commission regulations provide for a hearing before an Administrative Law Judge and review by the Commission that is fully in accord with constitutional due process of law requirements. See National Industrial Coal Operators' Association v. Klepp, 423 U.S. 400, 96 Sup. Court KT. 809 (1976).

## Citation 3074810

This citation alleges a violation of 30 C.F.R. § 56.12032 as follows:

The junction box cover for the #2 primary feeder vibrator motor was missing. The junction box was located on the vibrator motor. Exposed wire nuts were in the junction box conducting 440 volts. The hazard was 8 ft above ground level.

30 C.F.R. § 56.12032 provides as follows:

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Jaime Alvarez, Federal Mine Safety and Health inspector testified that he inspected the junction box for the No. 2 primary feeder vibrator motor. The junction box did not have a cover. He observed 3 exposed wires that were capped off with a

screw type cap. The wires were insulated as they came into the junction box but were bare from a point where the insulation had been cut off to the edge of the cap that covered the ends of the bare wire.

On cross examination the safety inspector testified that the uncovered junction box was not protected by location. Although the junction box was 8 feet above the ground it was only 4 feet above the level on which he observed an employee working. The employee was a horizontal distance of 12 feet from the junction box and had easy access to the junction box. If an employee were to come in contact with the exposed wire it could easily result in a fatal electric shock.

Mr. Baun testified that an employee using a ladder could intentionally contact the wires in the junction box but could not do so accidentally.

Mr. Baun also reasoned that since the vibrators were not working there must have been no electrical power to the junction box and the switch that turns on the electricity to the junction box was located several hundred feet away.

Asked why the junction box had no cover, Mr. Baun replied that normally that junction box was covered. He suggested that the cover may have "vibrated off" or someone may have been working on the vibrator.

The evidence presented clearly established a 104(a) violation of 30 C.F.R. § 56.12032. The citation is affirmed.

The Secretary proposed a \$20 penalty which respondent did not contest. Upon independent review and evaluation I have considered the six statutory criteria set forth in section 110(i) of the Act and find that the \$20 proposed penalty is the appropriate penalty for this violation.

#### Citation 3074811

This citation alleges a violation of 30 C.F.R. § 56.12008 which mandates power wires and cables be insulated adequately where they pass into or out of electrical compartments.

Mr. Alvarez testified that he inspected an electric sump pump motor located at the bottom of the secondary tunnel. The power cable was not bushed where the cable passes into the motor housing. The pump was sitting adjacent to a sump. It was near water and the discharge hose was connected. The power line plug was unhooked but was laying approximately two inches from the

female receptacle for the power line. There was a hazard of the electric shock from coming into contact with shorted electricity. The wet area increased the hazard.

Mr. Baun testified that the pump was a centrifugal water pump not a submersible pump. He stated that the pump was inoperable and was out of service at the time of the inspection. He did not know how long the pump had been inoperable.

Mr. Baun placed in evidence an invoice showing that he purchased parts to repair that pump. The invoice was dated August 19, 1987, six days after the date the citation was issued.

I credit the testimony of MSHA Inspector Alvarez and find that respondent violated the provision of 30 C.F.R. § 56.12008 as set forth in the citation.

Respondent did not contest the amount of the Secretary's proposed \$20 penalty. Upon independent review and evaluation, taking into consideration the six statutory penalty criteria set forth in section 110(i) of the Act, I find the appropriate penalty for this violation is the \$20 penalty proposed by the Secretary.

Citation No. 3074991

This citation alleges a 104(a) violation of 30 C.F.R. § 56.15004. The citation states:

An employee was observed hitting the steel shell of the primary crusher bin with a double jack hammer (@ 10 lb) with a mushroom head on each end. This employee was not wearing any eye protection to prevent an injury to his eyes from a piece of metal from either the steel bin wall or the split steel heads on the double jack.

30 C.F.R. § 56.15004 provides as follows:

All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Inspector Alvarez testified he observed an employee beating on the outside of steel shell of the No. 1 bin with a double jack hammer. The employee was not using safety glasses or any other eye protection to prevent flying objects such as a fragment of the hammer hitting him in the eye. Both heads of the jack hammer were mushroomed, showing that the steel on both ends of the head

had been fragmented due to the constant use of the hammer to beat on the steel side of the bin. The employee was called down and instructed in the use of safety glasses. The employee went to his car and took out and put on a pair of safety glasses.

Mr. Baun testified that this was a new employee but there was no excuse for the employee not wearing his safety glasses. The employee had received the required safety training and had been given a copy of the company's safety rules which specifically require wearing safety glasses whenever there is a danger of getting anything in the eye.

The violation of Citation No. 3074991 was established as alleged in the citation. The citation is affirmed.

Respondent did not contest the amount of the Secretary's proposed \$58 penalty. Upon independent evaluation, taking into consideration the six statutory penalty criteria set forth in section 110(i) of the Act, I find the appropriate penalty is the \$58 penalty proposed by the Secretary.

Citation No. 3074992

This citation alleges a 104(a) violation of 30 C.F.R. § 56.14007. The citation states:

The side of the guard on the self cleaning tail pulley on the crusher rock belt was found not in proper maintenance in that the center of the guard had been torn off thus leaving an open hole in the guard through which an employees hand, arm or foot, leg could easily contact the moving machine parts.

Inspector Alvarez inspected the guard on the tail pulley of the crushed rock belt. It was a light expanded metal guard that was not properly maintained in that there was a hole in the middle of the expanded metal portion of the guard that was 8-9 inches in circumference. It appeared to the inspector that the hole had been cut in the guard or at least partly cut and partly torn. He testified that there was moving machinery approximately 3 or 4 inches from the opening in the guard.

Mr. Baun testified that no hole had been cut in the guard. He explained that motorized equipment that cleaned up near the guard had ripped the side of the guard with its bucket. A flap of expanded metal may have been bent back but no hole was intentionally cut.

The violation of 30 C.F.R. § 56.14007 for failure to properly maintain the tail pulley guard as alleged in Citation No. 3074992 was established. The citation is affirmed.

Respondent did not contest the amount of the Secretary's proposed \$20 penalty. Upon independent evaluation, taking into consideration the six statutory penalty criteria set forth in section 110(i) of the Act, I find the appropriate penalty is a \$20 penalty as proposed by the Secretary.

Citation No. 3074993

This citation alleges a 104(a) violation of 30 C.F.R. § 56.9022 which requires berms or guard on the outer bank of elevated roadways.

Citation No. 3074993 alleges:

The berm on the pit haulage road was not adequate (along large areas were nonexistent) to prevent one of the Euclid (R-35) 35 ton truck from going over the elevated edge of the road. The drop from the edge of the 30 ft wide road @ 40 ft down into the adjacent pond. The berms were in need of repair for a distance of @ 200 yards on which there was 2-way traffic.

Inspector Alvarez testified that he observed an elevated pit haulage road that was approximately 30 feet wide. The road extended from the plant to the pit area, a distance of approximately three-quarters of a mile. On the day of the inspection there were two 35 ton trucks using the road to haul the sand and gravel. The elevated portion of the road was approximately one-half mile long. The inspector stated that the area cited had no berm for approximately over 200 yards. The inspector measured a drop of 40 feet from the roadway down to an adjacent pond below.

Mr. Baun testified that there had been a berm along this haulage road for many years. He surmised that the blade operator had bladed off some of the berm to improve the haul road.

The violation of 30 C.F.R. § 56.9022 was established. The citation is affirmed.

The Secretary proposed a \$42 civil penalty. Upon independent review and evaluation taking into consideration the six criteria set forth in section 110(i) of the Act, I find the appropriate penalty is the \$42 proposed by the Secretary.

Citation No. 3074997

This is a 104(a) citation alleging a violation of 30 C.F.R. 56.9087 the citation reads as follows:

"A Komtsu-wa 600(C # -- 11 E-14) rubber tired front-end loader was observed backing up while loading trucks in the yard without an operable back-up alarm. There was no foot traffic in the area".

30 C.F.R. § 56.9087 provides as follows:

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

The undisputed evidence established that the front-end loader had an obstructed view to the rear and was fitted with an appropriate audible warning device which was working at the beginning of the morning shift. Inspector Alvarez observed the loader for a few minutes while it loaded two trucks. The back up alarm was not working. The loader was stopped and the driver questioned. The driver stated the back up alarm was working that morning when he began his work shift. He explained that sometimes the shock resulting from the bouncing of the loader causes the wires to the back up alarm to break. The driver stopped the work and took the loader to the shop where it was immediately repaired.

Respondent contends that since the loader's back up alarm was repaired immediately when discovered to be inoperative and this auditory warning device was working when the shift began, that there was no violation of § 56.9087. Respondent's contention must be rejected. The view to the rear of the front-end loader was obstructed and the backup alarm was not operative at the time of the inspection. The violation of 30 C.F.R. § 56.9087 was established. The citation is affirmed.

The respondent did not contest the Secretary's proposed \$20.00 penalty for this violation. Upon independent review and evaluation, taking into consideration the six statutory criteria set forth in section 110(i) of the Act and the fact there was no foot traffic in the area and the fact that the alarm was working at the beginning of the shift, I find that the Secretary's proposed \$20.00 is the appropriate penalty for this violation.

### Conclusion

On the basis of the foregoing findings and conclusions it is found that Sanger Rock and Sand is subject to the provisions of the Act, and that respondent has been accorded due process of law, and this Commission and its undersigned judge have juris-

diction to decide this matter. All the citations are affirmed. Taking into consideration the statutory criteria set forth in section 110(i) of the Act, I conclude that the following civil penalty assessments are reasonable and appropriate for the violations which have been established.

<u>Citation</u>	<u>Violation</u>	<u>Amount</u>
3074810	30 CFR § 56.12032	\$ 20.00
3074811	30 CFR § 56.12008	20.00
3074991	30 CFR § 56.15004	58.00
3074992	30 CFR § 56.14007	20.00
3074993	30 CFR § 56.9022	42.00
3074995	Act Sec. 103(a)	35.00
3074997	30 CFR § 56.9087	20.00
		<u>\$215.00</u>

ORDER

The respondent is directed to pay the civil penalties assessed in these proceedings within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.

  
August F. Cetti  
Administrative Law Judge

Distribution:

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Mr. J. F. Baun, President, Sanger Rock and Sand, 17125 E. Kings Canyon Road, Sanger, CA 93657 (Certified Mail)

/bls

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**MAR 22 1989**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-105
Petitioner	:	A.C. No. 11-02392-03757
v.	:	
	:	Mine No. 25
OLD BEN COAL COMPANY,	:	
Respondent	:	
OLD BEN COAL COMPANY,	:	CONTEST PROCEEDINGS
Respondent	:	
v.	:	Docket No. LAKE 88-81-R
	:	Order No. 3031512; 3/4/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 88-82-R
ADMINISTRATION (MSHA),	:	Citation No. 3031513, 3/4/88
Respondent	:	
	:	Mine No. 25
	:	Mine ID 11-02392

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,  
U.S. Department of Labor, for the Secretary of  
Labor;  
Bronius K. Taoras, Esq., for Old Ben Coal Company.

Before: Judge Fauver

The Secretary of Labor seeks a civil penalty for an alleged violation of a safety standard, under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The operator seeks to vacate the underlying citation and withdrawal order.

The cases were consolidated and called for hearing on February 14, 1989, at St. Louis, Missouri. After the government's mine inspector testified and documentary evidence was received, a discussion off the record led to a motion by the parties to approve a disposition of the cases 1) permitting the government to vacate the citation and withdrawal order and 2) dismissing all the cases.

This Decision confirms my bench decision granting the parties' motion, for the reasons stated on the record.

ORDER

WHEREFORE IT IS ORDERED that the Secretary of Labor may vacate the citation and withdrawal order and based upon such actions, the above three cases are DISMISSED.

*William Fauver*  
William Fauver  
Administrative Law Judge

Distribution:

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Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

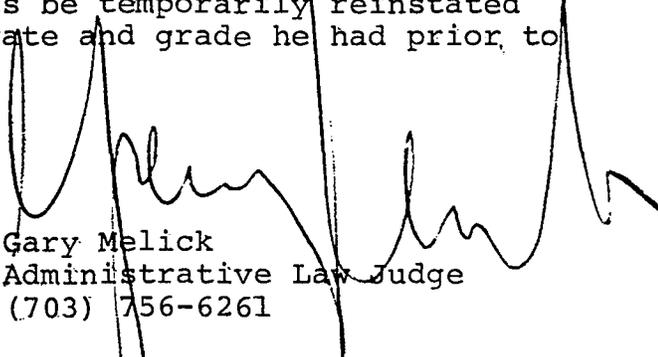
OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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FALLS CHURCH, VIRGINIA 22041

March 20, 1989

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. CENT 89-62-DM  
on behalf of :  
WILLIE C. JONES, : Case No. MD 89-21  
Applicant :  
v. :  
REYNOLDS METAL COMPANY : Mill I.E. No. 41-00906  
INCORPORATED, :  
Respondent :

ORDER OF TEMPORARY REINSTATEMENT

Pursuant to Commission Rule 44, 29 C.F.R. § 2700.44, and upon the Motion Withdrawing Request for Hearing, the Secretary's Application for Temporary Reinstatement on behalf of Willie C. Jones has been reviewed. Upon such review I have determined that the miner's complaint is not frivolously brought. Accordingly it is ORDERED that Willie C. Jones be temporarily reinstated immediately at the same wage rate and grade he had prior to termination.



Gary Melick  
Administrative Law Judge  
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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DENVER, CO 80204

MAR 24 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 87-72-M
Petitioner	:	A.C. No. 29-00174-05537
	:	
v.	:	Amax Mine & Mill
	:	
AMAX POTASH CORPORATION,	:	
Respondent	:	

DECISION

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

Before: Judge Lasher

This matter arises under Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of a penalty (\$700) for an alleged violation cited and described in a "Citation/Order" <sup>1/</sup> dated February 12, 1987, issued under the authority of Sections 104(a) and 107(a) of the Act, respectively, and which specifically charged Respondent (herein Amax) with an infraction of 30 C.F.R. 57.3200 (which appears in Subpart B of the codified regulations entitled "Ground Control", under the subparagraph pertaining to "Scaling and Support-Surface and Underground" and which itself is headed "Correction of Hazardous conditions"), to wit:

"Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impeded unauthorized entry."

1/ On line 12 of this form where the "type of action" is to be specified, the issuing Inspector designated his action to be an "Order" only --- the "Citation" box was left blank.

I note initially that 57.3200, in its essential language thrust, is nearly identical to the provision of 30 C.F.R. which may have been in effect in February, 1987, i.e. Section 57.3022, which provides: "Loose ground shall be taken down or adequately supported before any other work is done." Section 3022 has been the subject of specific analysis by this Commission in its landmark decision in Secretary v. Amax Chemical Company, 8 FMSHRC 1146 (1986). Any such question is found moot since it was not raised at hearing or in briefs.

The alleged violative conditions were described in Section 8 of the Withdrawal Order as follows:

Miners were observed in the 7 West Mains pillaring section making a scheduled belt-line and power move in preparation for further continuous mining of the next rows of pillars. After inspecting most of the area where miners were present it was determined by this inspector that an imminent danger condition existed by reason of (practice) a failure of the operator to take down or support much loose and drummy top as detected throughout this area "before" effecting the belt-line and power move that exposed this crew to the following (conditions):

A front-end loader was observed traveling under an area of loose and drummy top that measured about 7 feet wide by 4 to 5 feet long by 3 to 10 inches thick with visible separation and located in the southeast corner of the 180/6 intersection adjacent to the belt-line. A front-end loader and miners were observed traveling under an area of loose top located over the southeast corner of the 185/6 intersection and extending about 10 feet east along the belt-line. After this area was posted off with warning signs the same front-end loader again traveled under this loose and drummy top disregarding the signs.

An area of loose and drummy top was detected in the main travelway, 5 entry, along the east perimeter of a cut into the back at the 182 intersection. The loose top was about 4 to 5 feet long by about 10 to 12 inches thick and extended across the width of the intersection.

A loose and drummy area of top was detected in the 185 break near its intersection with 5 entry along the west rib line where a front-end loader had traveled.

Loose and drummy top was detected in the 186 break and 7 entry along the southwest corner of the pillar over the access to the operators cab of a parked shuttle car.

As other areas of loose and drummy top, unsupported, were found it became apparent that little effort had been put forth to secure bad top before using these travelways and accesses to effect the move. Consequently, miners were withdrawn from the area (180 break to the pillaring face along the 5, 6, & 7 entries).

On a five-level "gravity" scale provided on the face of the Order, the Order was marked "Reasonably Likely". The Order also indicated that the violation charged was "significant and substantial".

Amax contends that the violation charged did not occur, that the ground (roof) conditions described in the Order did not create a hazard, that the allegedly violative conditions did not constitute- or cause- an imminent danger, and that any alleged violation was not "significant and substantial". Respondent Amax also makes the contention that a drummy sound obtained by sounding the roof in its potash mine does not necessarily indicate a hazard, i.e., the danger of a roof fall.

Having considered the transcript of testimony, exhibits, and the briefs submitted by the parties, the position of Petitioner is found supported in the record and meritorious.

#### Discussion of Evidence and Findings.

On February 12, 1987, Lawrence R. Haynes, a Metal-Nonmetal Mine Inspector for MSHA, <sup>2/</sup> while conducting an inspection of the mine, issued the subject Citation/Order (T. 69). He was accompanied on this inspection by David Tackett, Respondent's safety supervisor, and Bruce Yates, an electrician (T. 257, 279).

2/ Amax attempted to impeach Inspector Haynes, who has been with MSHA 9 1/2 years, on the basis that he lacked sufficient experience in and knowledge of potash mines to determine and give opinion evidence as to the condition of the roof (ground) in the subject mine. Having carefully considered the record made in this connection, I conclude that the evidence of Inspector Haynes is not subject to rejection, nor should the weight to be given it be detracted from. The Inspector has approximately 16 years mining experience, and has inspected mines in the so-called Potash Basin wherein the subject mine is situated since the latter part of 1984. As the Inspector pointed out, his prior experience in other types of mining has some overall value in its contribution to this general core of information. Further, his opinion was supported by Supervisory Inspector Sidney Kirk who also testified and who has extensive background in potash mining and in the particular geographic area involved here.

On February 12, 1987, at point (area) "A" <sup>3/</sup> as depicted on Joint Exhibit 2, the conditions extant which led Inspector Haynes to conclude their was "loose" roof or ground, were described by him as follows:

"A. Well there were two things that came into play there. The first one, the most obvious, was seeing that section of roof hanging down diagonally away from the roof and hanging down far enough to where it was about three inches at its widest point, wide enough where I could have stuck my elbow in it. Secondly, by sounding the perimeter of that particular slab to gain an indication of the size of the loose material in the roof." (T. 74-75).

According to the Inspector the piece of roof that was hanging down was 3 inches thick at its narrowest and ran to 10 inches thick and the area at Point "A" which he cited was 4 feet by 5 feet in size (T. 75, 79, 192).

The areas in which Inspector Haynes determined there existed hazardous or loose ground were marked and are depicted on Joint Ex. 2, at Points marked thereon as "A", "B", "C", "D", and "E" (T. 70, 72-73, 319-321, 325).

The Inspector's description of Point "A" (referred to in Joint Ex. 2) in the Citation/Order has been set forth above. His descriptions of points "B" (T. 204), "C", "D", and "E" (T. 197) are set forth below:

B. "An area of loose and drummy top was detected in the main travelway, 5 entry, along the east perimeter of a cut into the back at the 182 intersection. The loose top was about 4 to 5 feet long by about 10 to 12 inches thick and extended across the width of the intersection."

C. "A loose and drummy area of top was detected in the 185 break near its intersection with 5 entry along the west rib line where a front-end loader had traveled."

D. "Loose and drummy top was detected in the 186 break and 7 entry along the southwest corner of the pillar over the access to the operator cabs of a parked shuttle car."

E. "A front-end loader and miners were observed traveling under an area of loose top located over the southeast corner of the 185/6 intersection and extending about 10 feet east

3/ The alleged condition at point "A" was described in the Citation/Order as follows:

"A front-end loader was observed traveling under an area of loose and drummy top that measured about 7 feet wide by 4 to 5 feet long by 3 to 10 inches thick with visible separation and located in the southeast corner of the 180/6 intersection adjacent to the belt-line."

along the belt-line. After this area was posted off with warning signs the same front-end loader again traveled under this loose and drummy top disregarding the signs."

At the time of the subject inspection, Amax was in the "retreat" mode of mining, was retreating from the western end of 7 West Mains toward the shaft and was removing (mining) the pillars which had been left during the initial development to support the roof (T. 60-65; Joint Ex. 1; T. 392-396, 416-419). The actual mining was to be accomplished by two continuous miners (T. 65, 401, 433-434).

Inspector Haynes was of the opinion based on his observations that due to the mode of retreat mining employed there was weight-shifting rolling over into the specific areas where he observed the violative conditions (T. 104-105, 215, 216-218, 221-226). There is a greater likelihood of loose ground (roof) falling where there is a weight shift into that area (T. 106-108, 110).

Inspector Haynes further described the mining process at the time as follows:

"Along the north and south of these 7 West Mains, there were still areas where there might have been a little bit of solid ground, virgin ground, to be mined into and developed out and then pillared anyway to be mined. There were also old, first mine, or already developed sections where there was ore in the pillars that could also be pillared or --. And the 7 West Mains themselves, I'm not sure how many pillars wide it averaged, you know, from beginning to end; but the idea was, and this was the explanation given to me by Danny (Desai) was to narrow the 7 West Mains, and whatever material was available in the way of other pillars on the side, down to approximately 10 pillars wide."

XXX

XXX

XXX

XXX

Barring any break down of equipment or anything that might take place to hamper a regular pulling of these pillars, or mining of these pillars, the two continuous miners were to begin at the far pillar on each side of the middle of the mains; pull that pillar, move to the next pillar, moving toward the center of the mains ... and continue on; and just progress in that fashion."

Inspector Haynes, who used a metal hammer to sound the roof at the various locations cited (T. 78), testified generally that beating on the roof with any solid object would normally give an indication whether there are any separations above the immediate

roof; that a "fairly good, high ring usually indicates solid material" and that a "hollow, or kind of a dull or drummy sound indicates a separation" (T. 75, 76). This was confirmed by MSHA Supervisory Mine Inspector Sidney Kirk who testified that if a roof sounds drummy it indicates a separation of strata requiring something "to be done" (T. 427-428), meaning "its to be supported or taken down" (T. 428, 432).

Inspector Haynes gave this explanation concerning the meaning of such a separation:

"Any ground, including this potash out here, has a certain ability to hold itself up without ever falling, forever and ever. However, when a void is opened up, it loses some of that strength and ability to hold its own self up. Normally, at the stress points where's there's going to be weight pulling down and away from more competent roof head of it, the weight alone can cause the immediate beam of salt above this void to sag down and actually separate from the next beam. Again, that would normally be at a mud seam or a seam of this carnallite. Once that separation has occurred, that is the separation I'm referring to that can be detected by sounding the ground, by beating on it and listening for that hollow, drummy sound. Once that drummy sound is detected, again, the separation, you can get pretty good indication of its parameters by sounding out away from the drummiest point to aid and determine the size of ground below that separation." (T. 77).

Inspector Haynes did not actually observe any miners or mining activity at or under Point "A". Nevertheless, there was tire-track evidence that a front-end loader had been in this area (T. 87). Had the loader, which the Inspector actually observed, worked under Point "A", it is probable that the miner operating the same would not have been directly under the area of loose roof (T. 87, 88, 194). There were roof bolts in the vicinity of Point "A", but not on the portion that was hanging loose (T. 89).

Because there was loose roof which was unsupported, the Inspector considered this area to be hazardous since there existed the potential of the roof falling which could "easily" have resulted in a fatality had a person been under it at the time of the fall (T. 89, 181, 193).

As with Point "A", Inspector Haynes testified that there were no bolts holding up the other 4 areas of actual loose roof he found to exist and designated as points "B", "C", "D" and "E" on Joint Exhibit 2 (T. 94, 103, 185, 195-198, 206, 212, 214, 222, 224, 230). He made his determinations of loose roof (ground) as to all five points by sounding (T. 198, 223-224). In addition,

as to Points A, B, C, D, and E, he visually observed a separation or sloughing of the roof material at the time of his inspection (T. 75, 96, 103, 104-107, 114-116, 198, 199, 207-210, 212, 214, 379). The separation at Point "B" was relatively slight (T. 207-210). The Inspector considered (1) points "A" through "E" to be hazardous because of loose ground (T. 181), (2) that the hazard of falling ground, should such occur, would "definitely" result in a fatal injury, and (3) that at that point in time when he determined imminency, "it was highly likely, not just reasonable" that the hazard could occur (T. 145-149). I find no probative or reliable basis in this record not to accept this determination.

At the time of his inspection, the Inspector himself did not attempt to bar down any of the loose ground at points A, B, C, D, or E (T. 138, 189-190) for two reasons, first, that MSHA would not allow him to, and secondly, because it would have been too dangerous (T. 139, 218). In the vicinity of Area "E" (which had a visible separation but not as bad as at Point "A"), the Inspector observed two signs which said "Keep out, Bad Top" (T. 198-199). At area "E" the Inspector observed a front-end loader operator disregard the signs and drive under the hazardous area (T. 115, 199-204). At area "D", Inspector Haynes observes shuttle cars and he testified that to gain access to the cab of a shuttle car, a person would have been required to pass "directly underneath the loose portion of ground" (T. 102-103).

The Inspector did not see anyone attempt to bar down any of the subject areas (T. 190).

It was Inspector Haynes's opinion that where an area of roof (ground) is sounded and is drummy, even if it is not subject to be being barred down by a scaling bar, the hazard of a roof fall exists even though such hazard is not immediate. Thus, he testified:

"Q. Well, if you try to bar it down and you can't at that moment it's not a fall hazard, right?

A. It is a fall hazard if it's not going to be supported. At some point in time, if it's left like that, it's going to fall. Eventually it's going to fall." (T. 189).

Respondent's own training program for employees (Ex. P-2, pg. 10, T. 286-289, 299) indicates that a drummy sound from the roof "usually", but not always, indicates a "separated or loose condition ..." In instances where a hollow or drummy sound is given off as the bar is struck against the top, Respondent's Safety Supervisor conceded that the word "usually" used in its training Program for employees (Ex. P-2, page 10) means that such hollow or drummy sound indicates "more often than not" that a "separated or loose condition exists in the overlying strata or roof." (Tr. 301). In such instances, Respondent's employees are

to either (1) bar the area down or (2) bolt it as a precautionary measure (T. 302). Respondent's safety supervisor also conceded that at area "E" there was a "loose" top, the size of which ranged from basketball size to 2 feet by 2 feet (T. 295-296).

Although Inspector Haynes testified that he personally did not attempt to bar down any of the cited areas, Respondent established that Bruce Yates, a member of the inspection party, attempted during the inspection to bar down the areas designated "A" and "E" on Joint Exhibit 2 (T. 260-268, 281-285). Asked as to the "success" of the attempts to bar down these two areas, David Tackett, Respondent's safety supervisor, testified:

"A. Not totally. Most of the time, when we made the attempt, small pieces would crumble off the edges where we would try to bar down.

Q. Was that potash ore that you were breaking with a scaling bar?

A. Right.

Q. Okay. And how large of pieces were breaking off?

A. Anywhere from softball size to, maybe, football size." (T. 283).

Mr. Tackett also testified that he observed nothing that he could "visually see" during the inspection walkaround that indicated that "something was going to fall before it could have been taken care of in the normal course of mining" (T. 285).

Although Respondent's witnesses indicated there was bolting in the vicinity of the five subject areas (T. 321) cited by the Inspector, that visible cracks were common and not evidence of looseness, and that there were no hazards, such evidence was almost entirely broadly stated (T. 301, 326-328, 332-336, 340, 341, 345, 348-350) and not specific <sup>4/</sup> enough in terms of numbers, distances, etc. to enable determination whether (1) the bolting present would have negated or lessened the hazards detected by Inspector Haynes, (2) the cracks observed by the Inspector were of no consequence, or (3) that the five cited areas were not hazardous.

Suresh Desai, Respondent's Production Superintendent, conceded that if an area is drummy and when scaled down pieces

4/ The testimony of Respondent's witness, Antonio Campos, was particularly uncertain and self-contradictory. He acknowledged, however, that the "company" taught that drumminess can mean looseness in the roof (T. 247-248).

come down from the separation, such is a "loose roof" area (T. 383-384). He also indicated that if an area is drummy but can't be barred down, further inspection, including further sounding is required (T. 384) to determine whether further bolting was necessary (T. 384-385). Mr. Desai also conceded that whether a roof bolt was providing some support would involve consideration of various factors, including the "quality" of material being supported, whether there was drumminess around a separation, whether or not the area could be scaled down, and whether or not air could get in and affect the strata (T. 408-409).

Mr. Desai, who examined the 5 cited areas after Inspector issued the withdrawal order on February 12, 1987, was of the opinion that there were no hazards at Points "A", "B", "C" and "E". He did not recall seeing Point "D".

Mr. Desai acknowledged that there was a separation (crack) at Point "A" (T. 326-328) and that separations indicate that there is less adhesion of the roof (T. 380). He would not concede, on cross-examination, however that such reduced adhesion would "necessarily" increase the likelihood of the roof's falling (T. 380), explaining:

"A. Why? Because you have to look at the separation, if the bolts installed or any precautionary measures are taken in terms of supporting the area with the remnant pillars or the bolts or could be a 60 x 60 pillar, which would support the area. So you have to use your own judgment."  
(T. 380-381).

Respondent's Safety Supervisor, Tackett, conceded that there was loose top at Point "E" (T. 295). Respondent's witness, Bruce Yates, an electrician, as above noted, was a member of the inspection party. He conceded that there was a "crack" at Point "B", stating "... I know we didn't try to bar that one down because it (was) so thick and there would be no way to pull something down that heavy I would think" (T. 261). <sup>5/</sup>

#### Legal Precedents and Conclusions

The safety standard involved here imposes the continuing duty on the mine operator to examine ground conditions in its potash mine and to take down or adequately support any loose ground. Secretary v. Amax Chemical Corporation, supra. In that case, the Federal Mine Safety and Health Review Commission

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<sup>5/</sup> Mr. Yates' memory of events was not particularly clear (259, 260, 262).

rejected any per se rule equating drumminess (detected in sounding the roof) with "loose" ground, stating "The result of a sounding test is an important factor, but is not necessarily dispositive." The Commission enumerated other factors to be considered in making a "loose ground" determination:

"The size of the drummy area and other possible explanations for the drumminess must also be considered. Visible fractures, sloughed material, "popping" and "snapping" sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas, are also relevant factors to be considered."

On the record in this matter, the only plausible explanation for the drumminess detected is separation of the strata. While there was bolting in the vicinity of the 5 areas (points) described by Inspector Haynes in the Citation/Order, there was no bolting in the drummy areas themselves. With respect to the size of the areas involved, all were sufficient in weight to have caused a fatality, i.e., 200 pounds to two tons, had a fall occurred. In addition, at all five points, visible separations, cracks or sloughing were detected. This record is relatively bland as to factors of operating experience, past or current, which would materially affect the determination of whether a hazard existed, or whether such was or wasn't an imminent danger. As noted previously, herein, Respondent's miner training program provides that a drummy sound usually, but not always, indicates a separated or loose roof condition.

In summary, the evidence indicates that sounding at all five cited locations produced drumminess, there was no bolting or evidence of other support inside the actual drummy areas, the size of the drummy areas was sufficient to cause fatalities, and visible separations, etc., were present. In addition, the record demonstrates varying degrees of exposure of miners to the danger of a roof (ground) fall (T. 87-89, 94, 98, 102-103, 114-115, 217). Inspector Kirk pointed out that these areas had not been barricaded or dangered off (T. 440-441). Accordingly, it is concluded that, in terms of the standard, ground conditions existed on February 12, 1987, that created a hazard to persons that were not taken down or supported before work or travel was permitted in the affected areas. This constitutes the violation as charged in the Citation/Order.

#### Imminent Danger and "Significant and Substantial" Considerations.

Inspector Haynes testified that he determined an imminent danger existed on February 12, 1987, because there was a

"potential for fall of ground", meaning a fall of the roof (T. 69, 70, 89, 122-127). In terms of the immediacy of the threat, Inspector Haynes gave this testimony:

"Q. Could and would that -- or would that reasonably be likely to happen if you had permitted AMAX to continue their operations without first stopping and withdrawing the miners and correcting this condition?

A. Yes. As a matter of fact, it was, in my estimation, highly likely that it was going to happen."  
(T. 140).

In addition to the size of the affected areas (the potential weight of a ground fall), and the exposure of miners thereto, Inspector Haynes also indicated that his observation that there was a weight shift occurring which Respondent was not staying ahead of led to his determination that an imminent danger existed (T. 122-128). In this connection, the Inspector pointed out that a roof bolting machine had been out of operation (T. 126-127). It is noted that Supervisory Inspector Kirk confirmed Inspector Haynes' opinion that Respondent was not staying ahead of the weight shift (T. 217). The likelihood of fatal injuries to miners resulting from a fall 6/ has previously been discussed.

Although Inspector Kirk did not personally observe the cited conditions on February 12, 1987, he agreed with Inspector Haynes that an imminent danger existed which was caused by the hazards described in the Citation/Order (T. 426-427, 439-440).

The term "imminent danger" is found in both the Federal Coal Mine Health and Safety Act of 1969 and the Amendments thereto which comprise the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and the definition thereof currently found in section 3(j) of the 1977 Act is for all intents and purposes identical in both Acts, to wit:

"the existence of any condition or practice in a coal or other mine 7/ which could reasonably be expected to cause

6/ The Federal Mine Safety and Health Review Commission itself pointed out in Secretary v. Halfway, Inc., 8 FMSHRC 8, at p. 13 (1986): "Our decisions have stressed the fact that roof falls remain the leading cause of death in underground mines".

7/ By virtue of Section 102(b)(4) of the 1977 Mine Act the phrase "or other" was added after the work "coal" to expand the Act's coverage to all mines.

death or serious physical harm before such condition or practice can be abated." (emphasis added).

During the enactment of the 1977 Act, the Senate Committee on Human Resources, made this statement:

"The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission." (Leg. Hist. of the Federal Mine Safety & Health Act of 1977, Act at 38). (emphasis added).

Under the 1977 Act, decisional emphasis seems to be on the individual factual configurations involved rather than on discrete tests and formulas for determining imminent danger. See, for example, Secretary of Labor v. U.S. Steel Corporation, 4 FMSHRC 163 (1982). At this time, the Act's section 3(j) definition appears to be the primary legal touchstone. Evaluating the dangerous condition or practice - whether or not a violation-in the perspective of continued mining operations, as is required with S & S violations, also appears to be a prerequisite in determining the validity of an imminent danger order. There also is a case for treating these as prerequisites: (1) that the hazard (risk) foreseen must be one reasonably likely to induce fatalities or injuries of a reasonably serious nature, and (2) that such hazard or risk have an immediacy to it, that is, it could come to realization "at any time." See C.D. Livingston, 8 FMSHRC 1006, 1013-1016 (1986).

It is concluded on the basis of the findings heretofore made concerning the types of injuries (fatalities) which would reasonably be induced by the occurrence of the hazard, and the testimony relating to both the likelihood and immediacy of the hazard, that an imminent danger resulted from the violation. It is also found that this violation was significant and substantial since it created an imminent danger (T. 140, 145-149, 426-427). Specifically, I find that the Petitioner has established the 4 elements of a significant and substantial violation, by establishing (1) the occurrence of an underlying violation of a mandatory standard, (2) a safety hazard contributed to by such violation, (3) that there was a reasonable likelihood that the hazard will result in an injury, and (4) a reasonable likelihood that such injury would be of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (January 1984).

### Penalty Assessment.

Respondent Amax operates a medium-sized underground potash mine which at material times had a payroll of approximately 248 employees and an annual tonnage of 2 million production tons (T. 9-11, 36-37, 50). Upon notification of the violation, Respondent proceeded in good faith to promptly abate the violative conditions (T. 6). During the pertinent 2-year period preceding the subject violation, Respondent had a history of 91 prior violations (T. 14; Ex. P-1). Payment of a penalty at any given appropriate monetary level will not jeopardize Respondent's ability to continue in business (T. 7).

The opinion of Inspector Haynes that only a moderate degree of negligence was involved is found to be well-reasoned and not otherwise rebutted in the record. The Inspector explained this determination in his testimony:

"Q. Why moderately?

A. Moderately negligent in that a problem in that area in regard to ground and ground movement and ground control was known. However, if there's mitigating circumstances, then the normal assignment is moderate negligence. And the mitigating circumstance in my mind was that an attempt was already in progress of getting a bolter for the area. By mine plan and an attempt to adhere to that mine plan, there was already an attempt and an ongoing attempt to stay ahead of the weight shifts. Even though there was a failure, the attempt was there and that, in my mind, was the mitigating circumstance."

(T. 146-147).

With respect to the gravity of the violation, I find no basis in this record to discount Inspector Haynes' determination that a high likelihood existed (T. 146) that the roof fall hazard he observed on February 12, 1987, could happen, and that if it did, a fatal injury would result if there were miners exposed to the hazard. He estimated the weight range of such a fall to be from 200 to 300 pounds at the least to up to two tons (T. 147-149). It has previously been concluded that the violation in question caused an imminent danger and that the violation was significant and substantial. It is concluded that this is a very serious violation.

In view of the foregoing mandatory assessment considerations, the \$700 penalty sought by the Petitioner is found appropriate and is here assessed.

ORDER

Citation/Order No. 2869304 is affirmed in all respects. Respondent shall pay to the Secretary of Labor within 30 days from the date hereof the sum of \$700.00 as and for a civil penalty.

*Michael A. Lasher, Jr.*  
Michael A. Lasher, Jr.  
Administrative Law Judge

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/bls

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**MAR 27 1989**

TERRY G. MILLER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 89-61-D
	:	
PEABODY COAL COMPANY,	:	MADI CD 88-18
Respondent	:	
	:	Camp #2
	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

Complainant filed a request on March 8, 1989, to withdraw his complaint as stated: "I Terry G. Miller wish to withdraw the 105c complaint (Docket # KENT 89-61-D) that I filed against Peabody Coal Co. in order that this matter may be settled. This is in the best interest of Local 1802 of "The United Mine Workers of America"."

Accordingly, based on the Complaint's request, the Complaint is DISMISSED.



Avram Weisberger  
Administrative Law Judge  
(703) 756-6210

Distribution:

Mr. Terry G. Miller, Rt. 1, Box 110-B, Uniontown, KY 42461  
(Certified Mail)

Eugene P. Schmittgens, Jr., Esq., Peabody Coal Company, 301 North Memorial Drive, P. O. Box 373, St. Louis, MO 63166 (Certified Mail)

dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 27 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 88-66-M  
Petitioner : A.C. No. 41-02918-05509  
v. :  
: Ellinger Plant  
SEVEN DAY CONCRETE, INC., :  
Respondent :

## DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas, for  
the Petitioner.

Before: Judge Koutras

### Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of \$2,680, for 16 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed an answer and notice of contest, and pursuant to notice issued on November 15, 1988, the case was scheduled for a hearing on the merits with two other civil penalty cases docketed for hearings during the term Tuesday, February 28, 1989, through Thursday, March 2, 1989. All of the cases originated from the Dallas Regional Solicitor's Office, and the instant case was scheduled for hearing on Thursday, March 2, 1989.

On Tuesday, February 21, 1989, while away from my office on other hearings, my Secretary received a copy of a letter addressed to the respondent by petitioner's counsel of record (Michael H. Olvera), concerning a proposed settlement of the case. Subsequently, Mr. Olvera telephoned my Secretary seeking a continuance of the hearing pending further consideration of the proposed settlement by the parties. Upon my return to

my office on Friday, February 24, 1989, petitioner's counsel was advised by telephone that the request for a continuance was denied as untimely, and he was advised that the hearing would proceed as scheduled and that the parties were expected to appear. Counsel was also advised that the parties would have an opportunity to present their settlement motion on the record at the scheduled hearing, and that the petitioner had the option of reassigning the case to the same counsel assigned to the two cases which would be heard in Houston on Tuesday and Wednesday, February 28 and March 1, 1989. Counsel Olvera's written motion for a continuance was subsequently received in my office on February 27, 1989, 4 days before the scheduled hearing and while I was in route to Houston.

On Tuesday, February 28, 1989, prior to the commencement of the hearing in one of the other cases, petitioner's counsel Brian L. Pudenz presented me with a Settlement Agreement and a Motion to Approve Settlement prepared by Counsel Olvera in this matter. Mr. Pudenz was advised that I would review the proposal and motion that same evening, and that the hearing scheduled for Thursday, March 2, 1989, would be advanced to Wednesday, March 1, 1989, at which time I would consider the matter further and issue a bench ruling and decision with respect to the proposed settlement. Mr. Pudenz was subsequently advised that after review of the settlement motion, the settlement agreement, and the pleadings filed by the parties, I would approve the settlement and render a bench decision. In view of my decision to advance the hearing date, Mr. Pudenz was requested to contact the respondent's representative and advise him that in light of my approval of the settlement, the respondent need not enter a personal appearance on Wednesday, March 1, 1989. Mr. Pudenz subsequently informed me that he contacted the respondent's representative and advised him that he was not required to personally appear at the rescheduled hearing regarding the settlement.

#### Discussion

On Wednesday, March 1, 1989, petitioner's counsel Pudenz was afforded an opportunity to formally present the proposed settlement for my consideration on the record, and he did so. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3061567	10/20/87	56.14001	\$157.00	\$157.00
3061568	10/20/87	56.14001	\$157.00	\$157.00
3061570	10/20/87	56.14001	\$157.00	\$157.00

3061573	10/20/87	56.11002	\$157.00	\$157.00
3061574	10/20/87	56.11001	\$157.00	\$157.00
3061575	10/20/87	56.14007	\$157.00	\$157.00
3061577	10/20/87	56.14001	\$157.00	\$157.00
3061578	10/20/87	56.12006	\$241.00	\$241.00
3061579	10/20/87	56.14001	\$157.00	\$157.00
3061580	10/20/87	56.12032	\$241.00	\$241.00
3061661	10/20/87	56.14001	\$157.00	\$157.00
3061662	10/20/87	56.14003	\$157.00	\$157.00
3061664	10/20/87	56.14001	\$157.00	\$157.00
3061665	10/20/87	56.14001	\$157.00	\$157.00
3061667	10/20/87	56.14001	\$157.00	\$157.00
3061668	10/20/87	56.9087	\$157.00	\$157.00

In the course of my bench decision, I took note of the fact that the proposed settlement disposition of this case requires the respondent to pay the full amount of the initial proposed civil penalty assessments for each of the violations in question, and that the respondent agreed to withdraw its notice of contest. After review of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement, including the available information of record with respect to the six statutory civil penalty criteria found in section 110(i) of the Act, I issued a bench ruling granting the motion, and a bench decision approving the settlement as reasonable and in the public interest. My bench decision in this regard is herein REAFFIRMED, and the motion IS GRANTED, and the settlement IS APPROVED.

I take note of the fact that the respondent has remitted a partial payment in the amount of \$670 to the petitioner in partial payment of the settlement, and that it has agreed to remit and pay the remaining amounts in accordance with a payment schedule agreed to by the parties. The remaining amount of \$2,010, will be paid by the respondent in 3 monthly installments of \$670, paid on the second day of each month, beginning April 2, 1989, and ending June 2, 1989. Payments are to be made by cashier's or certified check made payable to the Mine Safety and Health Administration, U.S. Department of Labor, and they are to be mailed to the Office of Assessments, Mine Safety and Health Administration, 4015 Wilson Boulevard, Arlington, VA 22203.

#### ORDER

The respondent IS ORDERED to pay the agreed-upon civil penalty assessments in the aforementioned amounts, and in accordance with the aforementioned payment schedule agreed to by the parties. This decision will not become final until

such time as full payment is made by the respondent to the petitioner, and I retain jurisdiction in this matter until payment of all installments are remitted and received by the petitioner.

In the event that the respondent fails to make full payment, or otherwise fails to comply with the terms of the settlement, petitioner is free to file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the case.

IT IS FURTHER ORDERED that the petitioner inform the Commission when the respondent has fully complied with this order, including confirmation that full compliance by the respondent has been achieved. Upon receipt of this information, this case will be ripe for dismissal.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Brian L. Pudenz, Michael H. Olvera, Esqs., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Edward F. Taylor, President, Marvin Meier, Vice-President, Seven Day Concrete, Inc., P.O. Box 996, Angleton, TX 77515 (Certified Mail)

/fb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 29 1989**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 88-214  
Petitioner : A.C. No. 46-01455-03702  
v. :  
 : Osage No. 3 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Secretary of Labor  
(Secretary); Michael R. Peelish, Esq.,  
Pittsburgh, Pennsylvania, for Respondent  
Consolidation Coal Company (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks penalties for three alleged violations of mandatory safety standards, which were charged in separate withdrawal orders issued under section 104(d)(2) of the Act on January 15, 1988, January 29, 1988 and February 12, 1988. Each order alleged that the violation cited was significant and substantial, and that it resulted from the unwarrantable failure of Consol to comply with the safety standard involved. Consol denies that the violations occurred, and asserts that if violations are established they were neither significant and substantial, nor were they the result of its unwarrantable failure. Pursuant to notice, the case was called for hearing in Morgantown, West Virginia, on November 15, 1988. Ken J. Fetsko testified on behalf of the Secretary; Daniel Serge, William A. Kun, William Keith Fox, and Larry Allen Bragg testified on behalf of Consol. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties, on the bases of which I make the following decision.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### 1. FINDINGS COMMON TO ALL VIOLATIONS

At all times relevant to this proceeding, Consol was the owner and operator of an underground coal mine in Osage, West Virginia known as the Osage No. 3 Mine. The mine has products which enter interstate commerce. Osage is a large mine with an annual production of more than 800,000 tons of coal. Consol is a large operator and annually produces more than 10 million tons of coal. Consol had 503 violations over 472 inspection days in the 24 month period prior to the issuance of orders 2707304 and 2707314. It had 480 violations over 456 inspection days in the 24 month period prior to the issuance of order no. 3104904. This history of prior violations is not such that penalties otherwise appropriate should be increased because of it. The assessment of penalties will not affect Consol's ability to continue in business. Each of the cited conditions was abated promptly and in good faith after the contested orders were issued.

### 2. ORDER NO. 2707304

On January 15, 1988, Federal mine inspector Ken Fetsko issued an order under section 104(d) of the Act, in which he alleged that a belt transfer drive was inadequately guarded to prevent persons from contacting the moving roller. There was a chain link guard in front of the drive which had been raised approximately 21 inches apparently to change perma-lube cannisters on the belt drive motor. The raised guard was attached to a J-hook. When the inspector arrived at the area, the belt was started up to resume production. A light coating of coal dust was present on the surface of the guard. The drive was located on a travel way. The mine floor in the area was damp. The hazard cited in the order was the possibility of a person contacting the roller: the chain and the motor themselves did not have unguarded moving parts. The roller was set back approximately 24 inches from the chain guard and was at an angle away from the guard.

30 C.F.R. § 75.1722(a) provides in part that ". . . exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." Although I believe it is unlikely that a person could accidentally put his hand through the raised guard and come in contact with the roller, I conclude that such an event "may" occur. Therefore, I conclude that a violation of 30 C.F.R. § 75.1722(a) has been established.

To establish that a violation is properly designated significant and substantial, the Secretary must show that it

contributes to a measure of danger to safety, and that there is a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984). The evidence in this record does not establish the likelihood that the violation will result in injury, because of the position and location of the roller behind the raised guard.

A violation is caused by unwarrantable failure if the evidence establishes that it resulted from the mine operator's aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997 (1987). Although management personnel were present when the belt was reactivated with the guard partially raised, there is no evidence that they were aware of the raised guard, nor can I conclude that their conduct was reckless, inexcusable, or otherwise aggravated with respect to the violation.

Therefore, I conclude that the Secretary improperly characterized the violation was significant and substantial, and improperly determined that it resulted from Consol's unwarrantable failure.

The violation was not serious, was the result of negligence, and was abated in good faith. I conclude that a penalty of \$75 is appropriate for the violation.

### 3. ORDER NO. 3104904

On February 12, 1988, Inspector Fetsko issued a 104(d)(2) order, alleging a violation of 30 C.F.R. § 75.523 because the deenergizing device on a continuous miner was disconnected and lying on the deck of the miner. The miner was being operated just prior to the issuance of the order. The evidence clearly establishes that the "panic bar" on the deenergizing device had come loose or had been disconnected and was lying in the deck in the operator's compartment of the miner. The inspector concluded that it had been there for some time because of rust on the bar and the fact that part of it was covered with coal dust. The miner operator, however, testified that he checked the panic bar at the beginning of the shift and it was attached. He also tested it and it effectively shut off the power. He began operating the miner, cutting rock and coal from the top for an overcast. After a short time, the conveyor on the miner became inoperative, and the miner was shut down. It was not operated again before the order was issued. The miner operator did not check the panic bar after he began cutting the coal and rock. I accept the miner operator's testimony as truthful and accurate, and therefore conclude that the panic bar was connected and operative at the beginning of the shift.

30 C.F.R. § 75.523 requires that electric face equipment be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. Although the miner operator testified that he customarily deenergized his miner by turning off the switch and never used the panic bar located below his left elbow, I conclude that the standard requires that the panic bar be attached and operative. The panic bar enables the operator to deenergize the motor with his knee or elbow even though both hands may be occupied with the controls. Therefore, I conclude that the evidence establishes a violation of 30 C.F.R. § 75.523.

Inspector Fetsko concluded that the violation was significant and substantial because it was reasonably likely that crushing injuries would occur as a result of the continuous miner striking a worker because of failure to deenergize the miner. These conclusions, however, failed to consider the other deenergizing devices on the miner, including the on-off switch, and the foot pedal which runs the tramming motor. I conclude that the Secretary failed to establish that there was a reasonable likelihood that the hazard he described would result in a serious injury.

I credit the miner operator's testimony that the panic bar arm was in place and operated properly at the beginning of his shift. There is no evidence that Consol knew that the arm was disconnected prior to the time the order was issued. Therefore, the Secretary has not established that the violation resulted from aggravated conduct constituting more than ordinary negligence.

The violation was moderately serious, and resulted from moderate negligence. It was abated in good faith. I conclude that \$100 is an appropriate penalty for the violation.

#### 4. ORDER NO. 2707314

On January 29, 1988, Inspector Fetsko issued a section 104(b) order charging a violation of 30 C.F.R. § 75.1105 because an enclosed pump house was not ventilated to the return air course. The pump was enclosed in a fireproof cinder block structure with a metal door. There was no tubing in place to vent the pump, which was in operation at the time the order was issued. The inspector testified that "1/21", ("a fireboss date"), was marked on the door. He further testified that John Mogus, the foreman told him on January 29 that the pump housing was built a week previously. Mogus was not called as a witness. The violation was abated by installing a vent tubing from the pump housing through an outby permanent stopping, across a belt

entry to a return aircourse. Consol's safety director, William Kun, testified that he was in the area with Inspector Fetsko on January 27, and that the pump in question was not housed at that time. He further testified that the pump was intended to be a temporary one and to be moved up as the work advanced. The pump was a large Gorman pump, and required four people to move it. Consol had a substantial problem with water in the area. It had a number of small sump pumps in the entry, in addition to the large Gorman pumps. All of the latter were housed in fireproof structures; none of the former were. All of the housed Gorman pumps, except the one cited in the order, were vented to the return aircourse.

30 C.F.R. § 75.1105 requires, inter alia, that "permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return."

I conclude that the pump which was the subject of the order involved herein was a permanent pump. Since the air ventilating the pump was not coursed directly into return air, a violation of the standard has been established.

The Inspector testified that the heat generated by the pump motor could cause smoke which would travel up into the construction section and on up through the main line where miners were working. He concluded that there was a reasonable likelihood that injury or illness could result from the violation, but he also seemed to agree that something would have to be wrong with the pump or the motor to cause the smoke. There is no evidence that at the time the order was issued, the pump or pump motor were defective in any way. I conclude that the Secretary failed to establish that there was a reasonable likelihood that a serious injury would result from the violation.

I am persuaded that the pump had been housed in the permanent fireproof structure for some days prior to the issuance of the order. I do not accept Consol's contention that this was done inadvertently. Management was clearly aware (Foreman Mogus) that the air ventilating the pump was not being coursed into the return. I conclude that the violation resulted from Consol's aggravated conduct consisting of more than ordinary negligence.

Therefore, I conclude that the Secretary improperly characterized the violation as significant and substantial, but properly determined that it resulted from unwarrantable failure.

The violation was moderately serious, was the result of aggravated negligence, and was abated in good faith. I conclude that a penalty of \$500 is appropriate for the violation.

ORDER

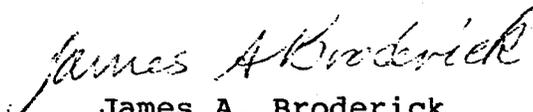
Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2707304 is MODIFIED to a section 104(a) citation. The special findings contained in the order that the violation was significant and substantial, and resulted from unwarrantable failure are not sustained.

2. Order No. 3104904 is MODIFIED to a section 104(a) citation. The special findings contained in the order that the violation was significant and substantial, and resulted from unwarrantable failure are not sustained.

3. Order No. 2707314 is AFFIRMED, including its finding that the violation resulted from Consol's unwarrantable failure. However, the finding that the violation was significant and substantial is not sustained.

4. Consol shall, within 30 days of the date of this decision, pay the sum of \$675 as civil penalties for the violations found herein.

  
James A. Broderick  
Administrative Law Judge

Distribution:

Anita D. Eve, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

slk

**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 29 1989**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 88-134-M  
Petitioner : A.C. No. 11-02842-05503  
v. :  
 : Pinkstaff Plant Mine  
ALLENDALE GRAVEL COMPANY, :  
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the  
Solicitor, U.S. Department of Labor, Chicago,  
Illinois, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking a civil penalty assessment in the amount of \$42, for an alleged violation of mandatory safety standard 30 C.F.R. § 56.18002. The respondent filed an answer and notice of contest, and the matter was scheduled for hearing in Evansville, Indiana, along with several other cases during the hearing term March 8-9, 1989. Petitioner's counsel advised me that the parties agreed to a proposed settlement of the case, and he was afforded an opportunity to present the motion and supporting arguments on the record at the conclusion of another hearing held in Evansville on March 8, 1989.

Issue

The issue in this case is whether or not the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty assessment to be made for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

### 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.

### Discussion

Section 104(a) "S&S" Citation No. 3260277, issued on April 20, 1988, cites a violation of mandatory safety standard, 30 C.F.R. § 56.18002, and the cited condition or practice states as follows:

Records were not provided to show that a competent person was making an examine (sic) of the work areas on a daily shift basis. There was no form provided to show that anyone had examined the work areas. A condition which could have adversely affected safety was cited during this inspection. There was no ground mat at the electrical control switches.

Petitioner's counsel confirmed that the parties have agreed to a proposed settlement of this case, and that the respondent has agreed to pay a civil penalty assessment in the amount of \$30, in satisfaction of the violation in question.

In support of the slight reduction of the initial civil penalty assessment made in this case, petitioner's counsel asserted that the gravity of the violation was moderate, and that the respondent exercised a moderate degree of negligence in that it knew or should have known that work shift examinations were required to be recorded and records kept. Counsel agreed that it was possible that the shift examinations were in fact made, and that the violation only concerns a failure to record the results of the examination.

Petitioner's counsel stated that the respondent is a very small operator with 5,506 annual work hours, and that it has no assessed civil penalty violations for the 24-month period preceding the issuance of the citation in question. Counsel stated further that in view of its small size, the respondent believed that it was not required to maintain the examination records in question. Counsel confirmed that the violation was timely abated in good faith by the respondent, and I take note

of the fact that the citation termination notice reflects that the mine superintendent is examining the work areas and recording the examinations in a log book.

Conclusion

After careful review and consideration of the pleadings, and arguments in support of the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$30 in satisfaction of the citation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

  
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)

Mr. James E. Litherland, President, Allendale Gravel Company,  
Inc., R.R. 1, Allendale, IL 62410 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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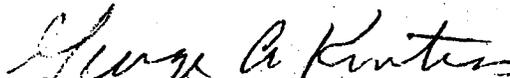
**MAR 30 1989**

ARNOLD SHARP, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 89-45-D  
: MSHA Case No. PIKE CD 88-18  
BIG ELK CREEK COAL COMPANY, :  
INC., :  
Respondent :

ORDER OF DISMISSAL

Before: Judge Koutras

Mr. Sharp's request of March 27, 1989, to withdraw his complaint in this matter IS GRANTED, and this case IS DISMISSED.

  
George A. Koutras  
Administrative Law Judge

Attachment

Distribution:

Mr. Arnold Sharp, General Delivery, Bulan, KY 41722  
(Certified Mail)

Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, 2600 Citizens  
Plaza, Louisville, KY 40202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

MAR 30 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 88-127-M  
Petitioner : A. C. No. 11-01657-05506  
v. :  
TUSCOLA STONE COMPANY, : Docket No. LAKE 89-26-M  
Respondent : A. C. No. 11-01657-05508  
: Tuscola Stone Company

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the  
Solicitor, U.S. Department of Labor, Chicago,  
Illinois for Petitioner;  
Daniel P. Foltyniewicz, Risk Manager, Tuscola  
Stone Company, Elgin, Illinois for  
Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 *et seq.*, the "Act," charging the Tuscola Stone Company (Tuscola) with two violations of regulatory standards. The general issue before me is whether Tuscola violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3260039 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 56.9003 and charges as follows:

The service brakes on the 50 Euc haul truck # ME01 are not adequate to stop and hold the truck on the inclines and declines being traveled in the pit. The service brakes were checked with the haul unit loaded and empty and in neither check would the service brakes stop and hold the haul truck. The truck is to be removed from service until the brakes are repaired. The haul roads being traveled

are narrow and steep, with a drop off on one or both sides.

The standard at 30 C.F.R. § 56.9003 requires that "powered mobile equipment shall be provided with adequate brakes."

Tuscola does not dispute the testimony of Inspector Bill Henson of the Federal Mine Safety and Health Administration (MSHA) in support of this violation nor does it dispute his gravity and "significant and substantial" findings. Henson testified that during the course of his inspection of the Tuscola limestone multi-bench open pit mine on March 2, 1988, he traveled to the loading area of the pit in the cited Euc #ME01 truck. The truck was loaded and as it started down a decline the driver was asked to apply its service brakes. The brakes were applied but the truck failed to stop and continued down the decline and partly up the next incline traveling 75 to 100 feet. In another test the brakes were applied on the decline with an unloaded truck. The brakes still did not hold and the truck continued to travel 50 to 100 feet.

The ramps in the area in which the cited truck was operating were only 20 to 25 feet wide--wide enough to allow only one of these large trucks to pass at a time--and up to 150 feet high. Inspector Henson observed that other trucks including 3/4 ton service vehicles and pick-up trucks were operating in the ramp area and he opined that it was highly likely that the haul truck in the cited condition, weighing about 100 tons fully loaded, would drive into another vehicle or pass over the side of the roadway and overturn. He also observed that the truck was used on a daily basis thereby increasing the likelihood of a fatal accident. Under the circumstances the violation is proven as charged. It is also proven that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Henson also opined that the violation was the result of high operator negligence. The driver of the cited truck informed Henson that an effort had been made to adjust the brakes but was unsuccessful and that he knew the brakes were not working properly. The mechanic also informed Henson that he had tried to adjust the brakes but had been successful in adjusting only one of the four brakes. He told Henson that the other brakes were either "frozen" or were

"self-adjusting". In any event the truck was returned to service with three of the four service brakes not functioning.

Tuscola maintains that it should not be charged with negligence since neither the mechanic nor the truck driver informed any management personnel of the defective brakes or that the truck had been returned to service without the brakes having been properly adjusted. Under certain circumstances a mine operator may in any event be held responsible for the negligence of its rank and file employees. See Secretary v. Southern Ohio Coal Co., 4 FMSHRC 59 (1982); Secretary v. Old Dominion Power Co., 6 FMSHRC 1886 (1984). It may reasonably be inferred from the evidence in this case that Tuscola failed to exercise proper supervision of its employees, failed to implement procedures for reporting unsafe equipment and failed to have appropriate disciplinary procedures in effect at the time of the cited violation for employees who failed to report unsafe conditions. Indeed, Tuscola management did not even inquire of the truck driver until almost a year after the incident as to why he failed to report the inadequate brakes and there is no evidence that any discipline was taken against him. Accordingly even in the absence of evidence of direct management knowledge of the defective brakes I find that the violation was the result of operator negligence.

Citation No. 3260040

Citation No. 3260040, as amended, alleges a violation of the regulatory standard at 30 C.F.R. § 56.9002 and charges as follows:

The parking brake on the 50 ton Euc haul truck #ME01 is not operative. The truck was checked empty on a slight grade. The truck is being used to haul shot rock from the pit benches to the primary stockpile. The hand brake (dump brake) on this haul unit is also inoperative.

30 C.F.R. § 56.9002 provides that "equipment defects affecting safety shall be corrected before the equipment is used."

Inspector Henson conceded at hearing that the test he performed on the parking brake in this case i.e. attempting to stop a moving truck with the parking brake, was not the

"standard test" used by MSHA. He further conceded that parking brakes are not designed to bring a moving haul truck to a stop. Under the circumstances I cannot find that the test utilized by Henson in this case is an appropriate test to determine the adequacy of the parking brake. Thus that part of the citation charging Tuscola with having inadequate parking brakes on the haul truck must be vacated.

The citation also charges however that the hand brake was inadequate. It is not disputed that the hand brake is in fact designed to bring a moving truck such as the cited truck to a halt. It is also not disputed that the cited truck failed to stop upon application of the hand brake. Under the circumstances the violation is proven as charged.

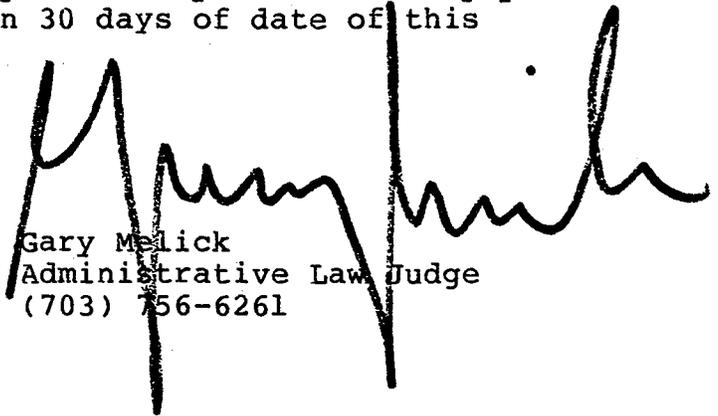
Henson opined that the violation was also "significant and substantial". He considered it "reasonably likely" that the inadequate hand brake could contribute to an accident. In particular he noted that the truck driver would most likely be struck by the moving truck while dismounting after parking and application of the hand brake. There is no dispute that the injuries to the truck driver would be serious if struck by the truck. This evidence is not disputed and I agree that the violation was serious and "significant and substantial".

Henson also found the operator to be chargeable with high negligence. For the reasons previously noted in support of the negligence findings under Citation No. 3260039, I also find the operator negligent with respect to the instant violation.

In assessing civil penalties in this case I have also considered that the violations were abated in accordance with the Secretary's directions, that the operator is small in size and that the operator has a minimal history of violations. Accordingly I find the following civil penalties to be appropriate: Citation No. 3260040-\$100; Citation No. 3260039-\$300.

ORDER

The Tuscola Stone Company is hereby directed to pay civil penalties of \$400 within 30 days of date of this decision.



Gary Melick  
Administrative Law Judge  
(703) 756-6261

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

MAR 30 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 88-37  
Petitioner : A. C. No. 18-00621-03633  
v. :  
: :  
METTIKI COAL CORPORATION, : Mettiki Mine  
Respondent :

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Mettiki Coal Corporation (Mettiki) with one violation of the regulatory standard at 30 C.F.R § 75.1400-4. The issue before me is whether Mettiki violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3115919, issued pursuant to section 104(a) of the Act alleges a "significant and substantial" violation and charges that: "The results of the daily inspection of the hoisting equipment at A-portal was [sic] not recorded for 4-15-88, the hoist was inspected on 4-14-88 and then on 4-16-88."

The cited standard provides as follows:

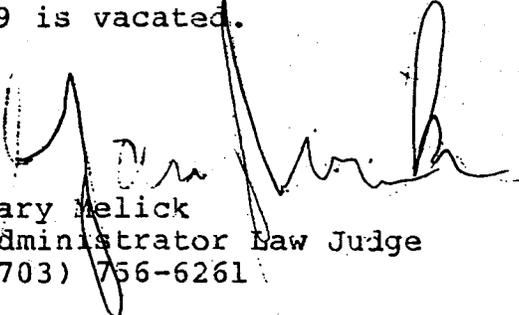
At the completion of each daily examination required by § 75.1400, the person making the examination shall certify, by signature and date, that the examination has been made. If any unsafe condition is found during the examinations required by § 75.1400-3, the person conducting the examination shall make a record of the condition and the date. Certifications and records shall be retained for one year.

In a motion to dismiss filed February 16, 1989, Mettiki argued, inter alia, that there was no violation on

April 15, 1988, of 30 C.F.R. § 75.1400-4 (requiring examinations to be recorded) because no examination had been performed on April 15, 1988. Mettiki notes that section 75.1400-4 is a recording regulation which requires that after a daily hoist examination is performed, the results of that examination must be recorded. Mettiki further observes that the Secretary's regulations imposed two distinct requirements on a mine operator: (1) an obligation to examine and, (2) an obligation to record examinations made.

I agree with Mettiki's position herein. Clearly the Secretary's regulations concerning hoisting and man-trips (Sub-Part O) have separate and distinct requirements--one for daily examinations under section 75.1400-3 and another for recordation of such daily examinations under section 75.1400-4. The latter standard does not in itself require a daily examination but rather requires recordation following an examination. Since it is not disputed that no examination was performed on April 15, 1988 (Mettiki arguing that none was required under the law) a condition precedent to a violation of 30 C.F.R § 1400-4 did not exist. See Secretary v. Dako Corporation, 10 FMSHRC 1259 (1988) (ALJ). Accordingly there was no violation as charged.

Under the circumstances Mettiki's Motion to Dismiss is granted and Citation No. 3115919 is vacated.



Gary Melick  
Administrator Law Judge  
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

MAR 30 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 88-55-M  
Petitioner : A.C. No. 31-01585-05502  
v. :  
 : Highsmith Pit  
ARNO SAND COMPANY, :  
Respondent :

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, Department of Labor, Atlanta, Georgia for Petitioner;  
George A. Arno, President, Arno Sand Company, Linden, North Carolina, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the Arno Sand Company (Arno) with two violations of regulatory standards. The general issue before me is whether Arno violated the cited regulatory standards and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial".

Citation No. 2859775 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 56.9003 and charges as follows:

The Clark 75 front-end loader being used to load sand was being operated without brakes. The brake caliper on left front wheel was bursted [sic].

The cited standard requires that "powered mobile equipment be shall provided with adequate brakes."

There is no dispute in this case that the Clark 75 front-end loader was indeed without adequate brakes when

cited on November 12, 1987. The left front brake caliper was admittedly broken and, upon later examination, the brake pads were found to be worn down almost to the metal. According to Inspector Ron Lilly of the Federal Mine Safety and Health Administration, (MSHA), Jimmy Arno, the front end loader operator, told him at the outset of the inspection that the brakes were in good shape but when asked to perform a test on the brakes, admitted that the brakes would not stop the loader. Arno also admitted to Inspector Lilly that he had loaded a truck with the loader that morning.

By way of defense, George Arno, former owner of the Arno Sand Company stated that there was no evidence in this case to show that the front-end loader was being operated at the time of the citation. In this regard Jimmy Arno testified that he had moved the loader that day only for the purpose of repairing the back-up alarm. Jimmy Arno also testified, that the last time he had used the front-end loader it had had brakes. He also testified however that he did not know when the brakes went out because he did not use the brakes. This testimony is internally inconsistent and conflicts with the earlier admission to Inspector Lilly. I therefore can give this testimony but little weight. Accordingly I do not find the proffered defense to be credible.

In addition at the time of his inspection on November 12, 1987, Inspector Lilly found the cited front-end loader with the motor running. The loader had admittedly not been tagged out to identify it has having been removed from service and Jimmy Arno admitted that he drove the loader that morning for the purpose of obtaining a "piece of wire" from the trailer. It is also apparent that the front-end loader had been used without adequate brakes on prior occasions since the brake pads had admittedly been worn nearly to the metal. Under the circumstances, it is clear that the violation is proven as charged.

Since the loader had not been removed from service by tagging out or other similar procedure the violation was also "significant and substantial". The testimony of Inspector Lilly in this regard is undisputed. Lilly observed that the cited loader weighed 20 tons. He considered it highly likely that other vehicles would be struck by this loader because it had to drive down a grade into the pit where other traffic from other mine operators were operating. See Mathies Coal Co., 6 FMSHRC 1 (1984).

Inspector Lilly found Arno chargeable with "moderate" negligence. It may reasonably be inferred from the evidence

that Jimmy Arno had been operating the loader at a time when the brakes were clearly deficient. When considering this in conjunction with the related citation for failing to report this brake defect in accordance the regulatory standard at 30 C.F.R. § 56.9001 it is apparent that the operator was indeed negligent in failing to establish and maintain appropriate procedures for reporting equipment defects. See Secretary v. Southern Ohio Coal Co., 4 FMSHRC 59 (1982); Secretary v. Old Dominion Power Co., 6 FMSHRC 1886 (1984).

Citation No. 2859825 alleges a violation of the standard at 30 C.F.R. § 56.9001 and charges that "the defect on the Clark 75 front-end loader had not been recorded." The cited standard requires in part as follows:

Equipment defects affecting safety shall be reported to, and recorded by, the mine operator. The record shall be maintained at the mine or nearest mine office for at least six months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

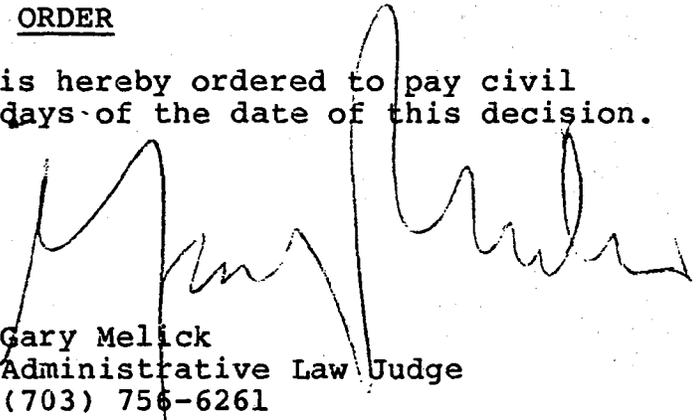
It is not disputed in this case that no records had been prepared concerning the cited defective brakes. Jimmy Arno conceded that he had not even orally informed his father about the worn out brake pads and broken brake caliper. Indeed Jimmy Arno admitted that he had never even seen a record concerning machine maintenance at the mine. George Arno also testified that he did not keep any such records except repair orders and bills. Under the circumstances the violation is proven as charged.

George Arno testified that he had no knowledge of MSHA record keeping requirements for equipment defects. Inasmuch as this mine was a very small operation and apparently had not been subject to prior inspections I find it chargeable with moderate negligence in regard to this violation.

Considering the small size of the operator, the absence of any history of violations and the apparent abatement I find that the following civil penalties are appropriate: Citation No. 2859775 \$50, Citation No. 2859825 \$10.

ORDER

The Arno Sand Company is hereby ordered to pay civil penalties of \$60 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge  
(703) 756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 31 1989

CONSOLIDATION COAL COMPANY	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 88-184-R
	:	Citation No. 2949890; 3/1/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Ireland Mine
ADMINISTRATION (MSHA),	:	Mine ID 46-01438
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-209
Petitioner	:	A. C. No. 46-01438-03730
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-282-D
ON BEHALF OF DAVID P. CLARKE,	:	
Complainant	:	MORG CD 88-7
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;  
Michael Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Cases

In these consolidated cases the Secretary (Petitioner) seeks a civil penalty for an alleged violation by the Operator (Respondent) of section 103(f) of the Federal Mine Safety and Health Act of 1977, and the Respondent has contested the

violation and alleges that the underlying citation be vacated. In addition, the Secretary on behalf of David P. Clarke seeks, in a Complaint filed on June 27, 1988, and in an Amended Complaint filed on July 20, 1988, seeks a civil penalty and various declaratory relief alleging that Respondent unlawfully discriminated against Clarke in violation of section 105(c)(1) of the Act. Respondent filed its Answer to the Complaint on July 11, 1988. Subsequent to notice, the cases were heard in Wheeling, West Virginia, on December 14, 1988. David P. Clarke, David Miller, and Lyle Tipton testified for Petitioner, and John Hiram Snyder and Hestle B. Riggle, Jr., testified for Respondent.

The Parties were allowed 3 weeks after receipt of the Transcript to file Proposed Findings of Fact and Memorandum of Law. Respondent filed its Brief on March 21, 1989. Petitioner did not file any Brief or Proposed Findings of Fact.

### Stipulations

At the hearing the Parties submitted the following stipulations:

1. Consolidation Coal Company is the owner and operator of the Ireland Mine located in Marshall County, West Virginia.
2. Consolidation Coal Company and the Ireland Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this case pursuant to section 105 of the Act.
4. Section 104(a) Citation No. 2949890 was issued by Lyle R. Tipton, a duly authorized representative of the Secretary of Labor.
5. The appropriateness of the penalties, if any, to the size of the coal operator's business, should be based on the fact that in the previous calendar year, 1987, the Ireland Mine produced an annual tonnage of 2.3 million and the contracting company, Consolidation Coal Company, had an annual tonnage of 48.5 million.
6. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 652, and the total number of inspection days for that period is 687.
7. Assessment of a civil penalty in these proceedings will not affect the operator's ability to continue in business.

## Issues

Essentially the ultimate issue to be decided in each of the above captioned cases, which have been consolidated, is whether Respondent discriminated against David P. Clarke in violation of section 105(c)(1) of the Act. In this connection, Respondent argues that Clarke was not engaged in any protected activities. However, Respondent concedes that if it be found that Clarke did in fact engage in protected activities, then it is not disputed that Respondent took adverse action against Clarke based solely upon his protected activity. As such, the critical issue to be determined herein is whether or not Clarke engaged in any protected activities.

## Findings of Fact and Discussion

David P. Clarke, a miner employed by Respondent at the Moundsville Portal of its Ireland Mine, is an elected Safety Committeeman of the union representing the miners at the Ireland Mine. In this capacity it is his responsibility, along with the three other members of the safety committee, to accompany MSHA inspectors on inspections of the Ireland Mine. On December 21, 1987, Hestle B. Riggle, Jr., Respondent's safety supervisor, in response to Clarke's inquiry, advised him at the beginning of the day shift, that an MSHA inspector was at the River Portal that morning to perform an inspection. Clarke informed Riggle that he was the elected official on the Union's Safety Committee, and requested of the latter permission to go to the River Portal to accompany the inspector on the inspection. Riggle denied his request and indicated that, in essence, the designated Union members at the River Portal, which was approximately 12 miles from the Moundsville Portal, would go with the Inspector. Clarke then made the same request of George Carter and received the same response. Subsequently on January 12 and January 16, 1988, Clarke made similar requests to accompany the MSHA inspector at the River Portal, and the requests were denied for the same reasons. At each instance there were no Union Safety Committeemen at the River Portal. Further, on March 1, 1988, Clarke made a similar request to accompany an MSHA inspector at the River Portal, and John Hiram Snyder, Respondent's operations superintendent at the Ireland Mine, informed him that he (Snyder), would not allow Clarke to travel to the River Portal unless the inspector would write a violation. Lyle Tipton, a MSHA Journeyman inspector, on March 1, 1988, issued a Citation No. 2949890 alleging that Respondent violated section 103(f) of the Act in refusing Clarke permission to accompany him at the inspection at the River Portal.

The local Union representing the miners at Respondent's Ireland Mine had prepared separate walk-around lists for the Moundsville Portal, River Portal, and Preparation Plant. According to the uncontradicted testimony of Snyder, the walk-around list for the Moundsville Portal was posted on the Portal's bulletin board. The Complainant's name was not on the posted list. The walk-around list for the River Portal and the one for the Preparation Plant were posted in those areas respectively. According to Snyder, prior to Clarke's request on December 21, 1987, it was the practice that an inspector commencing an inspection at the Moundsville Portal would get a walk-around from among the workers in that area. In 1987 and 1988 respectively, David Miller gave management an updated walk-around list containing only the four names of the safety committeemen as designated representatives. According to Miller, these lists stated that if one of the safety committeemen was not present, then the miners were free to choose their representative as per the Act. He further testified that the more extensive walk-around list was to be used at a specific location if the miners' Union representative was not present at that shift in 1985. Tipton indicated that in performing inspections, in the event that none of the walk-around specified on the walk-around list were present on the shift, he then offered an opportunity to the miners to select a representative to participate in the inspection.

It appears to be the position of Respondent that, in essence, inasmuch as the miners' representatives to accompany the inspector could be selected from a broad list supplied by the Union, Clarke was not engaged in any protected activities when he asked to travel from the Moundsville Portal to the River Portal to accompany the Inspector. I find however, that in resolving the issue of whether Clarke engaged in protected activities an analysis must be made of Clarke's rights, as opposed to an analysis of management's duties and responsibilities. In this connection, testimony from Miller and Clarke, which has not been contradicted, establishes that Clarke was elected by the Union representing the miners at the Ireland Mine, to serve as a safety committeeman. Further, as their testimony has not been contradicted, it established that in this capacity Clarke had a right to represent the miners in accompanying the MSHA inspector on an inspection. In this connection, Clarke explained that to disallow him to travel with an Inspector on an inspection would, in essence, decrease the effectiveness of his being an authorized representative of the miners as a member of the safety committee, inasmuch as in that capacity he receives complaints from miners with regard to various hazards at the mine. Hence, he explained that if he would be unable to accompany an inspector at the River Portal, he would not be able to bring to the attention of the inspector the safety complaints of the miners he

represents. I thus conclude that Clarke, in requesting of management on the various dates in issue, the opportunity to travel from the Moundsville Portal to the River Portal to accompany an inspector on an inspection, was engaging in a protected activity. (See, Secretary on behalf of Richard Truex v. Consolidation Coal Company, 8 FMSHRC 1293 (1986)). Hence, inasmuch as Clarke was a representative of the miners, and authorized by them, he thus had a right to accompany the inspector as requested pursuant to section 105 of the Act (See, Truex, supra). Thus, inasmuch as Clarke had engaged in a protected activity on each occasion that he requested to accompany an inspector on an inspection, and it is essentially not contested that adverse action was taken against him in denying him this right, it is concluded that Complainant herein has established a prima facie case of discrimination. (See, Secretary of behalf of Pasula v. Consolidation Coal Company 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. non. Consolidation Coal Company v. Marshall, 663 F 2nd 1211 (3rd Cir. 1981)). This prima facie case has not been rebutted, nor has Respondent herein established an affirmative defense. Thus, I conclude that there has been a violation of section 105(c) herein, and also of section 103(f).

In assessing a penalty for the violation found herein, I have taken into account and adopted the stipulations of the Parties with regard to the size of Respondent's operation, the history of its violations in the preceding 27 months, and the stipulation that an assessment of a penalty will not affect its ability to continue in business. With regard to Respondent's negligence, I have taken into account the testimony of Respondent's witnesses that the denial of Clarke's request to accompany the inspectors at the River Portal was based upon prior policy that miners working at that area be the ones to accompany the inspector. In this connection, Snyder explained the policy by indicating that a miners' representative traveling from the Moundsville Portal to the River Portal to accompany an inspector would lose production time during the travel between the two Portals, in contrast to having a representative from the miners already working at the River Portal accompany the inspector at that site. As such, Respondent's policy in this regard appears to be based upon a business reason. I also have taken into account Snyder's testimony that he conferred with legal counsel who advised him not to change the Respondent's policy in this regard. I also note that on each of these occasions when Clarke was deprived of his right to accompany the inspector, another miners' representative did indeed go with the inspector. However, with regard to the gravity of the violations, I note, as discussed above, that the deprivation of Clarke's right to accompany the inspectors at the River Portal would tend have the

effect of diminishing the effectiveness of safety complaints made by miners to him in his capacity as member of the safety committee. Taking into account all of the above factors, I conclude that a penalty herein of \$200 is appropriate for the violations found herein.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent shall post a notice stating that it will not violate section 105(c) of the Act. It is further ORDERED that Respondent shall cease and desist attempts to interfere with the right of David P. Clarke to accompany inspectors on inspections as the designated representative of the miners.

It is further ORDERED that Respondent shall, within 30 days of this Decision, pay \$200 for the violations found herein.



Avram Weisberger  
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041  
703-756-6232

March 3, 1989

JOHN DIXON HACKER, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 89-1-D  
: MSHA Case No. BARB CD 88-57  
BLACK STREAK MINING, :  
Respondent :

ORDER TO SHOW CAUSE

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The official file reflects that Mr. Hacker filed his complaint on August 15, 1988, with the Secretary of Labor, Mine Safety and Health Administration (MSHA) District 7 Field Office. The complaint states as follows:

At the end of our shift I ride the left outside. On 7/25/88 while riding the belt to the surface I observed a rock fall on the belt and where the fall was the belt was cribbed on both sides. When I jumped off the belt I hit one of the cribs and it threw me back into the belt structure. As of this date I have received no workman compensation. I have been told that I no longer have a job at this company.

I want my job back with backpay. Also I want the workman's compensation due me and all my medical bills paid.

The complaint states that Mr. Hacker was employed by the respondent as a Belt Head Man at a salary of \$6 an hour, based on a 40-hour work week. His overtime rate of pay is shown as \$9 an hour, and that he worked 8 hours of overtime each week during the 12-month period preceding the date of his complaint. The complaint shows that Mr. Darrell Middleton is the

President of the respondent company, and that Mr. Wendell Middleton is the Vice-President.

In a statement given to an MSHA special investigator on August 19, 1988, in the course of an investigation of his complaint, Mr. Hacker stated that he began his employment with the respondent in October, 1987, and that Mr. Wendell Middleton instructed him to ride the belt into the mine to his work station, while the rest of his crew rode the scoop. Mr. Hacker stated further that while it was illegal to ride the belt, he believed that if he complained, "I wouldn't have a job." Mr. Hacker stated that he also rode the belt out of the mine at the end of his shift because it was not practical for him to crawl to the section and ride the scoop out.

Mr. Hacker stated that approximately a week prior to his injury on July 25, 1988, MSHA Inspector Chalk Myers, was in the mine, and that he (Hacker) told Mr. Myers that he rode the belt into the mine, and although the belt had a stop cord, it did not work. Mr. Hacker stated further that he also informed Mr. Myers that at various times other miners also rode the belt, and that no one preshifted the area where he worked alone. Mr. Hacker stated that Inspector Myers "cited several violations to the company." Mr. Hacker stated that Inspector Myers "wanted me to call the face and have the No. 2 belt shut down so he could make some electrical checks, but they wouldn't do it."

Mr. Hacker stated that on the morning of July 25, 1988, when he rode the belt into the mine, he observed rock falling on the No. 1 belt, and when he rode the belt out he observed a large rock fall across the belt, and in order to avoid the rock, he jumped off the belt and struck a crib which was adjacent to the belt. When he later left the mine, he realized he was injured and went to a hospital where he was x-rayed and given a shot and told to stay off work 3 days. Two days later he was admitted to the Pineville, Kentucky, hospital for 9 days.

Mr. Hacker stated that he sent doctor's excuses to Mr. Middleton through another miner, and that his wife telephoned Mr. Middleton from the hospital, but that Mr. Middleton informed his wife that when he (Hacker) left the mine on July 25, he was "o.k." and that no accident had occurred.

Mr. Hacker stated that when he subsequently called Mr. Wendell Middleton on August 16, 1988, to inquire if he still had his job, Mr. Middleton informed him that as far as

he was concerned, Mr. Hacker had quit his job. Mr. Hacker stated that when he attempted to tell Mr. Middleton what had happened to him, Mr. Middleton would not listen to him and that "he told me to sue him."

By letter dated September 15, 1988, MSHA advised Mr. Hacker that it had investigated his complaint, and after a review of the information gathered during the investigation, made a determination that a violation of section 105(c) of the Act did not occur. Mr. Hacker was advised of his right to pursue the matter further by filing a complaint on his own behalf with the Commission within 30 days of MSHA's notification letter.

By letter dated September 26, 1988, Mr. Hacker filed his pro se complaint with the Commission, and it was received and docketed on October 4, 1988. His letter states in pertinent part as follows:

I have lost my job due to an injury that I received while being employed by Black Streak Mining. I have filed a workmen's comp. claim. I have yet to receive workmen's comp. or anything due to this injury. I want to know from you all is it right to lose your job while under a doctor care? I have doctor's statements and x-rays due to this condition, and I also have witnesses stating verification of getting treated by a doctor at the emergency room in Pineville at the hospital.

In addition to his complaint letter, Mr. Hacker submitted copies of his prior complaint statements made to MSHA, a copy of MSHA's letter of September 15, 1988, rejecting his complaint, and copies of certain hospital records incident to certain treatment he received on July 26 and August 4, 1988. Mr. Hacker subsequently submitted a letter to the Commission on October 21, 1988, stating that a copy of his complaint had been served on the respondent by certified mail, and he included the original postal service certified mailing receipt which reflects that it was received by the respondent on October 12, 1988.

On December 27, 1988, the Commission's Chief Administrative Law Judge Paul Merlin issued an order requiring the respondent to file an answer to Mr. Hacker's complaint, with the Commission within 30 days. The respondent was advised that if it did not file an answer it would be assumed that it has admitted the alleged acts of discrimination and that a

default judgment would be entered against the respondent granting Mr. Hacker any relief to which he may be entitled. The postal service certified mailing receipt reflects that the respondent received Judge Merlin's Order on January 7, 1989. However, the respondent has not complied with the order, and has not filed an answer to Mr. Hacker's complaint. Nor has it filed a response to Judge Merlin's order directing it to file an answer.

#### Discussion

The Commission's rules governing discrimination complaints filed pursuant to section 105(c) of the Act are found in Part 2700, Title 29, Code of Federal Regulations. Rule 40(b), 29 C.F.R. § 2700.40(b), provides as follows:

(b) \* \* \* A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complainant miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, \* \* \* .

Commission Rule 42, 29 C.F.R. § 2700.42, provides as follows:

A complaint of discharge, discrimination or interference shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.

Commission Rule 43, 29 C.F.R. § 2700.43 provides that within 30 days after service of a complaint filed by the complaining miner, the respondent mine operator shall file an answer.

The Commission rule governing summary disposition of any proceeding filed pursuant to its rules is Rule 63, 29 C.F.R. § 2700.63, and it provides as follows:

(a) \* \* \* When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

The pleadings in this case, including the complaint and information supplied by Mr. Hacker in support of his claim of

discrimination, reflect that his employment with the respondent was terminated on or about August 16, 1988. The respondent apparently takes the position that Mr. Hacker quit his job, and Mr. Hacker asserts that he was unable to return to work because of an alleged injury suffered when he jumped off a moving belt to avoid a falling rock, and that when he attempted to explain the circumstances of his failure to return to work, the respondent took the position that no accident or injury occurred, that Mr. Hacker quit his job, and that if Mr. Hacker wanted his job back, respondent invited him to sue.

Although Mr. Hacker's claim for workmen's compensation as a result of his alleged job-related injury, does not on its face present a viable discrimination complaint within the Commission's jurisdiction, his complaint does raise an inference that his job was terminated because of his informing an MSHA inspector approximately a week prior to his injury that he was instructed to ride the belt to his work place by the respondent's vice-president, and that riding the belt was illegal. Mr. Hacker purportedly informed the inspector that riding the belt was illegal, that the belt stop-cord was inoperative, and that he worked alone and his work area was not preshifted. According to the complaint, after Mr. Hacker's conversation with the inspector, several violations were served on the respondent, and there is a inference that these asserted violations were related to his riding the belt, the defective stop-cord, and the failure to preshift his work area. In these circumstances, there is a further inference that Mr. Hacker's termination may have resulted from his conversation with the inspector, and the asserted violations which followed. Since a miner has a protected right to bring any alleged violative mine conditions to the attention of an inspector, he may not be discriminated against by the respondent for exercising this right, and if the respondent terminated him for this reason, Mr. Hacker has established a prima facie complaint of discrimination. At this stage of the proceeding, and in view of the respondent's failure to file an answer, the complaint stands un rebutted.

The record in this case reflects that the respondent has failed to file an answer to the complaint as required by Commission Rule 29 C.F.R. § 2700.43, and that it has also failed to respond or comply with Judge Merlin's order directing it to file an answer.

ORDER

In view of the failure by the respondent to comply with the Commission's rule requiring it to file an answer to the complaint, and in view of its further failure to respond to Judge Merlin's Order, the respondent IS ORDERED TO SHOW CAUSE, that is, to explain or state why it should not be held in default and a summary judgment entered against it finding that it has discriminated against Mr. Hacker in violation of section 105(c) of the Act, and granting the relief requested by Mr. Hacker.

The respondent IS FURTHER ORDERED to file its response to this order within thirty (30) days of its receipt.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Mr. John Dixon Hacker, P.O. Box 63, Hulen, KY 40845  
(Certified Mail)

Mr. Darrell Middleton, President, Black Streak Mining,  
Box 261, Cawood, KY 40815 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER  
ROOM 280, 1244 SPEER BOULEVARD  
DENVER, CO 80204

March 22, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-230
Petitioner	:	A.C. No. 05-00301-03548
	:	
v.	:	Docket No. WEST 88-231
	:	A.C. No. 05-00301-03549
MID-CONTINENT RESOURCES, INC.,	:	
Respondent	:	Dutch Creek No. 1 Mine

ORDER SEALING PORTIONS OF TRANSCRIPT

During the hearing in the above cases certain matters were heard in camera as the evidence presented involved sensitive, proprietary and confidential information concerning the respondent's business operations.

Inasmuch as the appeal process favors a public transcript the in camera proceeding of December 1, 1988, is dissolved except for certain portions of the transcript which should remain sealed.

Accordingly, the following order is appropriate:

1. The following portions of the transcript are hereby sealed to be opened only by order of the presiding judge or by order of the Commission. These portions are as follows:

<u>Page</u>	<u>Line Number(s)</u>
5	11 through 25
6	1 through 12
7	25
8	10 through 22
10	4 through 11
15	21 through 22
16	19 through 24
28	7 through 25
30	1 through 6
31	13 through 16
32	6 through 22
33	23 through 24
34	1 through 24
35	1 through 17
38	6 through 13
39	12 through 18
40	7
42 <u>1/</u>	14 through 22

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1/ The portion excised on page 42 is a comment on the evidence by counsel and it is excised because the evidence relating thereto has been sealed.

The material under seal consists of the following:

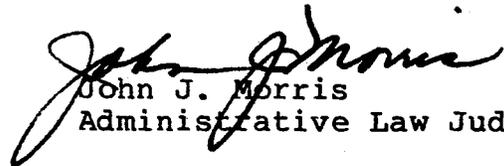
Two copies of the in camera proceedings in its entirety and two copies marked with a yellow highlighter to identify the portions excised from the transcript.

2. The public transcript containing sealed and unsealed evidence is altered by excising the sensitive, proprietary and confidential evidence portions from each page. Further, a copy of the entire in camera proceeding, as altered, is attached to this order.

Each page of the public transcript altered by this order shall contain a statement which shall identify the portion excised. Each portion so removed shall state it was excised by order of the presiding judge dated March 22, 1989.

3. A copy of the in camera proceedings, as altered by this order, is attached hereto and a copy is forwarded to each party.

4. I further direct counsel for the parties to seal the sensitive, proprietary and confidential evidence in their possession as identified by this order. Said evidence shall remain sealed until further order of the presiding judge or the Commission.

  
John J. Morris  
Administrative Law Judge

Distribution:

Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.O. Drawer 790,  
Glenwood Springs, CO 81602

James H. Barkley, Esq. and Margaret A. Miller, Esq., Office of  
the Solicitor, U.S. Department of Labor, 1585 Federal Building,  
1961 Stout Street, Denver, CO 80294

/ot

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041  
703-756-6232

March 14, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 88-79  
Petitioner : A.C. No. 12-01986-03504  
v. :  
: Hunley Creek  
SUPER BLOCK COAL CORPORATION, :  
Respondent :

ORDER TO SHOW CAUSE

This case was scheduled for hearing in Evansville, Indiana, on March 9, 1989. A Notice of Hearing was served on the parties informing them of the hearing date and location, and the returned postal service certified mailing receipt reflects that it was received by the respondent's representative of record, Mr. Larry Wallace, President, Super Block Coal Corporation, on November 19, 1988. An Amended Notice of Hearing advising the parties of the hearing date and location in Evansville, was issued on February 23, 1989, and Mr. Wallace received this notice by certified mail on February 27, 1989.

When the case was called for hearing in Evansville, at 9:30 a.m., on Thursday, March 9, 1989, Mr. Wallace failed to appear, and the hearing proceeded without him, and the petitioner presented evidence in support of the citation in issue and the proposed civil penalty assessment of \$20 for the violation noted in the citation. After the hearing had begun, I received a telephone message from a Mr. Danny Jasper, who identified himself as the mine superintendent, and he informed the individual taking the message that he was unable to attend the hearing. Upon return to my office after the close of the record, I found a telephone message from Mr. Jasper who had called my secretary in Falls Church, Virginia, on the day of the hearing, to advise her that he was unable to attend the hearing because "no one was at the mine to supervise the men." Mr. Jasper had not previously entered any appearance in this matter, and no further communication has been received from Mr. Wallace.

Since Mr. Wallace is the respondent's representative of record, it was incumbent on him to timely notify me of his intention not to appear at the hearing. Under the circumstances, and in view of the failure by the respondent to appear at the scheduled hearing, or to otherwise notify me that it did not intend to appear, the respondent (Larry Wallace) IS ORDERED TO SHOW CAUSE, and to explain, why it should not be declared in default and a summary decision and order entered pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, assessing the proposed civil penalty of \$20 as final, and directing that such payment be made. The respondent is FURTHER ORDERED to file its response within ten (10) days of the receipt of this Show Cause Order.

  
George A. Koutras  
Administrative Law Judge

Distribution:

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

Mr. Larry Wallace, President, Super Block Coal Corporation, Post Office Box 234, Crestwood, KY 40014 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 24, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-65-M
Petitioner	:	A. C. No. 11-02866-05501
v.	:	
	:	Docket No. LAKE 88-77-M
THREE STAR DRILLING &	:	A. C. No. 11-02866-05502
PRODUCTION CORPORATION,	:	
Respondent	:	Docket No. LAKE 88-92-M
	:	A. C. No. 11-02866-05503
	:	
	:	DAD Well No. 1
	:	

ORDER

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary; James B. Wham, Esq., Richard A. Cary, Esq., Wham & Wham, Centralia, Illinois, for Respondent.

Before: Judge Weisberger

Statement of the Case

The above consolidated cases are before me based upon proposals for civil penalties filed by the Secretary (Petitioner) for alleged violations by the Operator (Respondent) of various safety standards set forth in Volume 30 of the Code of Federal Regulations. The Respondent filed a Motion for Summary Decision, and Petitioner filed a Motion for Partial Summary Decision. Pursuant to a telephone conference call between Counsel for both Parties and the undersigned, at the request of Counsel, I met with Counsel at the site of Respondent's DAD Well No. 1 and observed its vertical shaft, on the morning of October 25, 1988. Pursuant to notice, on October 25 - 26, in Terre Haute, Indiana, and November 29, 1988, in Indianapolis, Indiana, a hearing was held solely for the purpose of allowing the Parties to present argument and evidence on the jurisdictional issues raised by the respective Motions for Summary Decision. At the hearing, Robert Earl Williams, Bernard Martin, and William Melcher testified for Respondent, and Raymond Roesler and Robert L. Ferriter testified for Petitioner. At the hearing, it was clarified by Counsel for both Parties that if the jurisdictional issues were to be decided

in favor of Respondent, then the cases should be dismissed. In the alternative, should the jurisdictional issues be determined in favor of Petitioner, then the cases should be set for hearing on the merits.

At the conclusion of the hearing, Counsel were directed to file Posthearing Briefs and Proposed Findings of Fact 3 weeks after receipt of the hearing transcript. Both Parties requested an extension to file briefs by February 6, and the request was granted. Petitioner filed its Proposed Findings of Fact and Conclusions of Law and Brief on February 8, 1989, and Respondent filed its Proposed Findings of Fact and Conclusions of Law and Brief on February 9, 1989. Subsequently, the Parties requested and were granted an extension until March 16 to file Reply Briefs, and Respondent filed its Answers to Petitioner's Brief on March 20, 1989, and Petitioner filed its Reply Brief on March 21, 1989.

#### Findings of Fact

1. Respondent, Three Star Drilling and Production Company, is an oil company which owns three oil wells in Illinois. Respondent sells its oil to the oil Producers Association in Springfield, Illinois.

2. Respondent is engaged in an oil recovery project known as the DAD Well No. 1 near Casey, in Cumberland County, Illinois.

3. The DAD Well No. 1 is located in the Siggins Field. Respondent has over 500 wells in this field that are "producers."

4. The Upper Siggins is approximately 300 to 350 feet deep and the Lower Siggins is approximately 500 to 550 feet deep. Between the Upper and Lower Siggins sand is a Stray sand that is approximately 412 to 427 feet deep.

5. Primary and secondary recovery of oil in the Upper Siggins sand, and primary recovery of oil in the Lower Siggins sand have occurred.

6. Primary recovery is by drilling a well from the top of the ground and the result is that the oil gushes out.

7. Secondary recovery is by pumping water into the oil reservoir which forces the oil to come out.

8. Respondent proposes to extract oil from the Siggins oil field by direct access drilling.

9. The DAD Well No. 1 will be developed in two stages:

- a. mine shaft sinking;
- b. developing oil collector rooms.

10. Respondent began excavating the shaft in October 1986. The shaft is 6 feet wide by 10 feet and 10 inches long, and as of November 29, 1988, reached a depth of 384 feet below the surface.

11. The mine shaft is deepened by drilling holes, loading the holes with explosives, blasting, and loading broken material into a hoist bucket with a Criderman mucking hoist.

12. The shaft is lined with concrete as it is deepened.

13. Employees are able to enter the shaft by riding a cage. The shaft has a ladder with a landing every 30 feet. It is used as an alternative method of exit from the shaft.

14. A blowing system, which delivers approximately 30,000 cubic feet of air a minute into the shaft, has been installed. The shaft has a 16 inch ventilation tube that is anchored to the walls.

15. Respondent has installed a conduit for electricity and a water piping system.

16. All surface equipment such as hoists, hoist drums, cables, and headframes are typical mine shaft equipment.

17. Employees work underground drilling holes, loading the hole with explosives, and loading the muck into a bucket.

18. A 24-foot circular oil collector room connected to the shaft, by a 20-foot tunnel, had been completed at the upper level of the Siggins Sand, 354 feet below the surface.

19. Respondent used a roof bolting machine to install roof bolts in the tunnel and oil collector room.

20. Respondent's plan for drilling involved the horizontal drilling of a number of holes in the walls of the oil collector room into the Siggins Sand formation. These 3 1/2-inch diameter horizontal holes will continue for a distance of approximately 800 feet. Each horizontal hole will be drilled, capped, and regulated by a remote control valve with a switch located in the hoist room or at the top of the shaft, both of which are located above ground. These horizontal drill holes will be connected to

a common line running to a sump, and any oil flowing into the sump will then be pumped to the surface by a pump actuated by remote control from above ground. No oil will run out of the horizontal drill holes into the sump with men underground. Nor will there be men underground when the oil is pumped from the sump to the surface.

21. DAD Well No. 1, is still under construction and there has been no oil produced nor drilling for oil commenced as of November 22, 1988, the date of the last evidentiary hearing. No product from DAD Well No. 1 has been sold to anyone.

22. The excavation of the oil collector room required that employees work underground.

23. After the development of the oil collector rooms, Respondent's employees might have to periodically work underground to replace pumps, unclog pipes, and drill long holes. During these procedures, the remote control valves, regulating the oil flow in the horizontal holes, will be shut off, and no oil will be extracted.

24. The State of Illinois Division of Mines and Minerals has ordered Respondent to comply with Chapters 13, 14, and 19 of the Health and Safety Rules and Regulations found in the 1985 Illinois Revised Statute, Chapter 96 1/2, paragraph 544023.3.

### Issues

1. Whether Respondent's operation at DAD Well No. 1 is a mine as defined in the Federal Mine Safety and Health Act of 1977.

2. Whether Respondent's operation at the DAD Well No. 1 affects commerce.

3. Whether the Federal Mine Safety and Health Act of 1977 is preempted by the 1985 Illinois Revised Statute, Chapter 96 1/2 Paragraph 5440 § 23.3.

### Discussion

#### I.

In evaluating whether Respondent's operation at the DAD Well No. 1 is subject to the Federal Mine Safety and Health Act of 1977 (the Act), and regulations promulgated thereunder, reference must be made to section 3(h)(1) of the Act which, as pertinent, defines a mine as . . . "lands, excavations, underground passage ways, shafts, slopes, tunnels and workings,

structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such materials from their natural deposits in nonliquid form, or if in liquid form, with workers underground, . . . ."

It appears to be Respondent's main argument that lands, shafts, and equipment used in extracting liquid minerals, are not to be considered a mine unless workers are underground during the time when the liquid minerals are being extracted. Respondent then argues that the operation herein can not be considered a mine, inasmuch as the evidence clearly establishes that no oil will be extracted when workers are underground. In this connection, the record indicates that oil is not produced or extracted while men are underground engaged in construction of the shaft, horizontal holes, or collector rooms. Indeed, no oil will be produced until construction is completed. Also, once production has commenced, no workers will have any regular tasks underground. Should a worker have to go underground on occasion to replace a pump, all valves will be first closed from above ground, stopping the extraction of oil before men actually go underground.

It is manifest that the language of section 3(h)(i), supra, does not clearly compel a conclusion, based on a plain reading of its words, that in order for an operation to be subject to the Act and be considered a mine, workers must be underground during the time when the liquid mineral is being extracted. The language of section 3(h)(i), supra, is also capable of being interpreted as encompassing in the definition of a mine, as in the case at bar, shaft and various equipment used in extracting liquid minerals with the additional requirement that workers be underground at sometime during the operation, but not necessarily concurrent with the limited activity of the oil being led into the pumps and pumped to the surface. Inasmuch as section 3(h)(i), supra, is capable of more than one construction, I place considerable weight on the legislative history of the Act, in determining how to interpret section 3(h)(i), supra. In this connection I note that Congress clearly intended that the coverage of the Act be as broad as possible. I find most instructive the following language, contained in the legislative history of the Act, with regard to Congressional intent to make the coverage of the Act as broad as possible. "The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." (S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (Legis. Hist.)). I thus conclude that to adopt the

narrow construction urged by Respondent would be violative of Congressional intent. Indeed, taking into account the very strong Congressional declaration, as contained in section 2 of the Act, that, with regard to the purpose of the Act, its first priority ". . . must be the health and safety of its most precious resource - the miner;" it would not seem logical for one working underground here in the construction of the shaft or one of its collector rooms, or in the replacing of a pump, not to be covered by the protections afforded in the Act, merely because the worker was not present concurrent with the physical pumping of the oil to the surface. It is clear that the shafts and collector rooms, where workers are presently located underground, are being developed for the purpose of extracting oil.<sup>1/</sup> I thus conclude that Respondent's operation at DAD Well No. 1 is a mine within the purview of the Act.

## II.

Section 4 of the Act, in essence, provides that a mine whose products enter commerce or whose ". . . operations or products of which affect commerce," shall be subject to the Act. Respondent, based on the uncontroverted evidence of record, argues that inasmuch as its operation, at DAD Well No. 1, is not yet producing any oil, it does not have any product which is entering commerce. The record supports Respondent's contention in this regard. However, Respondent is still under the jurisdiction of the Act if it is established that its operations "affect commerce." In this connection, it appears to be Respondent's argument, that inasmuch as its operation is in a speculative stage, and there is no assurance that oil will ever be produced, it has not been established that its operation has any affect on commerce.

In Godwin v. OSHRC, 540 F.2nd 1013 (9th Cir., 1976), the Court of Appeals was faced with a factual situation similar to the case at bar. In Godwin, supra, the Court had to consider whether the activity of clearing land for the purpose of growing grapes was included within the purview of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.), which provides that, in general, an employee is subject to the Act if his activities "affect commerce," 29 U.S.C. § 652(6), which is the same language as contained in Section 4 of the Act. The Court in Godwin, supra, essentially held that the clearing of the land for the purpose of growing grapes will adversely affect commerce if performed under unsafe conditions. The Court, at 1016, supra,

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<sup>1/</sup> Although the testimony of Respondent's witness indicates that if ultimately the extraction of oil is proved not feasible, then the shaft and appurtenances, will be used for the storage of waste, it is their present primary purpose, as a first step in the extraction of oil, which is deemed critical.

held as follows: "Clearing land is an integral part of the manufacturing of wine, and therefore commerce is affected by the activity." (Emphasis added).<sup>2/</sup>

Similarly, in the case at bar, the sinking of the shaft and excavating of the oil collector room, the activities presently being engaged in, are integral parts of the activity of the recovery of oil from the Siggins Field, and as such, commerce is affected by the present activities. (See also, Secretary v. Sun Landscaping and Supply Company 2 FMSHRC 975 (April 1980) (a company that had been in operation for 3 days intending to mine marble, crush it and sell it, and was engaged in crushing marble on the day of the inspection was held to be covered by the Act based upon its current activity and future intentions; see also, Secretary v. Bradford Coal Company, Incorporated, 3 FMSHRC 1567 (June 1981), where it was found that the business of building coal preparation plants was a class of activity the cumulative effect of which affected interstate commerce). I therefore find that Respondent's operation at DAD Well No. 1 does affect interstate commerce, and is thus within the jurisdiction of the Act.

### III.

Respondent, in essence, has raised the issue that the regulation of its mine by MSHA is improper inasmuch as the State of Illinois has maintained jurisdiction over the project from its commencement to the present. It is clear that any State of Illinois regulations, with regard to signaling during the operation of the hoist in the shaft, or with regard to any other aspect of Respondent's operation, do not preempt the Act. Section 506 of the Act permits concurrent State and Federal regulation, but under

<sup>2/</sup> The gravamen of Respondent's argument, that its present operations are only speculative and therefore can not affect commerce, was fully considered by Judge Ely, in a concurring opinion, in Godwin, supra. Judge Ely found it "almost inconceivable" for an accident at an early stage of an operation to have a nexus with interstate commerce where any number of circumstances could have prevented the fulfillment of the eventual objective. Indeed, Judge Ely stated as follows: "To me, it is virtually unthinkable that the Founding Fathers could have foreseen the extent to which an increasingly expansive interpretation of the commerce clause could so infringe local authority." (Godwin, supra, at 1017). However, nonetheless, Judge Ely reluctantly concurred in the majority decision and did not feel that he could conscientiously dissent in light of Wickard v. Filburn, 317 U.S. 111, (1942), Farmer's Irrigation Company v. McComb, 337 U.S. 755 (1949), and Hodgson v. Ewing, 451 F.2d 526 (5th Cir., 1971).

the Federal Supremacy Doctrine, a State Statute is void to the extent that it conflicts with a valid Federal Statute. Dixy Lee Ray v. Atlanta Richfield Company, 435 U.S. 151 1978. Accordingly, it is held that Respondent's contention in this regard is without merit.

ORDER

Inasmuch as it is found that Respondent's operation at the DAD Well No. 1 is subject to the jurisdiction of the Act, it is ORDERED that these cases be scheduled for hearing on the merits.<sup>3/</sup>



Avram Weisberger  
Administrative Law Judge

3/ I do not find Respondent's arguments persuasive that the decision herein should not be applied retroactively. Should the finding of jurisdiction be applied only prospectively, the burden already suffered by Respondent, i.e. being caught between the jurisdiction of the State of Illinois and MSHA and being subject to double inspections would not be effected. It is true that as a result of a retroactive application of the Act's jurisdiction, Respondent might become liable for civil penalties for violations of federally mandatory safety standards set forth in 30 C.F.R, et. seq. which allegedly occurred during the retroactive period. However, these penalties should be mitigated, as the record indicates Respondent acted in good faith in believing it was not subject to the jurisdiction of the Act, and hence did not act with any significant degree of negligence in not conforming with any federally mandated safety standards.

I reject the remainder of Respondent's arguments and find that the overriding purpose of the Act, i.e., the protection of miners, is best furthered by not limiting the jurisdiction of the Act to a prospective application.

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