MARCH 1990

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDER

MARCH 1990

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

Secretary of Labor, MSHA v. Pennsylvania Electric Company, Docket No. PENN 88-227. (Judge Melick, January 23, 1990)

Secretary of Labor, MSHA v. Flippy Coal Company, Docket No. VA 90-8. (Default Decision of Chief Judge Merlin on March 9, 1990)

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

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. WEST 89-96. (Judge Lasher, January 22, 1990)

Consolidation Coal Company v. Secretary of Labor, Docket No. WEVA 89-234-R, etc. (Judge Merlin, Interlocutory Review of January 24, 1990 Order)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 1990

LOCAL UNION 2333, DISTRICT 29, UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. WEVA 86-439-C
RANGER FUEL CORPORATION	:	

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

DECISION

BY THE COMMISSION:

This compensation 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 before the Commission for the second time. The United Mine Workers of America ("UMWA") seeks compensation from Ranger Fuel Corporation ("Ranger") under the third sentence of section 111 for an idlement of miners following the issuance of an imminent danger withdrawal order pursuant to section 107(a) of the Act. 1/ Previously,

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1/ Section 111 of the Mine Act provides in relevant part as follows:

> [1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who

on interlocutory review, we held that Ranger's payment of a civil penalty for a citation issued subsequent to the issuance of the imminent danger withdrawal order precluded Ranger from contesting in this

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> are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. ...

30 U.S.C. § 821 (sentence numbers added).

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

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, 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)] of this title, 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. ...

30 U.S.C. § 817(a).

compensation proceeding the violation that was alleged in the citation. We further held, however, that Ranger could challenge in this proceeding the causal relationship between the alleged violation and the issuance of the imminent danger withdrawal order. We therefore remanded this matter for further proceedings. Loc. U. 2333, UMWA v. Ranger Fuel Corp., 10 FMSHRC 612 (May 1988) ("Ranger Fuel I"). On remand, Commission Administrative Law Judge Gary Melick held that the imminent danger withdrawal order had not been timely contested by Ranger and had become final for purposes of section 111. Finding that there was a causal nexus between the withdrawal order and the violation alleged in the citation, the judge awarded the complainants compensation and prejudgment interest. 10 FMSHRC 1474 (October 1988)(ALJ). We granted Ranger's petition for discretionary review.

The principal issues presented on review are: whether an operator may challenge in a compensation proceeding the validity of an imminent danger withdrawal order despite the operator's failure to contest the order pursuant to section 107(e)(1) of the Mine Act (n. 3 infra); whether there was a causal "nexus" between the withdrawal order and the violation alleged in the subsequently issued citation; and whether prejudgment interest may be awarded in a compensation proceeding. For the reasons that follow, we affirm the judge's award of compensation and interest but direct that interest be calculated according to the formula set forth by the Commission in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2642 (December 1983), and, as applicable, Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988) ("Clinchfield II"), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC, No. 88-1873 (D.C. Cir. February 9, 1990). See also 54 Fed. Reg. 2226 (January 19, 1989).

I.

On May 29, 1986, William Uhl, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of Ranger's Beckley No. 2 underground coal mine located in Beckley, West Virginia. Inspector Uhl entered the mine at approximately 8:30 a.m. and proceeded to the 7-East section. While inspecting the longwall in that section, Uhl heard what he termed a "large fall" in the gob. Tr. 100-01. At about 10:00 a.m., Uhl arrived at a location in the Number 3 Entry on the tail side of the longwall immediately adjacent to the roof fall. Using a hand-held methane detector, he found the level of methane gas to be in excess of five percent. (Methane becomes explosive at a five percent concentration. Ranger Fuel I, supra, 10 FMSHRC at 614, citing Monterey Coal Co., 7 FMSHRC 996, 1000-01 (July 1985).) Uhl testified that the concentration of methane was too "heavy" for him to attempt further readings inby. However, he took additional readings outby, where the methane content was approximately one percent lower.

Uhl believed that the immediate cause of the methane concentration was a sudden inundation resulting from the roof fall that he had heard and he also believed that the mine's ventilation bleeder system was not working properly to dissipate the methane, due to a water blockage in a passageway. Tr. 99, 102-04, 106-12, 115, 118, 125, 148. At 11:30 a.m.,

Uhl issued imminent danger withdrawal order No. 2577281 to Ranger pursuant to section 107(a) of the Mine Act (n. 1 supra). The order states in part:

> An explosive mixture of methane gas in excess of five (5) per[c]ent was present in the seven east ... 0-13-0 section in the number three ... entry side of the longwall ... extending inby the face when tested with an approved E.70 methane detector (calibrated 05-22-86). ...

As a result, Ranger withdrew all miners then underground.

Later that same day, Kenneth Perdue, Ranger's senior safety supervisor, went to the 7-East section with two other foremen and took methane readings between 2:00 and 4:00 p.m. Perdue testified that there was not an explosive mixture present in the locations that he sampled and that none of his methane readings exceeded two to three percent. Perdue acknowledged, however, that excessive levels of methane were found when a gob probe was extended into the gob area. The highest methane reading obtained by Perdue using the gob probe was four percent. Perdue also testified that his inspection of the bleeder system showed sufficient ventilation and that the bleeder system was doing what it was supposed to do. In Perdue's opinion, Inspector Uhl's five percent methane reading was caused by the roof fall and because the bleeder system had not had enough time to dissipate the methane.

Between 6:00 and 8:00 p.m. Inspector Uhl's supervisor, Jules Gautier, arrived at the mine with a group of MSHA inspectors and proceeded underground to evaluate the bleeder system and determine what area was affected. Gautier testified that, at that time, further methane samples indicated that there was still an explosive mixture of methane present and, due to the water accumulation resulting in a blockage, he could not effectively evaluate the bleeder system.

The next day, May 30, 1986, MSHA personnel met with Ranger officials but did not go underground to inspect the mine. Ranger requested that the withdrawal order be modified to allow the miners in other sections to return to work. The request was denied because, according to Gautier, the methane samples taken the previous evening showed an explosive mixture of methane in the tail entries and, due to the problems with the water accumulation, it was not known to what extent methane was present. On May 31, 1986, after another visit by MSHA inspectors, MSHA modified the withdrawal order, permitting the west and north end of the mine to resume operation because the methane was no longer in the explosive range in the tail entry. The order remained in effect for the 7 East and 8 East sections, however, because the inspectors still could not reach the bleeder area.

On June 3, 1986, Gautier received an oral report concerning the results of methane bottle samples that had been collected on May 29 and 31, 1986. In Gautier's view, the report showed that two days after the initial outburst of methane, the cited section still had methane in the three to four percent range. Tr. 32. As a result of this report and a

bottle sample taken by Uhl on May 29 indicating 5.56 percent methane, Gautier instructed Uhl to issue Ranger a citation, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an inadequate bleeder system in violation of 30 C.F.R. § 75.329. 2/ The citation, issued on June 3, states:

> Based on laboratory analysis of an air sample collected on 05/29/86 ... the bleeder system failed to function adequately to carry away an explosive mixture of methane in the tail entries of the 7 East longwall section (013-0) ... extending inby for at least 500 feet. Analysis indicated the methane content to be in an explosive mixture of 5.56% CH_4 with 19.75% oxygen present. The citation was a factor that contributed to the issuance of imminent danger order No. 2577281 date 05-29-86, (therefore no abatement time is set.)

(Emphasis added.) Gautier included the underlined sentence in the citation because he believed that the bleeder system was not working effectively and that there was not enough air in the affected area to dilute the methane and render it harmless. Gautier testified that usually a bleeder system takes care of the methane "pretty quick" but that in this instance it took more than two days to get the methane out of the tail entries.

On June 4, 1986, MSHA terminated the section 107(a) withdrawal order and the section 104(a) citation following a determination that the methane level in the mine was below the maximum permissible level as a

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2/ Section 75.329, which restates section 303(z)(2) of the Mine Act, 30 U.S.C. § 863(z)(2), provides in pertinent part:

> On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas ... shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed..., When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

result of Ranger's installation of additional ventilation controls.

Ranger did not contest either the section 104(a) citation pursuant to sections 105(a) or (d) of the Mine Act or the section 107(a) withdrawal order pursuant to section 107(e)(1) of the Act. 3/ After receiving MSHA's notice of a proposed civil penalty assessment of $213 for the violation alleged in the citation, Ranger paid the penalty on August 29, 1986, without requesting a hearing.

As relevant here, the mine had been idled by the withdrawal order from 11:30 a.m., May 29, to 7:00 p.m., May 31, 1986, when the order was modified to permit resumption of production in certain areas of the mine. The miners working the 8:00 a.m. to 4:00 p.m. shift on May 29 were compensated by Ranger for the remainder of that shift and those scheduled to work the following shift, 4:00 p.m. to midnight, were also paid by Ranger for that shift. On August 15, 1986, the United Mine Workers of America ("UMWA"), the representative of the miners at the Beckley No. 2 Mine, filed with the Commission a compensation complaint seeking "one-week compensation" under the third sentence of section 111 of the Act (n. 1. supra) on behalf of those miners who had been scheduled to work on May 30 and 31, but were idled by the withdrawal order. (Under the third sentence of section 111, miners idled as a result of a section 104 or 107 withdrawal order issued "for a failure of

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3/ Section 105 of the Act, 30 U.S.C. § 815, provides operators with two opportunities to contest and request a hearing concerning issuance of a section 104 citation: section 105(d), 30 U.S.C. § 815(d), permits immediate review of a citation and section 105(a), 30 U.S.C. § 815(a), affords an opportunity to contest the penalty (and the underlying allegation of violation) after the Secretary has proposed a civil penalty for the alleged violation. See, e.g., Ranger Fuel I, 10 FMSHRC at 617-19.

Section 107(e)(1) provides operators an opportunity to contest the issuance of an imminent danger order:

> Any operator notified of an [imminent danger] order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a) of this section.

30 U.S.C. § 817(e)(1).

the operator to comply with any mandatory health or safety standards" are entitled to compensation "for such time" as they are idled or "for one week, whichever is the lesser.") Ranger's payment of the civil penalty for the violation alleged in the citation, referenced above, occurred some 10 days after Ranger had been served with a copy of the UMWA's complaint for compensation under section 111.

Prior to hearing on the compensation complaint, both the UMWA and Ranger filed motions for summary decision. The administrative law judge denied both motions. We thereafter granted the UMWA's petition for interlocutory review and reversed the judge's order insofar as he had held that Ranger could contest in this compensation proceeding both the fact of violation and the validity of the citation for which Ranger had already paid the proposed civil penalty. 10 FMSHRC at 617-20. We affirmed, however, the judge's order to the extent that he permitted Ranger to litigate the issue of causal nexus between the violation alleged in the citation and the issuance of the section 107(a) withdrawal order. 10 FMSHRC at 620-21. We remanded for further proceedings.

Following a hearing on remand, Judge Melick concluded that the section 107(a) imminent danger withdrawal order was "final" for purposes of section 111 because of Ranger's failure to contest that order within the time set forth in section 107(e)(1) of the Act (n. 3 supra). 10 FMSHRC at 1475-77. He concluded that the validity of the order and the underlying issue of whether the order was, in fact, issued for an imminent danger could not be contested in this compensation proceeding. Id. In reaching this conclusion, he stated that our decision in Ranger Fuel I "would appear to preclude litigation of the underlying order," finding the issue presented to be analogous to the operator's related failure to contest the citation or penalty proposal. 10 FMSHRC at 1476-77. He noted in particular that permitting Ranger to challenge the imminent danger order in the compensation proceeding would anomalously place the UMWA in the role of the Secretary of Labor in establishing the validity of the order. 10 FMSHRC at 1477. Accordingly, citing Old Ben Coal Co., 7 FMSHRC 205 (February 1985), he determined that the "assertion of 'imminent danger' ... in the order must ... be regarded as true." Id.

The judge also concluded that a causal nexus existed between the imminent danger order and the violation alleged in the citation, holding that an inadequate bleeder system was a causal factor in the existence of the explosive mixture of methane found by Inspector Uhl. 10 FMSHRC at 1476-78. He indicated that the allegations of violation and imminent danger in the citation and withdrawal order respectively "must be accepted as true" in light of Ranger's failure to contest those allegations. 10 FMSHRC at 1477. He disregarded any evidence conflicting with the relevant factual allegations in the citation and the order. Id. He then found that the testimony of Inspector Uhl, summarized above, concerning the effects of the malfunctioning bleeder system in creating the imminent danger, was more credible than the contrary testimony of Ranger's safety supervisor Perdue, also noted above. 10 FMSHRC at 1478. Accordingly, the judge concluded that "the cited violative condition[,] i.e., an inadequate bleeder system, was a

causal factor for the existence of the explosive mixture of methane found ... in the withdrawal order [and] the requisite causal nexus has been established." Id. Based on these conclusions and the parties' stipulations, the judge awarded compensation to the miners in question. He also awarded prejudgment interest on the compensation award, calculated in accordance with the formula set forth in Arkansas-Carbona, supra. 10 FMSHRC at 1479.

On review, Ranger submits that the judge erroneously refused to consider evidence that the withdrawal order upon which the UMWA's compensation claim is based was, in fact, invalid. Ranger submits that it had the right to challenge the validity of the imminent danger order in this compensation proceeding because that issue had never been actually litigated. Ranger further contends that the judge erred in finding a causal nexus between the imminent danger and the underlying violation. It notes that the withdrawal order itself was not issued for a violation of a mandatory standard, the citation being issued several days after the order. Additionally, Ranger argues that the violative conditions cited in the citation did not cause any "imminent danger" and that, thus, the judge's finding of causal nexus is not supported by substantial evidence. Finally, Ranger submits that the judge erroneously added prejudgment interest to the award of compensation inasmuch as section 111 does not specifically provide for interest on compensation awards.

II.

We turn first to the question of whether Ranger may challenge the validity of the section 107(a) imminent danger order in this compensation proceeding notwithstanding its failure to contest the order under section 107(e)(1) of the Act.

As we discussed in Ranger Fuel I, section 105 establishes a comprehensive scheme for contest and review of citations and orders issued pursuant to section 104 of the Act. 10 FMSHRC at 617-19. Accord, Loc. U. 1810, UMWA v. Nacco Mining Co., 11 FMSHRC 1231, 1238-39 (July 1989). We held that an operator's failure to contest under section 105 (n. 3 supra) an allegation of violation in a citation precludes it from challenging the fact of violation in the compensation proceeding. Ranger Fuel I, 10 FMSHRC at 618-19. We also concluded that an operator's payment of the proposed civil penalty generated the same preclusive effect for compensation purposes. Id. See also Loc. U. 1889, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317, 1330 (September 1986); Loc. U. 2274, UMWA v. Clinchfield Coal Co., 8 FMSHRC 1310, 1314 (September 1986) ("Clinchfield I"); Old Ben, supra, 7 FMSHRC at 207-09. Relying on Ranger Fuel I, we have subsequently held that an operator's failure to contest a section 104 withdrawal order and its later modifications (and the operator's payment of the civil penalty proposed in conjunction with the order) foreclosed it from attacking the validity of the order and its modifications in the compensation litigation. Nacco, supra, 11 FMSHRC at 1238-39.

Underlying these decisions is the recognition that the "compensation provisions of section 111 ... stand apart from the

interrelated structure for reviewing citations, orders and penalties created by section 105." Nacco, 11 FMSHRC at 1239. As we stated in Nacco:

> The distinct purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. That section 111 does not provide the basis for collaterally attacking the validity of an order that underlies a compensation claim is plainly revealed by the language of section 111, which, in its first two sentences, affords compensation "regardless of the result of any review" of an order and in its third sentence affords compensation "after such order is final." Thus, the Act contemplates that, for compensation purposes, the validity of the enforcement action upon which a compensation claim is based is either irrelevant or has already been otherwise established.

Id. We also emphasized that in section 105 contest proceedings the Secretary of Labor is a party, whereas in compensation proceedings only the miners and their representative and the operator are parties, and that requiring miners and their representative to establish the fact of violation or the validity of the Secretary's enforcement action in the compensation case would improperly thrust them into the Secretary's prosecutorial role. Ranger Fuel I, 10 FMSHRC at 619; Nacco, 11 FMSHRC at 1249-40. Accord, Int'l U., UMWA v. FMSHRC, 840 F.2d 77, 81-82 (D.C. Cir. 1988).

These same considerations support a consistent result here. Section 107 is an integral component of the Secretary's enforcement arsenal under the Act. Section 107(e)(1) specifically provides for adjudicative review of section 107(a) imminent danger orders, and expressly affords operators the opportunity to contest and request a hearing on the validity of such orders within 30 days of notification thereof. The contest and review provisions of section 107 are parallel to the section 105 scheme for contest and review of section 104 citations and orders and related penalty proposals. Thus, as with the relationship between section 111 and 105, we similarly conclude that section 111 "stands apart" from the structure for reviewing imminent danger orders created by section 107. See Nacco, 11 FMSHRC at 1239.

There is no indication in the text or legislative history of section 111 that the compensation provisions of the Mine Act were intended to provide operators with an additional avenue of review of, or a platform for collateral attack on, the validity of the Secretary's enforcement actions under section 107. Such an attack in a compensation case, as with a similar challenge to a section 104 citation or order, likewise would force miners and their representative to assume the Secretary's prosecutorial role of establishing the validity of her enforcement actions. Thus, we conclude that permitting challenges to

uncontested section 107 orders in section 111 compensation proceedings would create the same kind of statutory contradictions as would be created by allowing challenges of uncontested section 104 citations and orders under section 111. Ranger Fuel I, supra, Nacco, supra.

Ranger, however, points to the language in section 105(a) of the Act providing that an uncontested proposed penalty becomes "a final order of the Commission ... not subject to review by any court or agency" (see, e.g., Old Ben, 7 FMSHRC at 209), and argues that the absence of similar language in section 107 must mean that Congress did not intend a failure to contest an imminent danger order under section 107(e)(1) to carry the same preclusive effect.

We have observed in another section 111 case that the legal maxim expressio unius est exclusio alterius (the express direction for something in one provision, and its absence in a related provision, implies an intent to deny it in the latter setting), relied on by Ranger here, while "often ... useful ... in determining statutory meaning, ... is nevertheless only an aid to construction and not an invariable rule of law." Clinchfield II, supra, 10 FMSHRC at 1502, aff'd, Clinchfield Coal Co. v. FMSHRC, supra, slip op. at 11-12. In affirming our Clinchfield II decision on this point, the D.C. Circuit observed:

> The difficulty with this doctrine -- and the reason it is not consistently applied ... -- is that it disregards several other plausible explanations for an omission. The drafter (here Congress) may simply not have been focusing on the point in the second context; and, where an agency is empowered to administer the statute, Congress may have meant that in the second context the choice should be up to the agency. Indeed, under [Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-44 (1984)], where a court cannot find that Congress clearly resolved an issue, it presumes an intention to allow the agency any reasonable interpretative choice.

Clinchfield Coal Co. v. FMSHRC, slip op. at 11-12.

The legislative history makes it abundantly clear that the reason for inclusion of the "final order" language in section 105(a) was Congress' deep concern over what it viewed as failures in the civil penalty system under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("1969 Coal Act"). See, e.g., S. Rep. No. 181, 95th Cong., 1st Sess. 40-46 (1977)("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-34 (1978) ("Legis. Hist."). See also Coal Employment Project v. Dole, 889 F.2d 1127, 1132 (D.C. Cir. 1989), and authorities cited. The Senate Committee largely responsible for drafting the bill that was enacted as the Mine Act criticized the "lengthy, and often repetitive" procedures of penalty assessment and collection under the 1969 Coal Act and the delays occasioned thereby and, as one of "a number of means by which the method of collecting

penalties is streamlined," provided in that bill that an uncontested penalty would become a final Commission order. S. Rep. 44-45, reprinted in Legis. Hist. 632-33. No similar legislative concern is evidenced in the legislative history with respect to contest of imminent danger orders. Given the distinct substantive purposes of the civil penalty and imminent danger schemes in the Act, we can understand why a similar "final order" provision would not be deemed necessary for section 107(e)(1). What we find most decisive, however, is that the Act plainly reflects that the only way to challenge an imminent danger order is pursuant to section 107(e)(1). The presence of the final order proviso in section 105(a) does not, by itself, convince us that Congress considered and rejected a similar remedy for section 107(e)(1). See Clinchfield Coal Co. v. FMSHRC, slip op. at 12.

In support of its position, Ranger further contends that the failure of the imminent danger order at issue to allege a violation on its face is fatal to the UMWA's compensation claim. We rejected the identical argument in Clinchfield I & II (8 FMSHRC at 1314; 11 FMSHRC at 1496-98), and the D.C. Circuit has affirmed our holding. Clinchfield Coal Co. v. FMSHRC, slip op. at 4-9.

Finally, Ranger also relies upon the disparity in the time period allowed for an operator to contest an imminent danger order under section 107(e)(1) (30 days) and the time provided under Commission Procedural Rule 35 (29 C.F.R. § 2700.35) for claimants to file compensation complaints under section 111 (90 days). Ranger asserts that this divergence inefficiently and unfairly breeds litigation because operators will often be forced to contest an order that could potentially trigger a compensation claim, without notice of whether they actually face such a claim -- particularly in the case of an imminent danger order that itself does not cite a violation. We acknowledge that practical complications can arise in this regard. Cf. Clinchfield Coal Co. v. FMSHRC, slip op. at 6-7. However, we rejected similar arguments in Nacco with respect to an operator's failure to contest section 104 orders in a context of identically disparate contest periods (11 FMSHRC at 1240), and the Clinchfield court concluded that the "awkwardness" of having to contest an imminent danger order not citing a violation did not outweigh the sound reasons for allowing the Secretary, as here, to allege the underlying violation in a subsequent enforcement action. Slip op. at 7.

Thus, we hold that an uncontested section 107(a) imminent danger order is final and valid on its face for purposes of section 111 compensation proceedings and, accordingly, an operator is precluded in a compensation proceeding from contesting the validity of such an uncontested order.

Ranger also contends that the judge's finding of a causal nexus between the imminent danger order and the bleeder violation alleged in the relevant citation is improper and not supported by substantial evidence. As previously discussed, Ranger's failure to contest the citation and its payment of the civil penalty proposed for the citation result in the allegation of violation being treated as true for purposes of this compensation proceeding. Ranger Fuel I, 10 FMSHRC at 617-20.

As noted, the judge reviewed and specifically accepted as more credible the testimony of Inspector Uhl that the bleeder system was not functioning properly on May 29, 1986, and that the system's failure to dissipate the sudden inundation of methane was a contributing factor to the imminent danger that existed. 10 FMSHRC at 1476-78. We have often emphasized that a judge's credibility determinations may not be overturned lightly. E.g., Quinland Coals, 9 FMSHRC 1614, 1618 (September 1987). The relevant testimony of record has been summarized above and affords substantial support to the judge's finding that the inadequately functioning bleeder system contributed to the existence of the imminent danger, i.e., the excessive amount of methane in the mine. Therefore, we conclude that substantial evidence supports the judge's finding of a causal nexus between the imminent danger order and the violation set forth in the citation.

Lastly, Ranger contests the judge's award of prejudgment interest on the compensation found due. In Clinchfield II, we approved the award of prejudgment interest on compensation, in appropriate cases, and adopted the short-term Federal rate applicable to the underpayment of taxes as the appropriate rate for both compensation and discrimination proceedings under the Act. 10 FMSHRC at 1499-1506. See also 54 Fed. Reg. 2226, supra. The D.C. Circuit has affirmed our determinations in this regard (Clinchfield Coal Co. v. FMSHRC, slip op. at 9-13), and Ranger's various objections to the Commission's award of prejudgment interest are accordingly rejected. We modify the judge's award of interest, however, by directing that interest be computed as provided in Arkansas-Carbona, supra, and, as applicable, Clinchfield II and 54 Fed. Reg. 2226.

III.

For the foregoing reasons, the judge's decision is affirmed but his decision regarding the computation of interest is modified.

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
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March 21, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 88-128-RM
	:	LAKE 88-108-M
OZARK-MAHONING COMPANY	:	

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

DECISION

BY THE COMMISSION:

At issue in this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), is whether Ozark-Mahoning Company ("Ozark") violated 30 C.F.R. § 57.12016, a mandatory underground metal-nonmetal mine safety standard requiring deenergizing and locking out electrically powered equipment before mechanical work is done on the equipment. 1/ Commission Administrative Law Judge George Koutras concluded that Ozark violated section 57.12016 and assessed a civil penalty of $25. 11 FMSHRC 859 (May 1989)(ALJ). The Commission granted Ozark's petition for discretionary review. For

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1/ 30 C.F.R. § 57.12016 provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

the reasons that follows, we affirm the judge's decision.

Ozark operates the Annabel Lee Mine, an underground fluorspar mine in Cavernrock, Illinois. An electrically-powered hoist with a skip bucket is used to transport ore out of the mine. The hoist also is used to transport miners up and down the mine shaft in a man cage. The skip bucket is attached under the man cage and is approximately 4 feet high, 3 feet wide, and 3-1/3 feet long. When in use, the bucket moves up and down the shaft with the man cage.

The hoist is operated from a control booth inside a shop building located approximately 200 feet from the top of the shaft. The main disconnect switch for the electric power used to operate the hoist is located approximately 10 to 20 feet away from the control booth. Another power switch is located on the hoist control panel inside the control booth. The hoist is equipped with two sets of brakes, each set capable of holding a full load. The hoist also is equipped with a "dead man" braking switch. Foot pressure must be applied to the "dead man" braking switch in order to activate the hoist but, as soon as the pressure is released, the brakes automatically set. The hoisting system includes a control lever that must be manually engaged in order for the hoist to move. Thus, in order for the hoist system to move, both power switches must be energized, foot pressure must override the "dead man" braking switch, and the control lever must be appropriately engaged. The hoist system also has a manual brake lever that may be used to lock the brakes.

On March 4, 1988, Mine Safety and Health Administration ("MSHA") Inspector Gene Upton conducted a safety and health inspection at the Annabel Lee Mine. Upton observed a miner inside the skip bucket using welding equipment to patch the bottom of the skip bucket. That miner was assisted by another miner, who was approximately five feet from the shaft, bringing supplies to the area where the work was being performed. The skip bucket was located "a little above the level" of the top of the shaft while the work was being performed. Tr. 38. A hoist operator was at the controls in the control booth. The hoist control operator could not see the miner working inside the skip bucket but could see the bucket itself.

Inspector Upton found that the hoisting system was still energized because the control power switch, located inside the control booth, and the main disconnect switch were not deenergized. Upton also found that these switches were not locked out. However, the brakes were engaged, the foot pedal overriding the "dead man" braking switch was not activated, and the hoist was stationary.

Upton issued a citation to Ozark alleging a violation of section 57.12016. The citation stated:

> An employee was observed working in the skip under the man cage in the main hoist shaft without de-energizing the power for the hoist and locking the switch out. The hoist operator was sitting at the hoist controls.

Upton also designated the violation as being "significant and substantial" in nature. Ozark abated the violation within 10 minutes by shutting off and locking out the power switches and hoist controls.

Before the judge, Ozark argued that it did not violate section 57.12016 because it complied with the second sentence of the standard. Ozark argued that, although it had not deenergized the hoist system (or locked out the power switches), appropriate "other measures," within the meaning of the standard's second sentence, prevented the hoist from being moved without the knowledge of the miner working on it. These "measures" included the two sets of brakes, the "dead man" switch, the control lever, and the control panel switch. In Ozark's view, with these controls in place, turning the main power switch on could not cause the hoist to move. In addition, Ozark contended that the hoistman in the control booth was prohibited from starting or moving the hoist unless he received a signal to do so with the knowledge of the person doing the work.

The judge concluded that Ozark violated section 57.12016. He found that the hoist was "electrically powered equipment," that the skip bucket was a part of the hoist, that the work being performed in the bucket was "mechanical work," and that, therefore, the cited conditions fell within the scope of section 57.12016. 11 FMSHRC at 868. He construed section 57.12016 to require that the mine operator both: (1) deenergize electrically powered equipment; and (2) lock out power switches before any mechanical work is done on the equipment. 11 FMSHRC 868-69.

Crediting Inspector Upton's testimony, the judge found that the main power switch located outside the hoist operator's control booth and the second power switch located inside the control booth were neither deenergized nor locked out during the time that work was performed on the skip bucket. 11 FMSHRC 869-70. While the judge found "some merit" in Ozark's argument that the the second sentence of section 57.12016 provides for an alternative method of insuring against inadvertent energizing of the equipment while it is being worked on, short of locking out the power switches, he concluded that "[the] language [of the second sentence] only comes into play once the requirements found in the first sentence for completely deenergizing the equipment [are] complied with...." 11 FMSHRC at 869. Thus, according to the judge, "any alternative 'other measures' for insuring against the inadvertent energizing of the equipment while it is being worked on ... may not serve as a defense to the requirement found in the first sentence that all such equipment be initially deenergized." Id. Accordingly, the judge rejected Ozark's argument that there was no violation because Ozark had complied with the second sentence of the standard. 11 FMSHRC at 869-70. The judge also determined that the violation was not significant and substantial and assessed a civil penalty of $25. 11 FMSHRC at 872-73, 874.

On review, Ozark argues, for the first time in this proceeding, that section 57.12016 applies only to unmanned types of electrically powered equipment. It asserts that the hoist is manned equipment with an authorized person, a hoist operator, in charge and that, therefore,

the regulations at 30 C.F.R. § 57.19000 et seq. (Subpart R-Personnel Hoisting) apply. Alternatively, Ozark again argues that it complied with the second sentence of section 57.12016, thus negating any finding of violation.

Ozark's contention that section 57.12016 is applicable only to unmanned types of equipment was not presented to the judge. Under the Mine Act and the Commission's procedural rules, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii); 29 C.F.R. 2700.70(d). Ozark has not proffered any reason why it did not present that argument before the judge, and therefore we do not address this issue.

With respect to the judge's construction of the cited standard, we agree that the plain meaning of the first sentence of section 57.12016 requires that electrically powered equipment be first deenergized before mechanical work is done on such equipment. The second sentence of the standard requires appropriate measures to prevent reenergization of the equipment without the knowledge of the individuals working on it. The two sentences set forth conjunctive requirements, not alternative requirements. It is undisputed that the hoist was not deenergized within the meaning of the regulation. Tr. 10-11, 12, 19, 29, 62. We agree with the judge that Ozark's failure to comply with the first sentence of the standard is sufficient to sustain a finding of violation of section 57.12016.

For the reasons set forth above, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 27, 1990

ODELL MAGGARD	:	
	:	
v.	:	Docket No. KENT 86-1-D
	:	
CHANEY CREEK COAL COMPANY	:	
	:	
and	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of ODELL MAGGARD	:	
	:	
v.	:	Docket No. KENT 86-51-D
	:	
DOLLAR BRANCH COAL CORPORATION	:	
and CHANEY CREEK COAL COMPANY	:	

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

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners

This consolidated proceeding involves two discrimination complaints filed on behalf of Odell Maggard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and is on remand to us from an opinion of the United States Court of Appeals for the District of Columbia Circuit affirming in part and reversing in part our prior decision in this matter. Chaney Creek Coal Corp. v. FMSHRC, etc., 866 F.2d 1424 (1989), rev'g in part, aff'g in part, Odell Maggard v. Chaney Creek Coal Co., etc., 9 FMSHRC 1314 (August 1987). Both discrimination complaints allege that Mr. Maggard was illegally discharged in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1), and both are based on the same circumstances. The first complaint (Docket No. KENT 86-1-D) was brought by Maggard on his own behalf against Chaney Creek Coal Company ("Chaney Creek") pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3) (n. 1 infra). The second complaint (No. KENT 86-51-D) was brought by the

Secretary of Labor on Maggard's behalf against Chaney Creek and Dollar Branch Coal Corporation ("Dollar Branch") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). 1/ The complaints allege that Chaney

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1/ Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), prohibits various forms of discrimination against miners. Section 105(c)(2) of the Act provides in relevant part:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [section 105(c)] may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. If upon such investigation, the Secretary determines that the provisions of [section 105(c)] have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to [t]his paragraph.

30 U.S.C. § 815(c)(2).

Section 105(c)(3) states in relevant part:

> Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or

Creek and Dollar Branch (collectively, "operators") unlawfully discharged Maggard because he refused to perform certain work that he believed to be hazardous. In a decision on the merits and in a supplemental decision regarding remedies, Commission Administrative Law Judge Gary Melick upheld the complaints, ordered Maggard reinstated with back pay, interest and attorney's fees, denied the Secretary's motion to dismiss Maggard's section 105(c)(3) complaint on jurisdictional grounds, and assessed civil penalties against the operators. 8 FMSHRC 806 (May 1986)(ALJ); 8 FMSHRC 966 (June 1986)(ALJ).

The Commission granted the operators' petition for review of the judge's decision. The Commission affirmed the judge's conclusion of illegal discrimination. 9 FMSHRC at 1320 Further on the basis of the Commission's decision in John A. Gilbert v. Sandy Fork Mining Co., Inc., 9 FMSHRC 1327 (August 1987), aff'd in part, rev'd in part, Gilbert v. FMSHRC, etc., 866 F.2d 1433 (D.C. Cir. 1989), and the opinion of the United States Court of Appeals for the Fourth Circuit in Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639 (1987), a majority of the Commission (Commissioners Doyle and Nelson dissented) dismissed Maggard's section 105(c)(3) discrimination complaint and vacated the judge's award of attorney's fees. 9 FMSHRC at 1322-23.

I.

Both Maggard and Chaney Creek appealed the Commission's decision to the D.C. Circuit. The Court affirmed the Commission's conclusions that Chaney Creek had unlawfully discriminated against Maggard in violation of section 105(c)(1) of the Act. 866 F.2d at 1431-32. However, the Court reversed the Commission's dismissal of Maggard's individual complaint. 866 F.2d at 1429-30. The Court noted that no party had challenged before the Commission the judge's denial of the

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> interference in violation of [section 105(c)]. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under [section 105(c)], a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner ... for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation....

30 U.S.C. § 815(c)(3).

Secretary's motion to dismiss Maggard's section 105(c)(3) complaint and that the Commission had not directed review of the issue sua sponte pursuant to section 113(d)(2)(B), 30 U.S.C. § 823(d)(2)(B). Accordingly, the Court concluded that the matter was not before the Commission for review within the meaning of section 113(d) of the Mine Act, 30 U.S.C. § 823(d), and that the Commission therefore exceeded its authority in dismissing Maggard's individual complaint. 866 F.2d at 1429-30.

The Court also reversed the Commission's vacation of the judge's award of attorney's fees to Maggard. The Court held that because Maggard, without successful challenge, had prosecuted his own action before the Commission under section 105(c)(3) of the Act, Maggard "properly was an individual complaining party ... entitled to attorney's fees once he prevailed on the merits." 866 F.2d at 1430. In this regard, the Court stated:

> There remains a question ... noted by Commissioners Doyle and Nelson in dissent ... as to whether the fees awarded to Maggard by the ALJ were reasonable, in light of the employer's claim that some of the private counsel's work unnecessarily duplicated work that was being done by counsel for the Secretary. The Commission did not consider this question because it dismissed Maggard's individual complaint. We thus remand to the Commission for its consideration of any issues that may exist regarding the amount of attorney's fees that are reasonably due to Maggard.

866 F.2d at 1430 (emphasis in original).

Finally, the Court noted Maggard's argument on appeal that the operators owed interest in addition to that awarded by the judge, and the Court instructed the Commission to resolve "whether the amount of interest calculated to be paid Maggard was correct" under the legal formula set forth by the Commission in Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042 (December 1983). 866 F.2d at 1432-33.

For the reasons set forth below, we reinstate the judge's award of attorney's fees and remand for further proceedings with respect to the matter of interest on back pay.

II.

A. Attorney's Fees.

The administrative law judge awarded Maggard attorney's fees of $ 16,456.22. 8 FMSHRC at 967-69. As noted, the Court reversed the Commission's conclusion that attorney's fees are not awardable in this case and remanded for consideration of "any issues that may exist regarding the amount of the attorney's fees that are reasonably due to Maggard." 866 F.2d at 1430 (emphasis in original). Although the Court

characterized the operator's objection to the attorney's fee award as a claim that Maggard's private counsel's work partially duplicated work done by counsel for the Secretary, the operator's argument actually is somewhat broader. In addition to arguing that Maggard's private attorney's work was unnecessary and duplicative once the Secretary filed a complaint on Maggard's behalf, the operator also argued that, if fees are awardable, time spent by Maggard's private counsel in communicating with the Secretary's attorney and in opposing the Secretary's motion to dismiss Maggard's individual complaint should not be included in the fees assessed against the operator. Petition for Discretionary Review at 19-23; Reply Brief at 14-15. Also see 9 FMSHRC at 1325 (Commissioners Doyle and Nelson dissenting), cited at 866 F.2d at 1430.

The administrative law judge specifically addressed and rejected the operator's arguments. He rejected the argument that private representation was unnecessary once the Secretary's complaint was filed, finding that Maggard's section 105(c)(1) complaint was "independent" of the Secretary's. 8 FMSHRC at 967. (The Court agreed with the judge, finding that "Maggard['s] ... own action [was] independent of that brought by the Secretary" and that "Maggard was properly an individual complaining party before the Commission ... entitled to seek attorney's fees." 866 F.2d at 1430). As to the operator's further arguments the judge found that "[c]onsultation with the Secretary's counsel and the litigation of issues surrounding the Secretary's motion to dismiss are not unforeseeable consequences of a discriminatory action under the Act." 8 FMSHRC at 968.

An "attorney's fee award is a matter that lies within the sound discretion of the trial judge." Secretary on behalf of Ribel v. Eastern Assoc. Coal Corp., 7 FMSHRC 2015, 2027 (December 1985), rev'd in part on other grounds, 813 F.2d 639 (4th Cir. 1987). Here, the authorities relied upon by the judge support his determination that Maggard's private counsel's communications with the Secretary's counsel and Maggard's opposition to the Secretary's motion to dismiss his private complaint, can appropriately be included in a fee award against the operator. Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1982); 2 Derfner Court Awarded Attorney Fees Par. 16.02 at 16-14 n.25.1 (1989). Although our dissenting colleagues cite authority arguably supporting a contrary conclusion, we cannot say that under the remedial make-whole provisions of section 105(c) of the Mine Act the judge abused his discretion in determining that the expenses objected to were "reasonably incurred" and were not "unforeseeable consequences of a discriminatory action under the Act." 8 FMSHRC at 967, 968. Moreover, the litigation giving rise to the instant attorney fee award is traceable back to and occasioned by the underlying violative actions taken by Chaney Creek Coal against Maggard. See Natural Resources Defense Council v. U.S. Environmental Protection Agency, 703 F.2d 700, 713 (3rd Cir. 1983).

Accordingly, the operator's challenge to the fee award is rejected and the judge's award is reinstated.

B. Interest on back pay.

The remaining interest issue arises as a result of developments after the issuance of our prior decision, while this matter was pending on appeal in the Court. The judge had awarded Maggard back pay and interest thereon in the amount of $33,660.19. 8 FMSHRC at 966-67. The award reflected the parties' stipulation that Maggard was entitled to back pay through June 1, 1986, of $31,812, and interest of $1,848.19 on the back pay to that date, computed according to the formula in Arkansas-Carbona, supra. The Commission affirmed this award. 9 FMSHRC at 1323. Following issuance of our decision, the operators did not pay Maggard the backpay and interest found to be due. The Secretary petitioned the court on Maggard's behalf for a court order requiring the operators to either pay Maggard the amount owed or place the money in an interest-bearing escrow account. The operators responded that they would place the award in an escrow account. Maggard's private counsel then moved the Court to order the operators instead to pay Maggard the amount owed plus additional interest. The operators advised the Court that they had placed $35,523.37 in an escrow account and stated to the Court that the money "represents the full amount due to Odell Maggard, pursuant to the decision of the Commission." Notice at 1 (February 18, 1988). 2/ In turn, Maggard responded that the amount mentioned by the operators represented backpay plus interest only through June 1, 1986, and did not include interest subsequent to that date. Maggard asserted to the Court that the operators owed an additional $4,663.50 in interest, for a total award of $40,186.87. Maggard's Response to Operators' Notice at 2 (March 21, 1988).

On April 19, 1988, in response to these various claims, the Court issued an order directing the operators to pay Maggard the backpay awarded by the Commission with "reasonable interest to be agreed upon by the parties." Order at 1. Maggard subsequently moved the Court to modify the order to require the operators to pay interest pursuant to the formula in Arkansas-Carbona. The operators then paid Maggard $35,940.03, the amount deposited in the escrow account plus the interest that had accrued thereon. However, Maggard advised the Court that the operators owed an additional $4,246.84 in interest, the difference between the total amount of interest accruing after June 2, 1986, and the amount paid by the operators. Maggard Motion for Modification 2-6 (May 10, 1988). As noted, the Court ultimately remanded the interest question to the Commission to determine the proper amount of interest due. 866 F.2d at 1432-33.

In Arkansas-Carbona, noting that section 105(c)(3) of the Mine Act expressly includes interest on back pay as a form of relief that can be granted a discriminatee, the Commission approved the award of interest on back pay in appropriate cases. 5 FMSHRC at 2049. The Commission adopted as an appropriate rate of interest the "adjusted prime rate,"

2/ That amount of back pay and interest is larger than the amount awarded by the judge because the judge computed both wages and interest through June 1, 1986, and Maggard was not actually reinstated until June 20, 1986.

then announced semi-annually by the Internal Revenue Service ("IRS") under the then applicable version of 26 U.S.C. § 6621, and also adopted the "quarterly method" of calculating the amount of interest due. 5 FMSHRC at 2050-54.

Following enactment of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (1986), we reexamined the subject of an appropriate interest rate and adopted the "short term Federal rate" as the interest rate to be applied on both compensation awards under 30 U.S.C. § 821 and on back pay awards in discrimination cases. Loc. U. 2274, Dist. 28, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1504 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988). We further announced that the short term Federal rate would become effective January 1, 1987, replacing for periods commencing after December 31, 1986, use of the adjusted prime rate approved in Arkansas-Carbona. 10 FMSHRC at 1504-06. In computing the short term Federal rate, we retained the quarterly method explained in Arkansas-Carbona (5 FMSHRC at 2050-54). 10 FMSHRC at 1506. We also indicated that the Clinchfield formula would apply to all cases in which decisions were issued after the date of the Clinchfield opinion. 10 FMSHRC at 1505. See 54 Fed. Reg. 2226 (January 19, 1989).

As is clear, the parties dispute the proper amount of interest due on the back pay award. Because they have been unable to resolve this problem through stipulation, we must remand the matter to the judge, pursuant to the Court's remand, for any necessary further findings and, if he determines that Maggard is due additional interest, for calculation of the amount of the additional interest due in accordance with the applicable principles of Arkansas-Carbona and Clinchfield and the formula set forth at 54 Fed. Reg. 2226, supra.

III.

For the foregoing reasons, the judge's award of attorney's fees to Maggard is reinstated. We also remand to the judge for necessary findings and calculations regarding the interest due on the back pay award.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

Commissioners Doyle and Nelson, concurring in part and dissenting in part:

We join in the majority's decision to remand this case to the administrative law judge for a determination of the interest due on Mr. Maggard's back pay award. We respectfully dissent, however, from the majority's determination that the attorneys' fees awarded by the judge were reasonable and appropriate in their entirety.

In his petition for review, the operator contends that attorneys' fees should be reduced on the grounds that a significant amount of the time spent by Mr. Maggard's private attorney was spent on litigating issues surrounding the Secretary of Labor's Motion to Dismiss Mr. Maggard's section 105(c)(3) action, was unrelated to the anti-discrimination purposes of the Act, and did not pertain to any activities of the operators. Petition for Discretionary Review at 21, 23 & n. 8. We agree that Mr. Maggard is not legally entitled to recover from the operator for time spent by his attorney on collateral issues, i.e., for time spent by the claimant's attorney in defending against the Secretary's Motion to Dismiss. 1/

Some months after Maggard's attorney instituted the private action, the Secretary instituted her section 105(c)(2) action and moved to dismiss the 105(c)(3) action. The operator did not join in or oppose that motion. The judge found against the Secretary and allowed the 105(c)(3) action to continue. The Secretary petitioned for review of the judge's denial of her Motion to Dismiss and a majority of the Commission overruled the judge, found for the Secretary, and dismissed Maggard's 105(c)(3) action. On appeal to the D.C. Court of Appeals, Maggard contested only the retroactive application of the Commission's new Rule 40(b). The Secretary effectively conceded that retroactive application was not appropriate and asserted that she was primarily concerned about the prospective application of Rule 40(b). The operator was, for the most part, a silent observer of these machinations. The majority is of the opinion that the operator should pay for his ringside seat. We disagree.

1/ In our earlier dissent, we stated that we would affirm the award of attorneys' fees to the extent that they were incurred in instituting and prosecuting Mr. Maggard's discrimination claim but would disallow such fees to the extent that they were incurred in relation to the jurisdictional issue or coordinating the prosecution of the two cases. While the D.C. Circuit made reference to the issue we had raised, the court characterized it and the operator's argument as a challenge pertaining to duplication of work rather than one pertaining to collateral issues. 866 F.2d 1424, 1430 (D.C. Cir. 1989). In any event, the court's remand requires us to consider the amount of the attorneys' fees that are reasonably due to Maggard (Id. at 1430) and "to resolve any disputes remaining over the reasonableness of attorneys' fees due to Maggard." Id. at 1433. (emphasis added).

We are of the opinion that the majority's reliance on Ribel v. Eastern Assoc. Coal Corp., 7 FMSHRC 2015 (December 1985), to the effect that the attorneys' fee award is within the sound discretion of the trial judge (slip op. at 5) is misplaced. In fact, Ribel was reversed on the grounds that there was no legal basis for the award of attorneys' fees made by the judge. Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 644 (4th Cir. 1987).

Similarly, its reliance on Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982) is misplaced. Donnell involved a claim for attorneys' fees by defendant intervenors and the court held that "intervenors may be denied fees where their participation was unnecessary in light of the efforts of the prevailing governmental litigant". Id. at 246-7, n. 12. The case was remanded for consideration of that issue and of the appellants' specific challenges to time charges, including the challenge to duplicative efforts. Id. at 250. The administrative law judge properly distinguished Donnell from this case because Mr. Maggard was not an intervenor but rather had an "independent" action. 8 FMSHRC at 967. 2/

Liability for attorneys' fees is limited to those matters litigated between Maggard and the mine operator. Fees generated by the litigation between the Secretary and Maggard over jurisdiction under section 105(c), a separate legal issue warranting entirely different relief, are not appropriately assessed against the operator. See Smith v. Robinson, 468 U.S. 992, 1015 (1984). In United Nuclear Corp. v. Cannon, 564 F. Supp. 581 (D.R.I. 1983), the court denied fees for time spent by the plaintiff in battling a collateral issue, beyond the defendant's control. "The decision to battle against it was essentially a tactical judgment on plaintiff's part for its own ends" (Id. at 585), much like Maggard's decision to oppose the Secretary's Motion to Dismiss here. (emphasis added.) In Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981), the court found that time spent on a collateral issue should be excluded because "[a]ppellee's opposition to intervention was irrelevant to the goal of obtaining compliance; the attempted intervention was also a circumstance beyond appellants' control" (Id. at 670), again much like the case here, where Maggard's attorney opposed the Secretary's motion, not to obtain compliance with the Mine Act's anti-discrimination provisions but to

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2/ In its earlier opinion, the majority relied on Eastern Associated Coal Corp., 813 F.2d 639, also dealing with intervention, to support its vacation of attorneys' fees in their entirety. The court found that case to be inapposite because "Maggard, by contrast, did not intervene in the Secretary's action" but rather "prosecuted his own action before the Commission under section 105(c)(3)..." 866 F.2d at 1430.

retain control of the litigation. Fees should not be awarded against a defendant for activities in which it did not oppose the plaintiff. See Dubose v. Pierce, 579 F. Supp. 937, 957 (D. Conn. 1984), rev'd and remanded on other grounds, 761 F.2d 913 (2d Cir. 1985).

The majority also concludes that the judge did not abuse his discretion when he found that consultation with, and litigation against, the Secretary were not "unforeseeable consequences of a discriminatory action" and hence could be assessed against the operator as attorneys' fees. (slip op. at 5, quoting 8 FMSHRC at 968.) Even were the record to support that finding, it does not convert a wholly separate claim, on a different issue, that requested a totally different type of relief, into a discrimination claim. See Stickle v. Heublein, Inc., 716 F.2d 1550, 1564 (Fed. Cir. 1983). Rather, claims for fees generated by litigation against the Secretary are limited to those fees provided under the Equal Access to Justice Act, 5 U.S.C. 504.

For the foregoing reasons, we would remand to the judge with directions to delete that portion of the claimed fee which stems from litigation between Maggard and the Secretary.

Joyce A. Doyle
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 28, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 90-8
FLIPPY COAL COMPANY, INC.	:	

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 Chief Administrative Law Judge Paul Merlin issued an Order of Default on March 9, 1990, finding Flippy Coal Company, Inc. ("Flippy") in default for failure to answer the Secretary of Labor's civil penalty petition and the judge's order to show cause. The judge assessed civil penalties in the amount of $1,486 as proposed by the Secretary of Labor. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On March 14, 1990, Flippy's bookkeeper wrote a letter to this Commission stating that an attached letter explaining why "there should be no penalty" had been sent to the wrong address. The attachment, a letter from Flippy's president dated February 15, 1990, and addressed to the Department of Labor's "MSHA Civil Penalty Compliance Office" in Arlington, Virginia, contains a short and plain statement of the reasons why Flippy disagrees with a roof support violation and a roof plan violation alleged by the Secretary. Flippy's letter of March 14, 1990, was received by the Commission on March 16, 1990.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). We are treating Flippy's March 14 letter as a timely filed petition for discretionary review because it was received within 30 days of the judge's decision. E.g., Patriot Coal Co., 9 FMSHRC 382 (March 1987). The petition is granted.

The record discloses that on July 11, 1989, and on August 4 and 10, 1989, inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued seven citations and one order to Flippy alleging violations of various safety regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Flippy's president filed a "Blue Card" request for a hearing before this independent Commission. On December 12, 1989, counsel for the Secretary filed a proposal for penalty assessments, which was served by mail on Flippy. When no answer to the penalty proposal was filed, the judge, on January 22, 1990, issued a show cause order directing Flippy to file an answer within 30 days or show good reason for the failure to do so. As noted, Flippy's president mailed an answer to the Secretary on February 15, 1990. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the proposal for penalty. 29 C.F.R. § 2700.5(b) & .28.

Flippy appears to be a small coal company proceeding without benefit of counsel. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief where it appears that the party's failure to respond to a judge's order and the party's default are due to inadvertence or mistake. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); Patriot Coal Co., 9 FMSHRC 382 (March 1987). Flippy may have confused the roles of this independent Commission and the Department of Labor in this adjudicatory proceeding. As noted, Flippy's Answer was apparently sent to the Department of Labor within the time provided in the judge's order to show cause. In light of these considerations, we believe that the operator should have the opportunity to present its position to the judge. E.g., Amber Coal Co., 11 FMSHRC 131-32 (February 1989).

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether final relief from default is appropriate. See, e.g., Doug Connelly Sand & Gravel, 9 FMSHRC 385 (March 1987).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Chief Administrative Law Judge Paul Merlin
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 89-50-M
MORGAN CORPORATION	:	

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)("Mine Act" or "Act"), counsels for the Secretary of Labor and Morgan Corporation ("Morgan") have filed with the Commission a Joint Motion to Approve Settlement. For the following reasons, the parties' settlement approval motion is granted and this matter is dismissed.

On February 16, 1990, we granted Morgan's petition for discretionary review of a decision of Commission Administrative Law Judge George A. Koutras, concluding that Morgan had violated 30 C.F.R. § 56.9005 (1988) and assessing a civil penalty of $1,000.00. 12 FMSHRC 40 (January 1990)(ALJ). On March 28, 1990, the Secretary and Morgan filed the Joint Motion to Approve Settlement.

The parties note that section 56.9005 was superseded on October 24, 1988, by currently applicable 30 C.F.R. § 56.14200. 53 Fed. Reg. 32496, 32514 (August 25, 1988). The parties emphasize that under these circumstances, an adjudicative interpretation of section 56.9005 would have no precedential value in the Secretary's future enforcement efforts or in regulating Morgan's future conduct. They further state that Morgan has raised substantial questions concerning the proper interpretation of section 56.9005 and whether it violated the standard. The Secretary also seeks settlement because of her desire to use most effectively her limited resources. Accordingly, the Secretary and Morgan request approval of their settlement, including vacation of the citation and assessed penalty, vacation of the Commission's direction for review, and dismissal of the proceeding.

Oversight of proposed settlements of contested cases is an important aspect of the Commission's adjudicative responsibilities under the Mine Act (30 U.S.C. § 820(k)) and is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC

668, 674-675 (May 1986). The Commission has granted motions to vacate citations and orders and to dismiss review proceedings if "adequate reasons" to do so are present. E.g., Southern Ohio Coal Co., 10 FMSHRC 1669, 1670 (December 1988), and authorities cited ("SOCCO").

We conclude that adequate cause exists to grant the parties' motion. As the prosecutor charged with enforcement of the Act, the Secretary has determined that she should seek dismissal of this proceeding, particularly in view of the replacement of the cited standard by a new and differently worded standard. The operator joins in the motion and has not asserted that it would be prejudiced by dismissal. No other reason appears on this record as to why the motion should not be granted. See, e.g., SOCCO, supra, 10 FMSHRC at 1670.

Therefore, upon consideration of the motion, it is granted. Morgan's petition for review is dismissed. The underlying citation and the assessed civil penalty are vacated. Our direction for review is also vacated and this proceeding is dismissed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Administrative Law Judge George Koutras
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 1 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-75 A.C. No. 36-02404-03744
v.	:	
	:	Greenwich Collieries No. 2
ROCHESTER & PITTSBURGH COAL COMPANY, Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Petitioner;
Joseph A. Yuhas, Esq., Rochester and Pittsburgh Coal Company, Ebensburg, PA, for the Respondent.

Before: Judge Fauver

The Secretary seeks a civil penalty for an alleged violation under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The same citation was involved in Docket NO. PENN 88-194-R, a contest proceeding, in which the parties stipulated that this civil penalty case be adjudicated along with the notice of contest. After the hearing, the contest case was decided, affirming the citation and assessing a civil penalty of $78. The civil penalty case was STAYED pending review by the Commission of the contest decision.

The Commission decided the contest case on February 21, 1990, affirming the judge's decision.

ORDER

WHEREFORE IT IS ORDERED that:

1. The STAY in this case is LIFTED.

2. Respondent shall pay the assessed civil penalty of $78 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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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 1 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 89-56 A.C. No. 44-03795-03592
v.	:	
VP-5 MINING COMPANY, Respondent	:	VP-5 Mine

DECISION

Appearances: Javier Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Marshall S. Peace, Esq., Assistant General Counsel, Peabody Coal Company, Lexington, Kentucky, 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 VP-5 Mining Company (VP-5) with 10 violations of the regulatory standard at 30 C.F.R. § 50.20(a). The general issues before me are whether VP-5 violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the Secretary moved to vacate Citation Nos. 2760925, 2970940, 2970922 and 2971927 for the reason that those citations were controlled by the Commission decision in the case of Secretary v. Garden Creek Pocahontas Company, 11 FMSHRC 2148 (1989). The Secretary further moved to vacate Citation No. 2971939 on the grounds that she cannot prove that the miner suffering the alleged eye injuries actually used the prescribed medication.

The parties also moved for approval of a settlement agreement regarding Citation Nos. 2971928, 2971932, 2971935 and 2971936 in which Respondent agreed to pay the proposed penalties of $80 in full. I have considered the representations and documentation submitted herein and

conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly an appropriate order will be incorporated in this decision setting forth the terms of payment.

The citation remaining at issue, No. 2971929, alleges a violation of the regulatory standard at 30 C.F.R. § 50.20(a) and charges as follows:

> The operator failed to report to MSHA on Form 7000-1 an occupational injury as required by 50.20(a) of C.F.R. Employee Curtis Osborne incurred an injury on June 30, 1987, and returned to work on July 3, 1987, resulting in one lost work day.

30 C.F.R. § 50.20(a) provides in relevant part as follows:

> Each operator shall maintain at the mine office a supply of MSHA mine accident injury and illness report Form 7000-1 ... each operator shall report each accident, occupational injury or occupational illness at the mine ... the operator shall mail completed forms to MSHA within 10 working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

30 C.F.R. § 50.2(e) provides that:

> [o]ccupational injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury ...

The term "injury" is not further defined in the regulations. However the ordinary meaning of the term "injury" is "an act that damages, harms or hurts"; or "hurt, damage, or loss sustained." Secretary v. Freeman United Coal Mining Company, 6 FMSHRC 1577, 1578-1579 (1984), quoting from Webster's Third New International Dictionary (Unabridged) 1164 (1977). In the Freeman case, a miner developed back pains while putting on his work boots before entering the mine. There was no showing that he had suffered any work related mishap. The miner was hospitalized and did not work for 13 days. The Commission ruled in Freeman that the Secretary did not have to prove that the miner's back injury was related to his work, only that it occurred at the job site. In this regard the Commission stated:

> The remainder of the definition in section 50.2(e) refers only to the location where the injury occurred ("at a mine"), and to the result of an injury ("medical treatment, death,"etc.). Thus, sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury - a hurt or damage to a miner - occurs at a mine and if it results in any of the specified serious consequences to the miner. These regulations do not require a showing of a causal nexus. 6 FMSHRC at 1579.

It is not disputed in this case that Curtis Osborne, a miner working at the VP-5 mine on June 30, 1987, suffered pain in his lower back after exiting the cage and as he was walking toward the bottom of the mine. Osborne testified as follows:

> I remember getting off the cage, and I was walking over towards the bottom, on the shop-side of the cage. And a pain hit me in my lower back.

It is further undisputed that Osborne was unable to work the next workday because of this back pain and that VP-5 did not file the MSHA Form 7000-1 within 10 days of the onset of this back pain.

Contrary to VP-5's suggestion in its brief, the Commission did not set forth a requirement in the Freeman decision that an "act" must precede the "hurt, damage or loss sustained" in order to establish that an "injury" occurred. It is apparent in any event that the miner herein incurred a "hurt, damage or loss sustained" while engaged in the act of walking in the VP-5 underground mine.

Under the circumstances I find that the Secretary has sustained her burden of proving that Mr. Osborne, a miner, suffered a "hurt" or "damage" in a mine within the context of the Freeman decision and that he therefore suffered an occupational injury under 30 C.F.R. § 50.2(e). Accordingly VP-5 had the responsibility under the cited regulatory standard to report the injury within 10 days of its occurrence. Its failure to do so constitutes a violation as charged.

Since the law on this point has been clearly established since at least the 1984 Freeman decision, VP-5 was grossly negligent in failing to have reported the injury in this case. Considering all of the criteria under section 110(i) of the Act I conclude that a civil penalty of $150 is appropriate for this violation.

ORDER

VP-5 Mining Company is directed to pay civil penalties totalling $230 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 2 1990

BETH ENERGY MINES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 88-149-R Order No. 2941672; 2/4/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Livingston Portal Eighty Four Complex Mine I.D. #36-00958
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 88-197 A.C. No. 36-00958-03727
v.	:	Livingston Portal
BETH ENERGY MINES, INC., Respondent	:	Eighty Four Complex
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-154 A.C. No. 36-00958-03767 A
v.	:	Livingston Portal
SAMUEL J. KUBOVCIK, EMPLOYED BY BETH ENERGY MINES, INC., Respondent	:	Eighty Four Complex
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-155 A.C. No. 36-00958-03769 A
v.	:	Livingston Portal
JOHN RONTO, EMPLOYED BY BETH ENERGY MINES, INC., Respondent	:	Eighty Four Complex

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Respondent	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 89-156
	:	A.C. No. 36-00958-03727
v.	:	Livingston Portal Eighty Four Complex
JAMES NUCCETELLI, EMPLOYED BY BETH ENERGY MINES, INC.,	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Beth Energy Mines, Inc., Samuel J. Kubovcik, James Nuccetelli and John A. Ronto;
James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor.

Before: Judge Melick

Dockets No. PENN 88-149-R and PENN 88-197

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 Order No. 2941672 issued by the Secretary of Labor pursuant to section 104(d)(2) of the Act against Beth Energy Mines, Inc., (Beth Energy) and for review of civil penalties proposed by the Secretary for the violation alleged therein.[1]/

[1]/Section 104(d) of the Act reads 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 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

As amended at hearing, Order No. 2941672 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.303 and charges as follows:

> Representative [sic] of the operator (foreman) had a miner remove a danger-board and go inby at No. 79 to 80 cross-cut 4 butt track-haulage, to bring in 20 empty cars under "I" Beams that were not straped [sic] or saddled. Then proceed to come back through area second time with motor, and rehung the danger-board. This violation occurred on January 31, 1988.

The cited standard reads in part as follows:

> If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of

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cont'd fn.1

> 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.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall 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.

the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

At hearing the Secretary maintained that the violation occurred in this case when construction foreman John Ronto authorized the removal on January 31, 1988, of a danger sign and danger tag at the No. 53 trolley switch thereby allowing a miner to pass into the area so "dangered off". While the Secretary acknowledges that Mr. Ronto, a certified assistant mine foreman, was also a qualified mine examiner and was therefore authorized to remove such signs if he found no violation or hazard he did so unlawfully in this case because both a hazardous condition and a violation of a mandatory safety standard continued to exist at this time within the "dangered off" area.[2/]

Summary of the Evidence

On January 30, 1988, around 2:00 or 3:00 p.m., Donald Rados, a Beth Energy Mine Examiner, discovered five unsaddled beams in the 4-butt empty track area near the No. 80 stopping. According to Rados it was the uniform practice at the subject mine to saddle beams placed in haulageways immediately after installation of beams or, at the latest, before traffic was permitted in the area. Rados observed that the roof in the cited area was in bad shape. He thought the area was particularly dangerous because it had a history of derailments and indeed he had previously reported these types of dangerous conditions in the "Fire Boss" books in the past. According to Rados derailments could occur with a locomotive pushing the cars and the cars could be pushed as much as 100 feet before the locomotive operator might notice the derailment.

2/ At the conclusion of the Secretary's case-in-chief a motion to vacate the Section 104(d)(2) withdrawal order was made on the grounds that the Secretary failed to produce any evidence of the absence of an intervening clean inspection following the issuance of the precedential Section 104(d)(1) Order. See United Mine Workers of America v. FMSHRC 768 F.2d 1477 (D.C. Cir. 1985). The motion was granted and the order was accordingly modified to a citation under Section 104(d)(1) of the Act. See Footnote 1 supra.

Rados accordingly "dangered" the area off by placing a danger sign at the mouth of the empty track off the main haulage and by placing a danger tag on the trolley switch. According to Rados such danger signs mean that no one is to enter the "dangered" area except those "authorized by law". Rados, following company procedures, then warned the dispatcher not to send empty cars into the danger area and advised one of the "bosses" of the "dangered off" area. Rados also made a written entry in the mine examiner's book warning of the danger (See Exhibit G-3).

John Ronto was construction foreman on the 12:01 a.m. shift on January 31, 1988, with a 4-man crew. He too was a certified mine examiner. Together with his supervisor, acting shift foreman Sam Kubovcik, he learned that coal on the belt was hindering the work of a subcontractor. Kubovcik later called Ronto directing him to obtain some empty rail cars stored in the 4-Butt area to use to remove the coal from the belt. According to Ronto, Kubovcik advised him that unsaddled beams were in the 80 Stopping area and that whoever Ronto sent to obtain the empty rail cars should be so warned and should proceed with caution.

Ronto thereupon directed two locomotive operators to meet him at the 4-Butt dump area. Ronto testified that he then proceeded to the 80 Stopping, examining the roof, the beams, the legs, and the track clearance and condition. Ronto struck each leg with a hammer and checked its alignment and clearance. According to his testimony Ronto found the track to be in good shape and dry and clean. Ronto testified that he also measured between the tracks and the posts and found what he deemed to be ample clearance on both sides. Ronto then proceeded to the dump to wait for the locomotive operators.

Ronto later received a call from the locomotive operators inquiring about the danger sign. Ronto told them "everything was O.K." and that they were to bring in the empty cars. Ronto remained in the area to give directions. He estimated the speed of the locomotive and cars to be not more than one or two miles per hour. After the cars had been removed and the track mounted Fletcher returned to the area, the miners asked Ronto what to do with the danger sign. Ronto believed that he responded "let's put everything back the way we found it". According to Ronto the danger sign was replaced "possibly" over concern about the unstrapped beams. Ronto testified that he did not believe there was "considerable danger" but nevertheless left the danger sign as a caution to people who might not otherwise know of the conditions. Ronto acknowledged that he did not make any

entry in the mine examiner's book that the dangerous conditions previously reported by Mine Examiner Rados had at any time been eliminated.

MSHA Coal mine inspector Alvin Shade received a request to investigate the alleged violation on February 4, 1988, pursuant to section 103(g)(1) of the Act. Shade later interviewed witnesses and examined the subject area of the mine. The previously dangered area consisted of 5 "I" beams set on 8 inch by 8 inch posts over a 20 foot area. The beams had been strapped by the time of his examination on February 4. Shade concluded that indeed a hazard had been presented by such beams existing without strapping and that it was a "significant and substantial" violation of the cited standard. Shade believed that if any of the posts should have become dislodged by a rail car it could have caused the beam to fall. He observed that bolts were in the roof area but the roof was sagging and needed the support of the additional beams. Shade concluded that the condition could have resulted in a lost time accident.

Shade also concluded that the violation was the result of high negligence, aggravated conduct and "unwarrantable failure" for the reason that Construction Foreman Ronto replaced the danger sign upon his departure from the dangered off area. Shade believed that this act was an admission by Ronto that he knew a danger continued to exist throughout the time the empty cars were removed.

James Nuccetelli was acting chief construction foreman at the Beth Energy Eighty Four Mine on January 30 and 31, 1988. According to Nuccetelli the beams had been installed in the cited area on the 12:01 a.m. shift on Saturday, January 30, 1988, because of reports from fire bosses that the roof was getting "heavy". The beams were to be saddled on the Sunday, January 31, day shift. Nuccetelli agreed that the Beth Energy Roof Control Plan did in fact require saddling of the beams but contends that they had a "reasonable time" to accomplish this task. Nuccetelli observed that according to past practices they had been given up to 4 days to strap beams on even the main haulage area where there is more activity. According to Nuccetelli, these practices had been permitted over the years by MSHA inspectors. Nuccetelli also disagreed with Rados' conclusion that the unsaddled beams posed a danger but he, like Ronto, did not seek to overturn Rados' posting of the danger signs and reporting of hazardous conditions in the Mine Examiner's books.

On the morning of January 31st Nuccetelli purportedly warned shift foreman Kubovcik that the beams were not saddled

and told him to check the safety of the area in question before obtaining the empty cars.

Acting Shift Foreman Sam Kubovcik testified that he was called early on the shift concerning the need to remove coal from the belt. Nuccetelli told him to have Ronto inspect the 4-Butt area empty track and to remove the empty cars but since the beams had not been saddled, only if he determined the area was safe. Based upon Ronto's opinion, Kubovcik also opined that there was no hazard at that time. Kubovcik also contends that they were permitted a "reasonable time" to strap the beams.

Ronald Bizick a mine inspector for the Beth Energy Eighty Four Mine, testified that he could not recall any injuries at the mine caused by unstrapped beams falling. He also testified that he knew of MSHA inspectors who had themselves traveled beneath unsaddled beams in the main haulageway of the mine without having cited that condition.

James Gallick, Director of Safety and Environmental Health for Beth Energy, is "responsible for reviewing its roof control plans. It was Gallick's understanding that beams in the Eighty Four mine need only be strapped within a "reasonable time". He believed that a "reasonable time" meant until the next idle shift following the installation of the beams--which could be up to five days later. Gallick acknowledged however that even after the dispute in this case arose there had been no effort to amend the roof control plan to specify the time within which beams must be strapped. It was also Gallick's opinion that only "imminent dangers" need be dangered off and reported as a danger in the mine examiner's book. Although Gallick had never observed the conditions cited in this case it was his opinion that no "imminent danger" existed. Gallick also concluded that it was not reasonably likely for an accident to occur in the cited area based on his understanding that no injuries have ever occurred at Beth Energy mines as a result of a displaced beam.

In rebuttal, Alfred Paterini, a Beth Energy mine examiner for the previous 13 years, testified that it had been the practice at Beth Energy mines to strap beams on the same shift or the shift immediately following installation. According to Paterini it had also been the practice at Beth Energy where beams had not been strapped, for transportation to be provided up to the affected area and for miners to then be routed around the unstrapped beams. Paterini also recalled that there had been derailments in the cited area on several occasions and that he had been sent to

reset legs under beams displaced by derailments in that particular area.

Also in rebuttal, Mine Examiner Donald Rados testified that indeed an "imminent danger" existed in the cited entry when he dangered it off. When dangering the area off he put up a tag and 2-brattice boards across the empty track and erected a danger sign on the barrier.

Evaluation of the Evidence

In determining whether a violation existed in this case it is necessary to decide whether at the time Foreman John Ronto had the cited danger sign and danger tag removed, and at the time of the entry of the locomotive operator into the previously "dangered off" area there then continued to exist either a violation of a mandatory health or safety standard or a hazard in that area within the meaning of 30 C.F.R. § 75.303. I find in this case that both a violation of a mandatory safety standard (i.e. a violation of the Roof Control Plan) and a hazard of a significant nature continued to exist at that time. Since Ronto would have been authorized to remove the danger signs only if there was no hazard and no violation of a mandatory health or safety standard he was in clear violation of the cited standard in authorizing and directing that danger tag and sign to be removed.

The Secretary maintains in this case that the following provisions of the Beth Energy Roof Control Plan were violated:

> 19. On haulageways, all cross bars or beams shall be installed with some means of support that will prevent the beam or cross bar from falling in the event the supporting legs are accidently dislodged.

It is undisputed that at the time Ronto authorized entry into the dangered-off area the beams at issue had in fact not been "installed with some means of support that will prevent the beams or cross bar from falling in the event the supporting legs are accidently dislodged". Beth Energy and its agents argue however that this Roof Control Plan requirement that "beams shall be installed with some means of support" actually means that the support may be installed up to five days after the beams themselves are installed. I disagree. The Roof Control Plan could not be more clear and unambiguous in requiring that the means of support must be provided at the same time the beams are installed. If indeed it was the intent of the parties to allow "five days"

or "until the next idle shift" or for some other "reasonable time" for installation of the support after the beams themselves are installed, the Plan could easily have so provided. Thus it is clear that a violation of a mandatory standard (30 C.F.R. § 75.220) existed at the time Foreman Ronto authorized the removal of the danger sign and tag and accordingly directed the commission of a violation of the regulatory standard at 30 C.F.R. § 75.303.

The testimony of experienced mine examiner Don Rados is also credible and is sufficient in itself to support a finding that a significant hazard continued to exist at the time Foreman Ronto authorized and directed removal of the danger tag and sign. This testimony is fully corroborated by that of the experienced MSHA Inspector, Alvin Shade. Even Ronto himself acknowledged that although the conditions did not pose a "large hazard" and they were "not a considerable danger" a "caution to people" was nevertheless warranted. For this additional reason then it is clear that a violation of 30 C.F.R. § 75.303 was committed by Ronto.

The evidence also supports the "significant and substantial" findings in the citation at bar. In order to find a violation "significant and substantial" the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984). Here I have found that there was indeed a violation of the mandatory safety standard at 30 C.F.R. § 303(a), and that a discrete safety hazard i.e. exposure of miners to the hazard of falling beams, was contributed to by the violation. I further find it reasonably likely that the hazard of falling beams would have resulted in an injury and that it was reasonably likely that resulting injuries would be reasonably serious or fatal.

Whether the violation was the result of the "unwarrantable failure" of Beth Energy to comply with the law depends on whether it was the result of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987) appeal pending (D.C. Cir. No.

88-1019). In the Emery case the Commission compared ordinary negligence (conduct that is inadvertent, thoughtless, or inattentive) with conduct that is not justifiable or excusable. On the facts of this case I conclude that the conduct of the operator's agents in authorizing the removal of the danger tag and sign and permitting an employee to remove rail cars from the "dangered off" area (and where the facts constituting a hazard and a violation of the Roof Control Plan were then known to the operator's agents) constituted such aggravated conduct as to meet the definition of "unwarrantable failure". Indeed the conduct of the operator's agents, Ronto, Kubovick and Nuccetelli, was so aggravated that it constituted violations of Section 110(c) of the Act. For the same reasons noted, infra, this conduct also constitutes "unwarrantable failure". Considering the criteria under section 110(i) of the Act I find that a civil penalty of $1,000 is appropriate.

Finally, Beth Energy's claims herein that a Section 104(d) violation cannot be based upon an after-the-fact investigation are rejected. Secretary of Labor v. Emerald Mines Co., 9 FMSHRC 1590 (1987), aff'd 863 F.2d 51 (D.C. Cir. 1988).

Docket Nos. PENN 89-154, PENN 89-155, and PENN 89-156

These cases are before me upon the petitions for civil penalties filed by the Secretary pursuant to section 110(c) of the Act charging Samuel Kubovcik, John Ronto and James Nuccetelli as agents of the corporate mine operator (Beth Energy) with knowingly authorizing, ordering, or carrying out the corporate mine operator's violation of the mandatory standard at 30 C.F.R. § 75.303 as charged in Citation No. 2941672 previously upheld in this decision.

Section 110(c) of the Act provides in part of follows:

> Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under Subsection (a) and (d).

There is no dispute in this case that each of the three named Respondents were, at the time of the alleged violation, agents of Beth Energy. Upon the credible evidence before me I find that all of the cited agents "knowingly authorized, ordered, or carried out" the violation charged in this case. Mssrs. Ronto, Nuccetelli and Kubovcik all acknowledge that

when they issued orders to obtain the empty cars from the dangered-off area they were fully aware of the requirements of the Roof Control Plan including the requirement that "beams shall be installed with some means of support". It is undisputed moreover that they were also then aware of the fact that the cited beams were without support and that the area had been legally "dangered-off" by a qualified mine examiner pursuant to 30 C.F.R. § 75.303. Since the language of the Roof Control Plan is clear and unambiguous in its requirement that the means of support be installed contemporaneous with the installation of the beams it may reasonably be inferred that they "knowingly authorized [and] ordered" the violation herein. Their self serving claims that the Roof Control Plan granted them a "reasonable time" of up to five days to support the beams by strapping or saddling are without credible legal or factual basis.

Under the circumstances the Secretary has sustained her burden of proving that the three agents of the operator cited herein were in violation of Section 110(c) of the Act. Considering the relevant criteria under Section 110(i) of the Act I find that penalties of $400 each are appropriate.

ORDER

Order No. 2941672 is modified to a citation under Section 104(d)(1) of the Act and Beth Energy Mines, Inc., is directed to pay a civil penalty of $1,000 within 30 days of the date of this decision. John A. Ronto, James Nuccetelli and Samuel Kubovcik are in violation of Section 110(c) of the Act as charged and are directed to pay a civil penalty of $400 each within a 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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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 8 1990

MICHAEL P. DAMRON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. CENT 89-131-DM
REYNOLDS METALS COMPANY, Respondent	:	Sherwin Plant

DECISION

Appearances: Michael LaBelle, Esq., Powers and Lewis, Washington, D.C., for Complainant; Jean W. Cunningham, Esq., Richmond, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged by Reynolds Metals Company (Reynolds), on September 7, 1988, from his job as a hydrate area helper because he refused to perform work that he reasonably and in good faith believed to be dangerous, and that his refusal was protected under the Federal Mine Safety and Health Act of 1977 (the Act). Reynolds contends that Complainant was discharged for failure to obey a direct order, and that the task he was ordered to perform was not dangerous. Pursuant to notice, the case was heard on November 28 and 29, in Corpus Christi, Texas. Richard W. Spencer, Robert H. Lehman, Dalma Edward Rogers, Pete Zamora, Guy Asher, Paul Bucey, Michael P. Damron, and Bobby Tucker testified on behalf of Complainant. Thomas Glenn Reynolds, Arlon Boatman, Amos Stanley Millsap, Kennedy Wayne Haley, Bobby Joe Sasser and Darrell M. Harriman testified on behalf of Reynolds. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties, in making the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding Reynolds was the owner and operator of an alumina plant in Corpus Christi, Texas, known as the Sherwin Plant. The plant processes bauxite into aluminum ore, called alumina.

Prior to September 7, 1988, Complainant was employed as a laborer at the Sherwin plant for more than 9 years. In 1988, he worked as a hydrate area helper. Among the duties to which he was assigned was the operation of a ball mill which pulverized scale coming from the precipitation area. The scale, taken from the alumina tanks, is fed on to a conveyor belt from a hopper, and travels up the belt to the ball mill which crushes it to powder. The ball mill operator is required to maintain the conveyor belt with a head and a tail pulley at either end, and to remove foreign objects from the belt. A magnet is affixed to the belt, at about its midpoint, and the belt shuts down automatically when any metallic object passes under the magnet. The ball mill operator is required to remove and discard the metal, and restart the belt. He is also required to remove and discard other nonmetallic foreign objects from the belt to prevent them from passing into the ball mill. Two bins are provided near the magnet where the metal and nonmetal objects are deposited. A majority of the mill operator's work time is performed at or near the magnet. The ball mill and belt are located outside and immediately below the operating floor where the kilns are located. The operating floor is open and is approximately 30 feet above the ground where the ball mill is operated.

In about 1984, the then operator of the ball mill, Robert Lehman, asked to have overhead protection erected because of falling objects coming from the operating floor. These included filter cloths, caustic metal, bolts, valves and trash. About two or three weeks after this request, a 6-foot high scaffold was erected, 6 feet square, covered with three 2x12 boards and a piece of plywood on top of the boards. Lehman later enclosed the area to keep out the cold, the caustic and the dust. After about two years, Reynolds tore down the shelter because "it was an eyesore and they didn't want visitors to see it." (R. 54). However, it was replaced by a new similar shelter after two or three days. This remained in place until September 1988.

During the period from 1984 until September 1988, on numerous occasions large cloth filters weighing in excess of 100 pounds were dropped from the operations floor to the ground below by operations employees. Metal rods, pieces of scaffold boards, bolts, tools, and pieces of corrugated metal siding also fell or were dropped; liquid hydrate spilled from the upper floor to the ball mill area. The ball mill operators were aware of these occurrences and at least on some occasions reported them to supervisory personnel. Therefore, I find that Reynolds was aware that objects fell or were thrown from the calcinator floor or the floor where the numbers 8 and 9 kilns were located, to the ground below in the area of the ball mill.

On August 31, 1988, a regular Mine Safety and Health Administration (MSHA) inspection took place at the Sherwin plant. The inspector found missing guards on the two tail pulleys on the conveyor belt of the ball mill. A section 104(d) order was issued because Respondent had been cited previously for the same violation. Complainant Damron was operating the ball mill at the time and was inside the shelter. The MSHA inspector pointed out that an electrical extension cord running to the shelter was not properly grounded. He also commented that the shelter area was dirty, and the chair on which Damron sat was broken. No citations were issued for any conditions in the shelter. The following day, September 1, the shelter was taken down by Respondent.

On the day the shelter was torn down, Complainant protested the action to Glenn Reynolds, the General Supervisor in the precipitation and calcination areas of the plant. He also contacted Paul Bucey, the Union Safety Committee Chairman and requested a safety procedure meeting. Such a meeting was held on Friday, September 2. Complainant and the Union representatives contended that a safety issue was involved because of objects falling or being thrown from the upper floors, and caustic liquid spilling on to the area where the ball mill operator worked. The company representatives agreed to erect a barrier against the handrail of the upper floor and to erect a metal shed over the area where the magnet was located to protect the ball mill operator. Complainant sought a wooden overhead structure until the metal shed could be completed. Complainant testified that the company agreed to this proposal, but the company representatives testified that they specifically denied the request on the ground that it would "create more hazards then what we take care of." (R. 382). There may have been a misunderstanding of what was agreed to, but I find as a fact that the company did not accede to Complainant's request that a temporary wooden overhead structure be erected over the ball mill pending the erection of the metal shed. The company did agree not to operate the mill until the guardrail barrier was erected. On Monday, September 5 (Labor Day), a number of sheets of plywood were stacked up inside the handrail of the floor above the ball mill. The ball mill operator (Robert Lehman) was instructed to attach the sheets of plywood to the handrail with pieces of wire. No other overhead protection was in place. Lehman operated the mill by stepping away from the belt 15 or 20 feet. Operating from this position he was unable to remove nonmetallic foreign objects from the belt. Complainant worked on the next shift and was told by his foreman Arlon Boatman that he was going to have to run the mill. Boatman had not been present at the safety procedure meeting, and was not aware of what had been agreed upon. He assigned Complainant to work on certain problems in the "tray area," and he discussed with management people what had taken

place at the safety meeting. At the beginning of his shift on Tuesday, September 6, Complainant again worked on the trays. During discussions between Boatman and Complainant, Boatman told Complainant he would direct the overhead operators to be careful in hosing down the upper floor and to inform Boatman if they had to remove objects from the floor. He also told Complainant that he could operate the mill by turning the belt switch on, and then stepping back away and monitoring the belt from a distance. Complainant protested that he could not operate it in that manner because the metal detector does not always stop the belt when metal objects come up, and this could result in severe damage to the mill. Boatman told Complainant "that should anything go through the detector, if for any reason it failed and we did get metal in the mill, that it would be my responsibility." (R. 352). Boatman explained that a metal shed was being constructed which would be placed over the metal detector area. Because of the need for workers in the tray area, Complainant continued on that job and did not run the ball mill on Tuesday, September 6 (he worked a double shift 4:00 p.m. to midnight and 12:00 to 8:00 a.m., Wednesday). On Wednesday, September 7, on the day shift, Lehman was discharged for refusing to run the ball mill.

On Wednesday, Complainant reported to work on the afternoon shift. Boatman gave him a direct order to run the ball mill. Complainant refused because "I feel it's unsafe." (R. 231). Respondent gave him a suspension with intent to discharge. Complainant filed a grievance under the union contract which ultimately resulted in an arbitration proceeding. As a result of the arbitration decision, Complainant was reinstated without back pay.

General Superintendent Reynolds was at the Plant on Monday, September 5, because of severe tray problems. He was approached by Complainant Damron who told him that the company had agreed at the safety procedure meeting to erect a plywood overhead shelter for the ball mill. Reynolds denied that the company made such an agreement, and told Complainant that a metal structure was being constructed. Reynolds further testified:

> And I told him that, if he had any real safety concerns regarding the operation of the belt line, without that temporary shed, that he should go outside the building, down the tunnel, and operate the belt standing in that position. And that as metal came up the belt, he could shut the belt down and remove it. (Tr. 319).

On rebuttal, Complainant referred to this testimony:

> Q. Mr. Damron, did you hear testimony earlier by Mr. Reynolds that indicated that he had given you the

option of working down in the pit next to the conveyor belt of the ball mill?

A. Yes, I heard what he said. It's not true, he never given [sic] me any options, just to do it or else.

* * *

Q. Did anybody other than Mr. Boatman, ever suggest to you any other way of operating the ball mill, other than standing by the magnet?

A. No, they didn't. Nobody but Mr. Boatman. (R.460).

I find as a fact that Reynolds did tell Complainant that he could run the mill away from the building, "down the tunnel."

Boatman was asked whether on Wednesday when Complainant was terminated he would have permitted Complainant to operate the mill "from outside the building." He answered:

I would have allowed him to operate that mill as I had directed him to, which would have been under normal conditions, as we had been operating . . .

Q. And had he objected to working or standing at the magnet, what about that?

A. No. Because the situation, as far as me as a representative of the company, and as a supervisor, that if I gave him the direct order to operate the facility under normal conditions, standing where he needed to, if he needed to stand at the metal detector, if he needed to clean conveyor belts, tail pulleys or whatever, it would be the general operator, the regular operation of the facility. (R. 353).

This testimony is ambiguous on the issue of whether Boatman would have permitted Complainant to monitor the belt from a distance--away from the building as he indicated on Monday, September 5. However, he did not withdraw his authorization given two days before that Complainant could have operated the ball mill away from the belt. Nor did Complainant testify that he understood that it had been withdrawn.

Subsequent to Complainant's discharge (within a matter of a few days), the permanent metal barrier was in place inside the handrail of the operating floor and the metal shed was erected over the magnet area where the ball mill operator worked.

ISSUES

1. Was Complainant's work refusal, for which he was discharged, protected activity under the Act?

2. If so, to what remedies is he entitled under the Act?

CONCLUSIONS OF LAW

I

Complainant and Respondent are protected by and subject to the provisions of section 105(c) of the Act. Complainant is a miner; Respondent is a mine operator. I have jurisdiction over the parties and subject matter of this proceeding.

II

In order to establish a prima facie case of discrimination under the Act, a complaining miner must prove that he was engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. In order to rebut the prima facie case, the operator must show either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Secretary/Wayne v. Consolidation Coal Co., 11 FMSHRC 483 (1989).

III

A refusal to perform work is protected activity under the act if the miner has a good faith, reasonable belief that the work he refuses to perform is hazardous. The burden of proof is on the miner to establish both the good faith and the reasonableness of his belief that a hazard existed. Robinette, supra; Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983); Biddle, Means and Levine, Protected Work Refusals Under Section 105(c)(1) of the Mine Safety and Health Act, 89 W.Va. L. Rev. 629 (1987).

IV

The reasonableness of the miner's belief in the hazardous nature of the work is not determined by whether a hazard objectively exists, but by the miner's reasonable perception of a hazard. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Secretary/Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983). Respondent's witnesses here denied that there was a safety hazard

resulting from falling or thrown objects to a ball mill operator without overhead protection. But the weight of evidence contradicts Respondent's position. I have found as a fact that on numerous occasions objects fell or were dropped or spilled from the operating floor to the ball mill area. A hazard existed objectively. The extent of the hazard, that is, the frequency or likelihood of falling objects landing in the ball mill area is a matter of dispute. From the perspective of the ball mill operators, including Complainant, the hazard was real, and their perception of the hazard was reasonable.

V

The miner's work refusal must be made in the good faith belief that a hazardous condition obtained. Good faith "simply means honest belief that a hazard exists." Robinette, supra, at 810. Good faith requires the miner to inform the mine operator of his belief in the safety hazard to give the operator the opportunity to correct the condition. Secretary/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). See also, Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989).

Complainant's safety concerns were communicated in a formal safety meeting with Respondent. Respndent addressed the concerns by agreeing to put up a permanent barrier along the handrail of the operating floor above the ball mill and to erect a metal shed for the mill operator at or near the magnet. Although neither of these were completed at the time of Complainant's work refusal and discharge, a plywood barrier was in place at the handrail, and a permanent metal barrier as well as a metal shed were being constructed. Complainant knew that these would be erected in a few days and would provide him more protection than the shed which had been torn down. Superintendent Reynolds told Complainant that he could operate the mill from "down in the tunnel," where he would not be exposed to falling objects. Foreman Boatman told him he could operate from outside the belt area, and that he (Boatman) would take the responsibility if metal objects got into the mill.

Did these instructions, coupled with the erection of a barrier at the handrail overhead, and the planned erection of a metal shed, address the perceived hazards so as to make the work refusal in bad faith? Ordinarily a ball mill operator, wherever he stations himself at the beginning of his shift, must spend a substantial part of his time at or near the magnet where the belt control is located. However, Respondent Reynolds through Superintendent Reynolds and Boatman gave Complainant clear permission to operate the mill from outside the area of danger during the short period while the shed was being erected. Respondent addressed Complainant's reasonable fear of a hazard, and his refusal to work thereafter is not shown to be in good faith.

I conclude therefore that Complainant Damron's refusal to operate the ball mill on September 7, 1988, was not based on a reasonable, good faith belief that the work was hazardous. Respondent's action in discharging him was not in violation of section 105(c) of the Act.

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

1. Complainant's discharge on September 7, 1988, was not in violation of section 105(c) of the Act.

2. The Complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

MAR 8 1990

WILLIAM G. HAGY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 90-43-R
	:	Citation No. 3180625; 5/18/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Matthews Mine
	:	Mine ID 40-00570

ORDER OF DISMISSAL

Before: Judge Broderick

Contestant filed a Notice of Contest with the Commission on February 12, 1990, contesting order/citation 3180625 issued to Consolidation Coal Company on May 18, 1989. The order/citation was under section 107(a) and 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.202(a). A copy of the order/citation was sent to Contestant, with a letter from MSHA District Manager Joseph J. Garcia dated January 3, 1990, in which Contestant was notified that "MSHA is proposing to assess a civil penalty against you for knowingly authorizing, ordering or carrying out a violation of 30 C.F.R. § 75.202(a) as cited in Citation No. 3180625 issued May 18, 1989, which is enclosed."

The Secretary filed a Motion to Dismiss on February 16, 1990, on the grounds that the Notice of Contest was filed untimely, in that the citation was issued May 18, 1989, and the notice was filed February 12, 1990.

Contestant responded to the Motion on March 7, 1990. Although filed out of time, I accept and have considered the response.

Section 105(d) of the Act provides in part:

> If, within 30 days of receipt thereof, an operator notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation . . . issued under subsection (a) or (b) of this section, . . . or . . . any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification or termination of any order issued under section 104, or

> the reasonableness of the length of time set for abatement by a citation . . . issued under section 104, the Secretary shall immediately notify the Commission . . . and the Commission shall afford an opportunity for a hearing . . ..
>
> Section 107(e)(1) provides that an operator or representative of miners may apply to the Commission for review of an order issued under section 107.

The Notice of Contest states that Contestant is a Section Foreman at the subject mine. Assuming this to be true, as I must in considering the motion to Dismiss, he is a miner under the Act. It is not alleged that he is a representative of miners. Contestant argues that he is an "operator" under section 3(d). Without deciding that question, it is evident that the order/citation, which Contestant attempts to contest here was issued to Consolidation Coal Company and not to Contestant. I do not accept Contestant's argument that the January 3, 1990 letter "must be considered an issuance of the citation which was served by mail on the Applicant for purposes of protest by the Applicant." Contestant contests the validity but not the reasonableness of the length of time set for abatement of Citation 3180625. He apparently contests the 107(a) withdrawal order: Paragraph 3(b) "the Contestant was not in violation of 30 C.F.R. § 75.202(a) or § 107(a) of the Act. . . (d) no alleged violation discribed in Citation No. 3180625 was of such a nature as could reasonably be expected to cause death or serious physical injury before it could be abated, . . ." The Notice further avers that no alleged violation resulted from knowing conduct on the part of the Contestant.

Miners or their representatives do not have the right under the Act to challenge the validity of a citation issued under section 104(a) of the Act, but may only challenge the reasonableness of the abatement time. UMWA v. Secretary, 5 FMSHRC 807 (1983), aff'd sub nom. UMWA v. FMSHRC, 725 F.2d 126 (D.C. Cir. 1983).

Section 107 permits review by the Commission of a section 107(a) withdrawal order by an operator or representataive of miners. There is no provision for a miner to initiate such a review proceeding.

The order/citation does not charge a violation by Contestant of section 110(c) of the Act. Whether Contestant knowingly authorized, ordered, or carried out a violation is not before me in this proceeding.

I therefore conclude that Contestant does not have the right in this proceeding to challenge the order/citation issued to Consolidation Coal Co. On this basis, and not on the basis urged in the Motion to dismiss, this proceeding is DISMISSED. This disposition does not affect Contestant's right to challenge the citation in any proceeding which may be brought against him under section 110(c) of the Act.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

MAR 8 1990

THOMAS J. TABOR, JR., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 90-44-R
	:	Citation No. 3180625; 5/18/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Matthews Mine
	:	Mine ID 40-00570

ORDER OF DISMISSAL

Before: Judge Broderick

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> the reasonableness of the length of time set for abatement by a citation . . . issued under section 104, the Secretary shall immediately notify the Commission . . . and the Commission shall afford an opportunity for a hearing . . ..
>
> Section 107(e)(1) provides that an operator or representative of miners may apply to the Commission for review of an order issued under section 107.

The Notice of Contest states that Contestant is a Section Foreman at the subject mine. Assuming this to be true, as I must in considering the motion to Dismiss, he is a miner under the Act. It is not alleged that he is a representative of miners. Contestant argues that he is an "operator" under section 3(d). Without deciding that question, it is evident that the order/citation, which Contestant attempts to contest here was issued to Consolidation Coal Company and not to Contestant. I do not accept Contestant's argument that the January 3, 1990 letter "must be considered an issuance of the citation which was served by mail on the Applicant for purposes of protest by the Applicant." Contestant contests the validity but not the reasonableness of the length of time set for abatement of Citation 3180625. He apparently contests the 107(a) withdrawal order: Paragraph 3(b) "the Contestant was not in violation of 30 C.F.R. § 75.202(a) or § 107(a) of the Act. . . (d) no alleged violation discribed in Citation No. 3180625 was of such a nature as could reasonably be expected to cause death or serious physical injury before it could be abated, . . ." The Notice further avers that no alleged violation resulted from knowing conduct on the part of the Contestant.

Miners or their representatives do not have the right under the Act to challenge the validity of a citation issued under section 104(a) of the Act, but may only challenge the reasonableness of the abatement time. UMWA v. Secretary, 5 FMSHRC 807 (1983), aff'd sub nom. UMWA v. FMSHRC, 725 F.2d 126 (D.C. Cir. 1983).

Section 107 permits review by the Commission of a section 107(a) withdrawal order by an operator or representataive of miners. There is no provision for a miner to initiate such a review proceeding.

The order/citation does not charge a violation by Contestant of section 110(c) of the Act. Whether Contestant knowingly authorized, ordered, or carried out a violation is not before me in this proceeding.

I therefore conclude that Contestant does not have the right in this proceeding to challenge the order/citation issued to Consolidation Coal Co. On this basis, and not on the basis urged in the Motion to dismiss, this proceeding is DISMISSED. This disposition does not affect Contestant's right to challenge the citation in any proceeding which may be brought against him under section 110(c) of the Act.

James A. Broderick
Administrative Law Judge

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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 9 1990

DAVID THOMAS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-13-D
v.	:	
	:	BARB CD 88-16
AMPAK MINING, INC., Respondent	:	Mine No. 1
GEORGE ISSACS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-14-D
v.	:	
	:	BARB CD 88-34
AMPAK MINING, INC., Respondent	:	Mine No. 1

DECISION

Appearances: Tony Oppegard, Esq., and Stephen A. Sanders, Esq. Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky for the Complainants;
Geary Burns, Vice President, Ampak Mining, Inc., Van Lear, Kentucky for Respondent Ampak Mining, Inc.,
G. Graham Martin, Esq., Martin Law Offices, P.S.C., Prestonsburg, Kentucky for Respondent Johnson Coal Company, Inc.

Before: Judge Melick

These proceedings are before me to determine the amount of damages, attorney's fees and costs to be allowed based upon the December 26, 1989, decision finding that Ampak Mining, Inc., discriminated against the Complainants in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act".

The parties remaining in these cases have reached stipulations as to the damages incurred by the Complainants as follows:

> The backpay period for the unlawful demotion of David Thomas is 12/21/87 through 2/14/88; and the backpay period for the unlawful termination of Thomas is 2/15/88 through 7/1/88. Thomas' damages for these periods (what he would have earned at Ampak less his interim earnings) total $6,250, plus interest to be

computed at the time of payment pursuant to the formula employed by the Commission in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988).

The backpay period for the unlawful termination of George Issacs is 4/22/88 through 7/1/88. Issacs' damages for this period total $6,080 plus interest to be computed at the time of payment pursuant to the formula employed by the Commission in Clinchfield Coal Co.

Complainants have also filed a "Statement of Attorney's Fees and Expenses" seeking attorney's fees and litigation expenses of $43,806.80. These fees and expenses are not challenged and are accordingly awarded in accordance with Section 105(c)(3) of the Act.

The Complainants have also filed a pleading captioned "Motion for Leave to Proceed Against Ampak's Owners Individually, Based on the Alter Ego Doctrine, for the Liability Found Herein". In said Motion the Complainants apparently seek to enforce the judgment on this case individually against Geary Burns and Peggy A. Kretzer the alleged owners of the Respondent Ampak Mining Inc.

The Commission stated under similar circumstances in Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC at 1848, (1987), that:

[t]he essential nature of the remedy sought ... is collection of a judgement debt. This relief involves inter alia, enforcement and execution of the Commission's final decision in this matter. Such an enforcement request is properly directed to the Secretary of Labor. Under the Mine Act the Secretary is empowered to seek compliance with Commission orders in the federal Courts. See 30 U.S.C. §§ 816(b) & 818.

The Complainants herein must therefore direct their enforcement and execution efforts accordingly.

ORDER

Ampak Mining Inc., is hereby directed to pay the noted backpay award plus interest computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) within 30 days of the date of this decision. Ampak Mining Inc., is further directed to pay the Complainants attorney's fees and litigation expenses of $43,806.80 within 30 days of the date of this decision. The Complainants "Motion for Leave to Proceed Against Ampak's Owners Individually, Based on the Alter Ego Doctrine, for the Liability Found Herein" is denied. This decision represents the final disposition of these proceedings before the undersigned judge.

Gary Melick
Administrative Law Judge

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Mr. Geary Burns, P.O. Box 1183, Painstsville, KY 41240 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 9 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 90-5-M A.C. No. 15-00099-05514
v.	:	
	:	Strunk Crushed Stone
HINKLE CONTRACTING CORP., Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Bob Connolly, Esq., Stites & Harbison, Louisville, Kentucky 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 Hinkle Contracting Corporation (Hinkle) with two violations of mandatory standards and proposing a civil penalty of $1,350 for the violations. The general issue before me is whether Hinkle violated the cited standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Citation No. 3438481 issued pursuant to Section 104(d)(1) of the Act[1]/

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

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

charges, as amended, as follows:

> A 36 inch belt conveyor provided with an elevated walkway along its entire length was not equipped with a functional emergency stop device. The 575 conveyor was approximately 450 feet long. The trough rollers created pinch points along the length of the conveyor at approximately 42 inches from the walkway level. The conveyor had been installed approximately 6 months prior and had been fitted with the emergency stop device but had not been wired electrically in order for the device to function. The plant had been in operation since March 13, 1989. The plant superintendent William Huckaby, stated that they had been waiting on the availability of company electricians to furnish the installations. Management had not taken any steps to lessen the risk or hazard through warning signs or hazard training for the employees. This is an unwarrantable failure on the part of the operator.

The cited standard, 30 C.F.R. § 56.14109, provides as follows:

> Unguarded conveyors next to the travelways shall be equipped with--
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor

---

cont'd fn.1

> 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.

can readily deactivate the conveyor drive motor, or
(b) Railings which--
(1) Are positioned to prevent persons from falling on or against the conveyor.
(2) Will be able to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and
(3) Are constructed and maintained so that they will not create a hazard.

Hinkle acknowledged at hearing that it had neither an operable emergency stop device nor guard rails along its 450 foot long No. 57 conveyor. Hinkle alleges that an unwritten so-called "42 inch exception" to the cited mandatory standard was applicable to this case. Under this purported exception belt conveyors that are 42 inches or higher above the adjacent walkway need not be guarded or have an operable emergency stop device. Since the conveyor here was higher than 42 inches Hinkle maintains that the "42 inch exception" applies and that there was accordingly no violation.

The origins of this purported "42 inch exception" are unclear. In its answer filed in this case Hinkle states it was an unwritten "rule-of-thumb" applied by another Federal agency, the Occupational Safety and Health Administration (OSHA). William Huckaby a Hinkle superintendent recalled that it was a guideline once used by the State of Oklahoma which he learned about when taking a licensing test there. Safety Director Lowell Manning thought that other MSHA inspectors had told him of the "42 inch exception". Hinkle elected however not to call any such MSHA inspector who had allegedly given this advice.

Neither Inspector Shanholtz nor MSHA field office supervisor Vernon Denton had ever heard of any such "42-inch exception" to the mandatory standard. Indeed there is nothing in the language of the regulation to even remotely suggest such an exception. Moreover there is no rational basis for such an exception. Indeed, to the contrary, the most hazardous area of exposure to miners would appear to be within arms reach above 42 inches. Under the circumstances I find the so-called "42-inch exception" to be a fiction. The plain language of the standard must in any event prevail.

Since the conveyor when installed in 1988 came already furnished with an emergency stop cord and required only minimal electrical installation to activate, I find the failure of management to have had the cord activated to have been particularly negligent. This negligence is further aggravated by allowing the non-functioning stop cord

to remain in place thus giving a false sense of security. Operator negligence was even further aggravated by isolating the only means of stopping the conveyor at a location some 200 feet from the conveyor. This is the type of aggravated conduct and omission that constitutes unwarrantable failure. Emery Mining Corporation 9 FMSHRC 1997 (1987).

In reaching these negligence and "unwarrantable failure" findings I have not disregarded Hinkle's claims that the conveyor had previously been inspected by MSHA inspectors and had never before been cited. However the only credible evidence that the belt had in fact previously been inspected came from Inspector Shanholtz himself. According to Shanholtz when he previously inspected the plant it was not in production and the cited belt was not running. In any event even had other inspectors failed to discover the violative inoperable stop cord on prior inspections, that is by no means indicative of any MSHA approval of the violation. Indeed the presence of the stop cord, albeit an inoperable one, may very well have deceived other inspectors into believing there was no violation.

The violation was also of high gravity and "significant and substantial". In order to find a violation "significant and substantial", the Secretary has the burden of proving the existence of an underlying violation of a mandatory standard, the existence of a discrete hazard (a measure of danger to health or safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984).

The testimony of Inspector Shanholtz is credible in this regard and fully supports the gravity and "significant and substantial" findings. In reaching this conclusion I have not disregarded Hinkle's claims that the condition was not hazardous since there had never previously been any injuries along the belt and that the work of lubrication, maintenance and cleanup along the belt was performed only when the belt was shut down. Inspector Shanholtz noted however, without contradiction, that there was in fact pedestrian traffic on the walkway immediately adjacent to the unguarded conveyor. Moreover the hazard was particularly serious in this case because of the absence of any stopping mechanism in close proximity to the beltline. The only stop switch for the belt was located some 200 feet away. Thus if a miner became caught in the belt it was indeed reasonably likely that serious injuries or death would occur before the belt could be shut down.

Citation No. 3438483 charges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 56.3200 and charges as follows:

> Loose, unconsolidated material was observed on the highwall where the pit haul road parallelled the west quarry wall. Large loose slabs and boulders, some weighting several tons, were observed along a 200 foot section of the wall. The ground along the wall was fractured and fragmented. The wall was approximately 40 feet high. Haulage equipment and pickups utilized the road on a daily basis. One section of the road was slightly overhung by the loose material.

The cited standard 30 C.F.R. 56.3200 provides as follows:

> 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 impede unauthorized entry.

According to Inspector Shanholtz the cited loose material was fractured with numerous cracks. Some of the material was also in overhanging rock. He also found that along the top edge there were large round boulders "just sitting there" with "nothing holding them". According to Shanholtz, Foreman Tim Hatton, who was accompanying him during his inspection, agreed that the cited conditions did exist and admitted that the large boulders on the top edge appeared to be "sitting on nothing but their imagination".

Shanholtz also observed that the highwall actually over hung a section of the road. Other loose material along the highwall also was in need of scaling. According to Shanholtz falling material would likely have dropped onto the haul road on which haulage equipment and pick-up trucks were operating. Shanholtz opined therefore that it was highly likely for serious injuries or fatalities to occur.

Shanholtz also found the operator chargeable with high negligence in that MSHA officials had previously discussed the highwall problems with Hinkle officials. Hinkle had then agreed to scale the highwall and widen the road. Indeed

Shanholtz himself had discussed these problems with Hinkle representatives during his October 1988 visit.

According to Shanholtz, Hatton also admitted that he and Lowell Manning had inspected the highwall the week before the inspection and had agreed that it needed scaling. They had reportedly stopped scaling operations however because the machinery they had would not reach high enough along the wall. Shanholtz observed that it took seven days after the citation was issued to properly scale the highwall and thus abate the problem.

Within this framework it is clear that the violation is proven as charged and that it was "significant and substantial" and of high gravity. I find Inspector Shanholtz's testimony in this regard to be credible including his testimony regarding admissions by representatives of the operator at the time of the inspection.

While Hatton denied at hearing that he made the admissions attributed to him by Shanholtz I do not find his denials to be credible. Moreover I can give but little credence to the self-serving statements of Lowell Manning, William Huckaby, and Timothy Coomer.

Considering the criteria under section 110(i) of the Act I find that the following civil penalties are appropriate. Citation No. 3438481, $750, Citation No. 3438483, $600.

ORDER

Hinkle Contracting Corporation is hereby directed to pay civil penalties of $1,350 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 13 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF SIX MINERS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-90-D
SMOOTH SAILING COAL COMPANY, INC., AND JAMES W. RUNYON, Respondents	:	Mine No. 4
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF DARRELL MAYNE, LARRY D. SAYLOR, RICKY G. SAYLOR, AND TERRY D. SAYLOR, Complainants	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-100-D
SMOOTH SAILING COAL CO., INC., AND JAMES W. RUNYON, Respondents	:	BARB CD 89-04 BARB CD 89-05 BARD CD 89-06 BARB CD 89-08 Mine No. 4

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
Guy E. Millward, Jr., Esq., Millward and Jewell, Barbourville, Kentucky, for the Respondents.

Before: Judge Maurer

STATEMENT OF THE CASE

These proceedings concern a discrimination complaint and an application for temporary reinstatement filed by the Secretary of Labor (Secretary) on behalf of the affected miners named herein pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

On March 15, 1989, an Application for Temporary Reinstatement dated March 1, 1989, was filed with the Commission by the Secretary on behalf of Darrell Mayne, Larry D. Saylor, Terry D. Saylor and Ricky G. Saylor. On that same day, the case was assigned to the undersigned. No response was had from the respondents requesting a hearing on the application and on March 27, 1989, an order was issued by the undersigned directing the respondents to immediately reinstate the aforementioned four miners to the positions they held on August 26, 1988. However, the No. 4 Mine, where they all worked, became non-producing as of March 6, 1989.

On March 2, 1989, a Discrimination Complaint was filed with the Commission on behalf of these four miners plus Carl Croley and Timothy Cox. The complainant alleged that the respondents discriminated against the six miners by laying them off in retaliation for them making safety and health-related complaints to the respondents on several occasions prior to the date of the layoff. Respondents answered with what was essentially a general denial.

Pursuant to notice, a hearing on the merits was held in this matter on August 8 and 9, 1989, in Berea, Kentucky. A post-hearing brief was filed by the Secretary on December 5, 1989, on behalf of the six individual complainants. The respondents did not choose to file a post-hearing submission.

General Law Applicable to the Case

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 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, 462 U.S. 393, 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.

Findings of Fact

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. The six miners named herein as complainants along with their job titles from which they were laid off are: Ricky G. Saylor, roof bolter; Terry D. Saylor, scoop operator; Darrell Mayne, scoop operator; Carl Croley, drill operator; Timothy G. Cox, tailpiece man; and Larry D. Saylor, scoop operator.

2. The individual respondent herein, James Runyon, with Larry Bryant, owned and operated Smooth Sailing Coal Company (Smooth Sailing), and also worked in and around the mine as the foreman.

3. Smooth Sailing and Runyon were contract miners for Davis Branch Coal Company (Davis Branch) meaning that Smooth Sailing actually mined the coal for which Davis Branch held the mineral lease for the No. 4 Mine. Davis Branch also held the permit and provided the bond required by the State of Kentucky and "faced up" the area to be mined by Smooth Sailing.

4. The coal mined by Smooth Sailing at the No. 4 Mine was sold to the Gatliff Coal Company (Gatliff). Smooth Sailing was identified in the records of Gatliff as Davis Branch No. 3. Smooth Sailing had no direct contractual relationship with Gatliff, but Gatliff was aware that Smooth Sailing and Davis Branch No. 3 were one and the same.

5. Payments for the coal mined by Smooth Sailing and trucked to Gatliff, were made directly to Davis Branch from which Davis Branch deducted a fee and then paid the remainder to Smooth Sailing by issuing its own checks to Smooth Sailing.

6. The No. 4 Mine began operations on or about May 15, 1987, and was listed with MSHA as being non-producing as of March 6, 1989.

7. Ricky Saylor, more or less the spokesman for all the complainants by mutual agreement, began working for Runyon in or about 1983 at an earlier coal mine operation called Wax Enterprises. He started working for Smooth Sailing, per se, in or about 1985. He was laid off on August 26, 1988, along with the other five miners named herein as complainants.

8. Terry Saylor, brother of Ricky Saylor, worked for Smooth Sailing for approximately three years before he was laid off on August 26, 1988.

9. Darrell Mayne was hired by the respondents in the summer of 1987 and worked at the No. 4 Mine until being laid off on August 26, 1988.

10. Carl Croley worked for Mr. Runyon from 1984 or 1985, until he was laid off from the No. 4 Mine on August 26, 1988.

11. Tim Cox worked at the No. 4 Mine for the respondents for four or five months prior to the layoff of August 26, 1988.

12. Larry Saylor, another brother of Ricky, worked continuously for Mr. Runyon between approximately 1982 and the August 26, 1988 layoff.

13. Prior to being laid off, all the complainants had engaged in protected activity, that is, they all had complained to Runyon or to their spokesman or representative, Ricky Saylor, about bad roof conditions and the lack of adequate ventilation in the working areas of the mine. On many occasions, the other men would look to Ricky Saylor to speak for them to Mr. Runyon. When the men registered a safety or health-related complaint about the mining operation with him, he would tell Runyon of it on their behalf.

14. Ricky Saylor, on behalf of himself and others, had complained to Runyon on numerous occasions about the lack of ventilation to the working areas which caused an accumulation of what Saylor described as "bad air". He believed this was caused by a lack of ventilation curtains (or line brattices) which would have directed ventilating air into the working places. He also had complained to Runyon on many occasions about "bad top", i.e., unsupported roof, on the "right side" where the ventilation was also extremely poor. More specifically, he complained about the lack of "safeties" which are necessary as temporary support to protect him while he roof bolts. Saylor also testified that Runyon's practice of "double-cutting" caused the other complainants, particularly the drill operator and scoop operators to have to work under unsupported roof while doing their

respective jobs. "Double-cutting" was described by Saylor as drilling and shooting two rounds in the face of the coal without roof bolting in between.

15. Ricky Saylor had made the safety and health-related complaints enumerated in Finding of Fact No. 14 to Runyon at least on a weekly basis for the six months immediately prior to the August 1988 layoff. He testified that Runyon's response to these complaints was to the effect that if the current miners (the complainants) didn't want to work in these conditions, he had a hundred applications from other men who would be glad to take their place.

16. Terry Saylor had also on occasion complained to Runyon about working in the "smoke" and "dead air" in the mine, as well as having to go out under unsupported roof to get the coal. Typically, he would come out of the mine and tell Runyon it was too smoky in there, that he couldn't stand anymore of it. He would tell Runyon that he needed to hang some curtains to provide some ventilation. Runyon, instead of hanging curtains, however, would just go pull the coal out himself.

17. Darrell Mayne also personally complained to Runyon on many occasions about "bad top" and "bad air" in the mine, primarily during the last six months of his employment because of the worsening conditions at the mine. Runyon would get mad about it and say there was plenty of people looking for a job.

18. Carl Croley was the drillman for Smooth Sailing. Croley's job was to drill into the face of the coal, load these holes with explosives (assisted by the tamp man) and shoot down the coal. Croley corroborated the fact that there were roof and ventilation problems at the No. 4 Mine and that he had been required by Runyon to double-cut the coal faces. Croley had complained to Ricky Saylor who he knew would take his complaints to Runyon, as well as to Runyon himself about this. Furthermore, he had on at least one occasion shortly before he was laid off, refused to work in an area that had not been roof-bolted.

19. Ricky Saylor also testified and I find it credible that two to three months prior to the layoff, he and Carl Croley had refused to work on the "right side" of the mine because of becoming sick on "dead air". He testified that this "right side" had been advanced four to five hundred feet and that there had never been any ventilating air directed into this area.

20. Timothy Cox was the tailpiece man for Smooth Sailing and had also worked as the tamp man, assisting Carl Croley.

21. Cox had complained to Runyon about bad ventilation in the mine whenever he was in the smoke while greasing the belt. Moreover, on the few occasions he had worked with Croley as tamp man, he complained to Ricky Saylor, whom he considered his spokesman or representative with Runyon, about the bad ventilation and unsupported roof at the face.

22. Cox had also been present when the other complainants herein had made safety complaints to Runyon. He observed that Runyon's response to such complaints was to threaten to hire new miners.

23. Larry Saylor also testified concerning problems in the No. 4 Mine with working out under unsupported roof, and ventilation. He had also voiced complaints to Runyon about the lack of ventilation and roof support. He likewise observed that Runyon would respond angrily to complaints about safety from the men. Two to three weeks before the layoff Larry Saylor had refused to work on the "right side" of the No. 4 Mine where there was absolutely no ventilation. He made this refusal to Runyon who responded that "he'd find people to run the mine for him."

24. When Runyon initially announced the layoff, he told Larry Saylor that he wanted him to stay on after the layoff to keep the water pumped out of the mine and to produce approximately 52 tons of coal per day. Larry Saylor was the longest tenured miner at the time of the layoff and was also a qualified foreman. However, within two days, Runyon changed his mind and told Larry Saylor that he too was laid off.

25. Between November 12, 1985, and August 5, 1986, MSHA Inspector Earl Lankford issued seventeen (17) section 104(a) citations, and a section 104(d)(1) citation to Runyon for violations of Smooth Sailing's roof control plan at the No. 3 Mine.

26. On May 22, 1986, and August 5, 1986, Lankford found that no line brattice or curtains had been installed to direct air to the working section at the No. 3 Mine and therefore issued section 104(a) citations to Runyon.

27. The No. 3 Mine and the No. 4 Mine were similar operations which were mined in consecutive order by Smooth Sailing. The No. 3 Mine was abandoned prior to the start of operations at the No. 4 Mine on or about May 15, 1987.

28. MSHA Inspector James Langley issued a citation on August 12, 1988, at the No. 4 Mine, when he found that a cut had not been bolted as required by the roof control plan.

29. MSHA Inspector Richard Gibson inspected the No. 4 Mine in December, 1987 and November, 1988. During both inspections he issued citations for the failure of Smooth Sailing to have properly installed line brattices.

30. MSHA Inspector Charles Blume issued a citation at the No. 4 Mine on June 1, 1988, for the failure of Smooth Sailing to provide a line brattice to the No. 3 heading. Inspector Blume testified that there was no line brattice at all in this heading. The face was approximately 30 feet from the last open crosscut.

31. At the time of the August 26, 1988 layoff, there were ten miners, including the six complainants, working at the Smooth Sailing No. 4 Mine. After the layoff, Runyon and the Gray brothers worked the mine until Runyon left for college in the fall. After this, Ricky and Ronnie Gray worked the mine themselves until the first new miner was hired on September 19, 1988. Another new miner was hired on or about October 10, 1988 and another on or about October 31, 1988. After the layoff, it is noteworthy that Runyon never offered any of the complainants their jobs back at an hourly rate or on any other basis.

32. The claimed basis (although never proven) for the layoff by respondents was a notification by Gatliff that Smooth Sailing's output that they would accept had been cut to 52 tons per day. Prior to that time, Gatliff would take all the coal that Smooth Sailing could produce.

33. Purportedly, a truck driver named "Spider" had notified Smooth Sailing that they were cut back to 52 tons per day. Runyon was not personally present at the time and to confirm this information, he states he called Sam Carr, a Gatliff employee, who told him that they were cut back until December. Carr, however, doesn't believe he told him that. Also casting doubt on Mr. Runyon's version of the cut-back is the fact that after August 26, 1988, and up to the time the No. 4 Mine was shut down on March 6, 1989, Smooth Sailing never shipped as little as 52 tons a day (on a weekly basis) except the weeks of September 1, 1988, September 15, 1988, October 6, 1988 and March 10, 1989 (four days after it shut down). The actual coal production and sales for Smooth Sailing between August 26, 1988 and March 1989 when Runyon shut the mine down show that Smooth Sailing continuously and consistently produced more than 52 tons per day.

34. Runyon also testified that he believed the complainants wouldn't work if limited to producing 52 tons per day. However, the six complainants had never told Runyon that they would not work producing 52 tons per day and had, prior to August 26, 1988,

continued to work for Runyon even when the production tonnage was below 52 tons per day (on a weekly basis) or even zero.

DISCUSSION WITH FURTHER FINDINGS

The Secretary has demonstrated to my satisfaction that the six complainants named herein engaged in activity protected under section 105(c) of the Mine Act by making repeated complaints about unsafe and/or unhealthful conditions at the respondent's No. 4 Mine. After these complaints had gone on for some period of time, the six were laid off and have never been offered a chance to return to work.

Respondents claim that the layoff was motivated only by a cut-back in the purchase of coal instituted by Gatliff on the date of the layoff. However, the Secretary has amply demonstrated the pretextual nature of this "justification". Documents prepared in the ordinary course of business by Gatliff employees show that within one week of the layoff Smooth Sailing was scheduled to produce 1600 tons of high quality stoker coal for September 1988 and as of November 3, 1988, Smooth Sailing was scheduled to produce 400 tons per week or 80 tons per day of coal. Furthermore, the fact that Runyon hired three new employees shortly thereafter is further evidence that the layoff was motivated by the complainants' protected activity. I therefore find that the respondents have failed to show that there was a valid economic reason for the layoff or that the layoff was not motivated by the complainants' protected activities.

In summary, I find and conclude that the complainants engaged in repeated and justifiable protected activity over a protracted period of time prior to the layoff and that the layoff was motivated exclusively by those protected activities. Although there is no direct evidence of this latter point, I find the circumstantial evidence to be strongly supportive of this conclusion. The operator has failed to rebut this prima facie case of discrimination under the Act and therefore I find a violation of section 105(c) of the Mine Act to be proven as alleged in this instance.

ORDER

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

1. That the respondents shall reinstate the herein named six miners to the positions from which they were terminated at the No. 4 Mine, on August 26, 1988, at the same rates of pay, on

the same shift and with the same or equivalent duties, including seniority rights and all employee benefits to which they were entitled to immediately prior to their discharge, at such time as the No. 4 Mine should again become a producing mine.

2. That the respondents shall pay back wages with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) and provide all other employment benefits to the six miners which were lost because of their unlawful layoff. The back wages to which the six complainants are due shall be computed as follows:

a. The four miners who prior to the unlawful layoff were paid $.90 per ton (Larry, Ricky, and Terry Saylor, and Carl Croley) shall be paid for each ton produced by Smooth Sailing from August 26, 1988, until March 10, 1989, the date of the last payment from Davis Branch to Smooth Sailing; and

b. Darrell Mayne and Timothy Cox shall be paid at their regular rates of pay, for forty hours per week from the date they were laid off on August 26, 1988, until March 6, 1989, the date the No. 4 Mine was listed with MSHA as non-producing.

3. That the respondents shall within 30 days of the date of this decision, pay to the Secretary a civil penalty in the amount of $2000 for the violation found herein.

Roy J. Maurer
Administrative Law Judge

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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 13 1990

ENERGY FUELS COAL, INC.	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 89-237-R
v.	:	Citation No. 3077172; 5/2/89
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 89-239-R
MINE SAFETY AND HEALTH	:	Citation No. 3077170; 5/2/89
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 89-240-R
	:	Citation No. 3077169; 5/2/89
	:	
	:	Docket No. WEST 89-243-R
	:	Citation No. 3077166; 4/27/89
	:	
	:	Docket No. WEST 89-245-R
	:	Citation No. 3077164; 4/27/89
	:	
	:	Docket No. WEST 89-248-R
	:	Citation No. 3077161; 4/25/89
	:	
	:	Docket No. WEST 89-249-R
	:	Citation No. 2875340; 4/25/89
	:	
	:	Docket No. WEST 89-250-R
	:	Citation No. 2875339; 4/25/89
	:	
	:	Docket No. WEST 89-252-R
	:	Citation No. 2875337; 4/25/89
	:	
	:	Docket No. WEST 89-254-R
	:	Citation No. 2875335; 4/25/89
	:	
	:	Southfield Mine
	:	Mine I.D. 05-03455
	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 89-435
Petitioner	:	A.C. No. 05-03455-03572
v.	:	
	:	Southfield Mine
ENERGY FUELS COAL, INC.,	:	
Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado,
for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado,
for Petitioner/Respondent

Before Judge Lasher:

At an on-the-record prehearing conference in Denver, Colorado, on February 14, 1990, the parties reached a settlement resolving 10 of the 20 Citations involved in Penalty Docket WEST 89-435 each of which Citations is the subject of a separate Contest proceeding as reflected in the caption. As part of the settlement reached, as to all 10 Citations, which settlement was approved from the bench at hearing, Contestant/Respondent Energy Fuels Coal, Inc. (herein Energy Fuels) agreed to the withdrawal of its Notice of Contest in each of the related Contest proceedings and to the dismissal of such proceedings (T. 6,7, 8-25).

As to 5 of the 10 Citations, Energy Fuels agreed to pay in full MSHA's proposed penalty assessments. As to the remaining 5 Citations, the penalty reductions reflected in the schedule below were based on re-evaluation of the degree of gravity of such violations and MSHA's agreement to mollify its original penalty appraisals thereof.

Citation No.	Contest Docket No.	Initial Agreement	Agreed Penalty
3077172	WEST 89-237-R	$79	$79
3077170	WEST 89-239-R	79	40
3077169	WEST 89-240-R	79	40
3077166	WEST 89-243-R	126	63
3077164	WEST 89-245-R	85	45
3077161	WEST 89-248-R	79	79
2875340	WEST 89-249-R	147	75
2875339	WEST 89-250-R	20	20
2875337	WEST 89-252-R	20	20
2875335	WEST 89-254-R	20	20

ORDER

1. The penalties agreed to by the parties in the total sum of $481 as set forth hereinabove are here assessed and Energy Fuels shall pay the same to the Secretary of Labor within 30 days from the date hereof if it has not previously done so.

2. Citation No. 3077170 is modified to delete the "Significant and Substantial" designation thereon; Citation No. 3077169 is modified to delete the "Significant and Substantial designation thereon; Citation No. 3077166 is modified to delete the "Significant and Substantial" designation theron; Citation No. 3077161 is modified to delete the "Significant and Substantial" designation thereon; Citation No. 2875340 is modified to change Paragraph 10D thereof to reflect that "6" persons were affected by the violation rather than "10;" Citations numbered 2875339, 2875337 and 2875335 are modified to change Paragraph 9C thereof to charge a violation of 30 C.F.R. 75.1103-8(b) rather than 30 C.F.R. 75.1103-8(a) and to change Paragraph 8 therof to reflect the gravamen of the violation described to be that there was no record of the required inspections having been made, rather than that such inspections had not actually been made.

3. Contest Dockets numbered WEST 89-237-R, 239-R, 240-R, 243-R, 245-R, 248-R, 249-R, 250-R, 252-R and 254-R are dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

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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 13 1990

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-247-R
v.	:	Order No. 3077162; 4/26/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine Mine I.D. 05-03455
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 90-8
	:	A.C. No. 05-03455-03575
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Lasher

The parties, at the prehearing conference held on-the-record in Denver, Colorado on February 14, 1990, reached a settlement fully resolving the issues in these two related (Penalty and Contest) dockets. Penalty Docket WEST 90-8 contains two enforcement documents, Citation No. 2875336 and a related Section 104(b) Order No. 3077162, which Order is also the subject of Contest Proceeding WEST 89-247-R. Pursuant to their accord, the parties agreed that the "Significant and Substantial" designation on the Citation should be deleted and the $225 penalty originally proposed by MSHA therefor should be reduced to $125 based on such modification. As a further part of their settlement, the Section 104(b) (Failure to Abate) Order issued after Citation No. 2875336 is to be vacated. Based on such vacation, Contestant Energy Fuels withdraws its contest in Docket WEST 89-247-R. The approval of settlement issued from the bench (T. 14-18) is here affirmed.

ORDER

Citation No. 2875336 is MODIFIED to delete the "Significant and Substantial" designation thereon and is otherwise affirmed.

Withdrawal Order No. 3077162 is VACATED.

Docket No. WEST 89-247-R, having been withdrawn, is DISMISSED. Penalty Docket No. WEST 90-8, having been fully resolved, is DISMISSED.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof the sum of $125 as and for the civil penalty for Citation No. 2875336 above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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MAR 13 1990

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-255-R
v.	:	Citation No. 2875334;4/25/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine Mine I.D. 05-03455
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-434 A.C. No. 05-03455-03571
v.	:	Southfield Mine
ENERGY FUELS COAL, INC., Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Lasher

At a prehearing conference held on-the-record in Denver, Colorado, on February 14, 1990, the parties reached an amicable resolution as to Citation No. 2875334 - one of 20 enforcement documents involved in Penalty Docket WEST 89-434. On the basis of a reduced evaluation of the gravity of the violation and a modification of Section 10(D) of the Citation, the parties agreed that a penalty of $100 rather than the original assessment of $168 was appropriate and moved for approval of such settlement (T. 26). This motion and Energy Fuels' corollary motion to withdraw its contest in Docket No. WEST 89-255-R were approved from the bench and such ruling (T. 25-26) is here affirmed.

ORDER

1. Contestant/Respondent Energy Fuels, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof, the sum of $100 as and for a civil penalty for Citation No. 2875334.

2. Section 10(D) of Citation No. 2875334 is MODIFIED to show the "Number of Persons Affected" by the violation to be "1" rather than "2", "7" or any other number.

3. Contest Docket No. WEST 89-255-R is DISMISSED.

4. Penalty Docket No. WEST 89-434 will remain on the Judge's docket pending resolution of the remaining Citations contained therein.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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MAR 13 1990

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-273-R
v.	:	Citation No. 2875322;4/13/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine
	:	Mine I.D. 05-03455
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-434
	:	A.C. No. 05-03455-03571
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC., Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Lasher

At the prehearing conference held on-the-record in Denver, Colorado, on February 14, 1990, the parties reached various settlement agreements revolving some 18 enforcement documents (Citations and Orders) which were the subject of both Contest and Penalty proceedings. With respect to Citation No. 2875322 - one of the 20 enforcement documents involved in Penalty Docket WEST 89-434 - the Secretary, on the basis of proof of violation, moved to vacate such (T. 27). Such motion was approved as was Energy Fuel's corollary motion to withdraw its contest in Docket No. WEST 89-273-R (T. 27-28). See Commission Rule 11 (29 C.F.R. 2700.11). Such bench ruling is here affirmed.

ORDER

1. Citation No. 2875322 is VACATED.

2. Contest Docket No. WEST 89-273-R is DISMISSED.

3. Penalty Docket No. WEST 89-434 will remain on the Judge's docket pending resolution of the remaining Citations contained therein.

Michael A. Lasher, Jr.
Administrative Law Judge

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DENVER, CO 80204

MAR 13 1990

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-274-R
v.	:	Citation No. 2875321;4/12/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine Mine I.D. 05-03455
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-434
	:	A.C. No. 05-03455-03571
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC., Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Lasher

At a prehearing conference held on-the-record in Denver, Colorado, on February 14, 1990, the parties reached an amicable resolution as to Citation No. 2875321 - one of 20 enforcement documents involved in Penalty Docket WEST 89-434. On the basis of a reduced evaluation of the gravity of the violation, the parties agreed that a penalty of $50 rather than the original assessment of $98 was appropriate and moved for approval of such settlement (T. 27). This motion and Energy Fuels' corollary motion to withdraw its contest in Docket No. WEST 89-274-R were approved from the bench and such ruling (T. 26-27) is here affirmed.

ORDER

1. Contestant/Respondent Energy Fuels, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof, the sum of $50 as and for a civil penalty for Citation No. 2875821.

2. Contest Docket No. WEST 89-274-R is DISMISSED.

3. Penalty Docket No. WEST 89-434 will remain on the Judge's docket pending resolution of the remaining Citations contained therein.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

MAR 13 1990

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-290-R
v.	:	Citation No. 3077181;5/11/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine
	:	Mine I.D. 05-03455
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-449-A
	:	A.C. No. 05-03455-03569
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC., Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Lasher

At the prehearing conference held on-the-record in Denver, Colorado, on February 14, 1990, the parties reached various settlement agreements involving some 18 enforcement documents (Citations and Orders) which were the subject of both Contest and Penalty proceedings. With respect to Citation No. 3077181 - one of the 4 enforcement documents involved in Penalty Docket WEST 89-449-A - the Secretary determined that no violation had occurred and moved to vacate such (T. 29). Such motion was approved on the record as was Energy Fuel's corollary motion to withdraw its contest in Docket No. WEST 89-290-R (T. 28-29). See Commission Procedural Rule 11 (29 C.F.R. 2700.11). Such bench ruling is here affirmed.

ORDER

Citation No. 3077181 is VACATED.

Contest Docket No. WEST 89-290-R is DISMISSED.

Penalty Docket No. WEST 89-449-A will remain on the Judge's docket pending resolution of the remaining Citations contained therein.

Michael A. Lasher, Jr.
Administrative Law Judge

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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 13 1990

ENERGY FUELS COAL, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-291-R
v.	:	Citation No. 3077180;5/11/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine Mine I.D. 05-03455
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-449-A
	:	A.C. No. 05-03455-03569
v.	:	Southfield Mine
	:	
ENERGY FUELS COAL, INC., Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Lasher

At the prehearing conference held on-the-record in Denver, Colorado, on February 14, 1990, the parties reached various settlement agreements involving some 18 enforcement documents (Citations and Orders) which were the subject of both Contest and Penalty proceedings. With respect to Citation No. 3077180 - one of the 4 enforcement documents involved in Penalty Docket WEST 89-449-A - the parties settled the matter on the basis of Respondent's agreement to pay in full ($79) MSHA's proposed penalty and moved for approval of such agreement (T. 32). Such motion was approved as was Energy Fuel's corollary motion to withdraw its contest in Docket No. WEST 89-291-R (T. 32-33). Such bench ruling is here affirmed.

ORDER

1. Contestant/Respondent Energy Fuels shall pay the Secretary of Labor the sum of $79 as and for a civil penalty for Citation No. 3077180.

2. Contest Docket No. WEST 89-291-R is DISMISSED.

3. Penalty Docket No. WEST 89-449-A will remain on the Judge's docket pending resolution of the remaining Citations contained therein.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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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 13 1990

ENERGY FUELS COAL, INC. Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-293-R
v.	:	Citation No. 3077178; 5/11/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine Mine I.D. No. 05-03455

DECISION

Appearances: Phillip D. Barber, Esq., Welford, Dufford, Brown & Tooley, Denver, Colorado, for the Contestant; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Respondent.

Before: Judge Lasher:

The parties have reached a settlement covering the sole Citation (No. 3077178) involved and, in accord therewith, Contestant having moved to withdraw its contest, pursuant to 29 C.F.R. 2700.11 the same is approved, and this Contest proceeding is dismissed.

Although there is no related penalty proceeding involving Citation No. 3077178, as part of their settlement agreement reached on the record of a prehearing conference in Denver, Colorado on February 14, 1990 (T. 29-30), Contestant, Energy Fuels Coal, Inc., has agreed to pay a penalty of $50 for the violation and such is here approved and Contestant is ordered to pay such within 30 days of this Decision. Further, in effectuation of the settlement, Citation No. 3077178 is ordered MODIFIED to delete the "Significant and Substantial" designation thereon.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Phillip D. Barber, Esq., Welford, Dufford, Brown & Tooley, 1700 Broadway, Suite 1700, Denver, CO 80290-1701 (Certified Mail)

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

/ot

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

MAR 13 1990

ENERGY FUELS COAL, INC. Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 89-294-R
v.	:	Citation No. 3077177; 5/11/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Southfield Mine Mine I.D. No. 05-03455

DECISION

Appearances: Phillip D. Barber, Esq., Welford, Dufford, Brown & Tooley, Denver, Colorado, for the Contestant;
Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Respondent.

Before: Judge Lasher:

The parties have reached a settlement covering the sole Citation (No. 3077177) involved and, in accord therewith, Contestant having moved to withdraw its contest, pursuant to 29 C.F.R. 2700.11 the same is approved, and this Contest proceeding is dismissed.

Although there is no related penalty proceeding involving Citation No. 3077177, as part of their settlement agreement reached on the record of a prehearing conference in Denver, Colorado on February 14, 1990 (T. 31-32), Contestant, Energy Fuels Coal, Inc., has agreed to pay a penalty of $112 for the violation and such is here approved and Contestant is ordered to pay such within 30 days of this Decision.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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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 13 1990

BIG HORN CALCIUM COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 90-31-RM
v.	:	Citation No. 3455166; 7/24/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Granite Canyon Quarry

ORDER DISMISSING CONTEST PROCEEDING

Before: Judge Cetti

I have before me the Secretary of Labor's Motion to "Dismiss" the contest of Citation No. 3455166, issued on July 24, 1989, for the failure of Big Horn Calcium to contest the Citation within 30 days of receipt, as required by Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), and Section 2700.20 of the Commission's Rules.

The Secretary in support of the motion states that on July 24, 1989, MSHA Inspector Thomas L. Markve issued Citation No. 3455166 for violation of 30 C.F.R. § 56.11001 to Big Horn Calcium Company, a contractor working at the Granite Canyon Quarry. The Secretary contends that the facts clearly establish that Mike Latka, Big Horn Calcium's supervisor and company agent on the property, was served with the citation on July 24, 1989, and Mr. Latka participated in the close-out conference on July 25, 1989, where both Citation Nos. 3455165 and 3455166 were discussed.

I issued a Notice of Intention advising the parties of my intention to grant the Motion of Dismissal unless good cause to the contrary be shown in writing within the next 10 days.

In response to the "Notice of Intention" Big Horn stated in part as follows:

> "2. Big Horn does not maintain a corporate office at the Granite Canyon Quarry or in Cheyenne, Wyoming, staffed by corporate officers. Citation No. 3455166 was not received by Big Horn at its corporate office in Billings, Montana.

3. Citation No. 3455166 apparently was tendered by an MSHA inspector to local personnel at Big Horn's Granite Canyon Quarry. The receipt by subordinate personnel at the Granite Canyon Quarry of Citation 3455166 does not constitute receipt within the meaning of the Act. See, J.I. Hass Co. Inc., 1981 CCH OSHD ¶ 25,375 (3d Cir. 1981); Buckley & Company Inc. v. Secretary of Labor, 507 F.2d 78 (3d Cir. 1975).

4. Local quarry personnel inadvertently failed to notify and provide Big Horn a copy of this citation. The administrative error and neglect of subordinate personnel at the Granite Canyon Quarry to promptly forward Citation No. 2455166 to authorized corporate representatives was excusable and inadvertent. See, P & A Construction Co., Inc., 1981 CCH OSHD ¶ 25,783 (1981); Special Coating Systems of New Mexico, Inc., 1980 CCH OSHD ¶ 24,904 (1980). Big Horn did not initially submit a notice of intent to contest Citation 3455166 due to mistake, inadvertent surprise and excusable neglect within the meaning of Rule 60(b), Federal Rules of Civil Procedure.

5. Big Horn has made a good faith effort to comply with the procedural requirements of the Act, and has promptly responded to all known citations received by it within the meaning of the Act. Upon receipt in late September, 1989, of an Accident Investigation Report, Big Horn became aware of a reference to Citation 3455166. Big Horn attempted to locate a copy of that citation but could not find a record of having received the citation. . . . Big Horn subsequently obtained a copy from the MSHA office in Denver, Colorado, and filed its notice of contest."

The Secretary replied to Big Horn's response in part as follows:

"Big Horn's legal position is clearly wrong. The statutory scheme of the 1977 Mine Act is very different from the 1970 Occupational Safety and Health Act. Section 104(a) of the Mine Act, requires that MSHA issue citations and withdrawal orders for violations of Mine Act, or any mandatory health or safety standards, with reasonable promptness. Requiring MSHA inspectors to issue citations

to mine operators at their corporate offices, instead of to their agents on mine property, would restrict MSHA's enforcement actions and limit the mine operator's ability to abate violations rapidly.

It is beyond dispute that mine operators are liable for the acts of their agents under the Mine Act. Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir. 1982). Mr. Latka was clearly an agent as defined by Section 3(e) of the Mine Act, and his receipt of the citation is binding on Big Horn.

The OSHA cases cited by Big Horn relate to a regulatory and statutory scheme in which the notice of proposed penalties are served upon a corporate employer at the same time the citation is issued. Thus, there is always a delay between the date of the inspection and the issuance of citations under OSHA.

Mine Act citations and orders are issued at the time of the inspection in most cases, and such documents are served on a responsible official at the mine site. Furthermore, a mine operator may challenge the citation either immediately after its issuance or during a later penalty proceeding. An OSHA contest of a citation always occurs after both the citation and penalty proposed have been issued. Therefore, the rationale concerning receipt of a citation by a corporate employer in an OSHA case does not apply to serving an operator's agent on the mine property in a MSHA case."

On March 2, 1990, the parties filed joint written stipulations so as to avoid need for a hearing on the Secretary's pending Motion to Dismiss.

Agreed Stipulations

1. On July 24, 1989, MSHA Inspector Thomas L. Markve issued Citation No. 3455166 to Mike Latka, a supervisor employed by Big Horn at the Granite Canyon Quarry, located in Granite, Wyoming.

2. Big Horn states, and the Secretary does not dispute, that Mr. Latka did not forward a copy of Citation No. 3455166 to Big Horn's corporate office located in Billings, Montana.

3. Big Horn and the Secretary stipulate that with the exception of the jurisdictional issue raised herein, all other issues raised in this contest proceeding can also be raised in the pending civil penalty proceeding in Docket No. WEST 90-80-M.

Discussion

Upon careful review of the entire record I adopt and incorporate by reference the rationale set forth in the Secretary's above quoted reply to Big Horn.

It is also noted that 30 C.F.R. § 41.1 and 30 C.F.R. § 52.2 (c)(2) and several other 30 C.F.R. sections define "Operator" as including any agent or person charged with the responsibility for the operation or supervision of a mine and 30 C.F.R. § 41.11 requires an operator to notify MSHA of "the name and address of the person at the mine in charge of health and safety." (Emphasis added).

In Island Creek Coal Company v. Secretary of Labor and United Mine Workers of America, FMSHRC Docket No. PIKE 79-18 (August 3, 1979), the Review Commission affirmed the Administrative Law Judge's dismissal of Island Creek Coal Company's Application for Review "as not having met the jurisdictional filing period established by Section 105(d) of the Act." In that case the Application for Review was not received until 3 days after the 30-day filing period.

Stipulation No. 2 quoted above, conforms with existing practice. Under Quinland Coals, Inc., 9 FMSHRC 1641 (September 1987) the failure to file a notice of contest does not preclude the mine operator from challenging in a penalty proceeding the fact of violation or any special findings contained in a citation or order including that the violation was of a significant and substantial nature or was caused by the operator's unwarrantable failure to comply with the standard.

ORDER

The Secretary's motion to dismiss the contest of Citation No. 3455166 as not having met the filing period established by Section 105(d) of the Mine Act is granted. The above captioned contest proceeding is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

James J. Gonzales, Esq., Holland & Hart, 555 17th Street, Denver, CO 80201 (Certified Mail)

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/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 15 1990

TERRY FOWLER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 88-267-D
	:	MSHA Case No. PITT CD 88-19
ATLAS SERVICES CORPORATION, Respondent	:	Nemacolin Mine
	:	
ROGER D. BROADWATER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 88-281-D
	:	MSHA Case No. PITT CD 88-20
ATLAS SERVICES CORPORATION, Respondent	:	Nemacolin Mine

DECISIONS

Appearances: Thomas Whitney Rodd, Esq., and James B. Zimarowski, Esq., Morgantown, West Virginia, for the Complainants;
Robert L. Ceisler, Esq., and Thomas A. Lonich, Esq., CEISLER RICHMAN SMITH, Washington, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern discrimination complaints filed by the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants filed their initial complaints with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and were advised by MSHA that after review of the information gathered during the investigation of their complaints, MSHA determined that violations of section 105(c) had not occurred. The complainants then filed their complaints with the Commission, and hearings were held in Washington, Pennsylvania. The parties filed posthearing arguments which I have considered in the course of my adjudication of these matters.

The record reflects that the Nemacolin Mine was at one time an active producing mine, and that it was operated by the LTV

Steel Corporation. The respondent was an independent contractor performing contract services at the mine incident to its dismantling and sealing, and the mine was still under the ownership of the LTV Steel Corporation while this work was being performed. Complainant Terry Fowler alleges that he was terminated from his employment with the respondent for reporting safety violations to mine management and to MSHA and state mine inspectors. Complainant Roger D. Broadwater alleges that he was terminated from his employment for speaking with an MSHA inspector who was at the mine site conducting an investigation into an alleged safety violation.

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.

Issues

The issues presented in these proceedings are (1) whether the complainants engaged in any safety activities protected by the Act, and if so, (2) whether the respondent retaliated against them by terminating their employment for engaging in such activities. Additional issues raised by the parties are identified and discussed in the course of these decisions.

Complainants' Testimony and Evidence

James Vavrek, testified that he worked at the Nemacolin Mine for 12 years as a continuous-miner operator, repairman, and electrician, and also served as a union safety walkaround and committeeman. He confirmed that the mine ceased operating in August, 1986, because it was "basically mined out." After he was laid off, he was hired by the respondent in March, 1987, as part of several crews working to seal the underground shafts and the slope. He worked as a general laborer, and in April, 1988, was appointed the safety director because of his knowledge of the mine safety rules. He confirmed that he would report safety violations to project superintendent Jay McDowell and job superintendent Bill Parshall, but primarily to Mr. Parshall (Tr. 17-27).

Mr. Vavrek stated that he was appointed safety director the day after a Federal inspector came to the mine and issued some "(d) orders" shutting down the job site at the slope. Prior to this inspection, Mr. Fowler had registered "certain observations

and complaints about problems on the slope" to "Arty," an individual who he believed was a foreman. Mr. Vavrek stated that Mr. Fowler also mentioned these problems to him before he became the safety director, and to Ben Jordan, a laborer who was not part of management (Tr. 33).

Mr. Vavrek identified the "problems" referred to by Mr. Fowler as "illegal" lights on the slope which were not enclosed in glass, the use of a gasoline chain saw and cement cutter inside the slope, and the smoking of cigarettes by job superintendent William Parshall. Mr. Vavrek identified "Arty" and "Kenny" as Art Brienza and Ken Laida, and he stated that these individuals came to the slope area with daily work orders and told the workers what work was needed to be done on the slope (Tr. 36). Mr. Vavrek did not know whether Mr. Parshall was also advised of these complaints (Tr. 35).

Mr. Vavrek stated that employees would bring "safety issues" to him, and that Mr. Fowler also brought safety complaints to his attention. He confirmed that he previously worked with Mr. Fowler at the Nemacolin Mine "off and on" for 2 or 3 years, and he considered him to be a very good worker while employed at the mine and with the respondent. He stated that Mr. Fowler never had a safety or mine management grievance filed against him, and that he would rate Mr. Fowler as "extremely high" as a foreman who paid attention to safety questions (Tr. 43).

Mr. Vavrek stated that in April and May, 1988, Mr. Fowler complained to him about people being transported in a bucket with oxygen and acetylene tanks which were not fastened or tied off. Mr. Vavrek stated that he told Mr. Parshall about these complaints and informed him that if the violations persisted and were not corrected, there was a risk that an inspector would issue a violation if he were in the mine and observed the conditions (Tr. 46-47).

Mr. Vavrek stated that Mr. Fowler also complained about a contractor blasting and shooting while the blaster was 25 feet away, the failure to tie down acetylene torches while they were in use or stored, the lack of fire extinguishers at the places where welding was taking place, and the hauling of unsecured acetylene tanks in pickup trucks. Mr. Vavrek stated that these complaints were brought to his attention, and to the attention of Mr. Parshall (Tr. 47-49). He also stated that Mr. Fowler complained that he was not being permitted to make his gas checks in accordance with the mine sealing plan (Tr. 50-51).

Mr. Vavrek stated that Mr. Fowler's complaint about Mr. Parshall smoking underground was made to him and to Art Brienza, and that his complaint about the use of gasoline tools underground was made to him, to Mr. Brienza, and to Mr. Jordan (Tr. 49, 51). Mr. Fowler also complained on a few occasions

about the handling of asbestos which was being thrown down off the side of the building and permitted to lay on the ground, and the lack of self-contained self-rescuers underground while work was being performed at the slope (Tr. 51, 54).

Mr. Vavrek stated that Mr. Fowler regularly brought up safety matters, and that Mr. Parshall was more aware of the complaints than Mr. McDowell because Mr. Parshall was at the slope area where the work was being performed, and Mr. McDowell remained at the office (Tr. 54).

Mr. Vavrek stated that he told Mr. Parshall about Mr. Fowler bringing up these safety matters on "a few occasions" (Tr. 55). Mr. Vavrek stated that in April, 1988, Federal inspectors James Conrad, Cliff Spangler, and Robert Newhouse were in the slope area and called the miners out after issuing an imminent danger order. Mr. Fowler was talking to Inspector Conrad about hunting, and Mr. McDowell told Mr. Vavrek that he did not want Mr. Fowler talking to the inspector. Mr. Vavrek did not know why Mr. McDowell singled out Mr. Fowler (Tr. 55-58).

Mr. Vavrek stated that it was his impression that Mr. Brienza and Mr. Laida were foremen, that everyone went to them for orders "quite a bit," that Mr. Brienza and Mr. Laida "came down and told what was to be done," and if there were any questions "we would go to Art or Ken" (Tr. 60). If Mr. Brienza or Mr. Laida needed direction, they would go to Mr. Parshall, and Mr. Parshall was on the slope "sometimes" (Tr. 60).

Mr. Vavrek stated that approximately 3 days before Mr. Fowler was terminated he (Vavrek) was with Inspector Spangler and Mr. Fowler informed them that he had not made a gas check at the slope work area and that "they were not following the plans." Mr. Vavrek explained that Mr. Fowler was the only person working for the respondent who was qualified to make the required gas checks prior to the start of any work in the slope (Tr. 61).

Mr. Vavrek stated that after speaking with Mr. Fowler, he (Vavrek) and Inspector Spangler spoke with Mr. John Hoelle, an engineer who drafted the MSHA approved mine sealing plan. Mr. Vavrek believed that the plan required a qualified person to preshift the shaft work areas, and that the plan was not being followed (Tr. 63). Mr. Vavrek stated that he and Inspector Spangler then spoke with Mr. McDowell in his office, and after reviewing the mine fire boss book, Mr. Spangler found that it was not signed. Mr. Vavrek stated that Inspector Spangler commented that "Terry approached us and said that the plan was not being followed" (Tr. 63).

Mr. Vavrek stated that after Mr. Spangler informed Mr. McDowell that the plan was not being followed, Mr. McDowell "was pretty upset. He swore a little bit," and referred to

Mr. Fowler as a "fat roly-poly" (Tr. 64). Mr. Vavrek stated that this encounter with Mr. McDowell occurred the day prior to Mr. Fowler's lay-off, and that he (Vavrek) continued in the respondent's employ for another 4 months or so until August, 1988 (Tr. 65).

Mr. Vavrek stated that the day following Mr. Fowler's departure, the job was shutdown by a state inspector because there was no qualified or certified person to preshift the work. The respondent then contacted LTV Mine Superintendent Art Jones to come and preshift the job. Mr. Vavrek stated that the state inspector called him and asked if he were certified, and Mr. Vavrek told him that he was not. Mr. Vavrek stated further that Mr. Fowler was the only person on the job who was qualified to legally preshift the work, and that a day or so later, the respondent hired someone else who had the "papers" to do the morning preshifting, and the work then resumed (Tr. 66).

Mr. Vavrek stated that sometime in May or June, 1988, after Mr. Fowler's termination, Mr. Parshall told him that Mr. Fowler "would never get a job at Meadow Run if he had anything to do with it" (Tr. 66). He explained that Meadow Run was a new mine which had opened up and was hiring (Tr. 66). Mr. Vavrek stated that Mr. Fowler was "the main person" bringing safety matters to the attention of respondent's management, and that 2 days later the Federal inspectors came in and shut the slope down. Mr. Vavrek believed that Mr. Parshall or Mr. McDowell had knowledge of Mr. Fowler bringing up the safety issues 2 days before the slope was closed because Mr. Fowler brought these matters to Mr. Brienza, and he in turn would go to the office and report what was going on (Tr. 68).

Mr. Vavrek also believed that Mr. Fowler was the "main man" who brought the safety matters to the MSHA inspectors because Mr. Fowler told him and Inspector Conrad about the slope conditions. Mr. Vavrek stated that the inspectors had received a phone call, and he believed that Mr. Fowler had made the call. Mr. Vavrek denied that he had made the call, and confirmed that he was not the safety director or involved with the safety committee prior to the time the slope was closed down (Tr. 70).

Mr. Vavrek confirmed that he did not know for a fact that Mr. Brienza told Mr. McDowell and Mr. Parshall about Mr. Fowler's complaints, and that he did not know whether Mr. Fowler went directly to Mr. Parshall or Mr. McDowell with his complaints. Mr. Vavrek stated that Mr. Fowler went through Mr. Brienza with his complaints "because he thought, just like everyone else, thought he was a foreman" (Tr. 71).

Mr. Vavrek stated that in June, 1988, the respondent and several other contractors were involved in the demolition of surface structures which housed electrical transformers or panel

boxes which were labeled to indicate that the equipment contained PCB's. An allegation was made that the respondent was dumping these transformers down a shaft which was being sealed, and MSHA conducted an investigation of the matter. Mr. Vavrek stated that the day prior to Mr. Broadwater's discharge, he "heard" that the transformers were dumped down the shaft, but that he was not on the job when this purportedly occurred and "just heard talk about it." He stated that he heard about it from Mr. Broadwater, Homer Nicholson, and Bob Vance, and that Mr. Broadwater told him that "he saw them dumping" (Tr. 77). He explained that Mr. Broadwater told him about the dumping while they were having lunch and that he was upset about it. The next day, the inspectors came to the mine (Tr. 74-78).

Mr. Vavrek stated that the inspectors spoke to a number of people about the purported dumping, including Mr. Broadwater, but they did not speak to him (Vavrek) about the matter. Mr. Vavrek stated that Mr. Broadwater told him that he had called the inspectors (Tr. 81).

On cross-examination, Mr. Vavrek confirmed that Mr. McDowell placed him in charge of safety matters on the project because of his safety experience, and that it was his job to remedy safety violations. He also confirmed that MSHA inspectors receive safety complaints in confidence and are not permitted to reveal the names of individuals who complain. He believed that Inspector Spangler violated confidentiality by telling Mr. McDowell that Mr. Fowler had brought the matter concerning the preshift gas check to his attention (Tr. 85).

Mr. Vavrek identified the mine preshift examination book, and stated that he checked the book and found that no gas checks were recorded in the book for the 2 days before Mr. Fowler was terminated on May 23, 1988 (Tr. 87). He stated that he checked the book to determined whether Mr. Fowler had made gas checks while "burning" was going on, and he could not find any onshift book that one would sign to verify that gas checks were made under state law (Tr. 90-91). He explained that no entries were made concerning the gas checks because Mr. Fowler did not examine the area (Tr. 93). He believed that anytime Mr. Fowler makes a preshift or onshift examination, it must be noted in the book (Tr. 94).

Mr. Vavrek stated that Mr. Fowler told him that Mr. Parshall would contact him when he was needed to make his examinations and would then send him to the areas which needed to be examined. He confirmed that the book entry reflects that Mr. Fowler examined the number one shaft on May 17, 1988 (Tr. 96). Mr. Vavrek further confirmed that state law required anyone in Mr. Fowler's position to inspect a shaft before any burning is done, and he assumed that Mr. Fowler knew the law (Tr. 97).

Mr. Vavrek confirmed that he specifically told Mr. Brienza about the gasoline cement cutter and chain, the lights on the slope, and smoking underground, but that he did not speak to Mr. McDowell or Mr. Parshall about these matters even though they were on the job every day, and no one stopped him from speaking with them. He explained that he spoke with Mr. Brienza because he believed he was a foreman (Tr. 99-100).

Mr. Vavrek stated that when he received complaints from Mr. Fowler he either told Mr. Parshall about them or corrected the problem himself. He confirmed that when he complained to Mr. Parshall about safety violations, Mr. Parshall would at times have them corrected, and at times would not. Mr. Vavrek stated that when Mr. Parshall did nothing, he (Vavrek) also did nothing. Mr. Vavrek confirmed that he told Mr. McDowell about a few complaints, and when he told him about the need for fire extinguishers, Mr. McDowell would take them out and put them on the equipment (Tr. 104).

Mr. Vavrek confirmed that when he was laid off in August, 1988, Mr. Parshall and Mr. McDowell knew that he had made safety complaints. He confirmed that he did not file any discrimination claim because he asked to be laid off. He explained that he found another job and requested to be laid off and "couldn't see someone else getting laid off" (Tr. 105). He confirmed that in August, 1988, the respondent's job at the mine "was running down" and people were being laid off. He confirmed that lay-offs were taking place from March through June, 1988, but denied that the work had slowed down (Tr. 105). He confirmed that he knew that the respondent had subcontracted part of the shaft sealing work to another contractor, but denied that this reduced the need for laborers or employees (Tr. 106).

Mr. Vavrek stated that he could only recall John Bair and Dave Knisely being laid off (Tr. 107). He then confirmed that employee James Lowther was laid off, and that employee Frank Pavlovich got another job (Tr. 108). After the layoffs, additional people were hired to do the same work, but he did not know how many were hired (Tr. 114).

Mr. Vavrek confirmed that in a statement made to MSHA Inspector John Savine during his investigation of the discrimination complaints he told Mr. Savine that he was not sure that Mr. Brienza and Mr. Laida were "bosses or management men," that he is still not sure that they were in fact foremen, and that all he knew was that they came in with work orders (Tr. 111-112).

Mr. Vavrek confirmed that Mr. Broadwater never made any safety complaints to him. He also confirmed that "he heard" that MSHA found no evidence that any transformers were in fact dumped down the shaft, and he denied any knowledge that an inventory

made of the transformers revealed that only one transformer was missing (Tr. 118-119).

Mr. Vavrek confirmed that Mr. Broadwater told him that he had complained to MSHA about the transformers (Tr. 119). He also confirmed that he did not tell Mr. McDowell or Mr. Parshall about Mr. Broadwater's statement to him (Tr. 120). He also confirmed that he did not tell Mr. Savine about Mr. Broadwater's statement because he did not know about it at the time he was interviewed by Mr. Savine, and Mr. Broadwater told him about the transformers after he had spoken to Mr. Savine (Tr. 121).

Terry L. Fowler testified with respect to his employment at the Nemacolin Mine, and confirmed that he held several foreman's positions, including underground shift foreman supervising 120 underground miners. He confirmed that he holds certifications from the State of Pennsylvania as an underground assistant mine foreman, and that he is certified to make methane gas tests and air readings. He confirmed that he had a good work record at Nemacolin and never had any disciplinary problems (Tr. 125). He identified a letter of recommendation dated June 15, 1983, from the superintendent of the Nemacolin Mine (Tr. 126).

Mr. Fowler confirmed that he has worked for Jedco Minerals at the Ocean Five Mine since October 31, 1988, as a section foreman, and that he was unemployed for a few months after he was terminated by the respondent, except for "odds and ends jobs" doing road and contract work tearing down buildings (Tr. 127, exhibits C-1 and C-2).

Mr. Fowler confirmed that he was laid off by Nemacolin because the mine shutdown, and that Mr. McDowell hired him after confirming that he had fire boss and assistant mine foreman's papers. He confirmed that he started work on approximately February 17, 1988, as an underground fire boss and laborer and was paid approximately $8 an hour (Tr. 130). He described his fire boss duties, and confirmed that management would inform him where the work was taking place, and that he would make his preshift examination before work began in the shafts and slope. He confirmed that there were four shafts, the slope, and surface buildings and ponds, and a tipple. After completing his preshift examinations, he performed his laborer's work (Tr. 131). Mr. Parshall would inform him where the work was taking place, and Mr. McDowell was present in the office when he went there to receive his assignments from Mr. Parshall (Tr. 132).

Mr. Fowler stated that his work assignments conducting the required tests took him to different shafts, two of which are six or seven miles apart. He always entered his inspections in the mine books after he completed them, and would then receive his work assignments from Mr. Parshall, and on occasion from Mr. McDowell (Tr. 134). He described the work which he did at

the slope and shafts, including the "burning" or cutting of metal with acetylene torches (Tr. 134-136).

Mr. Fowler stated that after observing violations around the shaft, he informed Mr. Parshall about a compressor, the use of a gasoline powered grinder and power saw, Mr. Parshall smoking underground, and the presence of uncertified and untrained people underground. He explained that Mr. Brienza and Mr. Laida walked down the shaft slope for a few hundred feet without a flame safety light or spotter and without permission to enter the mine. He also expressed his concern about self-rescuers, backup horns on vehicles, the improper hauling of oxygen and acetylene tanks, and fire extinguishers. Mr. Fowler stated that he raised these concerns when he was working in the slope in late March and early April, 1988, and before Mr. Vavrek became the safety director (Tr. 138). He stated that he spoke to Mr. Parshall about these matters and "mentioned a few" to Mr. McDowell. Mr. Fowler stated that he advised Mr. Parshall about the violations and informed him that the inspectors would "write them up" and that he (Parshall) should take care of them. He also stated that Mr. Parshall said "I know" when he called these matters to his attention (Tr. 138).

Mr. Fowler stated that he informed Mr. Parshall and Mr. McDowell about the slope violations 2 days before the inspectors came in and issued violations closing down the slope (Tr. 140). Most of the violations were brought to the attention of Mr. Parshall, and "a few" were brought to Mr. McDowell's attention, but nothing was done to correct the conditions (Tr. 141).

Mr. Fowler confirmed that he telephoned MSHA inspector James Conrad at his home and told him about the violations and informed him that he was the fire boss and wanted him to do something about it and have the violations corrected. Mr. Fowler stated that he called Mr. Conrad the day before the inspectors came to the mine, and he requested that his name not be divulged (Tr. 143). Mr. Fowler stated that he also complained about a nonpermissible cable running down the slope where he was working, and uncovered light bulbs (Tr. 143).

Mr. Fowler confirmed that he did not enter the violations he complained about in the mine books because the conditions did not exist when he made his examinations. He asserted that the violations occurred during the shift after the completion of his examination. He further explained as follows at (Tr. 148-149):

> Q. You did bring it to the attention of management on numerous occasions that there were problems even though you didn't enter it in the book. Is that right?
>
> A. Yes, sir.

Q. Is there any other reason you did not enter these hazardous conditions into the book?

A. I just didn't want to see the company have it inspected by the inspectors and give them a bad name and write violations. It's bad practice.

Q. After you had done that numerous times, you say, you called the federal inspectors. Is that right?

A. Yes, sir.

Q. And they came out and they inspected the slope and they shut it down.

A. Yes, sir.

Q. Are you aware of the specific things they were written up for right now?

A. Yes, sir.

Q. What is your recollection?

A. All the violations I talked about.

Mr. Fowler believed that the slope was shutdown for 1 day, and that following this, Mr. Vavrek was appointed as safety director (Tr. 150). The parties agreed that the slope was shutdown on or about March 24 or 25, 1988, and that exhibit C-3, are the copies of the citations issued by the MSHA inspectors (Tr. 153). Mr. Fowler confirmed that the violations which were issued were those that he previously discussed with Mr. Parshall and Mr. McDowell 2 days earlier. He stated that he called Inspector Conrad because management was not taking any action to correct the violations, and he identified the other MSHA inspectors who came to the mine as Cliff Spangler and Robert Newhouse (Tr. 154).

Mr. Fowler stated that following the shutdown of the slope by the MSHA inspectors, he informed Mr. Parshall and Mr. McDowell that the company truck he was driving was not being inspected and that they replied "so" (Tr. 155). He also found out that "stuff" was being dumped down the shaft, and no certified person was examining the shaft. He asked the state and Federal inspectors about the matter, and they confirmed that if any work is done around the shafts they were required to be inspected by a certified person. Since he was the only certified person at the mine site, and he did not inspect the shaft when the material was dumped, Mr. Fowler concluded that the required shaft inspection had not been conducted. He reported this to Mr. Vavrek in the presence of Inspector Spangler, and Mr. Vavrek told Mr. Fowler that he would check on it. Mr. Fowler stated that he called

state mine inspector Raoul Vincinelli that same evening and informed him that the respondent did not allow him to conduct his shaft inspections, and that Mr. Vincinelli told him he would speak to management (Tr. 156-160). Mr. Fowler called Mr. Vavrek at his home and Mr. Vavrek told him that Mr. McDowell had referred to him (Fowler) as "a wimp or fat boy or something." Mr. Fowler did not tell Mr. Parshall that work was being conducted at the shaft without anyone inspecting it, but that a State and Federal inspector told Mr. Parshall to make sure that he (Fowler) makes his tests (Tr. 159-160). Mr. Fowler stated that he was terminated 1 day later after these events occurred (Tr. 160).

Mr. Fowler stated that Mr. Parshall spoke with him at the end of his work shift and informed him that "I'm going to have to let you go" for "lack of work." Mr. Fowler stated that he said nothing and left the site. He then called Mr. Vincinelli that day or evening and informed him that management had lied to him and had no certified people working for them. The next day, Mr. Vincinelli went to the site and shut the job down. Mr. Fowler stated that following this shutdown, it was his understanding that the methane checks were made by Mine Superintendent Art Jones (Tr. 163-164).

In response to a question as to whether Mr. Parshall or Mr. McDowell ever expressed any displeasure with his safety activities, Mr. Fowler stated that Mr. Parshall questioned his whereabouts when he was gone for 4-1/2 hours making methane checks where holes were being drilled and shot. Mr. Fowler stated that he informed Mr. Parshall that he could contact the State or Federal inspectors to verify what he was doing, and asked Mr. Parshall not to interfere with his methane testing (Tr. 167).

Mr. Fowler stated that Mr. McDowell questioned him about some comments he purportedly made to the mine owner, and indicated that he (Fowler) had made the owner mad (Tr. 167). The next day, Mr. Parshall and Mr. McDowell argued with him about his reporting late for work, and when Mr. Fowler asked them whether there was "a problem" and did not want to be harassed, Mr. McDowell stated "well, I've been getting too many 800 phone calls" (Tr. 168). Mr. Fowler took this to mean that someone had called an inspector, and that Mr. McDowell believed he had called the inspectors (Tr. 169).

Mr. Fowler stated that he did not know the mine owner, but offered to speak with him. However, Mr. McDowell stated "that is not a good idea" and that "the owner could get real tough." Mr. McDowell stated that he did not like to be threatened, and Mr. Fowler stated "I don't either, Jay" (Tr. 169). Mr. Fowler stated he wanted to speak with the owner because he had never spoken to him and wanted to find out why he was mad (Tr. 170).

Mr. Fowler stated that on one occasion when a safety meeting was supposed to be held, Mr. McDowell commented that "he was not going to be a safety nut on no job" (Tr. 171). Mr. Fowler stated that management never criticized his job performance. He stated that he called the Federal inspectors because management was not doing anything about the violations, and since he had to sign the fire boss books, he was concerned that management would blame him, and that Mr. Parshall and Mr. McDowell "did not know the laws" (Tr. 172).

Mr. Fowler stated that Mr. Brienza and Mr. Laida rode to work with Mr. Parshall and they talked on the job about someone calling the MSHA inspectors. Mr. Fowler stated that they stated that Mr. Parshall and Mr. McDowell were mad because someone was calling the MSHA inspectors and they wanted to know who it was. Mr. Fowler stated that he wanted everyone to know about the conditions that he complained about, and he believed that Mr. Brienza and Mr. Laida "would run to management and tell them everything" (Tr. 173).

Mr. Fowler stated that he did not resent Mr. Brienza and Mr. Laida giving him work assignments and had "no ax to grind with them." He stated that Mr. Brienza and Mr. Laida "both told me they was company." He also stated that he received his daily work assignments from Mr. Brienza, Mr. Laida, and Mr. Parshall, and that he would find out about his daily work assignments when he went to work (Tr. 176).

On cross-examination, Mr. Fowler stated that approximately 3 days after he was hired by the respondent he began making complaints about safety violations, and that he made them intermittently from February 20 to May 22, 1988. He confirmed that he knew that Mr. Parshall was the superintendent and that Mr. McDowell was the project manager, and that they would be the logical people to complain to (Tr. 178-181).

Mr. Fowler reviewed a copy of his 12-page statement given to MSHA Inspector John Savine in connection with his complaint, and stated that although "he may have left something out," his statements were true (Tr. 183). Mr. Fowler stated that he told Mr. Parshall and Mr. McDowell about all of the complaints which are referred to in his statement to Mr. Savine (Tr. 189). He conceded that he did not tell Mr. Savine that he had spoken to Mr. McDowell and Mr. Parshall about these complaints, and stated that he told Mr. Savine that "I went to management. Management is Jay and Bill" (Tr. 188). In response to a comment by respondent's counsel that his statement made to Mr. Savine does not include any assertion that he specifically told Mr. Parshall or Mr. McDowell about his complaints, Mr. Fowler responded "I told you I left things out" (Tr. 189).

Mr. Fowler confirmed that he was a member of the United Steelworkers Local 3403, and that the local represented the respondent's employees on the job at the mine. He confirmed that the President of the local, Tom Simon, filed a grievance on his behalf regarding his termination. Mr. Fowler confirmed that he told Mr. Simon that "I got laid off or discharged or fired, whatever you want to call it, and they hired a guy in my place" (Tr. 190-195). Mr. Fowler confirmed that his grievance was not pursued because it was not timely filed (Tr. 211).

Mr. Fowler identified the mine examiner's book, and he confirmed that in his capacity as the examiner he was supposed to make entries concerning mine conditions, gas tests, and any safety violations. In response to questions concerning certain entries he made in this book, Mr. Fowler conceded that without exception, each of the shafts and slope which he examined on the days shown in the book were all noted by him to be safe (Tr. 195-198, exhibit R-1). Mr. Fowler explained that these areas "were safe at the time" he inspected them and that the violations that he complained about took place during the shifts and that the areas noted in the book "was safe every day except the few days I told management about." He further conceded that there are no entries in the book that do not say "safe" in his own handwriting for every examination noted in the book (Tr. 199). Mr. Fowler confirmed that no one ever told him not to write up any violations in the book (Tr. 201).

In response to further questions, Mr. Fowler stated that he believed that Mr. Brienza and Mr. Laida were foremen because they told him they were "company" and not "union" (Tr. 208). He stated that neither Mr. Brienza, Mr. Laida, Mr. Parshall, or Mr. McDowell were authorized to go underground unescorted because they were not certified under Pennsylvania State law and had no underground training (Tr. 208-210).

Mr. Fowler stated that Mr. Brienza and Mr. Laida made comments that "the inspectors are here. Fowler must have called the inspectors," and that they made the statements "quite a few times." He also stated that he personally observed Mr. Brienza and Mr. Laida riding in a vehicle with Mr. Parshall (Tr. 213-214).

Mr. Fowler stated that one may assume that any violations which may have occurred during a work shift were corrected in 1 day if he found the area safe during his next daily preshift inspection (Tr. 218). He stated that "most of the time" his safety complaints were ignored and that is why he called the Federal inspectors. In response to certain bench questions with respect to whether he ever went to Mr. McDowell or Mr. Parshall with his complaints of violations, Mr. Fowler stated as follows (Tr. 218-220):

Q. The point I'm making is were these complaints that were just altogether ignored or were they taken care of?

A. Most of the time they were ignored. That is why I called.

Q. Most of the time they were ignored.

A. That is why I called the Federal inspector.

Q. How were they ignored?

A. They weren't taken care of.

Q. Did you ever go to Mr. McDowell or Mr. Parshall, who were the powers to be at the mine?

A. I told Bill and I told Jay about a few.

Q. Which ones?

A. Which ones?

Q. Do you remember which ones you told them about?

A. I can't remember. They didn't want to correspond or help out, so I said I would have to go to an inspector to get something done.

Q. You told them that.

A. Yes.

Q. On how many occasions did you tell them that you had to go to the inspector?

A. I told Jay -- excuse me. I told Bill if he interfered with my tests, with my examinations, that I would go to the Federal and State inspectors. I told Bill this.

Q. I'm taking about the conditions that you say they didn't take care of. Did you tell them about conditions that --

A. I told them about -- we had conditions. And they did nothing. They gave me dirty looks and started treating me --

Q. Do you know whether they took care of them?

A. Some they did and some they didn't.

Mr. Fowler denied that he ever heard Mr. Brienza state that he was "union," denied that he ever cursed Mr. Brienza or had a fight with him, or that he ever told Mr. Laida that he wanted to be laid off because he had another job (Tr. 221-224).

John R. Bair testified that he was formerly employed by the respondent as a laborer for approximately 6 weeks beginning on March 3, 1988. He stated that some oil spilled out of a transformer one day and he requested Mr. Vavrek to have him tested for possible PCB exposure. Mr. Vavrek told him that he would ask management about it, and Mr. McDowell came to him later and cursed him and told him that if he had any problems he should come to management. Mr. Bair stated that he also asked Mr. McDowell for the identity of his union president so that he could file a request to be tested for PCB exposure, and that Mr. McDowell cursed him. Mr. Bair stated that Mr. McDowell never responded to his testing request or for the identity of his union president. Mr. Bair claimed that he never received a union card, that no one knew what union they belonged to, and that he could not find the information (Tr. 227-231).

Mr. Bair stated that after his encounter with Mr. McDowell, Mr. Parshall told him that he would assign him to "burn cable" on the hoist house tower, but then left him standing in the rain for 3 hours without a further work assignment after he told Mr. Parshall that he would not climb the tower because it was too high and he feared for his life (Tr. 234). The next day, Mr. Parshall told him he was laying him off because there was a shortage of work. Mr. Bair stated he was actually laid off the following day and was not called back to the job (Tr. 235). He confirmed that Mr. McDowell had initially hired him for the job (Tr. 238). Mr. Bair denied that he was still mad at Mr. McDowell, but was mad at the company because of the treatment he received (Tr. 247).

Roger Broadwater testified that he worked for the respondent from approximately the middle of March, 1988 until June 1, 1988, and that he was hired by Mr. McDowell to work as a bulldozer operator. He stated that he has never been fired from a job for poor work and has never been the subject of any disciplinary actions (Tr. 250-252).

Mr. Broadwater described his work duties, including laborer's work, and cutting metal with a torch. He stated that his work assignments were primarily made by Mr. Parshall, and that Mr. Brienza and Mr. Laida would also inform him where he was needed to work on any given day (Tr. 252-255).

Mr. Broadwater stated that he was concerned about unsafe work practices such as the lack of fire extinguishers, unsecured

oxygen and acetylene bottles, the use of a Cherry picker with a broken front stabilizer, and a man cage being hauled around without a safety rig (Tr. 255). He stated that he mentioned these conditions to Mr. Parshall, and he believed that he spoke to Mr. McDowell about the oxygen and acetylene bottles when he first started work (Tr. 256).

Mr. Broadwater stated that he observed two transformers being pushed down a skip shaft by a highlift operated by Mr. Laida, and that Mr. Parshall and others were present when this occurred. Mr. Broadwater stated that he did not know whether the transformers contained any PCB's, but that he was upset because contaminants, oils, and flammable, combustible, and corrosive materials were not allowed to be put down the shafts (Tr. 258-261). After arriving home that same day he called Mr. Fowler and told him about the transformers being pushed down the shaft and Mr. Fowler had a friend of his, John Cox, call him back. Mr. Broadwater told Mr. Cox what he observed, and Mr. Fowler called the MSHA inspectors, and they came to the mine the next day (Tr. 264).

Mr. Broadwater stated that when he returned to work the day after speaking with Mr. Fowler, the inspectors were at the mine and wanted to know if anyone knew anything about the transformers being dumped down the shaft. Mr. Broadwater stated that he feared for his job and said nothing directly to the inspectors, but he did take Inspector Newhouse's phone number and told him that he would call him that evening (Tr. 266). At the end of the shift Mr. Parshall told him that four laborers were no longer needed and that he was one of them. Mr. Broadwater stated that he was laid off at the end of the day and that Mr. Parshall told him to find another job (Tr. 267). Mr. Broadwater stated that he had no opportunity to call or speak with Mr. Newhouse, but that he subsequently went to see him and filed his discrimination complaint with him (Tr. 268).

Mr. Broadwater believed that there was still "plenty of work" to be done when he was laid off, and that he was the only one laid off that day. He did not know whether the other three laborers mentioned by Mr. Parshall were subsequently laid off (Tr. 270).

Mr. Broadwater stated that when the inspectors were at the mine speaking with people about the transformers being pushed down the shaft he told four individuals what he had observed and that he was going to be telling the inspectors about it (Tr. 273). He believed he was laid off because he called the inspectors to look into the matter (Tr. 273).

On cross-examination, Mr. Broadwater stated that he believed that management knew that he had complained about the transformers being pushed down the shaft because they "probably must

have had a snitch." He could not identify the "snitch" because "I don't have a crystal ball." Mr. Broadwater confirmed that he did not say anything to management about the transformers (Tr. 275).

With regard to his complaint about the Cherry picker with a broken stabilizer being used to hoist men in a man cage, Mr. Broadwater confirmed that in a prior statement given to MSHA Special Investigator John Savine, he stated that "This cage was not used to hoist men, to the best of my knowledge." When asked to explain this contradiction, Mr. Broadwater stated that "I must have remembered something else," "I don't know if its a matter of time lapse," and "maybe I don't know" (Tr. 277-278).

Mr. Broadwater confirmed that in his prior statement to Mr. Savine he stated that he asked Mr. Parshall that "it looked like the job was slowing down and if there were going to be any layoffs" and that Mr. Parshall assured him that employees would not be laid off because there was a lot of work to do in the preparation plant (Tr. 282).

Mr. Broadwater acknowledged that he had several different jobs with the respondent but denied that he was ever taken off a job because he could not perform satisfactorily. He also acknowledged that Mr. Parshall gave him "an ear beating" when he backed up a backhoe and it caught some powerlines and broke down an old rotted telephone pole (Tr. 285).

Mr. Broadwater stated that he and the other miners who were interviewed by the MSHA inspectors concerning the transformers were all interviewed in private, and that there were no witnesses present during the interviews (Tr. 287). He confirmed that Mr. Fowler advised him of his right to file his discrimination complaint, but that he did not file a grievance over his layoff. When asked why he had not filed a grievance, he stated "I don't know why I didn't. Because there is no union representative on the job" (Tr. 291). He confirmed that his union dues were "checked off" and sent to the Steelworkers Union but that he had no union card, and only received one after he was laid off (Tr. 292). He confirmed that other people were hired after Mr. Bair and Mr. Knisely were laid off to do the same work, and it was his impression that they were not laid off because of a lack of work (Tr. 295).

Homer W. Nicholson testified that he was hired by Mr. McDowell as a laborer on March 1, 1988, and worked at the project in question for 3-1/2 months. He testified with respect to his knowledge concerning the transformers which were allegedly dumped down the mine shaft and explained what had occurred (Tr. 296-305). With regard to this incident, Mr. Nicholson stated that during the dinner hour one evening Mr. Broadwater stated that he was going to call the federal or state people about the

transformers, and he could only recall one other individual who was present at this time, and he identified him as Roger "Hobby" Vance. The following day, the Federal inspectors showed up at the site, and prior to their arrival, Mr. Brienza and Mr. Laida asked him not to say anything about the transformers. He stated that "he thought" that Mr. Laida and Mr. Brienza were foreman but that he did not know (Tr. 306). He confirmed that when he was interviewed by the inspectors about the transformers he told them that he did not see any transformers go down the shaft and that "once I load them, they're not my problem no more" (Tr. 306).

Mr. Nicholson confirmed that after the transformer incident, which he believed occurred on May 31, 1988, he continued to work for the respondent at the mine until approximately June 15, 1988, and then obtained a job at another mine with another "branch" of the respondent (Tr. 308). He confirmed that he heard the argument between Mr. Bair and Mr. McDowell, but could not hear any of the details because he was "downstairs." Although he had no personal knowledge of any safety problems at the site, he "heard" from others that burning was being done without the use of any fans, but that Mr. McDowell had him "fix up a fan for them" (Tr. 309).

On cross-examination, Mr. Nicholson testified further about his involvement with the transformers in question, and he confirmed that he visited Mr. McDowell's office many times (Tr. 309-313). He confirmed that there was a bulletin board in the office and that he has seen some "papers" posted on the wall concerning the union. Although Mr. Nicholson could not read in any detail a copy of a union agreement produced by the respondent's counsel because he did not have his glasses, he identified the name of the Local Union 1474 of the United States Steelworkers of America printed on the document, and stated that it could have been the document posted on the wall (Tr. 316-318).

In response to a question as to whether he ever told anyone in "management" that Mr. Broadwater complained about the transformers, Mr. Nicholson responded "Not in management, not unless it was Arty and Kenny, and they say they wasn't in management now" (Tr. 318). Mr. Nicholson stated further that when he began work for the respondent he thought that Mr. Brienza and Mr. Laida were foremen, but that they informed him that they were not (Tr. 319). Mr. Nicholson confirmed that Mr. Broadwater told him that he was going to make a complaint, and that he had heard that Mr. Robert Vance told Mr. Brienza that Mr. Broadwater "was going to tell on them" (Tr. 320).

David D. Knisely, testified that he was hired by Mr. McDowell as a skilled laborer and worked for the respondent for 10 days during the middle of April, 1988. He worked at "burning metal and stuff, steel, then stacking it on the truck or whatever, just labor work." He stated that on one occasion when

he was working with Mr. Broadwater and Mr. Bair, he asked Mr. Vavrek to find out if there was a union representative or steward on the job, and Mr. Broadwater inquired about the presence of any PCB's in the transformer banks in the building where they were working at. Shortly thereafter Mr. McDowell and Mr. Parshall came to the building while they were tearing it down and wanted to know whether there was a problem, and they used a few curse words. They also stated that they were to come to them if they had any questions, and Mr. Bair did most of the talking. Words were exchanged, and after Mr. Bair asked Mr. McDowell about the union steward and the PCB's, Mr. McDowell stated that he would find out about it. The next day, he and Mr. Bair went to the office to find out if Mr. McDowell had any answers to their questions, and Mr. McDowell informed them not to worry about the union because it would take 60 days for them to be in. When Mr. Bair asked to be tested for PCB's, Mr. Knisely stated that "I forgot what happened after that. It's been awhile" (Tr. 326).

Mr. Knisely stated that on the day that he and Mr. Bair went to see Mr. McDowell in his office, Mr. Parshall spoke with him later in the afternoon and informed him that he was laid off because of a lack of work, and that was his last day on the job. Although he had no personal knowledge whether there were any new hires after his layoff, Mr. Knisely stated that it was his understanding that there were (Tr. 326). Mr. Knisely stated that Mr. Broadwater and Mr. Fowler then advised him that he had "a good case if I filed 105(c)." He confirmed that he filed a complaint but was informed by MSHA by letter that his case had been "dropped" and he elected not to pursue it further and found other work in July (Tr. 327).

On cross-examination, Mr. Knisely stated that he and Mr. Bair asked Mr. McDowell about the union, and that Mr. McDowell was upset because they spoke to Mr. Vavrek first and did not come to him with their questions about the union. He confirmed that Mr. McDowell eventually "got to finding out about the union" but "ranted and raved about not coming to him first" (Tr. 330). Mr. Knisely confirmed that he had visited Mr. McDowell's office and recalled seeing "something about the retirement and health care" posted on the bulletin board, and that something about the union was also possibly posted, but he did not recall. Mr. Knisely stated further that Mr. McDowell was upset "mostly" with Mr. Bair, but was not pleased with him either because "I guess he didn't want nobody talking about the union" (Tr. 334). He confirmed that he had no first hand knowledge about the transformer question (Tr. 337).

Edward K. Locy, stated that he worked for the respondent as a heavy equipment operator from March 14 to approximately August 10, 1988, and later became an acting foreman. He stated that sometime in June or July, 1988, Mr. Parshall told him to start work early before the usual starting time of 7:00 a.m., and

that following Mr. Parshall's instructions, he dumped five or six plastic barrels of acid down a shaft after breaking them up with a dozer so they would not float. He stated that Mr. Parshall told him that Mr. Phil Stout, the respondent's owner, happened to see Mr. Fowler "doing something one day" and commented that "he didn't like the M-F'ers look, get rid of him," and that this occurred the day before Mr. Fowler left the job (Tr. 342).

In response to a question concerning his opinion of Mr. Fowler as a worker and safety conscious person, Mr. Locy responded "I can't really say that much about him . . . . I actually don't know the man. But he was always doing the job when I was around him" (Tr. 343). With regard to his opinion of Mr. Broadwater, Mr. Locy stated "Well, I know him. But personally associating with him, going to his house or something like that, no, I've never been there" (Tr. 343).

Respondent's Testimony and Evidence

Armand "Arty" Brienza testified that he was employed by the respondent during April through June, 1988, at the mine site in question as a carpenter and that Mr. Fowler and Mr. Broadwater were his co-workers. He confirmed that the work being performed by the respondent was a "union job," and that he and the other employees belonged to the United Steelworkers union at that time. He also confirmed that Mr. Kenny Laida worked for the respondent as a cement finisher and also belonged to the union, and that he and Mr. Laida were not foremen or bosses and were not part of management.

Mr. Brienza denied that he and Mr. Laida ever went into any of the work areas at the site with "work orders of the day" for any individual or group of employees to follow. Mr. Brienza explained that part of his work was to seal bore holes which were located within a 10-mile radius of the mine, and that he would generally have laborers helping him. The men were assigned to him by Mr. Parshall and he (Brienza) had nothing to do with selecting them. In view of the fact that he was a carpenter and needed to have materials available to him, he would instruct the laborers assigned to him to bring the materials to the work locations and that this was a normal practice "in the trade." He believed that this probably explains why others may have believed that he and Mr. Laida were foremen or a part of management. He further stated that he and his crew of two laborers would travel around in a dump truck used to haul the materials for sealing the bore holes, and that he would instruct the laborers as to where to take or place the materials needed for the job. He confirmed that once the laborers were assigned to him by Mr. Parshall, they were under his (Brienza's) control while they were in the field working with him, and that Mr. Fowler and Mr. Broadwater were never assigned to him to do any of the bore hole work (Tr. 354-360).

Mr. Brienza confirmed that the only time he gave any work orders to Mr. Fowler and Mr. Broadwater was during the work to seal off the slope, and on these occasions he would instruct them to bring in materials, do the "chipping out," carry blocks, or do anything else that was necessary, and that these orders were no different than was customary "in the trade." He believed that Mr. Fowler and Mr. Broadwater should have realized that craftsmen such as a carpenter or cement finisher could tell a laborer to "bring me this or that," and that although an experienced miner or construction person might believe that a carpenter was management or a boss or foreman "he ought to know" (Tr. 361).

Mr. Brienza stated that Mr. Fowler never treated him as a boss or foreman or part of management, that he used foul language while they talked and worked together while "kidding around," and that on one occasion they engaged in an altercation, but then shook hands. He further stated that he and Mr. Fowler worked "as a crew" together doing slope work for 6 to 8 weeks (Tr. 363). Mr. Brienza stated that Mr. Parshall and Mr. McDowell never worked "in the hole" with the men, and that the men did not talk to them like they did with him and treated them differently. There was no question that the men knew that Mr. Parshall was the superintendent and that Mr. McDowell was the project manager (Tr. 364).

Mr. Brienza stated that Mr. Fowler and Mr. Broadwater never made any safety complaints to him, but that he did hear Mr. Fowler mention or complain about the lights and use of a generator in the shaft, and fire extinguishers. These comments were made in "general conversation," and Mr. Brienza denied that he ever reported them to Mr. Parshall or Mr. McDowell. Mr. Brienza explained that he did not believe it was his responsibility to inform management about these matters, and since Mr. Fowler had more mine experience and knew the safety regulations, "he should have went and done more complaining to somebody else beside me" (Tr. 366).

On cross-examination, Mr. Brienza confirmed that he "heard talk" about transformers being dumped down a shaft, but that he had left the site four times on the day in question and had no personal knowledge about this purported incident (Tr. 368). Although he initially stated that he was "fire-bossing," and had "a card" allowing him to make methane checks, he later clarified his testimony and stated that he was not a fire boss, and was only certified to make methane tests on the surface (Tr. 371).

Mr. Brienza confirmed that he rode to work with Mr. Parshall in his vehicle because it was a trip of 37 miles one way and he had the opportunity to get a ride to work every day (Tr. 379). He confirmed that he still works for the respondent as a carpenter, does not act as a foreman, and is not presently a member

of the union (Tr. 380). He did not believe that it was reasonable for anyone to believe that he was the conduit between Mr. Parshall and the work force "because Mr. Parshall came down every morning and he gave the orders to everybody, what they had to do down there" (Tr. 381). He denied that he ever acted as a foreman, and stated that he was a carpenter who worked part of the time doing slope and bore hole work, and that there were days when he worked and labored with the men on different jobs (Tr. 382).

Mr. Brienza confirmed that he had no training "in the mining area," and that he and Mr. Laida took it upon themselves to go to the slope bottom to retrieve some copper material and that he knew this was illegal or improper and that Mr. Fowler told him so (Tr. 384). Mr. Brienza stated that he never received a union card, and that Mr. McDowell told him that Mr. Laida was the shop steward (Tr. 384). He also stated that the work which he performed around the bore holes took place after Mr. Fowler was terminated, and he conceded that this work would not be relevant to Mr. Fowler's perception that he was a foreman (Tr. 390).

Mr. Brienza confirmed that Mr. Fowler pointed out problems in the workplace on more than one occasion in his presence, and that he did so "as a group. In the hole talking, yes, he mentioned different things" (Tr. 391). Mr. Brienza denied that Mr. McDowell or Mr. Parshall were present during these discussions, and he had no knowledge that Mr. Fowler or Mr. Broadwater ever went directly to Mr. McDowell or Mr. Parshall with any safety complaints (Tr. 392). He believed that Mr. Parshall was concerned about the safety of the employees (Tr. 393). When asked why he did not communicate Mr. Fowler's safety concerns to Mr. Parshall, Mr. Brienza replied "Because I figured Mr. Fowler, he has a complaint, let him go. He complained down in the hole to all of us" (Tr. 395). Mr. Brienza confirmed that Mr. Fowler complained about fire extinguishers, lights, and self-rescuers, and that one of the reasons he was hired was because he was experienced in these matters. Mr. Brienza stated that all of these items in the slope was "new to me," and that as a carpenter he usually worked on the surface (Tr. 397).

Mr. Brienza denied any knowledge of Mr. Fowler's calling any federal inspectors. He confirmed that he was aware that the inspectors came to the site on March 24, 1988, and "writing up a bunch of stuff," and that he had no reason to dispute Mr. Fowler's claim that he called in the inspectors (Tr. 399). He confirmed that Mr. Fowler had worked in the mine, and that he was the only person who had knowledge about the mining laws and regulations (Tr. 405).

Mr. Brienza confirmed that he was at the mine when the slope was shutdown by the inspectors, but he was not interviewed and did not believe that he spoke with Inspectors Newhouse or

Spangler. He did not know who the inspectors spoke with, and never heard Mr. McDowell or Mr. Parshall say anything to Mr. Fowler suggesting that he should not speak to any federal inspectors (Tr. 407).

William Parshall testified that he was formerly employed in 1988 by the respondent as the job superintendent at the Nemacolin Mine, and that he and Mr. McDowell managed the project. He stated that Mr. Laida and Mr. Brienza were in no way part of management and that he never authorized them "to carry orders of the day to the men on the site." He confirmed that 14 to 16 men worked at the site, and that he would make the work assignments on a daily basis and directed all of the work orders (Tr. 410). He confirmed that Mr. Fowler and Mr. Broadwater worked for him (Tr. 411).

Mr. Parshall denied that Mr. Fowler or Mr. Broadwater ever made any safety complaints to him, and stated that the only time he found out that any complaints had been made was when the MSHA inspectors came to the site and shut the job down. He stated that "they shut the job down until I cleaned everything up that they wrote up, that I had that was improper" (Tr. 412). He confirmed that he never found out who may have complained, but that he was curious and asked Inspector Newhouse about it. Mr. Newhouse informed him that a complaint may be filed by using a toll free number to call MSHA in Washington, and that the source of any complaint is confidential and could not be revealed. Mr. Parshall stated that he had no knowledge that Mr. Fowler or Mr. Broadwater made any safety complaints about the area which was shutdown (Tr. 412).

Mr. Parshall denied that Mr. Fowler or Mr. Broadwater were fired because they made safety complaints. He stated that they were laid off. The decision to lay off Mr. Fowler was a joint decision made with Mr. McDowell. Mr. Fowler was laid off because the company was catching up with the work, had subcontracted work to another contractor, and he knew that he was going to reduce his work force. He laid Mr. Fowler off because he was the least qualified to do the work and he did not consider him to be a satisfactory employee. He stated that Mr. Fowler "walked around and talked to people instead of doing his work," was not a "production worker," was not an "energetic worker," and did not give him "eight hours work for eight hours pay" (Tr. 415). Although Mr. Fowler did what he was told, "it wasn't no expediency" and "it was just moping around and stop and talk to people. Things like that" (Tr. 415). Four or five other employees were laid off 2 or 3 weeks before Mr. Fowler, and others were laid off after Mr. Fowler (Tr. 416-417).

Mr. Parshall confirmed that at the time the MSHA inspectors came to the job site and shut the slope down and issued violations, he was aware that they spoke with Mr. Fowler. He stated

that he observed Mr. Fowler speaking with the inspectors, and he recalled that Mr. Ben Jordan and Mr. Brienza were also present at the slope with Mr. Fowler and the inspectors when it was shut-down, but he had no idea what the conversations were about (Tr. 419). He denied making any statement that Mr. Fowler would never get to work at the Meadow Run Mine, and confirmed that he never heard of that mine (Tr. 421).

Mr. Parshall confirmed that he laid off Mr. Broadwater. He explained that Mr. Broadwater was hired as a high lift operator, but that he did not consider him to be satisfactory at that job. He assigned Mr. Broadwater to other equipment at another shaft because the superintendent at that site needed an operator, but he was sent back within 2 days because the superintendent did not want him "because he wasn't very good" (Tr. 420). He then assigned Mr. Broadwater to "burning work," but found that he had difficulty doing that job. He then assigned him to "laboring here and there until I had to make a cutback . . . . I was going to lay laborers off, so I just let him go because he wasn't qualified to do any of the work, really" (Tr. 421).

Mr. Parshall denied that he ever told Mr. Broadwater that there was plenty of work, and he considered such statements to be a bad business practice. He denied that he laid off Mr. Broadwater because of any complaints concerning safety violations or transformers, and stated that he had no knowledge that Mr. Broadwater had made any complaints prior to the time he laid him off. He also denied that Mr. Vavrek ever informed him that Mr. Fowler and Mr. Broadwater had made safety complaints (Tr. 422).

Mr. Parshall confirmed that he knew about the EPA's interest in the complaint concerning PCB's and equipment being pushed down the shafts and that he "heard talk about it." He confirmed that MSHA came to the site to look into the matter and "found nothing." He stated that he had no idea that MSHA had anything to do with the mine prior to March 24, 1988, when the inspectors came and shut the job down, and that MSHA had never visited the site prior to that time while he was the superintendent. He had no idea who called MSHA, but assumed that someone called or made a complaint, "but I have no idea who" (Tr. 428). Mr. Parshall stated that he has been "in this business 39 years" and considers himself to be a safety conscious person and that he tries to work as safe as he can (Tr. 434).

Mr. Parshall confirmed that he was not familiar with the safety rules for underground mines when the job was started at the mine, and that Mr. Vavrek was appointed as the "safety man" because he had worked at the mine and was familiar with the safety rules. Mr. Fowler was appointed as a "fire boss for checking for methane gas" (Tr. 435). Mr. Parshall denied that he ever permitted any safety violations, and he denied that he ever

knowingly and deliberately committed any safety violations (Tr. 436).

On cross-examination, Mr. Parshall stated that he "vaguely" recalled the day that Mr. Fowler was laid off, and he denied any knowledge that Mr. Vavrek and MSHA Inspector Spangler spoke to Mr. McDowell about Mr. Fowler's concerns that gas checks were not being properly made (Tr. 450). Mr. Parshall believed that the joint decision to lay off Mr. Fowler was discussed and made approximately 10-days prior to the lay off, but that he was not sure. It was his understanding that Mr. Fowler was hired because he had fire boss papers, and that he and Mr. McDowell discussed the significance of laying off Mr. Fowler, and any particular problems which may have resulted by the lay off. He confirmed that when state mine inspector Raoul Vincinelli came to the site the day after Mr. Fowler was laid off and informed him that he would not allow work to continue until he brought in Mr. Art Jones or someone else to fire boss the job, he was surprised (Tr. 451).

Mr. Parshall stated that prior to Mr. Fowler's lay off, there were nine individuals qualified to make methane checks, but that none of them had fire boss or mine superintendent papers. He confirmed that Mr. Vincinelli informed him that the mine had to be firebossed, and stated as follows at (Tr. 453):

> THE WITNESS: I had no knowledge of it, but a fire boss -- we don't need a fire boss outside. We need a man -- he was a fire boss because he can take methane checks. We all, later, got cards to check methane. That way I didn't need Terry Fowler, because I had nine men go to school for methane checks. And that is all we had him do.
>
> BY MR. RODD:
>
> Q. Who did you have come in to fire boss the job before Mr. Vincinelli would let you get to work the day after Terry Fowler -- who did you have come in?
>
> A. Mr. Jones took the methane check because we did not have our authorization cards yet.

Mr. Parshall stated that Mr. Vincinelli instructed him not to do any further work until he had a qualified person to conduct the methane checks (Tr. 459). Since Mr. Jones was available at the nearby LTV mine and was still the superintendent and well-qualified to make the methane checks, he made the checks, and Mr. Vincinelli then permitted the work to continue (Tr. 460). Mr. Parshall confirmed that Mr. Barry Cox was then hired on a part-time basis to make the methane checks (Tr. 460).

Mr. Parshall stated that at the time Mr. Vincinelli came to the site, seven or nine of the respondent's employees had received training for taking methane checks, but had not as yet received their cards to show Mr. Vincinelli. They did have a "signed paper" from the methane instructor but the cards had not as yet arrived from Denver. Mr. Vincinelli later accepted the papers after Mr. Jones conducted the methane checks (Tr. 463). Mr. Cox had "mine papers," and although Mr. Parshall never saw any certifications, it was his understanding that Mr. Cox was certified to make certain inspections, and that after Mr. Fowler left, "we had certified or qualified methane check cards" (Tr. 465).

Mr. Parshall confirmed that Mr. Brienza and Mr. Laida rode to work with him in a company furnished pickup trucks, and that he picked them up on the highway on the way to work (Tr. 466). He denied that he ever ate lunch with Mr. Brienza and Mr. Laida, and stated that he lunched with Mr. McDowell (Tr. 467).

Mr. Parshall confirmed that he was curious about who may have complained to the MSHA mine inspectors, and that he discussed it with Mr. McDowell, but was not sure whether he discussed it on more than one occasion (Tr. 468). He also confirmed that "it was kind of shocking" to find out that he could not continue working until the violations were corrected. Since the mine was being closed, he was unaware of MSHA's involvement in surface mining, and he was not sure if Mr. McDowell was aware of it (Tr. 470). Mr. Parshall identified a copy of a mine sealing plan prepared for the respondent and submitted to MSHA, and stated that he had never seen it prior to the hearing in these proceedings (Tr. 474).

Mr. Parshall confirmed that he selected Mr. Vavrek as the responsible person for dealing with safety complaints because he believed he was a reliable and responsible person for dealing with such matters. He stated that he knew that Mr. Vavrek carried out his duties in a responsible and proper fashion "because I directed him to" (Tr. 481). He stated that Mr. Vavrek made his inspections prior to starting time, signed the papers attesting that "the job was safe," and that he always instructed Mr. Vavrek to correct any unsafe conditions. He had no reason to believe that Mr. Vavrek was not fulfilling his safety responsibilities, and he would verify Mr. Vavrek's safety assessments as he moved around the job project (Tr. 482). Mr. Parshall confirmed that Mr. Fowler had to travel 4 miles to perform some of his gas checks at the shafts, and used his own vehicle to do this on his way to work. He was then assigned a company truck to make these checks, and spent more time than he should have, and Mr. Parshall stated that he complained about it to Mr. Fowler, and that after this "he did a little better" (Tr. 483).

Mr. Parshall confirmed that after Mr. Bair and Mr. Knisely were laid off, other people were hired and were assigned the same jobs that they had performed. He denied that he told Mr. Broadwater that four others would be laid off at the same time that he was laid off. He confirmed that Mr. Broadwater was laid off alone, but that he laid off others at a later time "as I needed to." He also confirmed that he laid off people prior to Mr. Broadwater's lay off, and he identified them as Mr. Bair, Mr. Knisely, and Mr. Ben Jordan (Tr. 488). Mr. Parshall denied that he considered these individuals as "troublemakers" (Tr. 489).

Mr. Parshall stated that Mr. Fowler would spend an hour and a half making methane checks, and the rest of his 8-hour day doing labor work. He confirmed that on one occasion Mr. Fowler was gone for 2 hours and 10 minutes on a methane check, and when he discussed it with him, "his timing changed and he shortened his time" (Tr. 490). Mr. Parshall stated that Mr. Fowler's assigned job was to do labor work and make methane checks, and that Mr. Vavrek was responsible for making all of the other safety checks in his capacity as the "safety man" (Tr. 492).

Mr. Parshall stated that he did not lay off Mr. Fowler earlier because he needed someone to make the methane checks and that Mr. Vavrek could not make them because his card was not updated and Mr. Fowler was the only one with an updated card (Tr. 495). In response to questions concerning what he may have told Mr. Fowler and Mr. Broadwater when he laid them off, Mr. Parshall stated as follows (Tr. 495-496):

> Q. Did you tell Mr. Broadwater and Mr. Fowler you were laying them off because you weren't too happy with their work?
>
> A. Yes.
>
> Q. Is that what you told them?
>
> A. I just told them, "I'm through. I don't need you people anymore. I've caught up on my work."
>
> Q. That sounds as if you laid them off for a lack of work.
>
> A. Lack of work. Exactly. That is how they got signed up for unemployment. They were laid off for lack of work.
>
> Q. I thought you said you laid them off because you weren't too happy with their work.
>
> A. Well, naturally --

Q. Which one was it?

A. Okay. I wasn't happy with their work, which is the normal procedure for any superintendent on any construction job.

Q. Well, why not fire the man outright and say, "I'm not happy with your work. You didn't do your job. You didn't do this. You didn't do that. You're out the door, over the hill. Take your bucket and go home?" Why didn't you tell them that?

A. Because I told them they was laid off. That was it. I wasn't happy with their work.

Q. You kind of let them down easy?

A. I just let them go.

Mr. Parshall stated that Mr. Fowler and Mr. Broadwater received unemployment benefits, and that he has never denied anyone these benefits (Tr. 497). He confirmed that the violations which were issued on March 24, 1988, were issued 2 months before Mr. Fowler and Mr. Broadwater were laid off, and he denied any connection between the violations and the lay offs (Tr. 497). He denied that Mr. Fowler ever stated to him that citations would be issued and inspectors would come to the mine if certain conditions were not corrected, or that anyone else informed him that Mr. Fowler had made such statements (Tr. 498). He further stated that during the entire time that Mr. Fowler worked for the respondent, he never directly or indirectly made any statements about his safety concerns (Tr. 498).

Mr. Parshall stated that when he discussed Mr. Fowler's lay off with Mr. McDowell, he informed Mr. McDowell that he wanted to lay off Mr. Fowler because he was "very unsatisfactory and not productive at all." He denied that he was aware that Mr. Broadwater had raised any concerns concerning about PCB exposure, and also denied any knowledge about any request by Mr. Bair to be tested for PCB exposure (Tr. 500). He pointed out that Mr. Fowler and Mr. Broadwater were still employed many weeks after the MSHA inspectors came to the mine and closed it (Tr. 501). He confirmed that after Mr. Fowler and Mr. Broadwater were laid off, "quite a few other people" were hired as equipment operators as the job progressed, but that the hirings were made 4 or 5 months after they were laid off. He confirmed that he did not consider hiring Mr. Fowler and Mr. Broadwater back, and stated that "I don't know if they ever came back to ask for a job, but I wouldn't hire them" (Tr. 503-504).

Mr. Parshall stated that the respondent's work at the mine site did not end until late December, 1988, or January, 1989, but that he was not there to complete the job (Tr. 505-506). He denied that any complaints were ever made about his smoking underground, but admitted that he did smoke outside of the slope and that an MSHA inspector informed him that he was to leave his smoking material at least 25 feet away from the slope. He denied that Mr. Vavrek, Mr. Fowler, or Mr. Broadwater ever discussed his smoking with him, and he did not know if they made any issue about his smoking (Tr. 508).

Jay McDowell, testified that he was last employed by the respondent in October, 1988, as the project manager in connection with the work to seal the mine. He identified the three "management" personnel as himself, Mr. Parshall, and Mr. Clayford Matthews, the superintendent of the sealing work performed at the Number 4 shaft (Tr. 480, 510). He confirmed that Mr. Brienza and Mr. Laida worked on the project but were not part of management. Mr. McDowell stated that he issued work orders to Mr. Parshall and Mr. Matthews, and that he never directed or authorized that any orders given to these individuals be passed on to Mr. Laida or Mr. Brienza to be passed out to the other men (Tr. 510). He stated that he was at the job site on a daily basis and maintained an office there, and he believed that everyone knew that he was at the site because he was familiar with everyone there. His involvement with the project began in January, 1988, and ended during the first part of October, 1988. He employed as many as 27 men on the project and they all knew where his office was located because they came there to fill out forms when they were hired. There was a bulletin board in the office which contained a copy of the Steelworkers Agreement, the health and welfare benefits, and copies of MSHA citations (Tr. 512, exhibit R-2).

Mr. McDowell identified exhibit R-3 as a copy of a "green registration form used as part of the signup package for new employees" the day they start work and he stated that it is signed by Mr. John Robert Bair. He also identified an insurance and health and welfare waiver form signed by Mr. Bair when he was hired (exhibit R-4; Tr. 514-515). He further identified copies of the Steelworkers union cards signed by Mr. Fowler and Mr. Broadwater when they were hired, or shortly thereafter (exhibit R-5; Tr. 517).

Mr. McDowell stated that he entered into negotiations with some subcontractors to dismantle the mine preparation plant, and that he knew that this would result in the reduction of his work force. He stated that he discussed these negotiations with Mr. Parshall in April or May, 1988, and when his work on the project was diminishing he discussed who would be laid off with Mr. Parshall, and that other people were laid off before Mr. Fowler. Mr. McDowell confirmed that he initially authorized

the hiring of Mr. Fowler as a laborer after Mr. Matthews stated that he could use him, and that he knew that Mr. Fowler could inspect for methane and that this was "a plus" (Tr. 520). He stated that he did not consider Mr. Fowler's work performance to be satisfactory because he was "not very enthusiastic," had poor work skills, was not a "team player," and was not particularly qualified in any of his assigned work activities. He stated that Mr. Fowler was allowed to perform duties other than an laborer, and these included "burning" and operating a highlift, but that his performance at these tasks was not satisfactory (Tr. 521).

Mr. McDowell stated that on one occasion, one of the principal owners of the company, Philip Stout, his father-in-law, was at the job site, and after observing Mr. Fowler's performance while dumping some material commented to him (McDowell) that Mr. Fowler "didn't know what he was supposed to be doing" and that "I had better find someone who could get him on the right track and pointed in the right direction." Mr. McDowell stated that Mr. Fowler was apparently not working and that Mr. Stout's comments about Mr. Fowler embarrassed him. Mr. McDowell stated that he mentioned Mr. Stout's displeasure to Mr. Fowler and told him that Mr. Stout was "pissed off" and that he (Fowler) had embarrassed him (Tr. 524). Mr. McDowell stated that he considered this incident in his decision to lay off Mr. Fowler.

Mr. McDowell confirmed that seven MSHA inspectors came to the site on March 24 and 25, 1988, and he was told that they were there for an inspection. He also confirmed that they issued a series of violations and would not allow any work to continue until they were remedied. He stated that he had no knowledge that Mr. Fowler had called the inspectors, and had no reason to believe that he had done so. He stated that Mr. Fowler and Mr. Broadwater never made any complaints to him about safety violations, and that no one ever told him that they had made any complaints (Tr. 525).

Mr. McDowell stated that the decision to lay off Mr. Fowler was made 10 days in advance of his release, and that he delayed the lay off because Mr. Fowler was the only one at the job site who could do the methane testing and he needed to prepare others to do the testing. He subsequently learned from State Inspector Vincinelli after Mr. Fowler's lay off that the individuals who were trained under MSHA's guidelines to make the tests did not meet the state requirements for certification, and he then requested Mr. Art Jones to make the checks (Tr. 528).

Mr. McDowell confirmed that Inspector Newhouse was at the mine on the day the slope was shutdown, but said nothing about interviewing any of the men. Mr. Newhouse returned on June 1, 1988, in connection with the transformer issue, and although Mr. McDowell understood that Mr. Newhouse may have interviewed everyone at the site, he did not know who he spoke with since he

returned to his office while Mr. Newhouse was at the work areas (Tr. 530).

Mr. McDowell identified exhibit R-6 as a May 6, 1988, proposal made by a subcontractor for the demolition of the preparation plant, and he confirmed that he signed it. There was no question that Mr. Parshall knew about this and that there would be a marked reduction in the work force, and Mr. McDowell knew of no reason why Mr. Parshall would have told Mr. Broadwater that "there was a lot of work coming up" (Tr. 533).

Mr. McDowell denied ever telling Mr. Fowler that "there was no problem with his work," and he stated that he first learned about MSHA's 800 telephone number from Mr. Newhouse during the investigation of the transformer issue after Mr. Fowler was laid off. He also denied ever telling Mr. Fowler that he "was not going to be a safety nut," and denied cursing Mr. Bair or Mr. Knisely (Tr. 539). He further stated that he learned that Mr. Fowler had made some complaints after he was laid off, and that it came to his attention during the discrimination inquiry. He denied that these complaints had anything to do with his lay off on May 23, 1988 (Tr. 540).

With regard to Mr. Broadwater, Mr. McDowell characterized him as "a sad sack," and stated that "he wanted to do well, but he was just not capable of doing it." He stated that he had a friendly feeling for Mr. Broadwater and hired him as a heavy equipment operator, but that he performed "very poorly" and "did not have a sense of his work area." He assigned Mr. Broadwater work burning or cutting metal and that he was very slow at this task, had to be taken "step by step" and could not think for himself or do the work on his own and always "seemed to be at a loss for where he was or what he was doing" (Tr. 543). Mr. McDowell confirmed that he paid Mr. Broadwater at an hourly rate of $11, which was the rate for an equipment operator, and although the pay rate for a skilled laborer doing burner work was $8 an hour, he did not cut his pay and kept him at the higher rate of $11 an hour even though he was doing lower rate work, and he did so because he liked him (Tr. 543-544). Since Mr. Broadwater did not perform well as a burner, he was taken off that work and assigned to a "basic grunt" position around the project putting pipe together at the $8 an hour rate, and he and Mr. Parshall finally decided to lay him off (Tr. 544).

Mr. McDowell stated that Mr. Broadwater never came to him with any safety complaints, and the fact that he may have made any such complaints had nothing to do with his decision to lay him off. He confirmed that he hired three or four equipment operators during a period of a month after Mr. Broadwater was laid off (Tr. 545). He denied that Mr. Brienza or Mr. Laida ever communicated any safety complaints to him, and he knew of no reason why anyone would consider them to be bosses, foremen, or

part of management. He confirmed that he never invested them with any responsibility or authority over the work force (Tr. 564).

Mr. McDowell stated that he left the job before it was finished in January or February of 1989, and some of the men who talked to the Federal inspectors about the transformers were still employed by the respondent and finished out the job at the time that he left (Tr. 548). Mr. McDowell identified exhibit R-7, as a cover letter and his response to a grievance report he received from the Steelworkers Union with regard to Mr. Fowler, and confirmed that he stated that Mr. Fowler's "work qualification was less than those of the workers I continue to employ." Mr. McDowell stated that he heard nothing further about the grievance and made no further inquiry (Tr. 552). He stated that Mr. Fowler and Mr. Broadwater were not laid off because of any safety complaints, and that they were laid off because "they were the most unsatisfactory or the least satisfactory employees of those left in the area" he was going to reduce (Tr. 552).

On cross-examination, Mr. McDowell confirmed that his wife is employed by the respondent as the controller and that she is the daughter of one of the principal owners (Stout). He stated that he stopped working for the respondent to do graduate college work, but did not pursue this endeavor, and that he worked in the family business for approximately 8 years (Tr. 555). Insofar as Mr. Laida and Mr. Brienza are concerned, he believed that as a carpenter and cement finisher, they were "key people," and "a couple of the dominant workers" (Tr. 564). He confirmed that in a statement made on June 13, 1988, he stated that Mr. Brienza and Mr. Laida may be used as "key people in their work group" but that they were not foremen (Tr. 568).

Although he did not have any specific information to refer to, Mr. McDowell did not dispute the fact that after Mr. Knisely and Mr. Bair were laid off, there were at least 11 additional hirings made at the project. He could not specifically state when the subcontract he previously referred to was performed, but believed that it could have been 4 to 5 weeks later (Tr. 570).

Mr. McDowell confirmed that he spoke with Mr. Knisely and Mr. Bair, but denied that he was angry with them. He stated that Mr. Bair was aggressive and demanded to know about his union card, and that a question was raised about whether they were handling any asbestos (Tr. 580). Mr. McDowell conceded that he may have sworn, but denied that he cursed at them and stated that Mr. Bair put him "in a defensive position." He stated that Mr. Bair "got in his face," and although Mr. McDowell admitted that he may have "used some choice words," he asserted that "I did not direct them at his person" (Tr. 581).

When asked by the Court for an explanation as to why the witnesses in this proceeding believed that the respondent engaged in illegal dumping activities at the mine and whether they had "an ax to grind," Mr. McDowell speculated that "they were disgruntled employees and pursued an avenue of retaliation" (Tr. 601). He explained that at the time the respondent began work on the demolition project at the mine the United Mine Workers picketed the mine entrance because they felt that the work should have been done by coal miners rather than the respondent, and that he was physically accosted and threatened and had difficulty starting the job. He stated that he had no problem with the Steelworkers Union, and speculated that the UMWA was concerned that the steelworkers were going to represent the workers on the project (Tr. 602). Mr. McDowell stated that since the mine was closed down and there were unemployed miners in the area, he believed that it would be "good P.R." to hire the miners that had previously worked in the mine because they were familiar with the facility. He further speculated that some of the miners were "antimanagement and pro UMWA" and that they resented the respondent doing the work and "it came back to haunt me" (Tr. 603).

Mr. McDowell confirmed that he vaguely knew MSHA Inspector Spangler and did not spend much time with any of the MSHA inspectors who came to the mine, and he believed that Mr. Spangler was there when the citations were issued on the slope (Tr. 604). When asked whether Mr. Spangler informed him as to who may have complained, Mr. McDowell responded "absolutely not" (Tr. 604). He denied that Mr. Fowler ever told him that if certain conditions were not corrected, inspectors may come to the mine and take corrective action (Tr. 604). He denied that Mr. Vavrek ever made such a statement prior his appointment as the safety director, but conceded that after his appointment, Mr. Vavrek would periodically tell him about certain conditions that needed attention and that "we better take care of it" (Tr. 605). Mr. McDowell further stated that when Mr. Vavrek advised him about the need for fire extinguishers or backup alarms, he (McDowell) would order them. Mr. McDowell stated that as the safety man, it was Mr. Vavrek's responsibility to work with Mr. Parshall to resolve safety matters or to order the necessary safety equipment (Tr. 606).

Mr. Broadwater was recalled by the respondent as an adverse witness, and he confirmed that he complained about the transformers being put down the shaft. He further confirmed that he was interviewed by Inspector Newhouse "for a short time" about the alleged incident, but did not wish to speak with him at length at the mine site and asked for his phone number so that he could call him at a later time. He confirmed that he did not call him (Tr. 612).

Mr. Vavrek was called in rebuttal by the complainants, and he confirmed that during his employment with the respondent he

received the appropriate training and had the qualifications for making methane tests, and that some of the employees were also trained to make such tests (Tr. 637). He also confirmed that Mr. Barry Cox was hired by the respondent after Mr. Fowler was terminated and that Mr. Cox was a certified person qualified to make the required preshift examinations and sign the books (Tr. 638).

Mr. Vavrek confirmed that it was his understanding that Mr. Fowler was to conduct preshift checks anytime that burning was going on every 15 minutes, and before any dumping was done. He believed that if Mr. Fowler were visiting a job site while burning was taking place it would be consistent for him to remain there and make his checks while burning was being done (Tr. 639). He recalled an incident when Mr. Fowler came back later than normal and got into an argument with Mr. Parshall over the matter, and that Mr. Fowler told Mr. Parshall that burning was taking place (Tr. 640).

In response to further questions, Mr. Vavrek stated that the day before he was terminated, Mr. Fowler approached him and Inspector Spangler and stated to them that he was not making his gas checks, and that Mr. Fowler also complained about asbestos. Mr. Vavrek stated that Mr. Fowler believed that he should be performing these checks because he was the fire boss. After making these statements, Mr. Vavrek stated that he and Inspector Spangler then went to the mine office to check the books and the mine sealing plan and that Mr. McDowell was present. Mr. Vavrek stated that he wanted to check the plan to determine whether or not Mr. Fowler was supposed to be the person making the gas checks and that the matter was discussed with Mr. McDowell after speaking with Mr. Hoelle, and that Mr. Hoelle had made a statement that Mr. Fowler was supposed to be making the gas checks. Mr. Vavrek stated that Inspector Spangler made the statement that "Terry approached us that the air--that the gas readings were not being made" (Tr. 642-647).

Mr. McDowell was recalled by the Court and he denied that the conversations testified to by Mr. Vavrek with respect to himself and Mr. Spangler ever took place. Mr. McDowell denied that Mr. Vavrek and Mr. Spangler ever visited his office about the matter concerning the gas checks (Tr. 653). Mr. McDowell further denied any knowledge that Mr. Vavrek was qualified to make gas checks when he hired him. He also denied that he knew, or had reason to know, that Mr. Fowler had complained to any inspector, state or federal, that he was not making his gas checks (Tr. 654). He confirmed that state mine inspector Vincinelli told him that he could not operate unless he had someone making gas checks, and that 3 to 5 days later he had Mr. Art Jones make the checks. Mr. McDowell did not recall that he ever received any citations for not having properly qualified

people make gas checks, or for not having gas checks done (Tr. 655). Complainant's counsel produced a copy of a citation issued by Inspector Conrad on March 25, 1988, served on Mr. Parshall citing a violation of section 77.1713, which states that "The examination of each working area was not being performed by a certified person," and Mr. McDowell stated that he did not believe it was a citation for not performing methane checks, but "did not know" if this was the case. Although he could not recall any citations for failing to make gas checks, Mr. McDowell stated that it was "a possibility" that the respondent was issued the citation in question and that he "wouldn't be surprised" and did not dispute its authenticity (Tr. 657-658).

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 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 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

It is clear that Mr. Fowler and Mr. Broadwater enjoy a statutory right to voice their concerns about safety matters or to make safety complaints to mine management or a mine inspector without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede a miner's

participation in these kinds of activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

Communication of Safety Complaints and Respondent's Knowledge of the Complaints

The critical issues in these proceedings concern the questions of whether or not Mr. Fowler and Mr. Broadwater in fact made safety complaints to mine management or to mine safety inspectors, whether the complaints were otherwise communicated to management, whether management knew or suspected that Mr. Fowler and Mr. Broadwater made the complaints, and whether the terminations of Mr. Fowler and Mr. Broadwater were retaliatory and motivated by the complaints, rather than for other legitimate management reasons.

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate such complaints to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedqmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

Although the protected safety activities of Mr. Fowler and Mr. Broadwater concerned safety complaints rather than work refusals, the same principals apply and the complainants have the burden of establishing that they in fact made safety complaints, that they were communicated to mine management or an inspector, that management knew or had reason to know about the complaints, and that the adverse actions which followed were the result of the complaints and therefore discriminatory. In short, the complaints must establish a nexus between their complaints and the adverse discriminatory actions which followed. See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989).

The fact that the respondent may not have known as a fact that Mr. Fowler or Mr. Broadwater had complained to an MSHA inspector, or called MSHA to the mine to pursue a safety complaint, is immaterial. In Moses Development Corporation, 4 FMSHRC 1475 (1982), the Commission held that a complaining miner may establish a prima facie case by (1) proving that the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion. See also: Judge Broderick's similar hold in Larry Brian Anderson v. Consol Pennsylvania Coal Company, 9 FMSHRC 413 (March 1987).

During the course of the hearing, and in his posthearing brief, Mr. Fowler's counsel attacks the credibility of Mr. McDowell (Tr. 557-563; proposed finding #32, pg. 8, brief). In support of his argument, counsel pointed out that the respondent initially failed to file an answer to the complaint, and he suggested that its failure to do so is indicative of its continued deliberate disregard for the law. Counsel further pointed out that the corporate respondent, in its response to my Order to Show Cause of February 2, 1989, stated that pursuant to an agreement with Mr. McDowell, he would continue to assume responsibility for the handling of the complaint even though he had terminated his employment relationship with the respondent in late October, 1988, and that the respondent assumed that Mr. McDowell would continue to handle the matter and that all material received by the respondent from the Commission was brought to Mr. McDowell's attention. Counsel asserts that Mr. McDowell "testified clearly under oath that the papers had not been turned over to him for a response. Nor had he been contacted by respondent's attorney as represented in the pleadings." Counsel further asserts that these denials on Mr. McDowell's part "is further indicative of management's ignorance and contempt of mine safety and health regulations, and . . . that such false swearing by a party and/or his attorney is a fraud upon the court, and a proper ground for the imposition of sanctions under the Federal Rules of Civil Procedure Rule 11."

Mr. McDowell's testimony was in response to a question by Mr. Fowler's counsel as to whether he was delegated the responsibility of responding to the complaint in October, 1988, Mr. McDowell responded as follows at (Tr. 557-558):

> A. No, sir. They didn't delegate all the responsibility of that to me.
>
> * * * * * * *
>
> A. I understand the point. No. I was not delegated. I was not delegated that. And Atlas Services, it says, assumed, and they did, and I did, in fact, assume that role. I felt a responsibility.

And at (Tr. 559-560):

> Q. Can you explain why you didn't file any response in this case?
>
> A. Because I wasn't handling that.
>
> * * * * * * *
>
> Q. Did anybody tell you to take care of it, Jay?
>
> A. No, sir.

The record in these proceedings reflects that all of the prehearing orders and notices, including the complaint, were served on the corporate respondent by certified mail at a post office box number in Washington, Pennsylvania. The returned postal service certified mail receipts reflect that they were received and signed for by an individual other than Mr. McDowell. In its response to my show cause order, the respondent asserted that it first learned about Mr. McDowell's failure to respond to the complaint when it received my order. Respondent pointed out that in view of MSHA's finding after investigating the complaints that a violation of the Act had not occurred, and in view of its denials that it discriminated against Mr. Fowler or Mr. Broadwater, respondent would have no reason to ignore its responsibility to respond to the complaints, and that its failure to do so was due solely to the neglect on the part of Mr. McDowell in failing to file a response to the complaints.

I take note of the fact that at the time the complaints and prior notices were issued, the respondent was not represented by counsel. I also take note of the fact that Mr. McDowell is not an attorney. While it is true that Mr. McDowell's father-in-law is the company president, and that Mr. McDowell's wife worked for the company, and that he was still in contact with the respondent after he terminated his employment relationship in October, 1988, he was not employed by the company at the time Chief Judge Merlin issued an Order on November 23, 1988, directing the respondent to file an answer to the complaints, and at the time I issued my show cause order on February 2, 1988.

While it is also true that Mr. McDowell's assertions that he failed to respond to the complaints because he "was not handling" the matters, and that no one told him to take care of the matters, is contradicted by the response and supporting affidavit of his father-in-law in reply to my show cause order, which reflects an agreement and an assumption on the part of the respondent that Mr. McDowell would continue to handle the matters after his employment with the respondent ceased, I cannot conclude that Mr. McDowell's testimony amounts to "false swearing."

Mr. McDowell's denials that he was delegated the responsibility to respond to the complaints was truthfully explained when he testified that the respondent assumed, as did he, that he would assume this role and that he felt a responsibility to do so. Although Mr. McDowell may be guilty of neglect or ignorance in failing to carry out this responsibility, I cannot conclude that he is guilty of willfully lying or that he has shown contempt for these proceedings. Nor can I conclude on the basis of this very brief testimony that all of his testimony in these proceedings is less than credible and is tainted and untrue.

Mr. Broadwater's Complaint, Docket No. PENN 88-281-D

In his posthearing brief, Mr. Broadwater's counsel asserts that Mr. Broadwater's complaints did not concern any specific MSHA requirements, but focused on his concerns with the proper handling and disposal of PCB contaminated equipment at the mine site, and that the respondent retaliated against him by terminating him for voicing these concerns about the PCB materials and his "involvement" in calling the inspectors about the alleged dumping of these materials. (MSHA investigated the matter, and found no evidence of illegal dumping). Counsel argues that Mr. Broadwater witnessed the alleged dumping, reported the incident to the inspectors, and that he made it known to other employees, and in particular Homer Nicholson, that he had called the inspectors. Counsel characterized Mr. Nicholson as "a credible and impartial employee." Counsel concluded that it appears that Mr. Broadwater called the Federal inspectors on the PCB issue, and that fact became known to respondent. This led to respondent's decision to fire Mr. Broadwater. (Proposed Finding No. 35, posthearing brief).

Contrary to the assertion that Mr. Nicholson was told by Mr. Broadwater that he had called the inspectors about the PCB incident, Mr. Nicholson testified that during a dinner hour at the mine Mr. Broadwater told him that he was going to call the inspectors about the incident. Mr. Nicholson confirmed that he did not inform mine management about Mr. Broadwater's PCB complaint, and although he speculated that he may have told Mr. Laida and Mr. Brienza, individuals who he thought may have been foreman, I find no credible evidence that Mr. Nicholson told anyone about Mr. Broadwater's statement that he intended to call the inspectors about his PCB concerns. Mr. Brienza testified that Mr. Broadwater never made any safety complaints to him, and although he confirmed that he "had heard" about the transformer dumping incident, he had no personal knowledge of the matter. I find nothing in Mr. Brienza's testimony to indicate that Mr. Nicholson may have told him about Mr. Broadwater's statement concerning the dumping incident.

Former safety committeeman and safety director Vavrek confirmed that he too "heard about" the PCB dumping incident, but

that he was not at the mine when this incident allegedly occurred. Mr. Vavrek testified that Mr. Broadwater expressed his concern to him about this incident while having lunch, and that Mr. Broadwater told him that he had called the inspectors about the matter. Mr. Vavrek confirmed that he never told Mr. Parshall or Mr. McDowell about Mr. Broadwater's statement that he had called the inspectors, and when cross-examined about Mr. Broadwater's statements, Mr. Vavrek further confirmed that he said nothing about this statement to MSHA Special Investigator John Savine, the individual who conducted MSHA's investigation of Mr. Broadwater's discrimination complaint, and he admitted that Mr. Broadwater told him that he had complained to MSHA after he had been interviewed by Mr. Savine.

David Knisely confirmed that Mr. Broadwater had raised a question about the presence of PCB's in the transformers which were allegedly dumped, and that Mr. Parshall and Mr. McDowell later came to the area where the building housing the transformers was being torn down, and where he, Mr. Broadwater, and Mr. Bair were working, and that Mr. Bair and Mr. McDowell exchanged a few words. Mr. Knisely stated that Mr. Bair had raised a union question with Mr. Vavrek, and that Mr. Broadwater inquired about the presence of any PCB's in the transformers. Mr. Knisely further confirmed that Mr. McDowell advised Mr. Bair that he would look into the questions concerning the union and the PCB's, and that he and Mr. Bair went to Mr. McDowell's office the next day to pursue the matters further. There is nothing in Mr. Knisely's testimony to indicate or suggest that Mr. Broadwater said anything to him about complaining to the inspectors, or that Mr. Broadwater said anything to Mr. Parshall or Mr. McDowell about his PCB concerns. To the contrary, given the fact that Mr. Bair was doing most of the complaining, the fact that he and Mr. McDowell exchanged words, and the fact that Mr. Bair and Mr. Knisely went to Mr. McDowell the next day to seek further answers from him concerning these matters, I believe that it is reasonably to assume that if Mr. McDowell suspected anyone of complaining to MSHA about the PCB's, the likely candidates would have been Mr. Bair or Mr. Knisely, and not Mr. Broadwater. Mr. Bair was the individual who initially complained about possible PCB contamination by making a request to Mr. Vavrek that he be tested. Mr. Vavrek told Mr. Bair that he would discuss his request with Mr. McDowell, and shortly thereafter, Mr. McDowell came to the area where he was confronted by Mr. Bair.

Mr. Broadwater admitted that he never said anything to mine management about the alleged PCB dumping incident. His belief that management knew that he had complained was based on his belief that management "probably must have had a snitch" as the source of his complaint, but he could not identify the "snitch" because he "did not have a crystal ball." Mr. Broadwater stated that while he did not know for a fact that the transformers

contained PCB's, he was concerned about these and other contaminants being dumped down the mine shafts. As a result of this concern, he testified that he called Mr. Fowler at his home and informed him that the transformers were being dumped into the shafts, and that Mr. John Cox, a friend of Mr. Fowler's, called him back that same evening to discuss the matter. Mr. Broadwater testified further that Mr. Cox told him that he would "send the mine people down the next day," and that he (Cox) and Mr. Fowler would call the inspectors (Tr. 264-265).

Mr. Broadwater confirmed that after returning to the mine the day after his conversations with Mr. Cox and Mr. Fowler, the inspectors were at the mine inquiring about the alleged dumping incident and they interviewed several miners in private. Mr. Broadwater stated that he said nothing to the inspector who interviewed him about the dumping incident "because he feared for his job." He further stated that he took the inspector's phone number and told him that he would call him that evening, but did not do so and only went to see him after his layoff when he filed his discrimination complaint. Although Mr. Broadwater believed that he told four individuals that day that he was "definitely going to be telling the inspectors what I had seen," and that he may have told Mr. Locy, none of these individuals were called to testify in these proceedings. Although Mr. Locy testified, his testimony is devoid of any information that Mr. Broadwater said anything to him about his intentions to inform the inspectors, and Mr. Locy confirmed that he had a limited association with Mr. Broadwater.

I conclude and find that the preponderance of the credible testimony does not support a reasonable conclusion or inference that Mr. Broadwater made any safety complaints to MSHA or any inspector, or that he called the inspectors to the mine. The only witnesses who purportedly had knowledge of Mr. Broadwater's statements that he had called the inspectors were Mr. Nicholson and Mr. Vavrek. Mr. Nicholson's testimony indicates that Mr. Broadwater said he intended to call, and Mr. Vavrek confirmed that the statement was made after Mr. Broadwater was terminated during the time that Mr. Savine was conducting his investigation of Mr. Broadwater's complaint. Contrary to any suggestions that Mr. Broadwater called the inspectors, his own testimony reflects that Mr. Cox and/or Mr. Fowler called the inspectors.

I further conclude that there is no credible evidence to support any conclusion or reasonable inference that mine management suspected that Mr. Broadwater had complained to the inspectors about the alleged PCB dumping incident. Employees other than Mr. Broadwater were interviewed and the interviews were conducted in private and the names of the employees were not solicited or given (exhibit C-5). As noted earlier, although Mr. Parshall and Mr. McDowell were aware of the PCB concerns raised by Mr. Bair, it was Mr. Bair and Mr. Knisely who openly

pursued the matter, not Mr. Broadwater. Although Mr. Broadwater asserted that he told four individuals that he intended to tell the inspectors about the PCB dumping incident while they were at the mine conducting interviews, there is absolutely no evidence that Mr. Parshall or Mr. McDowell were aware of these statements.

In addition to his asserted complaints about the dumping of PCB's, Mr. Broadwater testified that he was "concerned" about the lack of fire extinguishers, unsecured oxygen and acetylene bottles, a cherry picker with a broken stabilizer, and a man cage which was used with a safety rig, and that he "had mentioned" these matters to Mr. Parshall. Mr. Broadwater also "believed" that he had mentioned the oxygen and acetylene bottles to Mr. McDowell when he began working for him.

I find no credible evidence that Mr. Broadwater ever complained about his "safety concerns" to any inspectors. I find no reasonable evidentiary basis to support any conclusion that these "concerns" were in fact safety complaints. Mr. Parshall and Mr. McDowell denied that Mr. Broadwater ever complained to them about any safety matters. Mr. Vavrek, the individual directly responsible for safety matters at the project, confirmed that when he received complaints from Mr. Fowler, he either told Mr. Parshall, or corrected the conditions himself. Mr. Vavrek also confirmed that when he advised Mr. McDowell about any complaints, and in particular, the fire extinguishers, Mr. McDowell took care of the matter and provided the fire extinguishers. Mr. Vavrek said nothing about any safety complaints communicated to him by Mr. Broadwater. Further, with the exception of the PCB matter, there is no evidence that Mr. Broadwater ever mentioned his "concerns" about the other conditions to Mr. Fowler, and there is no evidence that Mr. Broadwater was involved in the incident of March 24 or 25, 1988, when the slope was shut down by the MSHA inspectors. Mr. Brienza denied that Mr. Broadwater had ever made any safety complaints to him, and he confirmed that it was Mr. Fowler who commented about fire extinguishers, nonpermissible lights and the use of a generator in the shaft, and that he (Brienza) did not inform Mr. Parshall or Mr. McDowell about Mr. Fowler's comments.

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony with respect to Mr. Broadwater's discrimination complaint, I conclude and find that he has failed to establish a prima facie case. I conclude and find that the preponderance of all of the credible testimony and evidence in Mr. Broadwater's case does not, either directly or by any reasonable inference, establish that Mr. Broadwater made any bona fide safety complaints to MSHA or its inspectors, or to mine management. I further conclude and find that the evidence does not support any conclusion that Mr. Parshall or Mr. McDowell knew or suspected that Mr. Broadwater had made any safety complaints, or that their

decision to terminate his employment was in any way connected with any safety complaints. I further conclude and find that Mr. Broadwater's termination was not the result of any illegal discrimination, and that his termination was not motivated by mine management's desire to retaliate against him for making safety complaints to mine management or to MSHA or its inspectors. Accordingly, Mr. Broadwater's complaint IS DISMISSED, and the relief requested IS DENIED.

Mr. Fowler's Complaint, Docket No. PENN 88-267-D

Complainant's Arguments

In support of Mr. Fowler's complaint, his counsel argues that the evidence establishes that during his first month at the job site Mr. Fowler repeatedly brought mine safety concerns to the attention of supervisory personnel on the job, but the conditions were not corrected. Under the circumstances, Mr. Fowler contacted MSHA inspectors who came to the job site and shut the slope down, and it was widely speculated on the job that Mr. Fowler had called the inspectors, and that several witnesses, including Mr. Parshall and other witnesses who testified for Mr. Fowler corroborated the fact that Mr. Fowler was observed speaking to the inspectors, and speculated that he was one who had called them. Counsel cites the statement made by Mr. Parshall that "had he known it was Fowler, he would have fired him immediately" as evidence of the respondent's attitude and response to anyone voicing safety concerns.

Counsel argues further that following Mr. Fowler's calling of the inspectors to the site, Mr. Fowler continued to bring other matters regarding MSHA's safety requirements to the attention of respondent's supervisory personnel, including the newly appointed safety director, James Vavrek, who testified on Mr. Fowler's behalf. Counsel asserts that Mr. Fowler subsequently made a complaint about uncertified personnel making certain methane gas checks, and about other gas checks not being made, on the day prior to his termination. In connection with Mr. Fowler's complaint that the required gas checks were not being made, a federal mine inspector (Spangler) and Mr. Vavrek went to mine management (McDowell and Parshall) with Fowler's complaint, and Mr. Vavrek testified that Mr. Fowler's name came up as the person who had complained in the conversations with management. Counsel points out that although Mr. Parshall and Mr. McDowell denied that any such meeting with the inspector and Mr. Vavrek ever took place, it is apparent from the testimony and that of corroborating witnesses and circumstances, that such a meeting did in fact occur, and that the inspection records revealed that such a meeting did occur, but the inspector in his report did not indicate that he had mentioned Mr. Fowler. Assuming that Mr. Fowler's name was not revealed with the meeting with the inspector, counsel concludes that the identity of Mr. Fowler

as the person who complained was nonetheless readily deduced from the nature and circumstances of the complaint, particularly since Mr. Fowler was the certified fire boss who was required to make the checks, and no one else would have complained about the gas checks not being made by him.

Counsel further points out that immediately following the meeting with the inspector about the gas checks not being made, Mr. Fowler was terminated, and Mr. McDowell had to hire another certified fire boss to perform the gas checks in order to continue the work at the site. Counsel concludes that mine management's complete denial of the existence of the meeting concerning Mr. Fowler's complaint about the gas checks casts serious doubts of its credibility with respect to its explanation of the circumstances which precipitated his termination, particularly in light of the fact that the respondent failed to produce any records or documentation showing that Mr. Fowler's termination resulted purely from a reduction in the work force. Counsel further concludes that Mr. Parshall's statement that had he known of Mr. Fowler's complaints, he would have immediately terminated him, casts further doubt on the respondent's motives and credibility.

Counsel asserts that the work performed by the respondent at the job site "was a relatively short-term, in-and-out sort of job, where a number of people were hired for relatively short period of time, and that there was a significant flux in the work force." Under these circumstances, counsel asserts that it was easier for the respondent to simply "let go" persons, such as Mr. Fowler, who were being a "pain" about various safety issues. Counsel further concludes that when management believed that Mr. Fowler was no longer necessary to perform the gas checks, they let him go, but were subsequently proven wrong because management had to find someone else with Mr. Fowler's certifications in order to continue with the job the day after the inspectors were once again called by Mr. Fowler.

In response to the respondent's assertion that Mr. Fowler's termination immediately following his contacts with the inspectors was "mere coincidence," counsel maintains that it is such "mere coincidences" that the Act was partially designed to prevent. Finally, counsel concludes that the preponderance of the evidence clearly supports the conclusion that Mr. Fowler was terminated in retaliation for discharging his safety duties, and reporting numerous safety violations to State and Federal inspectors, and being a "pain" on safety issues.

The Respondent's Arguments

Respondent argues that the safety complaints allegedly made by Mr. Fowler were made to either Mr. Vavrek, or to Mr. Brienza, a carpenter, or to Mr. Laida, a cement finisher, and that

Mr. Brienza and Mr. Laida were not bosses, supervisors, or in any way connected with mine management. Respondent points out that although Mr. Vavrek testified that he was aware of the fact that Mr. Parshall was the job superintendent, and that Mr. McDowell was the project manager, he confirmed that at no time did he inform them that Mr. Fowler had complained about safety violations. Citing the applicable case law, respondent's counsel points out that a complaining miner must communicate any safety complaints to the project foreman or other management or supervisory personnel in order to afford management an opportunity to take corrective action, and to distinguish between genuine and spurious invocations of the Act's protection.

Respondent asserts that Mr. Fowler's safety complaints were nothing more than "gripes" communicated to fellow workers, and although he was aware of Mr. Parshall's and Mr. McDowell's management positions, he chose not to inform them of his alleged safety complaints. Respondent rejects Mr. Fowler's attempt to persuade the court that he believed that Mr. Brienza and Mr. Laida were management representatives and that his safety complaint to them would constitute notice to management. Respondent points out that the evidence establishes that neither Mr. Laida or Mr. Brienza were management personnel, that they were both union members, worked side by side with Mr. Fowler, and that daily orders to the work force were given by Mr. Parshall. Respondent asserts that any work instruction that Mr. Brienza may have given were based upon his job as a carpenter instructing laborers to bring him materials to the job site.

Respondent argues that since Mr. Parshall and Mr. McDowell were not aware that Mr. Fowler reported any alleged safety violations, or were aware that Mr. Fowler was the source of the complaints, they could not have discriminated against him for registering such complaints. Respondent maintains that because of the confidential manner in which a safety complaint is filed with MSHA, the respondent did not know, nor did it learn until the filing of the discrimination complaint, what individual registered complaints with MSHA. With regard to the March 1988, MSHA inspection which resulted in the closure of the mine slope area by the inspectors, respondent asserts that Mr. McDowell was unaware that Mr. Fowler had made the complaints of safety violations to MSHA.

Respondent maintains that it has articulated legitimate business reasons for the layoff of Mr. Fowler, and that he was laid off pursuant to the union contract as the least qualified person to perform the existing work. Respondent points out that in May 1988, the preparation plant demolition, which represented a large portion of the reclamation and demolition project contracted to the respondent, was subcontracted to another contracting firm. When this occurred, a reduction in the work force was indicated, and that before and after Mr. Fowler's layoff, other

workers were also laid off. Respondent maintains that Mr. Fowler was laid off because of a reduction in the work force, because his work performance was ineffective and unsatisfactory, and because he was the least qualified employee to perform the remaining job tasks, and that he was not laid off because of reporting safety violations.

Mr. Fowler's Safety Complaints

The Alleged Dumping of PCB Contaminated Transformers

I find no credible evidence or testimony to establish that Mr. Fowler made any complaints concerning the alleged dumping of PCB contaminated transformers down a mine shaft, or that he was otherwise involved in that alleged incident. Mr. Fowler was terminated on May 23, 1988. An MSHA memorandum report of June 6, 1988, concerning this incident reflects that the dumping complaint was made to MSHA on June 1, 1988 (exhibit G-5). An inquiry made by the appropriate Federal EPA office concerning this incident reflects that an EPA inspection of the site followed MSHA's inquiry, and it took place on October 25, 1988. Thus, the complaint and inquiries conducted by MSHA and the EPA in this matter came after Mr. Fowler's termination, and I cannot conclude that this matter had any connection with Mr. Fowler's termination on May 23, 1988.

MSHA's March, 1988, Inspection and Mine Slope Closure

The testimony and evidence adduced in this case establishes that Mr. Fowler made safety complaints about the slope conditions which triggered the MSHA inspection which resulted in the issuance of violations. I conclude and find that some of the complaints were made by Mr. Fowler to MSHA Inspector Conrad, to union safety walkaround representative Vavrek, and to Mr. Brienza, a carpenter. The critical question is whether or not Mr. Fowler's slope complaints were made or communicated to mine management (Parshall and McDowell), whether management had any reasonable basis for believing that Mr. Fowler had complained, and whether they retaliated against him for complaining.

The evidence establishes that MSHA Inspectors Newhouse, Spangler, and Conrad inspected the mine site in late March, 1988, and issued several section 104(a) citations and section 104(d)(1) citations and orders on March 24, 25, and 28, 1988 (exhibit C-3). Although Mr. Vavrek testified that the slope was shutdown by an imminent danger order, I find no evidence that any section 107(a) imminent danger order was issued. A section 104(d)(1) order issued on March 25, 1988, ordered the withdrawal of all "people working underground" for the failure to provide self-rescue devices to four employees working underground at the drift opening, and it was subsequently terminated on March 28, 1988. Two

additional section 104(d)(1) orders were issued on March 24, 1988, for failure to provide fire protection for a gas driven electrical generator providing lighting at the track slope area where sealing work was being performed, and for accumulations of combustible oil on the motor compartment of a compressor being used at the mine slope entrance. The operators of the compressor and generator were ordered withdrawn. A section 104(d)(1) order issued on March 24, 1988, ordered the withdrawal of a compressor operator because of accumulations of combustible oil on the cooling fan, motor mounting compartment, and the floor at the slope entrance of the mine.

The section 104(a) citations issued on March 24 and 25, 1988, were issued for a number of violations of mandatory safety standards, and the conditions cited are as follows:

-- Failure to record the examination of active work areas of the mine.

-- Failure by a certified person to perform examinations of the No. 1 and No. 4 shaft working areas, and the supply yard.

-- Failure to provide a back-up alarm on a dozer.

-- Failure to inspect and record the date of inspection of a fire extinguisher provided for a dozer.

-- Failure to provide a permanent inspection tag for a fire extinguisher provided for a front-end loader.

-- Failure to provide protective devices and to remove gauges from oxygen and acetylene bottles stored at the mine slope entrance.

-- Improper storage of gasoline and oil at the mine track slope area.

-- Failure to inspect mobile loading and haulage equipment before placing it in service.

-- Failure to provide a back-up alarm for a truck being operated in the supply yard.

Copies of the results of Mr. Fowler's daily inspections of the mine shafts, and slope areas, during intermittent periods from February 18, through May 17, 1988, including March 24 and 28, 1988, when nine of the violations were issued by the MSHA inspectors, contain a notation by Mr. Fowler that on all of these inspection days he found the areas to be "safe" and no violative conditions are noted. When asked to explain why he had not

recorded any of the violative conditions in the mine examiner's book, Mr. Fowler initially stated that "I just didn't want to see the company have it inspected by the inspectors and give them a bad name and write violations." He later explained that the violative conditions occurred during the work shifts after he had completed his examinations, and that at the time he conducted his examinations, the areas were indeed "safe." He confirmed that no one ever instructed him not to record any violative conditions in the mine examiner's book.

Mr. Vavrek testified that Mr. Fowler complained to him and to Mr. Brienza about the slope conditions, and he suggested that Mr. Parshall was aware of the complaints because he was at the slope area where the work was being performed, and that he told Mr. Parshall about the complaints. However, with respect to Mr. Fowler's complaints concerning the use of "illegal" lights on the slope, Mr. Parshall's smoking at the slope, and the use of gasoline powered chain saws and cement cutters inside the slope, Mr. Vavrek testified that he had no knowledge whether Mr. Parshall was informed about these complaints. In fact, Mr. Vavrek specifically testified that he informed Mr. Brienza about these complaints, and did not speak to Mr. Parshall or Mr. McDowell about them.

Despite his testimony that he did not speak with Mr. Parshall or Mr. McDowell about Mr. Fowler's slope complaints, Mr. Vavrek suggested that he spoke to Mr. Parshall "on a few occasions" about Mr. Fowler's safety concerns, and he confirmed that Mr. Parshall would sometimes take corrective action, and at times would do nothing about them. Mr. Vavrek confirmed that he would sometimes take care of the problems himself, and that when they were ignored by Mr. Parshall, he too would ignore them, even though he was the union safety committeeman. Mr. Vavrek further confirmed that when he advised Mr. McDowell about the need for fire extinguishers, Mr. McDowell took appropriate action and provided the fire extinguishers.

Mr. Brienza confirmed that Mr. Fowler "mentioned" or complained to him about the use of a generator and the lights in the shaft, fire extinguishers, and self-rescue devices, and that these matters were mentioned to him and other employees by Mr. Fowler "as a group" during "general conversation." Mr. Brienza denied that Mr. Parshall or Mr. McDowell were present during these discussions, and he denied that he ever communicated Mr. Fowler's complaints to them. Mr. Brienza took the position that Mr. Fowler should have communicated his complaints directly to Mr. Parshall or Mr. McDowell. Although Mr. Brienza's testimony reflects that the complaints made by Mr. Fowler to him may not have been in the nature of "formal" safety complaints, I nonetheless conclude and find that they were safety complaints made by Mr. Fowler and communicated to Mr. Brienza.

Both Mr. Vavrek and Mr. Fowler, as well as other witnesses, testified to their belief that Mr. Brienza and Mr. Laida were mine foremen and part of management. Although Mr. Vavrek testified as to his belief that these individuals were mine foremen, he admitted that when he was interviewed by the MSHA inspector during the investigation of Mr. Fowler's complaint, he told the inspector that he was not sure that they were management personnel, and that he is still not certain. The respondent's credible and unrebutted testimony establishes that Mr. Brienza and Mr. Laida were not management personnel or mine management foremen. In fact, they were skilled craftsmen who were necessarily assigned laborers by Mr. Parshall to assist them in their work. The day-to-day management of the work and the workforce rested with Mr. McDowell and Mr. Parshall, and I am not convinced that the workforce was unaware that this was the case. Mr. Fowler acknowledged that he was aware of the fact that Mr. Parshall was the project superintendent, and that Mr. McDowell was the project manager, and that any safety complaints would logically be filed with them. Under the circumstances, I conclude and find that any safety complaints made by Mr. Fowler to Mr. Laida or Mr. Brienza, were made to them in their capacities as members of the union workforce, rather than mine managers or foremen. I further conclude and find that the slope complaints made by Mr. Fowler to Mr. Vavrek were communicated to Mr. Vavrek in his union walkaround capacity rather than a member of management.

Mr. Fowler asserted that 2 days before the MSHA inspectors shutdown the slope area, he informed Mr. Parshall about the violative conditions which resulted in the issuance of the violations, and that he also informed Mr. McDowell about "a few of them." Mr. Fowler could not recall which specific conditions he complained to Mr. Parshall or Mr. McDowell about, and he confirmed that some of the conditions were corrected, but some were not.

Mr. Vavrek testified that during the MSHA inspection which resulted in the shutdown of the slope, Mr. Parshall and Mr. McDowell were present, and that Mr. Fowler was speaking with Inspector Conrad about hunting, and that the other employees who were present were also speaking to the Inspector. Mr. Vavrek stated that Mr. McDowell told him that he did not want Mr. Fowler speaking with the inspector, but said nothing to him or any of the other employees about talking to the inspector. Mr. Vavrek did not know why Mr. McDowell singled out Mr. Fowler, and there is no testimony that Mr. Vavrek ever communicated this instruction to Mr. Fowler, and Mr. Fowler did not mention the incident during his testimony.

Mr. McDowell confirmed that he was aware of the fact that the inspectors were at the site during the inspection of the slope area which was shutdown, but he denied any knowledge that

Mr. Fowler had called the inspectors, and stated that he had no reason to believe that Mr. Fowler had complained to the inspectors. Mr. McDowell confirmed that Inspector Newhouse said nothing to him about interviewing any of the employees who were present, and he was asked no questions, either on direct, or cross-examination, about his purported statement to Vavrek concerning his alleged admonition that he did not want Mr. Fowler speaking to the inspectors.

Mr. Brienza, who was present at the slope area when the inspectors were there, confirmed that he never heard Mr. Parshall or Mr. McDowell say anything to Mr. Fowler suggesting that he not speak with any of the inspectors. Mr. Parshall confirmed that he observed Mr. Fowler speaking with the inspectors, and that Mr. Brienza and laborer Ben Jordan were also present. Mr. Parshall stated that he had no idea what the conversation was all about, and he acknowledged that he was curious about who may have complained to the inspectors and asked Inspector Newhouse about it, and that Mr. Newhouse simply informed him that complaints may be filed through MSHA's toll-free telephone system and informed him that the source of any complaint is confidential and could not be revealed. Mr. Parshall denied any knowledge of who may have complained to the inspectors.

I find no credible evidence or testimony to establish, either directly, or by any reasonable inference, that Mr. McDowell made the statement attributed to him by Mr. Vavrek. Such a statement, if in fact made, would lend support to an inference that Mr. McDowell may have suspected that Mr. Fowler made the complaint and did not want him speaking with the inspectors. However, there were other employees present who also spoke with the inspectors, and there is no evidence to indicate that Mr. McDowell expressed any concern about anyone else speaking to the inspectors, what was said, or that he in any way interfered with, or otherwise inhibited the inspectors. If the statement were made, I believe it would be reasonable to assume that Mr. Vavrek would have communicated this to Mr. Fowler, and that Mr. Fowler would have mentioned it during his complaint interview with Inspector Savine, or at least testified about it during his testimony at the hearing. Under all of these circumstances, I give no credence to Mr. Vavrek's uncorroborated testimony concerning this purported statement, and I conclude and find that Mr. McDowell did not make the statement.

In a signed statement given to MSHA Inspector John Savine on June 3, 1988, in connection with his discrimination complaint, Mr. Fowler stated that he complained to Mr. Laida, Mr. Brienza, and to "union walkaround safety man" Vavrek in March, 1988, and that shortly after he began working for the respondent, he complained about the compressor located too close to the mine shaft with oil over it, the lack of self-rescue devices, the use of a gasoline powered grinder in the slope shaft, the failure to

properly seal the mine shafts, the use of nonpermissible lighting in the slope, the lack of back-up alarms, and the transportation of unsecured oxygen and acetylene bottles (exhibit C-4).

In his prior statement, Mr. Fowler said absolutely nothing about complaining to Mr. McDowell or to Mr. Parshall about any of the safety complaints which he stated were made to Mr. Brienza, Mr. Laida, or Mr. Vavrek, and which resulted in the issuance of the slope violations by the MSHA inspectors. The only reference to Mr. McDowell was a statement by Mr. Fowler that he "thought" that Mr. Vavrek may have told Mr. McDowell about his complaint on May 19 or 20, 1988, about gas checks being made by uncertified people. In connection with this complaint, Mr. Fowler stated that he did not make it to "anyone in management." Indeed, the only reference of complaints by Mr. Fowler to mine management is his statement to Mr. Savine that he assumed that Mr. Brienza and Mr. Laida were "management people" because they gave him orders.

In his prior statement to Inspector Savine, Mr. Fowler stated that he did not believe that the respondent found out about his complaints to Inspector Conrad from Mr. Conrad, but believed that the respondent "found out from someone because my name was always mentioned when inspectors came around." Mr. Fowler did not mention Mr. Brienza or Mr. Laida as the individuals who may have mentioned his name, but during the hearing, he speculated that Mr. Brienza and Mr. Laida informed Mr. Parshall about his complaints because they rode together to work and that they "would run to management and tell them everything." Mr. Fowler asserted that Mr. Laida and Mr. Brienza talked about someone calling the inspectors, and that Mr. Parshall and Mr. McDowell were angry and were trying to learn the identity of the informant. Mr. Fowler further asserted that Mr. Laida and Mr. Brienza commented "quite a few times" that "the inspectors are here, Fowler must have called the inspectors."

When a mine operator's adverse action against an employee closely follows the employee's protected activity, that fact itself may be considered evidence of an illicit motive. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom., Donovan v. Phelps Dodge Corporation, 709 F.2d 86 (D.C. Cir. 1983). In Mr. Fowler's case, the evidence establishes that he was laid off on May 23, 1988, 2 months after the MSHA inspectors shutdown the slope area and issued violations for the conditions which Mr. Fowler alleged he had complained about.

Except for Mr. Fowler, none of the other witnesses who testified on his behalf said anything about the purported statements made by Mr. Brienza and Mr. Laida that they suspected that Mr. Fowler called the inspectors. Although Mr. Fowler told Mr. Savine that his name was mentioned as the possible source of

the safety complaints, Mr. Fowler did not mention Mr. Brienza or Mr. Laida as the source of the statements. If it were true that Mr. Brienza and Mr. Laida openly mentioned Mr. Fowler's name as the possible source of the complaints "quite a few times," I believe it would be reasonable to assume that other employees would have heard the statements, and would have testified about them. Yet, no one other than Mr. Fowler, testified about any such statements. Further, if it were also true that Mr. Brienza and Mr. Laida routinely informed Mr. Parshall or Mr. McDowell about everything that was going on, it would be reasonable to assume that if they in fact informed them about their suspicions, and Mr. Parshall or Mr. McDowell were predisposed to terminate Mr. Fowler because of his safety complaints, I believe they would have done so immediately, rather than wait for 2 months before doing so.

In support of his conclusion that Mr. Parshall had knowledge of Mr. Fowler's safety complaints, and would have fired him immediately if he had known that it was Mr. Fowler who made the safety complaints, Mr. Fowler's counsel cites Mr. Parshall's "proffer" made in this regard during the hearing. Mr. Parshall's statement came in response to certain bench questions and testimony by Mr. Parshall that even though Mr. Fowler or other employees made safety complaints, they were still employed by the respondent after any such complaints. Mr. Parshall made the following statement (Tr. 501):

> Whatever was--that they figured that we called--we figured they might have called the MSHA people. They were still employed. If I ever thought--<u>if I was any kind of a scrupulous man and I thought you called the Federal inspector, if I was a scrupulous man, I would lay you off tonight</u>. (Emphasis added).

Having viewed Mr. Parshall on the stand during his testimony, and after listening and specifically recalling this testimony, I believe that Mr. Parshall intended to use the word <u>unscrupulous</u> rather than <u>scrupulous</u>. The term scrupulous means "having moral integrity" (Webster's New Collegiate Dictionary), and I seriously doubt that Mr. Parshall intended to convey the impression that a scrupulous person would have immediately fired anyone for complaining to an inspector. I do not believe that Mr. Parshall had any intention of admitting that he would immediately fire anyone who complained to an inspector, particularly in light of his consistent denials that Mr. Fowler was terminated because of his safety complaints. Under the circumstances, and taken in context, I reject the suggestion that this statement by Mr. Parshall supports any conclusion that he was aware that Mr. Fowler complained to the inspector, or that he was predisposed to terminate Mr. Fowler because of such complaints.

After careful examination of Mr. Vavrek's testimony, I find it contradictory and inconsistent with respect to whether or not he communicated Mr. Fowler's safety complaints to Mr. Parshall or to Mr. McDowell. Mr. Vavrek stated that he did not know whether Mr. Parshall was advised of some of the complaints (Tr. 35). He stated that Mr. Parshall was aware of the complaints because he was at the job site where the work was being performed, and that he advised Mr. Parshall about Mr. Fowler's "bringing up safety matters" on "a few occasions" (Tr. 54-55). He then stated that Mr. Fowler made his complaints to and through Mr. Brienza (Tr. 71), and that he (Vavrek) believed that Mr. Parshall or Mr. McDowell had knowledge that Mr. Fowler had made the slope complaints 2 days before the slope was closed down by the inspectors because Mr. Brienza probably told them about Mr. Fowler's complaints (Tr. 68). Mr. Vavrek further testified that he did not speak with Mr. McDowell or Mr. Parshall about some of the slope conditions, even though they were on the job every day and no one prevented him from communicating with them (Tr. 99-100). When asked a direct question as to whether he had at any time told Mr. Parshall nor Mr. McDowell that Mr. Fowler had made safety complaints, Mr. Vavrek responded "No" (Tr. 104).

Mr. Fowler confirmed that after the slope area was shutdown, he continued performing his laborer's duties and continued making his normal fire boss inspections (Tr. 151, 155). When asked whether or not Mr. McDowell or Mr. Parshall ever expressed any displeasure with the manner in which he was making his safety inspections, Mr. Fowler indicated that on one occasion Mr. Parshall questioned his absence while he had gone to inspect several shafts, and that Mr. McDowell discussed the incident which prompted Mr. McDowell's father-in-law to question whether Mr. Fowler was doing any work. Shortly thereafter, Mr. Fowler stated that he had an "encounter" with Mr. McDowell about his reporting time for work, and they mutually accused each other of harassment and that Mr. McDowell purportedly stated that he was receiving "too many 800 phone calls." Mr. Fowler took this to mean that Mr. McDowell knew that someone was complaining to the inspectors, and "that I was calling the inspectors." Notwithstanding this alleged conversation, Mr. Fowler confirmed that after asking Mr. McDowell where he wanted him to test for methane, he proceeded to make the tests, and there is nothing to suggest that Mr. McDowell prohibited or otherwise inhibited him from doing so (Tr. 168).

Mr. Parshall confirmed that he asked Mr. Fowler about his whereabouts after he had been assigned a company truck and was away conducting methane checks at some of the shafts. Mr. Parshall acknowledged that he believed that Mr. Fowler was spending too much time making his checks, and that his timing improved after he discussed it with him. I find nothing unusual about a job superintendent such as Mr. Parshall raising this question with one of his employees, and absent any credible

evidence to the contrary, I cannot conclude that Mr. Parshall attempted to inhibit Mr. Fowler from continuing to make his fire boss checks.

With regard to Mr. Fowler's encounter with Mr. McDowell, Mr. McDowell's explanation that his father-in-law's comments about one of his employees caused him some embarrassment, was reasonable and plausible in the circumstances, and I find nothing unusual about Mr. McDowell's discussing this with Mr. Fowler. Indeed, as noted earlier, after this conversation took place, Mr. Fowler continued to perform his fire boss duties, and I find no credible evidence to support any reasonable conclusion that Mr. McDowell interfered with his duties in this regard. As a matter of fact, the fire boss records reflect that Mr. Fowler continued to inspect the shafts well after the closure of the slope by MSHA, and at least up to May 17, 1988, 6 days before he was laid off.

When asked for an explanation as to why he said nothing in his 12 page statement of June 3, 1988, to Mr. Savine about his alleged complaints made to Mr. Parshall and Mr. McDowell, when "it was fresh on his mind," Mr. Fowler explained that he "left things out" of the statement. He conceded that the information which he omitted from his prior complaint statement to Mr. Savine was a critical part of his claim that he communicated his safety complaints to Mr. Parshall and Mr. McDowell. Mr. Fowler further explained that he told Mr. Savine that "I went to management, management is Jay and Bill" (McDowell and Parshall). I have closely examined Mr. Fowler's prior statement to Mr. Savine, and the only reference I find to "management" is Mr. Fowler's denial that he complained "to anyone in management" about his complaint that gas checks were being made by uncertified people (pg. 3, exhibit C-3). As noted earlier, Mr. Fowler's statements to Inspector Savine concerning his safety complaints specifically state that they were made to Mr. Vavrek, Inspector Conrad, Mr. Brienza, and Mr. Laida, and there are no statements or inferences that he ever complained to Mr. McDowell or to Mr. Parshall.

In addition to his prior statement to Inspector Savine, I take note of the fact that in a complaint statement executed by Mr. Fowler on May 24, 1988, and filed with MSHA's field office, Mr. Fowler stated that he reported safety violations "to management and the safety department." There are no statements that he complained to Mr. Parshall or to Mr. McDowell.

Although Mr. Fowler testified that 2 days before the slope was shutdown, he informed Mr. Parshall and Mr. McDowell about all of the conditions for which violations were issued by the MSHA inspectors, he confirmed that he only "mentioned a few of them" to Mr. McDowell. Further, although Mr. Fowler testified that he informed Mr. Parshall about the compressor and the use of a

gasoline powered grinder and saw in the slope, and "expressed his concern" to Mr. Parshall about the lack of self-rescuers, fire extinguishers, back-up alarms, and oxygen and acetylene tanks, his prior statement to Inspector Savine, which was made more than a year before the hearing, when the events were fresh in his mine, reflect that these "complaints" or "concerns" were made to Mr. Vavrek, Mr. Brienza, Mr. Laida, or Inspector Conrad, and not to Mr. Parshall or to Mr. McDowell.

In view of the foregoing, I consider Mr. Fowler's testimony that he communicated his safety complaints to Mr. Parshall and Mr. McDowell, to be inconsistent, contradictory, and less than credible, particularly in light of his prior critical omissions when he made his complaint statement to Mr. Savine. I can find no reasonable basis for mitigating Mr. Fowler's failure to include a critical element of his case from the prior statement which he made to Mr. Savine. Mr. Fowler was an experienced miner who held prior mine foreman's positions, and had knowledge of MSHA's safety rules and regulations. He admitted that he was aware of the fact that Mr. Parshall and Mr. McDowell were the project managers, and that any safety complaints should logically be communicated to them. I find nothing to suggest that Mr. Fowler was inhibited in any way from communicating his complaints to Mr. Parshall or to Mr. McDowell, or that he was intimidated in any way by Mr. McDowell or Mr. Parshall. Having viewed Mr. Fowler during the course of the hearing, he did not impress me as a timid individual.

I take note of the fact that in his posthearing proposed findings and conclusions, Mr. Fowler's counsel made several references concerning Mr. Fowler's safety complaints to "supervisory personnel on the job," including "the newly appointed safety director, Mr. Vavrek" (proposed findings No. 4, No. 9, No. 14, No. 15). During a bench colloquy at the hearing, counsel confirmed that part of the theory of his case is that Mr. Brienza and Mr. Laida were perceived as part of mine management by the workforce, and that Mr. Fowler's day-to-day safety complaints about the alleged unsafe work practices in the workplace, as distinguished from his fire boss complaints, were brought to the attention of the persons in the "chain of command who every day, told him what to do in the work place" and that "on some occasions, he also communicated or believed it was communicated, either both, to higher management" (Tr. 205). Counsel further stated that the respondent was clearly on notice "of what our claim about Arty and Kenny's (Brienza and Laida) relationship is to this case," and that "the cumulative evidence in this case will show that management, through Arty and Kenny, through the entire gestalt of events that occurred, were well aware this man (Fowler) was a significant source of raising safety complaints" (Tr. 206-207). In view of these arguments, it seems apparent to me that Mr. Fowler is advancing an argument that since his safety complaints were communicated to Mr. Brienza and Mr. Laida, the

"supervisory personnel" who he believed constituted "mine management," the complaints obviously reached, or were communicated to Mr. Parshall and Mr. McDowell. However, I have rejected this argument.

After careful consideration of all of the evidence and testimony in this case with respect to Mr. Fowler's safety complaints concerning the slope conditions which prompted the shutdown by MSHA and the issuance of the violations for the cited conditions in question, I conclude and find that the preponderance of all of the credible testimony and evidence does not establish that Mr. Fowler made or communicated his safety complaints concerning the slope conditions to Mr. Parshall or to Mr. McDowell, or that these individuals had any knowledge of the complaints, or had reason to know that Mr. Fowler had registered complaints to the MSHA inspectors. Although I have found that Mr. Fowler made complaints about the slope conditions, I conclude and find that the slope complaints were made to non-management personnel, e.g., Mr. Brienza, Mr. Laida, possibly to other rank and file employees, and to Mr. Vavrek, who at the time the slope was inspected and shutdown by the inspectors, was serving as a union walkaround man. The evidence establishes that Mr. Vavrek was appointed the respondent's safety director after the slope was shutdown, and although one may reasonably assume that a company safety director is a member of mine management, the record in this case is devoid of any evidence to establish that Mr. Vavrek was in fact a part of mine management. I further conclude and find that while Mr. Vavrek may have told Mr. Parshall or Mr. McDowell about some of the slope conditions, he did not inform Mr. Parshall or Mr. McDowell that Mr. Fowler had made the complaints.

Methane Gas Check Complaints

Mr. Fowler alleges that immediately prior to his lay off on May 23, 1988, he complained to Mr. Vavrek and to Inspector Spangler that gas checks were not being made, and that uncertified personnel were making the checks. Mr. Fowler also has alleged that he was not allowed to perform the gas checks and did not perform them prior to any work in the shafts. In order to resolve this issue, a determination must be made as to whether or not the preponderance of the credible testimony and evidence establishes with any degree of probative certainty, or by any reasonably supportable inferences, that Mr. Fowler complained to Inspector Spangler, that Mr. Spangler informed mine management (Parshall or McDowell) that Mr. Fowler had complained, and that acting on the knowledge that Mr. Fowler had complained, Mr. McDowell and/or Mr. Parshall retaliated against Mr. Fowler by laying him off.

Mr. Fowler testified that one day before his termination he informed Mr. Vavrek and Inspector Spangler that the examination

of the shaft was not being made when materials were being dumped, and that Mr. Vavrek informed him that he would look into it. Mr. Fowler stated that he called Mr. Vavrek at his home that same evening, and Mr. Vavrek informed him that Mr. McDowell had referred to him (Fowler) as a "wimp or fat boy or something." Mr. Fowler also testified that he called state mine inspector Raoul Vincinelli that same evening and informed him that the respondent did not allow him to conduct his shaft inspections, and that Mr. Vincinelli told him that he would talk to management and also told him that management told him (Vincinelli) that people were available to test for methane (Tr. 158). Mr. Fowler further testified that he spoke with Mr. Vincinelli after he was laid off, that same day or evening, and informed him that management had lied to him and that there were no certified people working at the mine. The following day, Mr. Vincinelli went to the mine and shut the mine down, and it was Mr. Fowler's understanding that following this shutdown, Mr. Art Jones made the methane checks.

Mr. Vavrek testified on direct examination that three days before Mr. Fowler was terminated, Mr. Fowler spoke with him and Inspector Spangler and informed them that while work was being performed at the slope area he did not make a gas check and that the respondent was not following the mine sealing plan (Tr. 61). Mr. Vavrek testified later that this conversation took place one day before Mr. Fowler was laid off (Tr. 64). Mr. Vavrek stated that following this conversation, he and Inspector Spangler went to the mine office and spoke with Mr. Hoelle, the LTV engineer who drafted the sealing plan. After reviewing the plan, Mr. Vavrek concluded that the plan was not being followed. Mr. Vavrek further testified that after reviewing the plan, he and Inspector Spangler spoke to Mr. McDowell in his office, and after reviewing the fire boss book, Mr. Spangler found that it had not been signed. Mr. Vavrek stated that Inspector Spangler commented that "Terry (Fowler) approached us and said the plan was not being followed," and that Mr. McDowell became upset, "swore a little bit," and called Mr. Fowler as a "fat roly-poly." Mr. Vavrek further testified that "the day before or two days before" Mr. Fowler's termination, Mr. Spangler made the statement that "Terry is the one that brought this to our attention" and that "Terry approached us and we checked into it" (Tr. 85, 86).

During his testimony on the second day of the hearing after being called in rebuttal by Mr. Fowler, Mr. Vavrek again testified that the conversation with Mr. McDowell took place one day prior to Mr. Fowler's termination, and that during the conversation, Inspector Spangler stated that "Terry approached us that the air--that the gas readings were not being made" (Tr. 642, 643). Mr. Vavrek further stated that Mr. Fowler had also complained to Inspector Spangler about asbestos (Tr. 646).

Mr. Hoelle and Inspector Spangler did not testify in these proceedings. In light of Mr. Vavrek's testimony concerning the statements purportedly made by Inspector Spangler identifying Mr. Fowler as the individual who had complained about the gas checks, the respondent was afforded the opportunity to take the posthearing deposition of Mr. Spangler, and a contact was made by the respondent with the appropriate MSHA Solicitor's Office to make Mr. Spangler available to be deposed. However, Mr. Spangler suffered a heart attack on September 22, 1989, and his return to duty was delayed. In view of his physical incapacity and unavailability to be deposed, the respondent filed a motion requesting my reconsideration of a ruling made during the hearing rejecting a prior statement made by Mr. Spangler to Special Investigator John Savine in the course of his investigation of Mr. Fowler's discrimination complaint. The motion was granted over the hearsay objection's of Mr. Fowler's counsel, and the statement was received and made a part of the record in this case. Mr. Spangler's statement, which is not signed, and which reflects that it was made to Mr. Savine by telephone on June 30, 1988, states as follows:

> This interview was conducted by telephone. Statement was sent to Conrad to be signed. One morning while I was inspecting Atlas Services I was told by Jim Conrad that he had been told of some safety problems at Atlas. Conrad did not tell me who had made the complaints. I checked out what he told me and took the appropriate action. I never heard management call Fowler a whimp (sic). Fowler did complain to me about Samtek people throwing asbestos coated siding off a building. I did not observe this. I don't remember any other complaints made by Fowler. I never told the company of any complaints I received about safety.

Respondent argues that Mr. Spangler's statement directly refutes Mr. Vavrek's testimony, and reflects that Mr. Spangler did not inform mine management about any safety complaints he received and was never informed who made any safety complaints. The respondent points out that the only complaint Mr. Spangler could recall from Mr. Fowler concerned "Samtek people throwing asbestos coated siding off a building." Respondent concludes that since Mr. Spangler was not informed as to who was making safety complaints, he could not have informed mine management of the source of the complaints. Absent any evidence that management knew that Mr. Fowler had made the complaint, respondent concludes further that it cannot be inferred that management retaliated against Mr. Fowler.

I take particular note of the fact that Mr. Fowler does not argue that his gas check complaint to state Inspector Vincinelli was known to mine management prior to his lay-off, or that it had anything to do with his termination. The thrust of Mr. Fowler's

case is his assertion that his gas check complaint to MSHA Inspector Spangler was communicated to Mr. McDowell by Mr. Vavrek and Mr. Spangler, and that Mr. Spangler's purported comments in the presence of Mr. McDowell identifying Mr. Fowler as the person who had complained, motivated Mr. McDowell to lay him off in retaliation for making the complaint.

I find no credible evidence to support any conclusion that mine superintendent Parshall was present during the alleged "meeting" with Mr. McDowell, Mr. Vavrek, and Inspector Spangler. Nor do I find any credible evidence that Mr. Fowler communicated his complaint about the gas checks to Mr. Parshall, or that Mr. Parshall laid him off for making the complaint. Mr. Parshall testified that Mr. Vincinelli came to the mine the day after Mr. Fowler was laid off, informed him that the mine had to be firebossed, and instructed him not to do any further work until he had a qualified person available to conduct the methane checks. Mr. Parshall explained that seven or nine individuals working at the mine had received training for making methane checks and had papers signed by the instructor who trained them, but had not as yet received their official cards certifying them as qualified to make the checks. Under the circumstances, the required checks were made by Mine Superintendent Art Jones, who was qualified, and Mr. Vincinelli later accepted the certification "papers" of the other trained individuals. Mr. McDowell confirmed that after Mr. Fowler's lay off, Mr. Vincinelli informed him that the individuals who had been trained to make the methane checks pursuant to MSHA's requirements did not meet the state certification requirements, and that under these circumstances, he requested Mr. Jones to make the checks.

Mr. Fowler's testimony suggests that he made two telephone calls to Mr. Vincinelli, one on the evening prior to his termination, and after he had spoken to Mr. Vavrek, and one on the day or evening after he was terminated. Mr. Fowler's initial testimony reflects that he spoke with Mr. Vincinelli and that Mr. Vincinelli informed him that he would talk to management about the matter and also informed him at the same time that management claimed that it had certified people available to make the gas checks. I find it difficult to believe that Mr. Vincinelli would have told Mr. Fowler that he would discuss the matter with management, and at the same time tell him about management's explanations to his complaint before he had an opportunity to discuss the matter with them. When pressed for the time frame when he spoke with Mr. Vincinelli, Mr. Fowler stated that "it must have been the next day," which would have been the day he was laid off. This testimony is consistent with Mr. Fowler's later testimony that he called Mr. Vincinelli on the day he was laid off after Mr. Parshall informed him that he was laid off, and that Mr. Vincinelli went to the mine the following day and shut the job down because of the unavailability of qualified personnel to fire boss the mine.

Mr. Vincinelli was not called to testify in this matter. The testimony of Mr. Parshall and Mr. McDowell that they discussed the gas check matter with Mr. Vincinelli after Mr. Fowler's lay off stands unrebutted, and I find it credible and believable. Mr. Fowler's testimony that he spoke with Mr. Vincinelli after he was laid off corroborates the testimony of Mr. Parshall and Mr. McDowell. Further, in the absence of any evidence to the contrary, I cannot conclude that Mr. Parshall or Mr. McDowell had any knowledge of Mr. Fowler's gas check complaints to Mr. Vincinelli prior to Mr. Fowler's lay off, or that this complaint influenced their decision to lay off Mr. Fowler.

I find no evidence to support Mr. Fowler's assertion that the "inspection records" confirmed that the purported meeting with Inspector Spangler, Mr. Vavrek, and Mr. McDowell did in fact take place. The only mention of any such report was made during the course of the hearing by Mr. Fowler's counsel during his cross-examination of Mr. McDowell (Tr. 587-588). The report, (exhibit C-5), is a memorandum from MSHA Inspectors Newhouse and Spangler to MSHA's District 2 Manager Donald W. Huntley concerning their inquiry of the alleged PCB dumping incident conducted on June 1, 1988. The report reflects that Mr. McDowell spoke to the inspectors about the alleged dumping incident, but it contains absolutely no information concerning the issue of gas checks or the purported meeting in question. Further, as noted in the report, the visit by Inspectors Newhouse and Spangler was made on June 1, 1988, a week after Mr. Fowler's lay-off. Under the circumstances, counsel's assertion that the report establishes that the purported meeting with Inspector Spangler was in fact held a day before, or immediately prior to Mr. Fowler's lay-off, is unfounded and it is rejected.

During his direct and cross-examination testimony, Mr. McDowell was asked no questions concerning the purported meeting with Inspector Spangler and Mr. Vavrek. Mr. McDowell testified that he "vaguely" recalled Mr. Spangler as one of the MSHA inspectors who came to the mine during the slope inspection, and that he would be "hard pressed" to recognize him in a crowd. He also stated that he did not spend a lot of time with the inspectors when they visited the mine (Tr. 603-604).

When called in rebuttal, Mr. McDowell unequivocally denied that any meeting ever took place with Inspector Spangler and Mr. Vavrek, and he characterized Mr. Vavrek's testimony to the contrary as untrue. Mr. McDowell denied that Mr. Spangler and Mr. Vavrek ever visited his office to discuss the matter of gas checks, and he denied that he knew or had reason to know that Mr. Fowler ever complained to any State or Federal inspector that he was not performing gas checks.

Mr. McDowell further testified that he could not recall ever receiving any citation for failure to make the required gas checks. Mr. Fowler's counsel produced a copy of an MSHA citation issued by Inspector conrad and served on Mr. Parshall on March 28, 1988, citing a violation of 30 C.F.R. § 77.1713, for the failure of any certified person to examine the working areas at the Nos. 1 and 4 shafts, and the supply yard (exhibits C-3 and C-7). Mr. McDowell did not dispute the authenticity of the citation, and stated that he did not know that it was issued for failing to make the methane checks.

With regard to Mr. Fowler's argument in his supplemental brief that "the testimony of the mine superintendent did not refute the fact that the issue concerning the gas checks was raised by Mr. Fowler, and simply contradicted Mr. Vavrek's testimony that Mr. Fowler's name was actually mentioned," I take note of the fact that the respondent's project superintendent William Parshall gave no testimony concerning the alleged meeting with Inspector Spangler or the statements attributed to him by Mr. Vavrek. As noted earlier, there is no evidence that Mr. Parshall was present when the Spangler statements were purportedly made. With regard to the testimony of project manager McDowell, he unequivocally denied that any meeting took place, or that Mr. Spangler made the statements in question, and he denied any knowledge of Mr. Fowler's asserted complaint about the gas checks. Mine superintendent Art Jones, the individual who conducted the gas checks after the job was shutdown by Mr. Vincinelli, did not testify in this case.

In his prior statement of June 3, 1988, to MSHA special investigator Savine in the course of the investigation of his complaint, Mr. Fowler stated that he complained to Mr. Vavrek on May 19 and 20, 1988, 3 or 4 days prior to his lay off on May 23, 1988, about gas checks being made by uncertified people. Mr. Fowler characterized Mr. Vavrek as the "safety man (union)" and "walkaround union man." Mr. Fowler stated that he "thought" that Mr. Vavrek told Mr. McDowell about his complaint and that Mr. Vavrek informed him that Mr. McDowell had referred to him as a "wimp" for making the complaint. Mr. Fowler further stated that Inspector Spangler was present "and should have heard the comment," and that he did not make his complaint "to anyone in management."

Mr. Fowler's prior statement that he made his gas check complaint 3 or 4 days before his lay-off, contradicts his hearing testimony that it was made the day before his termination. Although Mr. Vavrek initially testified that the complaint was made to him and to Mr. Spangler 3 days before Mr. Fowler was terminated, he later testified that the complaint was made the day before. In his prior statement, Mr. Fowler does not state that he also complained to Mr. Spangler. He simply states that Mr. Spangler was present when Mr. McDowell referred to him as a

"wimp" for making the complaint, and that Mr. Spangler should have heard the comment. The prior statement contains no information concerning the statements attributed to Mr. Spangler by Mr. Vavrek with respect to Mr. Fowler's name being mentioned by Mr. Spangler.

There is no evidence that the mine closure which occurred a day after Mr. Fowler's alleged complaint about the gas checks resulted from any enforcement action by MSHA or its inspectors. The evidence reflects that the mine was shutdown by State Inspector Vincinelli on the basis of the complaint made to him by Mr. Fowler after he was laid off. Further, there is no evidence that Mr. Vincinelli informed Mr. Parshall or Mr. McDowell about the complaint made by Mr. Fowler, or that they were aware of it.

There is no evidence in this case that Inspector Spangler took any enforcement action or issued any citations as a result of the alleged complaint by Mr. Fowler and meeting with Mr. McDowell a day before Mr. Fowler's termination. Although Mr. Vavrek testified that after reviewing the fire boss book during this meeting, Mr. Spangler found that it had not been signed, there is no evidence that Mr. Spangler issued a citation as a result of this finding. The only evidence of record concerning the respondent's failure to record the results of inspections of its work areas in the mine books, and the failure by certified persons to examine the active work areas, are two citations issued by MSHA Inspector James Conrad on March 24 and 25, 1988, 2-months prior to Mr. Fowler's lay-off (exhibits C-3 and C-7). Mr. Spangler's involvement with these citations concerned the modifications of the citations extending the abatement times for correcting the cited conditions, and his termination of the citations on March 30, 1988, after finding that the required examinations were being conducted by a certified person and that the results of the examinations were being recorded in the mine book.

I take note of the fact MSHA's mandatory safety standard 30 C.F.R. § 77.1713, requires daily on-shift examinations of the active surface working areas of a mine by certified persons designated by the mine operator, and the examiner is required to report any hazardous conditions noted to the operator. Section 77.1901, requires preshift and onshift examinations of slope and shaft areas by a certified person, including tests for methane and oxygen deficiency. Both of the prior citations issued by Inspector Conrad were issued for a violation of section 77.1713, and none of the remaining citations which were issued during MSHA's slope inspection of late March, 1988, were for violations of section 77.1901. Given the fact that Mr. Spangler had participated in the inspections and shutdown of the slope area in March, 1988, and that a number of citations were issued, including the two citations concerning inspections by qualified mine examiners, I believe that one may reasonably conclude that

Mr. Spangler would have issued additional citations, particularly for repeat offenses, as a result of the complaint which Mr. Fowler contends he made to Mr. Spangler immediately before his lay-off. The absence of any evidence that Mr. Spangler took any enforcement action on the basis of Mr. Fowler's alleged complaint raise serious doubts in my mind that Mr. Fowler ever complained to Mr. Spangler about the gas checks.

Mr. Vavrek's testimony reflects three different versions of the statement purportedly made by Inspector Spangler in Mr. McDowell's presence during the alleged meeting in question. The purported statements are as follows: "Terry approached us and said the plan was not being followed;" "Terry is the one that brought this to our attention. Terry approached us and we checked into in;" and "Terry approached us that the air. . . that the gas readings were not being made." Mr. Vavrek's testimony also reflects inconsistent statements as to when the statements were made, ranging from 1 to 2 or 3-days prior to Mr. Fowler's lay off. As previously noted, Mr. Fowler's prior statement to Special Investigator Savine over a year prior to the hearing that he complained about the gas checks to Mr. Vavrek 3 or 4-days prior to his lay off, contradicts his hearing testimony that he made the complaint 1 day before his lay off. These inconsistencies and contradictions raise doubts with me about the credibility of Mr. Vavrek and Mr. Fowler.

With regard to the hearsay statement of Inspector Spangler, the Commission has held that hearsay is admissible in Mine Act proceedings so long as it is material and relevant, Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n. 7 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 77 L.Ed.2d 299 (1983); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-1137 (May 1984).

Although Mr. Spangler's statement is not signed, it was made to Inspector Savine during his investigation of Mr. Fowler's complaint and it is part of MSHA's official report of investigation made by Mr. Savine. Although the entire report was rejected by me in the course of the hearing, Mr. Spangler's statement has been admitted, and I find it relevant and material to the issue raised by Mr. Vavrek's testimony that Mr. Spangler revealed a confidence and informed Mr. McDowell that Mr. Fowler complained to him about the gas checks not being made by certified or qualified personnel.

Mr. Spangler states that in the course of his inspection of the respondent, Inspector Conrad informed him that he (Conrad) was told of "some safety problems at Atlas," but did not tell him who had complained. Although Mr. Spangler does not state when this inspection took place, and simply states that it was "one morning," I find the statement to be otherwise reliable since it lends credence to Mr. Fowler's testimony that he telephoned

Mr. Conrad about some safety complaints at the mine site where the respondent was performing work. The statement also corroborates Mr. Fowler's prior statement to Mr. Savine that he had complained to Mr. Conrad about the slope conditions.

Mr. Spangler denied that he ever informed the respondent of any safety complaints that he received, denied that he ever heard management call Mr. Fowler "a whimp," (sic) and he stated that the only complaint that he could recall receiving from Mr. Fowler was about "Samtek people throwing asbestos coated siding off a building." This statement lends credence to Mr. Vavrek's testimony on direct that there was a "problem on a few occasions" with asbestos being thrown off the side of a building (Tr. 51). Under all of these circumstances, I find Mr. Spangler's statement to be reliable and trustworthy, and have no basis for concluding that he would be less than truthful.

Mr. Spangler's statement that the only complaint he could recall made to him by Mr. Fowler concerned asbestos directly refutes Mr. Vavrek's testimony that while he and Mr. Spangler were together at the site, Mr. Fowler informed them that he was not making his gas checks while work was being performed in the slope work area. It also refutes Mr. Fowler's testimony that he informed Mr. Spangler about this matter at the time he complained to Mr. Vavrek, and that Mr. Spangler "was standing right with" Mr. Vavrek when he told him (Tr. 160).

As noted earlier, in his prior statement to Mr. Savine, Mr. Fowler, on two occasions, stated that he had made his gas check complaint to Mr. Vavrek and did not complain to management (exhibit, pgs. 3 and 8). Mr. Fowler did not state that the complaint was also made to Mr. Spangler, and at page 4 of his prior statement, Mr. Fowler suggests that Mr. Vavrek may have told Mr. McDowell about his complaint. Further, Mr. Fowler's prior statement does not even suggest that Mr. Spangler may have overheard his complaint to Mr. Vavrek, and it only suggests that Mr. Spangler may have overheard Mr. McDowell's alleged disparaging remark about Mr. Fowler. Since there is no evidence that Mr. McDowell was present when Mr. Fowler may have first approached Mr. Vavrek and Mr. Spangler, any such remark, if made, would have been forthcoming at a later time. Mr. Spangler denied that he ever heard such a remark.

After careful review of all of the testimony and evidence, including Mr. Spangler's statement, which I find reliable and probative, I find that it is more credible and believable than the testimony of Mr. Vavrek and Mr. Fowler. Mr. Spangler's denial that he ever informed mine management about the source of any safety complaints is consistent with MSHA's long standing policy that prohibits an inspector from revealing the source of any safety complaints. I find no evidence to suggest that

Mr. Spangler was other than a disinterested party while conducting his inspections, and Mr. Fowler conceded that with respect to the prior slope inspection which included Mr. Spangler and Mr. Conrad among the inspectors who came to the mine during that visit, he had no reason to believe that any of the inspectors may have informed management about the source of those complaints. Indeed, Mr. Fowler testified that he requested Inspector Conrad not to reveal his name, and Mr. Spangler's statement that Mr. Conrad did not tell him who had made the telephone complaints would seem to indicate that Mr. Conrad maintained the confidentiality of the source of the complaints even from his fellow inspector.

Mr. Parshall's unrebutted and credible testimony reflects that when he inquired of Inspector Newhouse as to who may have complained about the slope conditions, Mr. Newhouse informed him that the source of any complaint is confidential and could not be revealed. Further, during the course of MSHA's inquiry into the alleged PCB dumping incident, the employees were interviewed in private, their names were not solicited or given, and they were informed by the inspectors (Newhouse and Spangler) that any information given with respect to that incident would be maintained in strict confidence.

Under all of the aforementioned circumstances, I find it difficult to believe that Inspector Spangler would have revealed a confidence by identifying Mr. Fowler as the source of the complaint in the presence of Mr. McDowell, or informing Mr. McDowell directly that Mr. Fowler made the complaint. Such a serious breach of confidentiality would have been markedly inconsistent with the inspectors' investigative procedures, and would have undoubtedly exposed Mr. Spangler to disciplinary action by his superiors. Further, given the different versions of the statements purportedly made by Mr. Spangler, as reflected by Mr. Vavrek's testimony, and the inconsistent and contradictory testimony of Mr. Vavrek, as well as Mr. Fowler, with respect to the time frame of the purported meeting when the statements were allegedly made by Mr. Spangler, I find Mr. Vavrek and Mr. Fowler to be less than credible witnesses, and I do not believe their testimony.

In view of the foregoing, I conclude and find that the purported meeting with Mr. McDowell did not take place as testified to by Mr. Vavrek. I find no credible evidence to support any conclusion that Mr. Fowler complained to Inspector Spangler about the gas check matter, or that Mr. Spangler informed Mr. McDowell that Mr. Fowler was the source of the complaint. Although Mr. Fowler may have complained to Mr. Vavrek about the matter, I find no credible evidence to support any conclusion that Mr. Vavrek informed Mr. McDowell about the matter prior Mr. Fowler's lay off, or that he informed Mr. McDowell that Mr. Fowler was the source of the complaint.

I find no credible evidence to support any conclusion that mine management ever prevented Mr. Fowler from conducting his required examinations. I also find no credible evidence of any disparate or hostile treatment of Mr. Fowler by the respondent. As a matter of fact, after the conversations with Mr. Parshall and Mr. McDowell concerning his long absences and the comments by Mr. Stout concerning his work, Mr. Fowler was allowed to resume his normal examination duties and the examination records (exhibit R-1) reflect that Mr. Fowler examined the shafts and slope work areas and made his examination entries, from February 18, 1988, to May 17, 1988. Although there is some testimony that Mr. McDowell on occasion may have cursed Mr. Bair, I find no credible evidence that Mr. Parshall or Mr. McDowell ever cursed Mr. Fowler or exhibited any open hostility towards him because of his fire boss duties.

With regard to Mr. Fowler's complaints about the slope conditions, as previously noted, these complaints were made 2-months prior to Mr. Fowler's lay off on May 23, 1988, and I have concluded that the complaints were not communicated to Mr. McDowell or to Mr. Parshall, and that they had no knowledge that Mr. Fowler was the source of the complaint prior to his lay off. With regard to Mr. Fowler's alleged complaint about the gas checks, I find no credible evidence to support any conclusion, either directly, or by inference, that Mr. Fowler communicated his complaint to Mr. McDowell or to Mr. Parshall, or that they knew, or had reason to know, prior to the lay off, that Mr. Fowler was the source of the complaint. Under these circumstances, I cannot conclude that in making their decision to lay off Mr. Fowler, Mr. McDowell or Mr. Parshall were motivated by his complaint, or that the lay off decision was made to retaliate against Mr. Fowler for making the complaint. In short, I conclude and find that Mr. Fowler has failed to establish a prima facie case of illegal discrimination on the part of the respondent, and that his complaint should be dismissed.

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 these proceedings, I conclude and find that the complainants have failed to establish a violation of section 105(c) of the Act. Accordingly, their complaints ARE DISMISSED, and their claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 16 1990

ARCH OF KENTUCKY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 89-161-R
	:	Citation No. 3172128; 4/20/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. KENT 89-163-R
	:	Citation No. 3172130; 4/20/89
	:	High Splint No. 2
	:	Mine ID 15-16084
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 90-39
	:	A. C. No. 15-16084-03519
v.	:	
	:	High Splint No. 2 Mine
ARCH OF KENTUCKY, INC., Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary;

Michael T. Heenan, Esq., Smith Heenan, & Althen, Washington, DC, for the Respondent.

Before: Judge Fauver

Arch of Kentucky, Inc., seeks to vacate two citations, and the Secretary of Labor seeks civil penalties for the two violations they allege, under § 105(d) the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have filed cross-motions for summary decision, based upon a stipulated record.

The citations were issued during the investigation of a fatal accident that occurred at Arch's High Splint No. 2 Mine on April 18, 1989.

The mine produces coal two shifts a day, with maintenance on a third shift, five days a week. It employs 77 underground employees and three surface employees.

On April 18, 1989, Maintenance Foreman David L. Funk and his crew were trying to repair a continuous mining machine, which had broken down on the previous shift.

At the time of the accident, the foreman and his crew were attempting to repair the right side planetary gear box on the continuous miner. The repair required removal of the planetary gear box, which could not be dropped out of the continuous miner without first removing the pinion shaft that extends through the planetary. The pinion shaft drives the tram chain sprocket, which turns the chain that propels the continuous miner as it travels from one place to another underground.

Before repairs were started, the continuous miner was taken out of production, deenergized, jacked up and blocked. The guard that covers the tram chain during normal operations was swung open to provide access to the pinion shaft and chain sprocket.

Work to remove the shaft was first tried by inserting a roof bolt into the end of the shaft and trying to hammer the shaft out using a 16 lb sledge hammer. The parties have stipulated that this effort although unsuccessful was "consistent with established maintenance procedure." Another accepted procedure "would have been to use a cutting torch to cut the pinion shaft and thereby free the planetary gear." However, as stipulated by the parties, Mr. Funk decided to avoid a cutting job. Instead, he used a method that was "not a maintenance procedure that is recommended or otherwise addressed by the manufacturer" and "which proved to be completely unsafe." Stipulations, ¶ 13. The method he used is described as follows in the MSHA Accident Investigation Report (which the parties stipulate "correctly states the facts of this case" (Stipulations, ¶ 5)):

> Funk decided to try and shear the splines off the shaft by rotating the shaft back and forth alternately using the tram motor with sprockets and tram chain attached. Funk instructed the crew to stand away from the miner in the event something went wrong. Funk told the miner operator to tram the motor back and forth. After approximately 15 or 20 times, the tram chain broke, hurling a piece of chain (connecting link) approximately 12 feet, striking Funk (victim) in the right side of his neck, severing an artery, causing profuse bleeding from the wound.

Mr. Funk died before reaching the hospital. The MSHA Accident Investigation Report also states the following findings of "Physical Factors" involved in the accident:

1. Prior to performing repair work on the final

drive assembly, the electrical power was not removed from the control circuit of the Joy 14CM5 continuous miner, Serial Number JM 2915.

2. The planetary and transmission sprockets were not completely installed on the shafts and secured with the retaining plates. The splines on the planetary drive shaft were fouled, not allowing the sprocket to be fully seated. The tram chain was installed around the sprockets, misaligned by approximately one (1) inch.

3. The planetary shaft was being removed by wringing the shaft from the pinion gear using the force applied to the sprocket, via the traction motor and tram chain.

4. The resultant stresses sheared a pin from the back plate of a connecting link on the Whitney 200H roller chain. Part of the connecting link was propelled approximately twelve (12) feet to where it struck the victim, causing severe trauma to the right side of the victim's neck.

5. The guard covering the tram chain and sprockets had not been replaced before energizing the traction motor.

DISCUSSION

Citation No. 3172128 charges a violation of 30 C.F.R. § 75.1725(c), which provides:

(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Citation No. 3172130 charges a violation of § 75.1722(c), which provides:

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

Arch contends that the exceptions to both safety standards applied.

It contends that Mr. Funk was using the machinery's motion to "adjust" the pinion shaft and therefore there was no violation of § 75.1725(c). It contends that the guard was not secured because Mr. Funk was "testing" whether his method of trying to remove the pinion shaft would work and therefore there was no violation of § 75.1722(c).

The Secretary contends that Mr. Funk used an unsafe method of trying to strip the pinion shaft from the planetary gear and such method had nothing to do with "making adjustments" or "testing" equipment within the meaning of the exceptions to the two safety standards.

The facts indicate that Mr. Funk tried to take a shortcut "which proved to be completely unsafe" (Stipulation, ¶ 13). He chose a dangerous practice that is not sanctioned either as making machine "adjustments" or as "testing" machinery within the meaning of § 75.1725(c) or § 75.1722(c). A continuous miner is not designed to shear the splines from the planetary shaft by using the torque of the tram motors. Attempting to use it for such purpose did not qualify as an "adjustment" or "testing" exception to the cited safety standards.

Accordingly, the stipulated facts establish a violation of § 75.1725(c) as alleged in Citation No. 3172128 and a violation of § 75.1722()c) as alleged in Citation No. 3172130.

The foreman was highly negligent in endangering himself and his crew by using an unsafe and highly dangerous practice. Compliance with the cited safety standards would have prevented this fatality. The foreman's negligence is imputed to the mine operator. The gravity of each violation was very high. The reliable evidence amply sustains the inspector's findings that the violations were of a "significant and substantial" nature.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $3,000 is appropriate for the violation of § 75.1725(c) and a penalty of $8,000 is appropriate for the violation of § 75.1722(c).

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.

2. The Secretary of Labor is entitled to summary decision as a matter of law.

3. Arch of Kentucky, Inc., violated the safety standards as alleged in Citation Nos. 3172128 and 3172130.

ORDER

WHEREFORE IT IS ORDERED that:

1. Arch of Kentucky, Inc's motion for summary decision is DENIED.

2. The Secretary of Labor's motion for summary decision is GRANTED.

3. Citations Nos. 3172128 and 3172130 are AFFIRMED.

4. The contest actions in Docket Nos. KENT 89-161-R and KENT 89-163-R are DISMISSED.

5. Arch of Kentucky, Inc., shall pay the above-assessed civil penalty of $11,000 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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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 19 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 89-16-M A.C. No. 04-04780-05511
v.	:	Docket No. WEST 89-17-M A.C. No. 04-04780-05512
CHANNEL & BASIN RECLAMATION, Respondent	:	Hansen Dam Plant

DECISION

Appearances: John C. Nangle, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Richard M. Atkinson, Esq., Ontario, California, for Respondent.

Before: Judge Lasher

Upon motion for approval of a proposed settlement of the 22 violations involved in these 2 dockets and the same appearing proper and fully supported in the record, the settlement is approved and the penalties agreed to by the parties are here assessed:

Citation	Proposed Penalty	Settlement Amount
03068926	$ 20.00	$ 20.00
03068933	294.00	20.00
03073526	500.00	375.00
03291621	350.00	262.00
03291622	241.00	193.00
03291623	350.00	262.00
03291624	20.00	20.00
03291627	227.00	20.00
03291628	294.00	235.00
03291629	350.00	20.00
03291631	20.00	20.00
03291632	20.00	20.00
03291633	20.00	20.00
03291634	350.00	300.00
03291635	350.00	300.00
03291636	20.00	20.00

03291637	20.00	20.00
03291638	392.00	355.00
03291639	294.00	294.00
03291641	20.00	20.00
03291642	350.00	350.00
03291644	840.00	630.00
Total	$5,342.00	$3,776.00

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor on or before May 10, 1990, the sum of $3,776.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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 19 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of LEONARD E. EDWARDS, Complainant	:	DISCRIMINATION PROCEEDING Docket No. PENN 90-8-D PITT CD 88-17 Greenwich coal No. 2
v.	:	
ROCHESTER & PITTSBURGH COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw her complaint in the captioned case and the individual Complainant, Mr. Edwards, has filed his consent to such withdrawal. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 19 1990

ARCH OF KENTUCKY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 89-176-R
	:	Order No. 3174493; 5/8/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. KENT 89-177-R
	:	Citation No. 3174494; 5/8/89
	:	Docket No. KENT 89-178-R
	:	Citation No. 3174495; 5/9/89
	:	Mine No. 37
	:	Mine ID 15-14670
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 90-48
	:	A. C. No. 15-04670-03600
v.	:	Mine No. 37
ARCH OF KENTUCKY, INC., Respondent	:	

DECISION

Appearances: Tina Gorman, Esq., and Edward Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary;

Michael T. Heenan, Esq., and C. Gregory Ruffennach, Esq., Smith, Heenan, & Althen, Washington, DC, for the Respondent.

Before: Judge Fauver

The Company seeks to vacate a withdrawal order and two citations issued by the Secretary, and the Secretary seeks civil penalties for the two alleged violations, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. At the hearing, the Company moved to withdraw its contest of the withdrawal order. That motion is granted, and Docket No. KENT 89-176-R will be dismissed.

These cases focus on the meaning of the April 20 amendment to the Company's roof control plan. The pivotal issue is whether

the amendment required remote-control shearer operators to station themselves outside the area between Shields 85 and 104 when the shearer was cutting in that area. The Secretary contends they had to stay outside the area. The Company contends they could stand anywhere in the walkway between Shields 85 and 104.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACTS

1. On April 12, 1989, a coal outburst occurred on the tailgate side of the 004 Section of the R-9 Longwall Panel at Arch of Kentucky's No. 37 Mine. This was the Company's first experience with a coal outburst at the the No. 37 Mine.

The R-9 Longwall Panel

2. The R-9 Longwall Panel is a standard longwall unit, developed by advancing two parallel sets of entries about 500 feet apart into a block of coal. After the entries penetrated approximately 7400 feet, they were connected by a set of perpendicular entries in which a longwall mining face was established. The key components at the longwall face are a set of longwall shields, which support the roof while the coal is being mined, and a shearing machine (in this case a Mitsui Trojan 700 Shearer), which moves back and forth across the face to mine the coal.

3. The longwall shields are chock-shields, which have roof support legs in the front, called props, and a cover in the back to protect from falling gob. Each shield is about 5 feet wide and has two sets of props which support a canopy that presses against the roof. The area between the front two props and the back of the shield serves as a walkway for the longwall crew members and permits them to travel along the longwall face with overhead protection from the canopy, lateral protection from the gob, and partial lateral protection from the face. The shields are attached to the pan line (in which the coal conveyer operates) by hydraulic cylinders, which pull the shields closer to the face and push the pan line closer to the face as mining continues.

4. After the shearer mines a portion of the face, propmen advance the shields toward the face. The canopy of each shield is lowered slightly from the roof. A positioning cylinder pulls the shield toward the face and simultaneously pushes the conveyor to the face. After this repositioning, the canopy is again raised and pressed against the roof. The shields on the 004

Longwall are numbered sequentially from No. 1 at the headgate to No. 104 at the tailgate.

5. The Mitsui Trojan 700 Shearer has two cutting wheels, either or both of which can be positioned high toward the roof, low toward the floor or in between depending on how the seam is to be cut. Each cutting wheel has a cowl that suppresses dust.

6. Depending on the direction the shearer is cutting (i.e. toward to the headgate or toward to the tailgate), one of the shearer wheels will be leading and one will be following. Typically, the leading wheel cuts near the roof and the following wheel cuts near the floor. Since the shearing machine does not turn around, but only moves back and forth across the face, one of the cutting wheels is always on the side of the machine closer to the headgate. This is called the headgate wheel. The opposite wheel is called the tailgate wheel.

7. The Mitsui Trojan 700 Shearer is controlled by two operators who usually move along with the shearer as it progresses across the face. Each shearer operator controls one of the shearer wheels and its cowl. On occasion, propmen serve as relief shearer operators.

8. The shearer can be controlled either by remote control or manually. While operating by remote control, the shearer operator is able to remain in the walkway behind the props a distance of one or many shields from the shearer. While operating mannually, the shearer operator must walk right next to the machine, inby the walkway. Prior to the coal outburst on April 12, 1989, the general procedure was to operate the leading shearer wheel by remote control and to operate the following shearer wheel manually.

The April 12, 1989, Outburst

9. A coal outburst is not a roof collapse but rather, as the term implies, it is a sudden bursting of coal from the face. Coal outbursts are typically the result of the squeezing of unmined coal between underlying and overlying strata. Such coal outbursts are also referred to as "mountain bumps" or "bounces."

10. Although it is not exactly clear what factors cause pressures on the face to increase, there is likely to be an increase when the roof over mined areas fails to collapse. This leaves more overhead weight on less coal support. The longer the increased pressure remains on the unmined coal, the greater the chance for an outburst at the face.

11. In this case, sandstone strata overlying part of the R-9 Panel was, in retrospect, apparently retarding falls in the mined area and thereby increasing the pressures on the face. This, coupled with the unyielding sandstone underneath the shale

floor of the section, created the squeezing conditions at the face.

12. A coal outburst occurred on April 12, 1989. Two miners were struck by flying coal. Neither man was seriously injured, and no citations were issued. One of the miners, a propman, was standing in front of the props near the pan line. The other miner, the headgate wheel operator, was in the walkway.

13. Due to the force of the coal outburst, the Mitsui Trojan 700 Shearer was substantially damaged and had to be removed from the mine for major rebuilding. Solid steel pieces were twisted and bent. The damage was extensive. The cost of repairing the shearer and lost production was about $2 1/2 million.

Company Response to the Outburst

14. After the outburst, the Company's longwall safety coordinator, Dickie Estep, contacted MSHA and the Kentucky Department of Mines and Minerals. The following morning, April 13, 1989, Bob Blanton, MSHA inspector, informed Dickie Estep that the longwall was under a section 103(k) order. After investigating the outburst, MSHA did not issue any citations and the section 103(k) order was terminated.

15. Following the outburst, mine management began to gather information to help the Company formulate procedures to help prevent outbursts in the future. The Company contacted the Bureau of Mines for technical advice, hired Agapidu & Associates, a consulting firm specializing in longwalls, and contacted a German expert on longwalls and other mining companies that had experience with outbursts,including Midcontinent, UP&L and Cottonwood mines.

MSHA Request For Roof Plan Modifications by April 28, 1989

16. On April 14, 1989, MSHA requested the Company to modify its Roof Control Plan to develop "measures to control coal bursts in areas where the longwall face is penetrating sandstone rolls." Its letter was in accordance with 30 CFR § 75.220, which calls for additional measures if unusual hazards are encountered. MSHA knew that the Company wanted to resume operation of the longwall as soon as possible in order to alleviate pressure on the face. The letter requested the Company to submit plan modifications by April 28, 1989.

17. After contacting various experts, the Company began to formulate a plan to help prevent outbursts and to protect miners in the event of another outburst. Dan Stickel, the superintendent of the No. 37 Mine, and John Lozier, the longwall mining engineer, met to discuss both preventive and protective

measures. As Superintendent, Dan Stickel, was responsibile for final Company decisions affecting the safety of all miners at the No. 37 Mine.

18. Dan Stickel's contemporaneous notes from the above meeting outline the specific precautions the Company intended to take to prevent another outburst and to protect miners. With regard to protecting miners, his notes stated:

> Limit the number of people at the shearer in the potential bump area. The operators and propmen will be required to operate the machine remotely and away from the machine. Extra precaution will be taken the last 100 feet at the tailgate. The last 100 feet of mining at the tailgate will be done by remote control only. Manual operation will not be used. [Tr. 2 at 199-201.]

19. Following the meeting between Stickel and Lozier, Lozier drafted a memorandum summarizing the meeting. The memorandum stated that the Company would "limit the number of people at the shearer during the cut on the tailgate" and not allow "propmen . . . [to] be in the general area of the shearer." Jt. Ex. 9.

20. In the meantime, Dickie Estep kept MSHA apprised of the status of repairs on the shearer and the date the Company expected to resume mining. Based on the repair schedule, the Company planned to resume mining on April 21 or 22, 1989. The Company was anxious to resume mining to relieve pressures on the face that were causing it to deteriorate. In this connection, MSHA also wanted the Company to start mining to relieve the pressures on the face.

21. Apart from the process for modification and approval of the roof control plan, which was not scheduled to be officially completed until sometime after April 28, 1989, it was the Company's intention to implement the safety precautions developed by Stickel and Lozier before resuming production.

The April 20, 1989, Meeting to Discuss Company Progress in Developing a Plan

22. On April 19, 1989, MSHA Roof Control Specialist Gary Harris called Dickie Estep to set up a meeting at an MSHA office to discuss the type of modifications the Company was considering. The Company believed that the meeting, which was scheduled for the next day, April 20, 1989, would be the first of several meetings. The typical procedure for modifying a roof control plan was to meet with MSHA several times and exchange ideas. With this in mind, and considering that MSHA's letter called for submission of modifications by April 28, 1989, the Company

attended the April 20 meeting without having a written plan ready to submit for approval.

23. The meeting was at an MSHA office. Company representatives were Dickie Estep, Dan Stickel, and Mike Lincoln, who is a geologist. The MSHA representatives included Roof Control Specialist Gary Harris, Supervisor Tom Hooker, and Ken Dixon, MSHA Chief of Engineering Services at the District office.

24. The meeting began, as expected, with an exchange of information and ideas on coal outbursts. MSHA's Ken Dixon relayed his experience with outbursts and recommended certain options to consider for controlling them.

25. At this point in the meeting, the Company representatives told MSHA that they had developed a list of operating procedures to prevent outbursts which they planned to implement when they resumed mining. Although the Company representatives had developed safety precautions for immediate implementation, they explained that they did not have a formal plan ready to submit for approval. At the same time, they advised MSHA that they intended to resume mining on either April 21 or 22, 1989. The MSHA representatives replied that to do so the Company must submit modifications for approval on that day, adding that if the Company did not submit a supplemental plan, MSHA would reinstate the § 103(k) order. The Company representatives suggested that they return to the mine to develop a plan, but MSHA insisted that they submit a plan immediately if they wanted to resume mining as planned.

26. Concerned about the increasing pressures and deterioration of the longwall face, the Company representatives decided to summarize for MSHA the new safety procedures that they had developed. The Company's planned procedure of operating remotely was mentioned, but was not discussed. Afterwards, Mr. Dixon told the Company representatives that "those were the things that we were looking for," and Mr. Dixon and the other MSHA officials said they would leave the room to give the Company time to draft a plan for submission.

27. Dickie Estep, Dan Stickel and Mike Lincoln drafted a plan, based on the notes in Dan Stickel's notebook.

28. The Company representatives returned to the meeting and submitted a Supplemental Roof Control Plan to MSHA. The MSHA representatives reviewed the plan, and made one change, which clarified that the plan applied only to the R-9 Longwall Panel. There was no additional discussion regarding any other provisions. MSHA offered to have the plan typed in letter form addressed from the Company to MSHA. This was done, and Dickie Estep signed the plan. By letter dated the same day, April 20, 1989, MSHA approved the plan. The approval was tentative and limited to a period of 60 days, during which there was to be an evaluation to

determine the Supplemental Plan's contribution to employee safety.

29. Following the meeting, MSHA's Gary Harris discussed the plan with his supervisor, Frank Strunk. There was no discussion as to any specifics for remote operations in terms of "distances," "feet" or other "measurement." Tr. 1 at 56.

The Company's April 20, 1989, Supplemental Roof Control Plan

30. The Supplemental Roof Control Plan approved by MSHA was as follows:

April 20, 1989

Mr. Joseph J. Garcia, District Manager
Mine Safety & Health Administration
HC 66, Box 1762
U.S. 25E. South
Barbourville, Kentucky 40906

RE: Arch of Kentucky, Inc., No. 37 Mine, I.D. No. 15-04670, Supplement of Roof Control Plan coal and rock outburst.

Dear Sir:

We request the following procedures be reviewed and approved to control potential coal and rock bursts on R-9 Longwall Section when such potential coal and rock burst conditions are known to exist.

1. Review geologist's study on R-9 Longwall Panel to identify bump prone areas such as massive sandstone roof and mine floor.

2. Modify operating procedures in potential bump areas by:

A. Minimizing the distance the headgate is in front of the tailgate.

B. Closely monitor the gob overhanging to evaluate potential burst/bump conditions.

C. Monitor face advance rate. Production will be used to keep the face advancing.

D. Limit the number of people at the shearer in potential bump area.

E. The operators and propmen will be required to operate the machine remotely from #85 shield to #104 shield.

F. #85 through #104 shields will be advanced as soon as the full face web is cut.

3. A study shall be conducted by the USBM to develop a coal and rock burst plan prior to mining on the R-3 Panel.

If you have any questions call me at 848-5431.

Sincerely,

Joe R. Estep

Implementation of the April 20, 1989, Supplemental Plan

31. Before mining resumed, the miners on the 004 Section of R-9 Longwall Panel were instructed how to operate under the procedures of the Supplemental Plan. Foreman Ralph Price recorded his instructions on implementing the plan in a memorandum. Jt. Ex. 11. He instructed the miners that, "when running the shearer at the tail" they would have to "stay in shields," "not to get out in front of shields" and "use the radio [control] for turning the headgate cowl." Jt. Stip. 43, Jt. Ex. 11. The crews on other shifts received similar instructions. On April 22, 1989, the 004 Section resumed operations.

The May 8, 1989, Coal Outburst

32. On May 8, 1989, a second coal outburst occurred. The outburst was between shields 91 and 101. (As in the case of the first outburst, this was on the tailgate side of the section.) The tailgate operator, Chuck Dudash, was at the No. 99 shield, operating the tailgate shearer wheel using remote control. The headgate operator, John Thompson, was at the No. 91 shield, operating the headgate shearer wheel using remote control. Although Thompson was inside the props he was struck by flying coal and suffered fractured ribs and a shoulder injury. He was nearly buried by flying coal.

33. After investigating the second outburst, the MSHA inspector issued two citations. Citation No. 3174494, issued on May 8, 1989, alleges a violation of 30 CFR § 75.220, and states in part:

The headgate side shearer operator was not operating the shearer remotely from the No. 85 shield. The headgate shearer operator was operating the shearer

on remote control; however, he was stationed at the No. 91 shield. The approved roof control plan stipulated in Item 2.E. that the operators and propmen will be required to operate the machine remotely from the No. 85 shield to No. 104 shield.

34. Citation No. 3174495, issued on May 9, 1989, also alleges a violation of 30 CFR § 75.220, and states in part:

> The tailgate side shearer operator was not operating the shearer remotely from the No. 85 shield. The tailgate shearer operator was operating the shearer in possession of the radio control, however, he was stationed at the No. 99 shield. The approved roof control plan stipulates in item 2.E. that the operator and propmen will be required to operate the machine remotely from tne No. 85 shield to the No. 104 shield.

35. At the hearing, the Secretary moved to amend Citation No. 3174495 on the ground that the original intent of the citation was to allege a violation for failure to position the tailgate operator at shield 104. The Company opposed the motion. The motion was granted. As amended, Citation No. 3174495 states, in pertinent part:

> The tailgate side shearer operator was not operating the shearer remotely from the No. 104 shield. The tailgate shearer operator was operating the shearer in possession of the radio control, however, he was stationed at the No. 99 shield. The approved roof control plan stipulates in item 2.E. that the operator and propmen will be required to operate the machine remote from the No. 85 shield to the No. 104 shield.

Modification of Supplemental Roof Control Plan After the May 8, 1989, Outburst

36. Following the May 8, 1989, outburst, MSHA issued an imminent danger withdrawal order. In order to resume mining the Company modified the plan, with MSHA approval, to add the following provision:

> While the shearer is cutting anywhere past the Number 85 shield, no employees will be allowed in the area except the tailgate shearer operator who will be stationed at Shield 103 or 104. The operator will be operating the shearer by remote control through this area from the said remote locations . . . . [Jt. Ex. 15.]

DISCUSSION WITH FURTHER FINDINGS

On April 12, 1989, the No. 37 mine experienced a coal outburst in which two men were struck by flying coal. Neither

man was seriously injured, and no citations were issued. As a result of the outburst, MSHA requested Arch to change its roof control plan to take into account the potential for further outbursts. A meeting was held at the MSHA office in Barbourville, Kentucky, on April 20, 1989, at which MSHA and Arch representatives discussed proposed changes in the roof control plan. A Supplemental Roof Control Plan was submitted to MSHA that day and approved tentatively for 60 days.

A second outburst occurred on May 8, 1989. One man was seriously injured. The same day, MSHA investigator James Poyner issued an imminent danger order and one citation for violating the Supplemental Plan. The following day he issued a second citation charging a violation of the Supplemental Plan.

This case focuses on the meaning of provision 2.E of the Supplemental Roof Control Plan, which states:

> The operators and propmen will be required to operate the machine remotely from #85 shield to #104 shield.

The Secretary contends that this provision required the remote control shearer operators to remain outside the area between Shields 85 and 104 when the shearer was cutting within such area. The Company contends that the operators could stand anywhere in the walkway between Shields 85 and 104 while operating the shearer by remote inside that area.

An analysis of a written document must begin in the first instance with the specific language. Tennessee Valley Authority v. Exxon Nuclear Co., Inc., 753 F.2d 493, 496-97 (6th Cir. 1985) (contract); Mallard v. U.S. District Court for Southern District of Iowa, 109 S. Ct. 1814, 1818 (1989) (statute); Bradley v. Autin, 841 F.2d 1288, 1293 (6th Cir. 1988) (statute). Where the language is clear and unambiguous, a court must regard it as conclusive and should not look to other aids of construction. Tennessee Valley Authority, 753 F. 2d at 496; Bradley 841 F.2d at 1293.

The express language of the Supplemental Plan provides that "operators and propmen will be required to operate the machine remotely from #85 shield to #104 shield." Provision 2.E does not state that the machine will be operated from remote locations at 85 and 104 and not in between. Rather, it states that the machine will be "operate[d]. . . remotely from #85 shield to #104 shield." Thus there is no express requirement for operators to station themselves at Shield #85 or at Shield #104, or at any other specified location.

A written document must be read as a whole; particular provisions should not be read in isolation. U.S. v. Morton, 104 S.Ct. 2749, 467 U.S. 823 (1984) (statute); Washington Metro v.

Mergentime Corp., 626 F.2d 959 (D.C. Cir. 1980) (contract). Also, different provisions of the same document must be read and interpreted consistently with each other, avoiding conflicts. U.S. v. Stauffer Chemical Co., 684 F.2d 1174 (6th Cir. 1982) aff'd 464 U.S. 165 (statute). In this case, provision 2.E of the Supplemental Plan must be read in light of the other provisions of the document.

Provision 2.D of the Supplemental Plan limits the number of persons in the potential bump area, that is, between Shields 85 and 104. The provision specifically states:

> Limit the number of people at the shearer in potential bump area.

The Company's intention, which is expressed in this language, was to limit, not to eliminate, nonessential personnel in the bump prone area. Tr. 1 at 223, Tr. 2 at 79. The Company believed that with fewer people in the area of the shearer, the chance of injury was greatly reduced. Tr. 1 at 220, 221. 1/

Had the Company intended to eliminate persons in the area between Shields 85 and 104, the drafters of the plan would have used the word "eliminate" instead of "limit." MSHA had the authority to insist on the word "eliminate" or "exclude," but it did not do so.

The Company's choice of the word "limit" in provision 2.D cannot be ignored. Effect must be given to each part of a document to avoid making any word or part meaningless or superfluous. Reiter v. Sonotone Corp., 99 S.Ct. 2326, 442 U.S. 330 (1979) (statute); Fulps v. City of Springfield, Tenn., 715 F.2d 1088 (6th Cir. 1983) (statute). The Secretary's interpretation that Section 2.E makes the area between Shields 85 and 104 a "no-man's land" (Secretary's Brief p. 10) is contrary to the meaning of provision 2.D. If accepted, this would make the word "limit" and the entire provision 2.D superfluous and meaningless.

Provision 2.E of the Supplemental Plan was intended to improve the safety of miners. Prior to the Supplemental Plan, the lead wheel operator would often operate the machine by

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1/ It was the first outburst on April 12, 1989, which prompted the Company to limit the number of people at the shearer in the bump prone area. As a result of the first outburst, a propman, Larry Cornet, was injured. Propmen are not essential employees in the cutting area. The Company believed that by limiting nonessential persons from the cutting area, such as propmen, mechanics, and visitors, the likelihood of injury in the event of a future outburst would be greatly reduced.

remote, standing in the walkway. The following wheel operator typically operated the wheel manually, walking immediately along side the machine and using the controls on the deck of the machine to adjust the wheel whenever it cut too deep or too shallow. At the time of the April 12, 1989, outburst, the headgate operator was using the manual controls to control the following wheel.

After the Supplemental Plan was adopted, both operators were required to use the remote control to operate the shearer. Because the shearer can receive signals from only one remote control device, it was necessary for the shearer operators to share the remote control. They would cooperate so that one operator could control the wheel of the other according to exchanged signals.

Although the April 20 change was intended to reduce the likelihood of injury, the Company seriously misjudged the dangers involved. Despite being behind the props, the shearer operators in the walkway in the bump prone area were in peril. 2/ Thus, in the May 8 coal outburst, one of them was seriously injured and nearly buried in flying coal.

The Secretary contends that the Company had a duty to avoid ambiguity in its roof control plan and to resolve any ambiguity in favor of protecting its miners. She points out that the first outburst (April 12) did considerable damage to the longwall shearer. The force of th outburst was substantial, severe enough to tear up six-inch steel and cover the walkway with 18 inches of coal. Two miners were in the bump prone area and they were both hit by flying coal. The Secretary contends that it was not reasonable for the Company to assert that standing within the walkway would provide adequate protection from such a potentially dangerous condition.

She argues that the Company's failure to resolve any ambiguity it may have discerned in the plan was a significant contributing factor to the injury sustained in the second outburst. She concludes, "whatever the reasons may be for Arch's misinterpretation of the terms of the roof control plan, the operator was guilty of a moderate to high degree of negligence." Secretary's Brief p. 13.

2/ In a bump prone area, the props do not provide the shearer operators with adequate protection from flying coal. Each shield is approximately 5 feet wide. The props or legs are 12 inches in diameter. Thus, every five feet of travelway is protected by only 2 feet of metal. In other words, miners in the walkway have only 40% lateral protection from coal flying from the face.

However, the facts, as outlined in the Findings, show that the Company drafters intended to have the plan permit remote control operators to stay in the walkway between Shields 85 and 104. (It was not an ambiguity to them.) The language of the April 20 plan did not state otherwise, and one of the key provisions (2.D) would be meaningless without recognizing the Company's intention in provision 2.E. It is true that the Company's April 20 plan permitted a dangerous condition to continue. The Secretary could have prevented this, but she did not do so. She finally corrected it, after a second coal outburst and a serious injury, by issuing an imminent danger order (which is no longer contested). It was then, and only then, that the Company came up with a modification to require that no one be permitted in the area between Shields 85 and 104 while the shearer was cutting in that area.

The later modification may not be applied retroactively to change the meaning of the Supplemental Roof Control Plan of April 20, 1989. That plan did not require the stationing of shearer operators outside the area between Shields 85 and 104. It was therefore not a violation of the plan to operate the shearer by remote while standing in the walkway between Shields 85 and 104.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.

2. The Secretary failed to prove a violation as alleged in Citation No. 3174494.

3. The Secretary failed to prove a violation as alledged in Citation No. 3174495.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3174494 and 3174495 are VACATED.

2. Docket No. KENT 89-176-R is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 21 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-210
	:	A.C. No. 15-13469-03711
v.	:	
	:	No. 9 Mine
GREEN RIVER COAL CO., INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary); B.R. Paxton, Esq., Central City, Kentucky, for Green River Coal Co., Inc. (Green River).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of the mandatory safety standard in 30 C.F.R. § 75.511 promulgated under the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to notice, the case was heard in Owensboro, Kentucky, on January 18, 1990. Allen L. Head testified on behalf of the Secretary. Michael McGregor testified on behalf of Green River. The parties were given the opportunity to file post hearing briefs. Neither party has filed such a brief. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. At all times pertinent hereto, Green River was the owner and operator of an underground coal mine in Hopkins County, Kentucky, known as the No. 9 Mine.

2. Although the corporate identity did not change, the management of the No. 9 Mine changed as of November 15, 1988.

3. Green River produces approximately one million tons of coal per year and has approximately 200 employees. It is a relatively large operator.

4. During the period from April 11, 1987 to November 14, 1988, 869 paid violations were assessed at the subject mine, of which 705 were denominated significant and substantial. None of these violations were of 30 C.F.R. § 75.511.

5. During the period from November 15, 1988 to April 11, 1989, when the mine was under new management, 123 paid violations were assessed, of which 93 were denominated significant and substantial. None of these violations were of 30 C.F.R. § 75.511.

6. On April 12, 1989, on the Number 2 Unit of the subject mine, a mechanic and a roof bolter were working on a trailing cable for a roof bolter machine. The mechanic had cut open a permanent splice in the cable and was checking the cable for a fault or ground by inserting the probes of his volt meter into the power wires.

7. The disconnecting device at the unit power center, was not locked out or tagged. The power center was approximately 200 feet from the trailing cable being worked on, and was not visible from the cable because two 90 degree corners and a ventilation check curtain separated them. The disconnecting device was lying on the mine floor in front of the receptacle from which it was unplugged.

8. Other disconnecting devices and receptacles were in the area. These were attached to two other roof bolting machines.

9. The power center voltage is 4160 volts; 480 volts goes to the roof bolter cable. This is considered low voltage.

10. Federal Mine Inspector Allen Head issued a section 107(a) imminent danger closure order and a section 104(a) citation because of the condition described in finding of fact No. 7.

11. In the event that someone had inadvertently put the power on the trailing cable involved, the mechanic could have been electrocuted or severely shocked. Approximately 16 miners work on the section and others come on the section periodically.

12. The section foreman was not in the area when the violation was cited.

13. The mechanic who, after the order and citation were issued, locked out and tagged the disconnecting device told Green River's safety manager, Michael McGregor, "this isn't the first mine we've worked in." The inspector understood that statement

to mean that the safety manager "was making a big issue out of not locking and tagging out, and also that he [the mechanic] probably had a practice of not locking and tagging out." (R.22) McGregor was asked how he interpreted the mechanic's statement and he responded: "Largely, the same way Mr. Head took it." (R. 26)

14. Since November 1988, Green River has conducted weekly safety meetings with all employees. Separate weekly meetings with top management discuss safety matters. Lock out procedures are discussed in the weekly safety meetings. The mechanic has an electrical certification, and therefore is required to undergo a 16 hour retraining program annually.

15. The violation was abated within 3 minutes when the mechanic locked out and tagged the disconnecting device. Also, Green River's safety manager informed him of the company policy. The mechanic admitted that he knew of the lock out and tag policy. He had a lock and tag on his person. The following day, a meeting was held with all maintenance personnel, and the company policy on locking out and tagging was reiterated.

REGULATION

30 C.F.R. § 75.511 provides as follows:

[STATUTORY PROVISION]

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

ISSUES

1. Did Respondent violate the mandatory safety standard contained in 30 C.F.R. § 75.511 by performing electrical work on a trailing cable without locking out and tagging the disconnecting device to the cable?

2. If so, what is the proper penalty for the violation?

CONCLUSIONS OF LAW

I

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

II

Finding of Fact No. 7 establishes a violation of the standard in question. Green River does not seriously contest the occurrence of a violation.

III

The violation was very serious, and could have resulted in electrocution or serious electrical shock to the mechanic or the roof bolter, if the power was put on the cable by the section foreman or another miner. The occurrence of such an event is not unlikely, when the disconnecting device is not locked out and suitably tagged.

IV

The violation resulted from Green River's negligence. Even though the mechanic had been properly trained, he had apparently been involved in prior violations of the standard and was not adequately supervised to make certain that he followed the regulation.

V

Green River's history of prior violations has improved under its new management (45+ violations per month prior to November 15, 1988; 24+ violations subsequent to that date). I take that improvement into account, but nevertheless consider the entire history shown in Government's Exhibits 4-A and 4-B. Secretary v. Green River Coal Co., 11 FMSHRC 2036 (1989), Commission Review denied, November 1989, appeal docketed, No. 89-4133 (6th Cir. December 27, 1989).

VI

Considering the above findings and conclusions in the light of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $750.

ORDER

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

1. Order No. 3418284 and Citation No. 3418285 issued April 12, 1989, are AFFIRMED.

2. Respondent Green River shall, within 30 days of the date of this decision pay the sum of $750 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 22 1990

SECRETARY OF LABOR FOR AMOS HICKS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 89-72-D
v.	:	
	:	NORT CD 89-18
COBRA MINING, INC., JERRY K. LESTER, and CARTER MESSER, Respondents	:	

DECISION

Appearances: Glenn M. Loos, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Kurt J. Pomrenke, Esq., White, Elliott, & Bundy, Bristol, Virginia, for the Respondents.

Before: Judge Weisberger

Statement of the Case

On August 22, 1989, the Secretary, on behalf of Amos Hicks, alleged that the Operator and three named individuals violated section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the Act). On September 19, 1989, the Secretary filed an Amended Complaint in which it deleted one of the previously named Respondents, Garnett Sutherland, and demanded various relief. Respondents filed an Answer on September 25, 1989.

Pursuant to Notice, the case was scheduled for Hearing for December 27-28, 1989. On December 22, 1989, in a telephone conference call with Counsel for both Parties and the undersigned, Respondents' Counsel advised that he was ill and sought an adjournment. Counsel for the Secretary did not object. The case was rescheduled and subsequently heard in Abington, Virginia, on January 3, 1990. Amos R. Hicks, David Lee Payne, Mary Lou Ray, and Douglas Wayne Lester testified for the Secretary. Opie Steven McKinney, Garnett Sutherland, Danny Osborne, Paul Horn, Carter G. Messer, and Jerry Keith Lester testified for Respondents. Findings of Fact and Memorandum of Law were filed by Petitioner and Respondents on February 28 and March 5, 1990, respectively. Reply Briefs were filed by the Secretary and Respondent on March 15 and 19, 1990, respectively.

Findings of Fact and Discussion

I.

As set forth in Goff v. Youghiogheny & Ohio Coal Company 8 FMSHRC 1860 (December 1986), in order to establish a prima facie case of discrimination under section 105(c) of the Act, it is incumbent for the Secretary to establish, not only that the Complainant engaged in protected activity, and that adverse action was taken against him, but that ". . . the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir 1983) (specifically approving the Commission's Pasula-Robinette test)."

Protected Activities and Adverse Action

Amos Hicks was employed by Respondents as a shuttle car helper for approximately 2 1/2 years until until he was discharged May 1989. Prior to his employment by Respondents, he worked for Respondents' predecessor for 6 years,

Hicks indicated that he complained to his shift foreman Garnett Sutherland "fairly often" (Tr. 24) that support jacks were not being set. Mary Lou Ray, a roof bolter on the same section as Hicks, indicated that she heard Hicks "off and on" (Tr. 194) complain about jacks not being set. Sutherland indicated that a "few times" Hicks mentioned that jacks were not set (Tr. 250). Hicks also indicated that, in riding the man trip to the section, he complained to Sutherland about loose rock on the roof.[1/] Ray testified that she heard Hicks complain to Sutherland about loose rock 2 to 3 times a week. Sutherland indicated that Hicks told him about loose rock once or twice, and he responded by stopping the man trip and pulling down the loose rock. David Lee Payne, who was the mine superintendent until May 12, 1989, indicated that Hicks had complained to him about the roof on several occasions.

1/ Paul Horn, a scoop operator on Hicks' shift, testified that he did not recall Hicks' complaining about loose rock on the top of the ceiling. I find this testimony not sufficient to rebut the testimony of Hicks, Ray, Payne, and Sutherland that Hicks did in fact bring to the attention of management, the existence of loose rock on the ceiling.

Hicks further indicated that in the first part of 1989, he complained to Sutherland that there were two miners in one split of air, and it was so dusty that he could not see. He also testified that he complained to Sutherland that there were pinners working in the return air, and they were not able to see. He told Sutherland that he would not work in those circumstances.

Hicks also indicated that sometimes he complained to Sutherland that a ventilation curtain was hung on the wrong side. Ray corroborated that Hicks had complained about ventilation problems. Douglas Wayne Lester, a shuttle car operator with whom Hicks worked, testified that he and Hicks complained about dust in the air. Sutherland did not rebut Hicks' testimony in this regard, and indicated that Hicks had said that he would not work in the dusty atmosphere like the pinners did. Payne indicated that Hicks did complain to him that he had to run the scoop through return air.

It was Hicks' testimony that approximately 3 to 4 times a week, he, along with the miners in the section, would have to ride a scoop, rather than a man trip from the section to the mine exit. He indicated that the scoop was crowded, there was not enough room to lie down, and on one occasion he was caught up against the roof and thrown out. He also indicated that he complained to Payne about this situation. Ray indicated that she heard Hicks make the complaints in this regard on a "consistent basis" (Tr. 201). Payne indicated that Hicks had voiced these complaints to him and Sutherland in his (Payne's) presence. Sutherland, in essence, indicated that Hicks had made complaints about riding in the scoop.

I conclude, as testified to by Hicks, that he did make statements to Sutherland concerning loose rock, improper ventilation, and improper jack supports. I also find that Hicks complained to Payne about roof conditions, and ventilation problems. The evidence also establishes that Hicks complained to Payne and Sutherland with regard to riding in the scoop in lieu of the man trip. I find that in bringing these matters to the attention of management, Hicks was engaged in protected activities. (See, Secretary on Behalf of Robinette v. United Castle Coal Co., supra. Further, the record before me unequivocally establishes that on May 10, 1989, Hicks was fired, and he thus suffered adverse action.

II.

Motivation

a. When Safety Complaints Were Made

Hicks testified on direct examination that he made a complaint to Sutherland about safety jacks a week before he was fired. Upon cross-examination, it was elicited that on

October 16, 1989, in answers he gave in response to interrogatories, he had said that he did not know when these complaints occurred. In his testimony, he indicated that, with regard to when he complained of inadequate jacks "it (the instances when he made the complaints) happened at different times all the way through" (Tr. 99). (Explanatory phrase added). However, Sutherland did not specifically rebut Hicks' testimony with regard to having made a complaint about inadequate jacks the week before he was fired. I thus find, on the basis of Hicks' uncontradicted direct testimony, that a week before his discharge, he had complained to Sutherland about the failure to use safety jacks.

The weight of the evidence fails to establish that the balance or Hicks' complaints were made within close proximity to his discharge. Hicks testified that about a month before he was fired, he had made complaints to Sutherland about loose rock on the roof. He indicated that he again made such a complaint on May 8, 2 days before he was fired, and Sutherland told him to have the man trip stopped, and to pull off the rock. However, neither Ray nor Lester, who rode the man trip along with Hicks, corroborated his testimony that he had made a complaint about the loose rock 2 days before he was fired. In this regard, it was Sutherland's testimony, in essence, that the incident, in which the man trap was stopped, and he had Hicks pull down the loose rock, occurred 1 month prior to his firing and not a few days prior thereto. Hicks indicated, on direct examination, that he complained about improper ventilation a week before he was fired. However, upon cross-examination it was elicited that in his response to interrogatories taken on October 16, he did not say that he had made such complaints a week before he was fired.

Hicks indicated that he made complaints with regard to riding the scoop in April or May, but he did not indicate specifically when these complaints were made. However, neither Ray nor Lester provided any testimony with regard to the most recent time Hicks made such a complaint prior to the time he was fired. Sutherland indicated that Hicks had complained several months prior to the firing.

b. Reaction of Respondents' Managers to Hicks' Complaints

According to Hicks, when he complained about riding the scoop, inadequate jacks, and loose rock on the roof, Sutherland got mad. Douglas Wayne Lester, a shuttle car operator who worked with Hicks, indicated that "sometimes," Sutherland got angry about the safety complaints (Tr. 227). Sutherland did not specifically rebut this testimony of Hicks and Lester.

c. Complainant's Prima Facie Case

Thus, the record indicates that Hicks made multiple safety complaints and had voiced complaints about inadequate jacks week before he was fired. Also, the weight of the evidence establishes that Hicks' foreman, Sutherland, got mad on occasion, when presented with Hicks' complaints. Thus, I conclude that there is some evidence to support a finding that the firing of Hicks by Sutherland was based, in some part, on the safety complaints that Hicks had made.

d. Affirmative Defense

On May 10, 1989, at approximately 10:00 a.m., Sutherland informed Hicks and Lester that they should take lunch.[2/] According to Hicks, Sutherland returned 20 minutes later and told him and Lester to return to work. Both Hicks and Sutherland indicated that they argued, and that Hicks said to Sutherland "kiss my a--." Sutherland then told Hicks that he was fired. Although there is evidence that the miners and Sutherland regularly cursed back and forth, Sutherland indicated that he fired Hicks after the latter made the above statement, because he felt that Hicks was not joking.[3/] The following day Hicks met with Payne and Sutherland. According to Payne, who had the authority to hire and fire, Sutherland explained that he had fired Hicks because he "bad mouthed him" (Sutherland) (Tr. 148). In essence, Payne indicated that he told Sutherland to make the decision with regard to the firing of Hicks. Payne indicated that he talked to Jerry Keith Lester, who is a one third owner of Respondent's operation, and the latter said that the matter of the firing would be left up to him (Payne). Lester indicated that prior to the firing, Sutherland had complained about Hicks

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2/ Apparently, it was not unusual for the shuttle operators, Lester and Hicks, to take lunch other than the noon hour, due to interruptions in the normal mining cycle.

3/ It appears to have been common practice in the mine for the miners and Sutherland to curse one another. The only time a miner had been disciplined or threatened for cursing or talking back, was on one instance when Ray, in anger, cursed Sutherland. Sutherland then fired Ray, but rescinded this action upon advice of Payne, and Ray did not miss any work.

Thus, I find that the firing of Hicks by Sutherland for cursing was not a pretext as argued by Complainant, inasmuch as Sutherland threatened Hicks the same way he had previously threatened Ray. Although Payne advised Sutherland not to fire Ray, but supported his decision to fire Hicks, there is no evidence to establish that Payne in any way was motivated by Hicks' safety complaints. Indeed, he concurred in many of these complaints.

getting his buggy late to the face, and that Hicks had made smart remarks in the last few months when he was asked to perform some tasks. Lester indicated that he had said it was time to do something about it, and that he went along with Sutherland's decision to fire Hicks. Lester indicated that he did not talk to Carter G. Messer, who also has a one third ownership in the operation. He said that in his conversations with Payne with regard Hicks, Payne had said that Hicks was always clean even though he worked in a dirty environment. Payne indicated that after the meeting on May 8, 1989, Messer told Hicks that he was fired and that "we've got to take a stand somewhere and we'll just leave it at that" (Tr. 151). According to Payne, after Messer told Hicks he was fired, Messer said that he wanted to get rid of Hicks for a long time, but "couldn't get anything on him" (Tr. 152). Payne indicated that prior to that time, Messer had never said that he wanted to fire Hicks, and indeed indicated that the latter was a good buggy man. Messer denied telling Payne that he wanted to get rid of Hicks for a long time. He indicated that, prior to the firing of Hicks, he did not discuss with Lester either Hicks or his work habits. He indicated that he supported the decision of Sutherland to fire Hicks as he was 100 percent behind his foreman. According to Messer, Sutherland never told him that Hicks had made safety complaints. He was asked whether he talked to Sutherland with regard to Hicks' work habits, and indicated that Sutherland had told him that it takes Hicks a long time to do things.

I find that at least a week elapsed between Hicks' complaint about jacks and loose rock, and his being fired. It is significant that Hicks did not indicate that Sutherland manifested any displeasure or anger at the complaint he (Hicks) had made about loose rock on May 8, 2 days before he was fired. There is no evidence that Payne, who according to his testimony had the responsibility for hiring and firing, ever expressed displeasure at Hicks for his having made safety complaints. Also, there is no evidence that Lester and Messer, who together own two thirds of Respondent's operation, had, prior to the firing of Hicks, any knowledge of the latter's safety complaints. Moreover, due to the nature of the words spoken by Hicks to Sutherland, his foreman, and the manner in which they were spoken, I find that a valid business reason existed for the firing of Hicks.

I find that Sutherland found Hicks deserving of being fired on May 10, for the manner in which he talked to him, and that he would have fired him for this action in any event. I thus conclude, that Respondents have established an affirmative defense that Hicks would have been fired in any event based on his unprotected activities alone. Accordingly, it must be concluded that the Complaint is to be dismissed. (See, Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, at 2799-2800 (October 1980)), rev'd on other grounds sub. non. Consolidation Coal Co., v. Marshall, 663 F 2nd 1211 (3rd Cir. 1981)).

ORDER

It is hereby ORDERED that the Complaint of Discrimination filed on August 23, 1989, be DISMISSED.

Avram Weisberger
Administrative Law Judge

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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 27 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JACK WINNINGHOFF, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 89-79-D
	:	Black Pine Mine
v.	:	
BLACK PINE MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This proceeding was brought by the Secretary of Labor on behalf of Jack Winninghoff, under § 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for certain corrective relief to undo the effects of alleged discrimination against him, and for a civil penalty for an alleged violation of § 105(c) of the Act.

The parties have moved for an order approving their proposed settlement, ordering compliance with its terms and for dismissal of this proceeding. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in §§ 105(c) and 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion for approval of the settlement is GRANTED.

2. Respondent, Secretary and Complainant shall comply with all the terms of the settlement agreement.

3. The Secretary withdraws her complaint and does not seek a civil penalty against respondent for its alleged violation of Section 105(c) of the Act.

4. Respondent shall pay Jack Winninghoff the lump sum of $14,000 which sum represents payment of all claims, including lost wages.

5. Subject to full compliance with the agreement, the complaints of the Secretary and Jack Winninghoff will be considered withdrawn and this proceeding is DISMISSED with prejudice.

August F. Cetti
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
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DENVER, CO 80204

MAR 27 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-240
Petitioner	:	A.C. No. 42-00121-03610
	:	Deer Creek Mine
v.	:	
	:	Docket No. WEST 86-243
EMERY MINING CORPORATION;	:	A.C. No. 42-01944-03514
UTAH POWER & LIGHT COMPANY,	:	Cottonwood Mine
Respondent	:	
	:	Docket No. WEST 86-257
	:	A.C. No. 42-00080-03570
	:	Wilberg Mine

ORDER OF DISMISSAL

Before: Judge Morris

The Secretary has moved to withdraw her request for civil penalties herein.

As a grounds therefor the Secretary states the 10th Circuit Court of Appeals has vacated the citations herein.

The Secretary further notes that the Circuit Court's decision clarifies a point of Mine Act interpretation. Accordingly, the Secretary requests that the Court's decision be attached to this order of dismissal so the decision may be readily reviewed by Mine Act practitioners.

For the foregoing reasons the following order is appropriate:

ORDER

For good cause shown, the Secretary's motions are GRANTED and the cases herein are dismissed.

Further, a copy of the 10th Circuit Court of Appeals decision is attached to this order of dismissal.

John J. Morris
Administrative Law Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UTAH POWER & LIGHT COMPANY, Substituted for Emery Mining Corporation, Petitioner, v. SECRETARY OF LABOR, FEDERAL MINE & SAFETY REVIEW COMMISSION, Respondents, UNITED MINE WORKERS OF AMERICA, Intervenor, AMERICAN MINING CONGRESS, Amicus Curiae.	)	Nos. 88-1655 & 88-1659

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL MINE SAFETY
AND HEALTH REVIEW COMMISSION
(Nos. West 86-126-R,
West 86-131-R,
West 86-140-R, and
West 86-141-R)

Submitted on the briefs:

John A. Macleod, Thomas C. Means, and Ellen B. Moran, Crowell & Moring, Washington, D.C., for Petitioner.

George R. Salem, Solicitor of Labor, Edward P. Clair, Associate Solicitor, Dennis D. Clark, Counsel, Appellate Litigation, and Barry F. Wisor, Attorney, United States Department of Labor, Arlington, Virginia, for Respondent.

Michael H. Holland, and Mary Lu Jordan, Washington, D.C., for Intervenor.

Charles W. Newcom, and Susan K. Grebeldinger, Sherman & Howard, Denver, Colorado, Edward M. Green, and Mark G. Ellis, American Mining Congress, Washington, D.C., filed an Amicus Curiae Brief for American Mining Congress.

Before TACHA, BALDOCK, and BRORBY, Circuit Judges.

PER CURIAM.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

These cases present two issues of first impression in this circuit:

> 1. Whether walkaround rights established in § 103(f) of the Federal Mine Health and Safety Act of 1977 (Act), 30 U.S.C. § 813(f), extend to miners' representatives who are not employees of the mine operator?
>
> 2. Whether a miners' representative seeking to exercise walkaround rights under § 103(f) of the Act must first comply with the requirements of 30 C.F.R., Part 40?

The Federal Mine Safety and Health Review Commission (Commission) answered the first question in the affirmative and the second in the negative. We affirm on the first issue and reverse on the second.

On the morning of April 15, 1986, Vern Boston, a Mine Safety and Health Administration (MSHA) inspector, arrived at the Deer Creek Mine, an underground coal mine in Utah, to conduct an inspection. Deer Creek Mine was owned by Utah Power & Light Co. (UPL) and operated by Emery Mining Corporation (Emery). Inspector Boston was met at the gates of the mine by Tom Rabbitt, a member of the International Health and Safety Department of the United Mine Workers of America (UMWA), who introduced himself to the inspector and asked to accompany him on the inspection.

Boston agreed that Rabbitt could accompany him on the inspection, and he and Rabbitt entered the premises to get clearance for Rabbitt. The mine manager, Earl White, met with Rabbitt and told him he could enter the mine pursuant to the collective bargaining agreement with the UMWA but for the fact that he had not given the twenty-four hour advance notice required by Emery. Rabbitt then said he was seeking entrance under § 103(f) of the Act, which provides for walkaround rights.[1]

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[1] Section 103(f) of the Act provides:

> **Participation of representatives of operators and miners in inspections**
>
> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of

(Continued on next page.)

White, Rabbitt, and Boston discussed the scope of walkaround rights under § 103(f). White was of the opinion that since Rabbitt was not an Emery employee, he had no walkaround rights under the Act. Boston disagreed, saying that Rabbitt had walkaround rights because he was a member of the UMWA International. Boston then wrote White a citation under § 104(a) of the Act, 30 U.S.C. § 814(a), for violating § 103(f). He gave White ten minutes to abate the violation.

White, fearing that Boston might issue a withdrawal order if White did not abate the violation, agreed to let Rabbitt participate in the inspection, but said he must first sign a hazard recognition and waiver of liability form that Emery required nonemployees to sign before entering the mine. Rabbitt refused to sign the form. Boston then called his supervisor, who was not familiar with Emery's waiver form. Based on his belief that a representative of the UMWA International had an unlimited right of access to a mine under § 103(f), the supervisor

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(Continued from previous page.)

> miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

instructed Boston to proceed with Rabbitt on the inspection. Boston then informed White that his refusal to permit Rabbitt to participate in the inspection unless Rabbitt signed a waiver of liability was in violation of § 103(f). Boston added a second violation of § 103(f) to the original citation.

Thereafter, White agreed to abate the alleged violation by allowing Rabbitt to accompany the inspector without signing the waiver of liability. The inspection party, consisting of Boston, Rabbitt, Mark Larsen, a representative of miners from the safety committee, and Terry Jordan and Dixon Peacock, representatives of Emery, then proceeded underground.

On April 17, 1986, pursuant to § 105(d) of the Act, 30 U.S.C. § 815(d), Emery filed a notice of contest of the citation issued April 15, 1986. Shortly thereafter, the UMWA moved to intervene in the proceedings. On April 24, 1986, Emery's contract with UPL was terminated and UPL took over the operation of its mines, including the Deer Creek Mine. UPL subsequently received three more citations from the MSHA for violations of § 103(f) similar to Emery's. UPL filed a timely notice of contest with respect to each citation. The parties agreed to try the citation issued to Emery and to have the administrative law judge's (ALJ) ruling on that citation control the disposition of the three citations issued to UPL.

The ALJ held an evidentiary hearing on May 14 and 15, 1986. The issues before him were the two under consideration in this appeal, as well as a third, concerning whether an operator can require a nonemployee representative of miners to sign a waiver of

liability before exercising walkaround rights. On August 7, 1986, the ALJ ruled against Emery on all three issues. Emery Mining Corp., 8 F.M.S.H.R.C. 1192 (1986).

Thereafter, the Commission granted discretionary review of the ALJ's decision pursuant to 30 U.S.C. § 823(d)(2)(A)(i). After briefing and oral arguments, the Commission issued its decision on Emery's citation on March 29, 1988. Emery Mining Corp., 10 F.M.S.H.R.C. 276 (1988). The Commission also issued a consolidated summary opinion on UPL's three citations the same day. Utah Power & Light Co., 10 F.M.S.H.R.C. 302 (1988). The Commission affirmed the ALJ on the first two issues and reversed him on the third issue concerning the waiver of liability.

Emery and UPL petitioned this court for review of the Commission's decisions pursuant to § 106(a) of the Act, 30 U.S.C. § 816(a). They challenge the Commission's rulings with respect to nonemployee walkaround rights and compliance with the requirements of 30 C.F.R., Part 40. We consolidated the petitions under the caption Utah Power & Light Co. v. Secretary of Labor. Since UPL has been substituted for Emery on appeal, we will refer to the arguments of UPL hereinafter.

I.

We first address UPL's contention that § 103(f) walkaround rights do not extend to nonemployee representatives of miners. In reviewing the interpretation of § 103(f) asserted by the Secretary of Labor (Secretary) and the Commission, we are mindful of the

United States Supreme Court's directions in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

We have held that an agency's interpretation of a statute entrusted to that agency for administration should be accepted if it is a reasonable one, even if another interpretation may exist that is equally reasonable. Jones v. Federal Deposit Ins. Corp., 748 F.2d 1400, 1405 (10th Cir. 1984); Brennan v. Occupational Safety and Health Comm'n, 513 F.2d 553, 554 (10th Cir. 1975).

Congress did not speak to the precise issue before us when it drafted § 103(f) of the Act. Nonetheless, we, like the Commission, find the language of § 103(f) dispositive. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); Colorado Property Acquisitions, Inc. v. United States, No. 87-2564, slip op. at 4

(10th Cir. Jan. 24, 1990)("When the meaning of a statute is clear from its face, resort to rules of statutory construction or legislative intent is unnecessary.").

The first sentence of § 103(f) provides that "a representative authorized by [the operator's] miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section." This sentence confers upon the miners the right to authorize a representative for walkaround purposes without any limitation on the employment status of the representative. See Council of S. Mountains, Inc. v. Federal Mine Safety and Health Review Comm'n, 751 F.2d 1418, 1421 n.18 (D.C. Cir. 1985)("The Mine Act, however, merely refers to 'representatives' and does not articulate any distinction between the rights of employee and nonemployee representatives.").

The third sentence of § 103(f) provides that "[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." (Emphasis added.) As noted by the Commission, "also" means "in addition," "as well," "besides," and "too." Emery Mining Corp., 10 F.M.S.H.R.C. at 284 (quoting Webster's Third Int'l Dictionary 62 (Unabridged ed. 1971)). Put in other words, the third sentence of § 103(f) reads: "A representative of miners who, in addition to being a representative, is an employee of the operator shall suffer no

loss of pay during the period of his participation in the inspection . . . ."

By creating a subclass of representatives who are entitled to compensation while exercising walkaround rights under § 103(f), Congress clearly recognized that some miners' representatives may be employees of the operator and some may not. Those who are employees are entitled to compensation. Those who are not employees may participate in the inspection, but are not entitled to compensation from the operator under § 103(f) for their participation.

UPL argues that the Commission ignored other reasonable interpretations of the third sentence of § 103(f). Specifically, UPL contends that the third sentence represents a congressional recognition that

> there would be situations in which mine operators might consent to walkarounds by non-employee representatives of miners, or in which non-employee representatives had contractual rights to enter upon mine property for the purpose of accompanying inspectors. [Congress] simply wanted to be clear that the compensation right under § 103(f) did not attach in those circumstances.

Brief of Petitioner Utah Power & Light Co. at 19-20.

We are not persuaded by UPL's argument. UPL would have us read a limitation into the statute that has no basis in the statutory language. Furthermore, if a nonemployee representative could exercise walkaround rights only if the operator so consented or the parties' contractual rights so provided, and could not exercise walkaround rights under § 103(f), Congress would have no reason to clarify that a nonemployee representative is not entitled to compensation from the operator under § 103(f).

UPL asserts that selected excerpts from the Act's legislative history support its theory that Congress did not intend to extend walkaround rights to nonemployee representatives. In particular, UPL cites to a debate between Senator Javits, who was a sponsor of the Senate bill that eventually became the Act, and Senator Helms. See 123 Cong. Rec. 20,019-20 (1977).

While we agree with UPL that the Senators' debate focused on the importance of miners participating in inspections of the mines in which they work,[2] that focus is explained by the context of the Senators' debate. Senator Helms had introduced an amendment that would strike the third and fifth sentences of the present § 103(f), thereby deleting the provisions concerning compensation for employee representatives. Senator Javits opposed the amendment. See 123 Cong. Rec. 20,019 (1977). The two Senators, therefore, were debating the merits of compensating employee representatives. They were not concerned with whether

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[2] For instance, Senator Javits remarked: "[G]reater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine . . . ." 123 Cong. Rec. 20,019 (1977).

Senator Javits also said:

> If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.
>
> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents.

123 Cong. Rec. 20,020 (1977).

nonemployees, who would not be compensated by the operator, could be miners' representatives for purposes of walkaround rights.[3]

UPL also argues that the purposes of § 103(f), which include encouraging miners to participate in inspections and enhancing miners' understanding and awareness of the health and safety requirements of the Act,[4] will not be furthered by allowing nonemployees to act as miners' representatives under § 103(f). We disagree. A congressional desire to increase miners' knowledge about health and safety issues does not require the exclusion of nonemployees as miners' representatives for walkaround purposes.

Miners may benefit in a number of ways from nonemployee representatives participating in walkarounds. For instance, the ALJ in this case found that Rabbitt had held virtually every job in a coal mine and had received special training in health and safety matters, including seminars sponsored by the MSHA that are given to federal inspectors. Furthermore, Rabbitt had investigated "accidents, disasters, fires, and explosions" in various mines. Emery Mining Corp., 8 F.M.S.H.R.C. at 1186. These findings illustrate that a nonemployee representative may have greater expertise in health and safety matters than an employee representative.

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[3] Senator Helms, himself, appeared to recognize that a representative of miners might not be an employee of the operator. In arguing for the adoption of his amendment, the Senator said: "As written, the act states that the representative of the miners, if he 'is also an employee of the operator shall suffer no loss of pay as a result of his participation in the inspection.'" 123 Cong. Rec. 20,019 (1977) (emphasis added).

[4] See S. Rep. No. 181, 95th Cong., 1st Sess. 28, reprinted in 1977 U.S. Code Cong. & Admin. News 3401, 3428.

In addition, if a nonemployee representative has inspected other mines, his knowledge of those mines may increase his ability to spot problems and to suggest solutions in the mine under consideration. Furthermore, a nonemployee representative is not subject to the same pressures that can be exerted by an operator on an employee representative. Therefore, the underlying purposes of § 103(f), and the Act in general, can be furthered by allowing both employees and nonemployees to act as miners' representatives for walkaround purposes.

UPL contends that statements in an interpretive bulletin issued by the Secretary in April of 1978 support its position that walkaround rights were not intended to extend to nonemployee representatives.[5] While isolated comments in the bulletin may support UPL's position, other comments support the present position of the Secretary, that walkaround rights do extend to nonemployee representatives. The interpretive bulletin is inconclusive on the issue before us. Neither the bulletin nor the legislative history convince us that the interpretation accorded the statute by the agency is unreasonable or unsupportable.

Finally, UPL argues that permitting nonemployees to exercise walkaround rights under § 103(f) impermissibly infringes on an operator's property rights. UPL relies on a number of fourth amendment cases which express the United States Supreme Court's concern with the infringement of property rights by federal inspections. In particular, UPL cites Donovan v. Dewey, 452 U.S. 594, 605 (1981), in which the Court held that warrantless

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5 See 43 Fed. Reg. 17,546 (1978).

inspections of mines by federal inspectors under the Federal Mine Safety and Health Act are not unreasonable.

UPL contends that although the Act "establishes a predictable and guided federal regulatory presence" so that "the operator of a mine 'is not left to wonder about the purposes of the inspector or the limits of his task,'" id. at 604 (quoting United States v. Biswell, 406 U.S. 311, 316 (1972)), the same cannot be said of a nonemployee miners' representative. UPL cautions that "[t]he Mine Act presents an inherent temptation for abuse by non-employee union representatives," and cites as an example a case in which the UMWA acknowledged that "its designation of walkaround representatives 'was made for purposes unrelated to the Act's safety objectives and thereby constituted an inappropriate exercise of the UMWA's designation right under § 103(f).'" Brief of Petitioner Utah Power & Light Co. at 35 n.21 (quoting Nacco Mining Co., 6 F.M.S.H.R.C. 2734, 2738 (1984)).

UPL's argument ignores the fact that, as with a federal inspector, the Act clearly spells out the purpose of a miners' representative's participation in an inspection. Section 103(f) provides that an authorized miners' representative shall have the opportunity to accompany a federal inspector during the inspection of a mine "for the purpose of aiding such inspection." While we recognize UPL's concern that walkaround rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights altogether. The

solution is for the operator to take action against individual instances of abuse when it discovers them.

In sum, we conclude that the Secretary's and the Commission's interpretation of the Act is both reasonable and supportable, and we hold that miners may authorize nonemployees to act as their representatives under § 103(f) of the Act.

II.

The second issue we must address concerns the Commission's holding that "an operator may not refuse a miner's (sic) representative access to a mine for walkaround purposes solely because the representative has not filed identifying information under [30 C.F.R.,] Part 40." Emery Mining Corp., 10 F.M.S.H.R.C. at 279.

The regulations set forth in 30 C.F.R., Part 40 provide as follows:

§ 40.1 Definitions.

As used in this Part 40:
(a) "Act" means the Federal Mine Safety and Health Act of 1977.
(b) "Representative of miners" means:
(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and
(2) "Representatives authorized by the miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

§ 40.2 Requirements.

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the

information required by § 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the act relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

§ 40.3 Filing procedures.

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name, address, and Mine Safety and Health Administration identification number if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; or if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information filed is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

§ 40.4 Posting at mine.

A copy of the information provided the operator pursuant to § 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

§ 40.5 Termination of designation as representative of miners.

(a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.

(b) The Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated pursuant to paragraph (a) of this section or which are not in compliance with the requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

The Commission, in holding that Emery could not refuse Rabbitt admission to the mine for walkaround purposes just because neither he nor his position were listed on the documents filed with Emery pursuant to Part 40,[6] relied on its holding in Consolidation Coal Co., 3 F.M.S.H.R.C. 617 (1981), which it found "to represent a sound interpretation of section 103(f) and to accurately reflect the Secretary's clearly expressed intent in promulgating his Part 40 regulations." Emery Mining Corp., 10 F.M.S.H.R.C. at 287.

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[6] The information submitted to Emery under Part 40 listed Frank Fitzek as the selected representative of miners and listed thirteen other people, including Mark Larsen, as selected multiple representatives. In the space provided for listing the organization, if any, with which the representative is associated, the document listed the UMWA and reflected that Frank Fitzek, safety chairman, was the representative associated with that organization.

The "Secretary's clearly expressed intent" to which the Commission referred, arose from the preamble to the final Part 40 regulations which stated in part: "However, it should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as representatives of miners under this part." 43 Fed. Reg. 29,508 (1978). The Secretary argues on appeal that the foregoing language "is dispositive of the Secretary's intent in promulgating the Part 40 regulations." Brief for the Secretary of Labor at 26.

In reviewing the Secretary's interpretation of the Part 40 regulations, we are mindful of two rules. First, an agency's regulation "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980). Second, "'a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984)(quoting Trustees of Ind. Univ. v. United States, 618 F.2d 736, 739 (Ct. Cl. 1980)).

The Part 40 regulations themselves do not make any exception for representatives of miners who desire to be authorized representatives for § 103(f) purposes. The only place such an exception is set forth is in the aforementioned preamble to the regulations, which is not part of the regulations as published in the Code of Federal Regulations. Neither the preamble nor the Secretary's interpretive bulletin to which it refers,[7] cite any

[7] 43 Fed. Reg. 17,546 (1978).

reasons for making an exception to the regulations for purposes of § 103(f). Likewise, the Secretary, here, gives no explanation for such an exception.

Section 103(f) of the Act provides that "[s]ubject to regulations issued by the Secretary, . . . a representative authorized by [the] miners shall be given the opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine." (Emphasis added.) As both the Secretary and the Commission have acknowledged, the Part 40 regulations were implemented pursuant to the authority delegated to the Secretary in § 103(f) of the Act. See Brief for Secretary of Labor at 15-16; Emery Mining Corp., 10 F.M.S.H.R.C. at 285. On their face, the regulations apply to all representatives of miners for all purposes under the Act. Thus, the Secretary's interpretation of the regulations is at odds with both the Act and the plain language of the regulations themselves.

Furthermore, valid reasons exist for requiring compliance with the Part 40 regulations for § 103(f) purposes. As Chairman Ford pointed out in his dissent below, the information required to be filed by Part 40 establishes the identity and bona fides of each miners' representative, as well as the scope of his authority. See Emery Mining Corp., 10 F.M.S.H.R.C. at 294-95; 30 C.F.R. § 40.3. The information must be provided to both the MSHA district manager and the operator of the affected mine. 30 C.F.R. § 40.3(a). The operator, in turn, is required to post a copy of the information filed on the mine bulletin board, and to keep the information current. Id. at § 40.4.

The Secretary has explained the importance of posting the Part 40 information on the mine bulletin board as follows:

> The posting of "Representative of Miner" information will keep the miners abreast of who their representatives are, and for what purpose under the act their representatives serve. This knowledge will better acquaint the miner with MSHA's health and safety programs which will further promote an awareness among the miners of the importance of health and safety at the mine.

43 Fed. Reg. 29,508, 29,509 (1978).

The Secretary and the Commission have stressed the importance of walkaround rights throughout this litigation, and the legislative history of the Act reflects that Congress, too, thought walkaround rights to be important in increasing miner awareness and knowledge of health and safety conditions and requirements. See S. Rep. No. 181, 95th Cong., 1st Sess. 28, reprinted in 1977 U.S. Code Cong. & Ad. News 3401, 3428; Secretary of Labor ex rel. Truex, 8 F.M.S.H.R.C. 1293, 1299 (1986).

Every miner cannot participate in a federal inspection. Therefore, § 103(f) provides that miners may authorize representatives who will participate in the inspection on their behalf. Pursuant to 30 C.F.R. § 40.1(b), any person or organization who represents two or more miners is considered a "miners' representative." The regulatory scheme contemplates that the miners at a mine may have more than one representative for walkaround purposes and may have different representatives for other purposes under the Act. See id. at § 40.2(b).

Under such a scheme, it is imperative that both the miners and the operator know who the miners' representatives are and the

scope of their authority. As the Secretary has said, knowledge on the part of the miners of the identity, whereabouts, and scope of responsibility of their representatives promotes the purposes of the Act. See 43 Fed. Reg. 29,508, 29,509 (1978). Allowing people to act as representatives of miners under § 103(f) does little to further the purposes of the Act unless the miners know who their § 103(f) representatives are so that they may communicate with them regarding health and safety issues related to the inspections.

Furthermore, since a person need only represent two miners to qualify as a "miners' representative," compliance with the requirements of Part 40 is necessary to ensure that a person who attempts to exercise walkaround rights on behalf of miners is in fact "authorized" by the miners to do so, as required by § 103(f) of the Act.

In addition, the Secretary's interpretation of the Part 40 regulations places the operator in a precarious and untenable position. If an operator cannot rely on the Part 40 information to determine whether someone is an authorized representative of miners for walkaround purposes, he has no settled criteria by which to judge an alleged representative's authority.

As the Secretary has recognized, an operator's refusal to permit an authorized miners' representative to exercise the walkaround rights provided in § 103(f) is a violation of the Act for which the operator is subject to a citation under § 104 and a civil penalty under § 105 of the Act. See 43 Fed. Reg. 17,546, 17,547 (1978). Furthermore, if the operator fails to abate the

violation of § 103(f), not only will it be subject to additional civil penalties for each day of nonabatement, but the inspector may issue a withdrawal order pursuant to § 104(b) of the Act. See 43 Fed. Reg. 17,546, 17,547 (1978).

Thus, the consequences of an operator's refusal to permit an authorized miners' representative to exercise walkaround rights under § 103(f) are quite severe. This severity requires that an operator have a sure and settled method by which to determine who is an authorized miners' representative for walkaround purposes.

Under the method adopted by the Commission in Consolidation Coal Co., and reaffirmed below, whether an operator is justified in denying a purported miners' representative walkaround rights depends on the circumstances of the particular case. See Consolidation Coal Co., 3 F.M.S.H.R.C. at 619. If the inspector does not agree with the operator's determination that someone is not an authorized miners' representative for § 103(f) purposes, as happened in the present case, the operator must risk the issuance of a citation, the assessment of civil penalties, and the possible closure of a portion of the mine before it can get a determination from the Commission whether it was justified in refusing to allow the purported representative to exercise walkaround rights.[8]

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[8] In contrast, if an operator refuses to allow a federal inspector to inspect a mine, the inspector cannot gain immediate access. Instead, the Secretary must bring a civil suit against the operator to enjoin future refusals of admission. See 30 U.S.C. § 818(a)(1). Thus, the operator is furnished a forum prior to the inspection in which "to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have." Donovan, 452 U.S. at 605.

The interpretation of the Part 40 regulations asserted by the Secretary and adopted by the Commission is contrary to the plain language of the regulations, fails to further the purposes of the Act, and puts the operator in an untenable position. We therefore reject the Secretary's interpretation and hold that the mandatory requirements of the Part 40 regulations apply to miners' representatives for § 103(f) purposes. Thus, a miners' representative's failure to comply with the regulations entitles an operator to refuse the representative access to the mine for walkaround purposes. Our holding will not work a great hardship on the miners since the requirements of Part 40 are straightforward, and if a miners' representative fails to comply with them and, therefore, cannot exercise walkaround rights, the Act requires the federal inspector to "consult with a reasonable number of miners concerning matters of health and safety in such mine." 30 U.S.C. § 813(f).

In the present case, the parties do not dispute that on April 15, 1986, Rabbitt was not listed as an authorized miners' representative for walkaround purposes on the documents filed with Emery pursuant to Part 40. Therefore, Emery did not violate the Act by refusing Rabbitt access to the mine for walkaround purposes under § 103(f).

III.

The Commission's decisions in Emery Mining Corp., 10 F.M.S.H.R.C. 276 (1988), and Utah Power & Light Co., 10 F.M.S.H.R.C. 302 (1988), are AFFIRMED in part and REVERSED in part. The citations at issue in those cases are hereby VACATED.

ADMINISTRATIVE LAW JUDGE ORDERS

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

March 21, 1990

ARMANDO M. RIVAS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 89-395-DM
PHELPS DODGE MORENCI, INC., Respondent	:	MD 89-36

ORDER DENYING MOTION

Following an on-the-record preliminary hearing on February 6, 1990, for the special purpose of resolving Respondent's Motion for Summary Decision, counsel for both parties submitted their positions by oral argument at the close of hearing in lieu of filing written briefs.

Respondent contends the Complaint should be dismissed since Complainant did not file such with MSHA until approximately 174 days (T. 52) after he was discharged on September 15, 1988 (T. 14), or some 3½ months beyond the 60-day filing limit provided in Section 105(c) of the Mine Act.

Complainant presented three witnesses at the hearing to establish that the filing delay resulted from his suffering epilepsy, and memory defects, and from the time it took for him to consult with attorneys and to investigate his remedies with other agencies (T. 12-13).

Respondent presented no witnesses (T. 49) but claimed both general and specific prejudice (T. 54) from the filing delay. Thus Respondent contends:

> "... there are approximately two dozen employees that are listed in Mr. Rivas's three page complaint who either participated in alleged harassment of him or observed that alleged harassment. ... it is not reasonable for this tribunal to assume that all 24, 25, 30 of those employees mentioned in there would have the same recollection of events two years ago as they would have of events if they were permitted to testify to them in a timely manner.
>
> And with respect to the specific prejudice issue ... it is clear from the testimony that Mr. Rivas gave, and that of his mother, that he himself has very specific recollection problems. He testified that he has trouble remembering things, his memory is not good, that he is confused. His mother testified that there are some things he remembers and other things that he does not."

XXX XXX XXX

"... there has been an inadequate (sic) showing of justification. The complainant clearly was aware of the Mine Safety Act and his right to assert complaints under it as early as February of 1988. He apparently was contacting both agencies and attorneys as early as November of 1988. And if he has received poor advice from those attorneys, from those agencies, that is not obviously the fault of the respondent."

According to Complainant, Armando M. Rivas, (age 32 with a high school education), he made contact with his employer, Phelps Dodge, when he met with James Madison to request his job back (T. 15). After that he called "several attorneys" and several agencies who advised him they could do nothing (T. 15, 20).

Mr. Rivas, an epilectic, was depressed and had "disorder" seizures during the period after his discharge which seizures cause him to get confused, jerk, and affect his memory (T. 16). This condition worsened in October and November, 1988 (Tr.).

In November, 1988, Complainant apparently found out about his rights to go to MSHA and file a complaint against his employer (T. 35).

In January or February, 1989, while at the Civil Rights Division (believed to be a division of the Arizona Attorney General's Office), a call was made in his behalf to MSHA which subsequently sent him complaint forms to be filled out (T. 22-26). Complainant received help from a Community Action agency in Safford, Arizona in completing the MSHA forms which led to the Complaint (Ex. R-2) being prepared in late February, 1989 (T. 45-48) being filed in early March, 1989 (T. 23, 27, 48).

According to Complainant's mother, Maria Meza, Complainant never left "the home". She indicated that Complainant had seizures in October, November and December of 1988, and that his "mind wasn't well," (T. 42) and that "he remembers some things, others he doesn't." (T. 44).

The Commission has held that the 60-day time limit is not jurisdictional and that while the purpose of the 60-day time limit is to avoid stale claims, a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). the Mine Act's legislative history relevant to the 60-day time limit states:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 674 (1978) (emphasis added).

Timeliness questions therefore must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation. Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).

To prevail, the Respondent mine operator must establish that it suffered material legal prejudice which was attributable to the Complainant's delay in filing his complaint. See Secretary of Labor v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June 1986); Buelke v. Thunder Basin Coal Company, 11 FMSHRC 238 (February 1989).

In this matter, the Complainant established the existence of a most significant mental handicap affecting both his ability to function as well as his memory following his discharge. It also appears that following his discharge he made, in the context of his condition, reasonable efforts to ascertain his remedies and to obtain direction. The delay of 3½ months beyond the filing period is not sufficient to constitute the basis for creation of a presumption of legal prejudice to the operator. Respondent's allegations of prejudice, specific and general, are broad and speculative and do not constitute grounds for a determination that it has suffered sufficient material legal prejudice which are attributable to the filing delay. 1/ See Nealey v. Transportation Maritime Mexicana, S.A., 662 F.2d 1275, 1280-1281 (9th Cir. 1980)

1/ A weak excuse may suffice if there has been no prejudice; an exceeding good one might still do even when there has been some. Larios v. Victory Carriers, Inc., 316 F.2d 63, 67 (2d Cir. 1963).

Accordingly, Respondent's motion for dismissal of these proceedings is denied.

Michael A. Lasher, Jr.
Administrative Law Judge

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