MARCH 1991

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MARCH 1991

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

Secretary of Labor, MSHA v. Explosives Technologies International, Inc., Docket No. CENT 90-95-M. (Judge Broderick, January 24, 1991)

Secretary of Labor, MSHA v. Jet Concrete, Inc., Docket No. WEST 90-347-M. (Chief Judge Merlin, Default Decision, February 14, 1991)

Secretary of Labor, MSHA v. Ricky Davis, employed by Wampler Brothers Coal Co., Docket No. KENT 90-432. (Chief Judge Merlin, Default Decision, February 13, 1991)

Charles T. Smith v. KEM Coal Company, Docket No. KENT 90-30-D. (Judge Fauver, January 31, 1991)

Ronny Boswell v. National Cement Company, Docket No. SE 90-112-M. (Judge Maurer, February 7, 1991)

Secretary of Labor, MSHA v. Warren Steen Construction, etc., Docket No. LAKE 89-68-M, LAKE 89-93-M. (Judge Broderick, February 19, 1991)

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

Secretary of Labor on behalf of Clyde Cole v. Canyon Country Enterprises, Docket No. WEST 90-165-DM. (Judge Lasher, January 22, 1991)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 1, 1991

SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA)	:	
On behalf of CLYDE C. COLE	:	
v.	:	Docket No. WEST 90-165-DM
CANYON COUNTRY ENTERPRISES d/b/a CURTIS SAND AND GRAVEL, a corporation	:	

ORDER

A petition for discretionary review has been filed on behalf of Complainant Clyde C. Cole seeking review of a decision issued by Commission Administrative Law Judge Michael A. Lasher on January 22, 1991. In that decision, the judge granted the Secretary of Labor's motion to withdraw her complaint of discrimination filed on Mr. Cole's behalf under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), and the judge dismissed the section 105(c)(2) complaint with prejudice.

As grounds for his granting of the motion to withdraw and his dismissal of the section 105(c)(2) complaint, the judge indicated that upon completion of discovery in this matter, the Secretary determined that no violation of section 105(c) of the Mine Act had occurred. The judge further declined a request by David P. Koppelman, Esq., International Union of Operating Engineers, Local 12, AFL-CIO, attorney for Mr. Cole, to substitute Mr. Cole in lieu of the Secretary as sole complainant. In so declining, the judge stated, "such rights as Mr. Cole has would appear to be provided in section 105(c)(3) of the [Mine] Act." The judge's disposition of this matter is correct.

The statutory scheme devised by Congress for addressing miners' complaints of discrimination provides that when the Secretary determines that no discriminatory violation has occurred, the miner may still pursue his individual complaint of discrimination pursuant to section 105(c)(3) of the Act. [1] "The

---

[1] Section 105(c)(3) provides, in part:

> "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's

presence of section 105(c)(3) within the statutory scheme establishes the appropriate recourse Congress intended the miner to have under the Mine Act", when the Secretary determines that a complaint should not be filed or, as here, should be withdrawn. Robert K. Roland v. Secretary of Labor, 7 FMSHRC 630, 635-636 (May 1985). See also S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-625 (1978).

The appropriate procedural route in this case is the one indicated by the judge, i.e., the complainant's filing of a complaint under section 105(c)(3). Under the circumstances presented here, we deem the filing of the petition for discretionary review as suspending the 30-day time limit applicable to the filing of individual complaints under section 105(c)(3). Should complainant wish to pursue this matter, he may do so by filing a section 105(c)(3) complaint within 30 days after receipt of this order. The record in the section 105(c)(2) case may be noticed judicially in any such new proceeding.

Accordingly, under the circumstances, the petition for discretionary review is denied.

Richard V. Backley, Acting Chairman

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

---

determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]."

30 U.S.C. § 815(c)(3).

Distribution

David P. Koppelman, Esq.
I.U.O.E., Local No. 12
150 East Corson St.
P.O. Box 7109
Pasadena, California 91109

Scott H. Dunham, Esq.
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071

Susanne Lewald, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson St., Suite 1110
San Francisco, California 94105

Administrative Law Judge Michael Lasher
Federal Mine Safety and Health Review Commission
280 Federal Bldg.
1244 Speer Blvd.
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 7, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 90-347-M
JET CONCRETE, INC.	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On February 14, 1991, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Jet Concrete, Inc. ("Jet") in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed Jet a civil penalty of $3,000, as proposed by the Secretary. For the reasons explained below, we vacate the judge's default order and remand for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on February 14, 1991. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has been issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). By letter to Judge Merlin, filed February 25, 1991, Jet asserts that it filed its answer with Commission Administrative Law Judge John Morris. Under the circumstances, we deem Jet's February 25th letter to constitute a timely petition for review, requesting relief from the judge's default order. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

The record discloses that an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Jet ten withdrawal orders alleging violations of various safety regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Jet filed a "Blue Card" request for a hearing before this independent Commission. On October 15, 1990, counsel for the Secretary filed a proposal for civil penalty assessments. When no answer to the penalty proposal was filed, Judge Merlin issued a show cause order on November 28, 1990, directing Jet to file an answer within 30 days or show good reason for the failure to do so. 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.

In its February 25th letter Jet states that, in fact, it filed an answer which was dated December 19, 1990, and addressed to Judge Morris. Jet submits that this case was assigned to Judge Morris in an order dated November 1, 1990, and, thus, that it believed all correspondence was to be sent to Judge Morris. However, the order of assignment to Judge Morris referred to by Jet does not involve Docket No. WEST 90-347-M, the present proceeding, but rather an unrelated proceeding involving Jet, Docket Nos. WEST 90-273-M and WEST 90-274-M.

It appears that Jet, proceeding without benefit of counsel, may have confused the roles of Judge Merlin and Judge Morris in this proceeding. It also appears that Jet may have responded, or attempted to respond in a timely manner, to Judge Merlin's show cause order. The Commission has generally afforded a party relief from default where it appears that the party's actions were due to inadvertence, mistake, or excusable neglect. See, e.g., Amber Coal Company, 11 FMSHRC 131, 132 (February 1989). In light of these considerations, we conclude that the operator should have the opportunity to present its position to the judge, who shall determine whether ultimate relief from default is warranted. See, e.g., Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the foregoing reasons, we grant Jet's petition for discretionary review, vacate the judge's default order and civil penalty assessment, and remand this matter to the judge for appropriate proceedings. Jet is reminded to file documents connected with this proceeding with the judge and to serve counsel for the Secretary with copies of any of its filings. 29 C.F.R. §§ 2700.5(b), 2700.7.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Duane S. Frehner
Jet Concrete Inc.
112 W. Brooks Avenue
North Las Vegas, Nevada 89030

Catherine R. Lazuran, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson St., Suite 1110
San Francisco, CA 94105

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 90-432
RICKY DAVIS, Employed by WAMPLER BROTHERS COAL CO., INC.	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On February 13, 1991, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Ricky Davis ("Davis"), employed by Wampler Brothers Coal Co., Inc., in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. Davis had been cited under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for, allegedly, knowingly ordering a violation of 30 C.F.R. § 75.1701. The judge assessed the civil penalty of $800 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On February 21, 1991, the Commission received correspondence from Davis in which he states that he had received a "letter" informing him that he had failed to respond to a "letter," and directing him to pay $800. Davis asserts that he had mailed a response on December 17, 1990, to J. Philip Smith, an attorney with the Department of Labor's Regional Solicitor's Office in Arlington, Virginia. Mr. Smith has informed the Commission's Docket Office that his files do not contain a response from Davis.

The judge's jurisdiction in this proceeding terminated when his default order was issued on February 13, 1991. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. 823(d)(2); 29 C.F.R. § 2700.70(a). Here, Davis's letter, received by the Commission on February 21, 1991, seeks relief from the judge's default order. We will treat it as constituting a timely petition for discretionary review. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

The record discloses that upon preliminary notification by MSHA of the civil penalty proposed for his alleged violation, Davis filed a "Blue Card" request for a hearing before this independent Commission. On October 5, 1990, counsel for the Secretary served Davis with the Secretary's penalty proposal. When no answer to the penalty proposal was filed, the judge, on November 28, 1990, issued a show cause order directing Davis to file an answer within 30 days or show good cause for his failure to do so. As noted, Davis alleges that he mailed a response on December 17, 1990, to Smith in the Solicitor's office. Under the Commission's rules of procedure, the party against whom the penalty is sought must file an answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & .28.

It appears that Davis, proceeding without benefit of counsel, may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. It also appears that Davis may have timely responded, or attempted to respond, to the judge's show cause order. In accordance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission will afford relief from default upon a showing of inadvertence, mistake, or excusable neglect. See, e.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989).

On the basis of the present record, we are unable to evaluate the merits of Davis' position but we will permit Davis the opportunity to present his position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

Accordingly, we vacate the judge's default order and remand this matter for further proceedings. Davis is reminded to file all documents and correspondence with the Commission, and to serve the Regional Solicitor's Office with copies of all such filings. 29 C.F.R. §§ 2700.5(b) & .7.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Ricky Davis
General Delivery
Shelby Gap, Kentucky 41563

J. Philip Smith, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 1991

STENSON BEGAY	:	
	:	
v.	:	Docket No. CENT 88-126-D
	:	
LIGGETT INDUSTRIES, INC.	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988), is on remand to the Commission from an opinion of the United States Court of Appeals for the Tenth Circuit affirming the decision of Commission Administrative Law Judge Roy J. Maurer in this matter. Liggett Indus., Inc. v. FMSHRC, ___ F.2d ___, No. 89-9546 (January 9, 1991), aff'g, 11 FMSHRC 887 (May 1989)(ALJ). (The judge's decision became a final decision of the Commission through operation of the statute. 30 U.S.C. § 823(d)(1).) In its decision, the Court indicated that counsel for complainant Stenson Begay had requested the Court to award him attorney fees for legal services rendered in the Court proceedings and had argued to the Court that such fees are statutorily mandated. Slip op. at 7. The Court stated, however, that this "matter should first be considered by the ALJ." Id.

In accordance with the Court's order to the Commission, this matter is remanded to Judge Maurer for further appropriate proceedings consistent with the Court's opinion.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 1991

DONALD NORTHCUTT, GENE MYERS, and TED EBERLE	:	
v.	:	Docket No. CENT 89-162-DM
IDEAL BASIC INDUSTRIES, INC.	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

ORDER

This discrimination proceeding under the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act") is before the Commission on interlocutory review.

On January 31, 1991, the petition for interlocutory review filed on behalf of Ideal Industries, Inc., ("Ideal") was granted. [1] In its petition, Ideal seeks review of the December 7, 1990 Order of Commission Administrative Law Judge John J. Morris. Specifically, Ideal urges that the final disposition of the proceeding will materially advance upon immediate review of the following issues: (1) Does a miner's claim that he was discharged in retaliation for filing a workers' compensation claim state a claim for which relief can be granted under section 105(c) of the Act, and if so, (2) Is this claim barred under the doctrine of res judicata where the miner has already settled and dismissed with prejudice his workers' compensation retaliatory claim in federal district court. Subsequent to filing the instant petition, Ideal received the December 14, 1990 Order of the judge, which purported to set forth the scope of the issues pending in the subject section 105(c)(3) action. Ideal filed an amendment to its petition seeking Commission clarification of the issues pending before the judge. Amendment at 1.

For the reasons that follow, we decline to rule that, as a matter of law, the filing of a workers' compensation claim fails to constitute a protected activity under section 105(c) of the Act; we remand, for reconsideration the issue of whether the doctrine of res judicata bars the subject complaint of discharge; and we clarify the specific issues pending before the judge.

We have reviewed the record in this case, and the record of the predicate section 105(c)(2) discrimination case docketed at No. CENT 88-142-D. We conclude that it is necessary, at this juncture, to set forth

---

[1] The petition was filed by Holnam, Inc., described by counsel as "successor by operation of law to Ideal Basic Industries, Inc...."

the specific issues pending before the judge.

The instant action has been filed pursuant to section 105(c)(3) of the Act. To be valid a complaint thereunder must allege violations that were investigated by the Secretary of Labor and were determined by the Secretary not to be violative of section 105(c)(1) of the Act.

In this case the clearest indication of the issues investigated by the Secretary is contained in the predicate section 105(c)(2) complaint of discrimination and discharge filed by the Secretary on behalf of the complainants and others on August 23, 1988 and docketed at No. CENT 88-142-D. [2] In that complaint, the Secretary alleged that the complainants engaged in two forms of protected activity: (1) prior to October 16, 1987, complainants filed Oklahoma State workers' compensation claims based on disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant, and (2) complainants made safety complaints to supervisors and agents of Ideal. The Secretary also alleged three separate adverse actions taken by Ideal: (1) Ideal discriminated against the complainants by requiring them to wear respirators and hearing protection devices that were different from those required of other miners performing the same job, and in more areas of the mine than other miners, (2) complainants were disciplined for failure to comply with such disparate requirements and (3) that Ideal's "discrimination and, or discharge of complainants was in violation of section 105(c)(1) of the Act." Complaint at 3.

Thus, the complaint filed by the Secretary on behalf of the complainant miners alleged illegal discharges because the complainants engaged in the two aforementioned protected activities. Although the Secretary failed to set forth any details regarding the discharges, the record discloses that discharges allegedly occurred in April of 1988. Order of December 7, 1990 at 4.

On July 28, 1989, the Secretary and Ideal filed a joint "motion to approve settlement agreement and motion to withdraw." In that document, Ideal effectively admitted engaging in the first two of the three alleged adverse actions charged by the Secretary. In that same motion, the Secretary effectively determined that no discriminatory discharge violation had occurred. The motion contained the following:

> The Secretary of Labor, after further review and evaluation, has determined that there is an insufficient basis for the Secretary to proceed with the claim of discriminatory discharge of any of the complainants.

Motion at 4.

---

[2] The complaint was amended on November 4, 1988. However, the amendment contained therein related only to the amount of civil penalty sought by the Secretary.

In his Decision Approving Settlement, on August 3, 1989, Commission Administrative Law Judge Michael A. Lasher Jr., properly construed the Secretary's withdrawal of the allegation of discriminatory discharge to have triggered the provisions contained in section 105(c)(3) of the Act:

> (Complainant and Respondent have agreed that the Secretary of Labor's withdrawal shall not prejudice the rights of the individual claimants to pursue, pursuant to 30 U.S.C. § 815(c)(3) and 29 C.F.R. § 2700.40(b), 41(b) and 42(a), their allegations of discriminatory discharge).

Decision at 2.

Consequently, at the conclusion of the predicate section 105(c)(2) action filed by the Secretary on behalf of the complainants (No. CENT 88-142-D), only one of the three allegations of violation of section 105(c)(1) survived. Specifically, the surviving allegation was that: complainants were illegally discharged because they had engaged in two protected activities: (1) filing workers' compensation claims based upon disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant, and (2) making safety complaints to supervisors and agents of Ideal. Accordingly, this allegation of violation was the sole allegation which could properly have been the subject of a complaint filed pursuant to section 105(c)(3) of the Act.

After review of the subject section 105(c)(3) complaint filed September 11, 1989, and complainants' statement of issues filed February 12, 1990, in response to Judge Morris' Order of January 23, 1990, we conclude that the case presently pending before Judge Morris does contain the very same allegation of illegal discharge initially filed by the Secretary, i.e., that the complainants were illegally discharged in violation of section 105(c)(1) because complainants engaged in two protected activities: (1) filing workers' compensation claims based on disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant, and (2) making safety complaints to supervisors and agents of Ideal.

To the extent that the record in this matter contains conclusions, findings or orders by the judge that conflict with the foregoing, they are hereby vacated.

Protected Activity

Ideal argues that a miner's claim that he was discharged in retaliation for filing workers' compensation claims fails to state a claim for which relief can be granted, i.e., that such a claim does not constitute an activity protected by § 105(c) of the Act. In relevant part, section 105(c)(1) provides:

> No person shall discharge ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or

> safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ...

(emphasis supplied).

This issue has not been the subject of prior review by the Commission, but several Commission administrative law judges have found the existence of protected activity when agencies other than the Mine Health and Safety Administration were contacted regarding health or safety hazards. [3]

In the predicate section 105(c)(2) action before Judge Lasher, Ideal moved for dismissal or summary judgment based upon the same argument. In denying the motion Judge Lasher held:

> [T]he filing by a miner with an appropriate state agency of a claim for Workmen's Compensation can in the abstract be considered to be a notification to a mine operator of an alleged danger or safety or health violation as provided in section 105(c)(1) of the Act. Whether such claim should be so considered and become a protected activity can only be determined on the basis of all the evidence. In this connection, in the perspective of the issue raised on motion for dismissal or summary judgment, it is pointed out that Petitioner has specifically alleged that the Oklahoma State Workmen's Compensation claims were "based on disabilities allegedly caused by hazardous conditions ...." Petitioner also contends that such claims are complaints "related" to the Mine Act.

Order of June 13, 1989, at 2.

We agree with Judge Lasher that the issue is not summarily disposed of by exclusive reference to the text of section 105(c) of the Act. The factual context in which the alleged activity occurred is determinative of whether the activity is protected.

Accordingly, we conclude that the issue of whether the filing of workers' compensation claims is a protected activity is a proper subject of litigation in this case. To the extent that the record in this matter contains conclusions, finding or orders that conflict with the foregoing,

---

[3] See Secretary of Labor on behalf of William Johnson v. Borden Inc., (Chemical Div., Smith-Douglass), 3 FMSHRC 926, (April 13, 1981); Johnny Howard v. Martin-Marietta Corp., 3 FMSHRC 1599, (June 19, 1981); Secretary of Labor on behalf of Joseph Gabossi v. Western Fuels-Utah, Inc., 9 FMSHRC 1481, 1505 (August 21, 1987), remanded on other grounds, 10 FMSHRC 953 n. 3 (August 15, 1988). But see Randy J. Collier v. Great Western Coal, Inc., 12 FMSHRC 35, (January 9, 1990).

they are hereby vacated.

Res judicata

Ideal argues that the subject claim of illegal discharge under the Mine Act is barred by the doctrine of res judicata because the complainants previously settled and dismissed with prejudice workers' compensation retaliatory discharge claims in federal district court.

Prior to the initiation of the instant case, Ideal filed a civil action against complainants and other employees in the U.S. District Court for the Eastern District of Oklahoma charging, inter alia, violations of the Racketeer Influenced and Corrupt Organizations Act (Case No. 88-186-C). Complainants interposed a counterclaim alleging that Ideal discharged them in retaliation for filing state workers' compensation claims in violation of Oklahoma State law. However, on June 2, 1989, the parties consented to entry of an order whereby the complainants voluntarily dismissed with prejudice the counterclaim which alleged "workers' compensation retaliation wrongful discharge." Order at 1.

Reciting the foregoing, Ideal moved to dismiss the complaint in the instant case on the basis of res judicata. In his order of December 7, 1990, denying the motion, the judge concluded that "... different causes of action were involved in the District Court case and the case before the Commission." Order at 4. In explaining the basis for his legal conclusion, the judge said:

> As indicated in this order, the issue of whether a workman's compensation claim is an activity protected under the Act is not an issue in this case. Such issue will not be decided, since it was dismissed with prejudice in the case filed before Judge Lasher. (CENT 88-142-D).

Order of December 14, 1990 at 4.

As we have indicated earlier, the workers' compensation claim issue was not dismissed with prejudice by Judge Lasher and is presently pending. Accordingly, we remand this issue to the judge for reconsideration.

Without intimating an opinion on this issue, we note that the Commission has previously considered the issue of res judicata and its impact upon matters arising under section 105(c) of the Act. Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 4, 1982), 2 MSHC 1729. There the Commission set forth a framework for analyzing application of res judicata to section 105(c) actions. The dismissed counterclaim should be compared to the present section 105(c)(3) complaint in light of the principles set forth in Bradley.

For the foregoing reasons, this matter is hereby remanded to the judge.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Michael C. Towers, Esq.
Fisher & Phillips
1500 Resurgens Plaza
945 East Paces Ferry Rd.
Atlanta, Georgia 30326

Benn A. Goff, Esq.
Goff and Meador
6301 Gaston Ave., Suite 520
Dallas, Texas 75214

J. Warren Jackmsn, Esq.
Pray, Walker, Jackman, Williamson & Marlar
Ninth Floor
Oneok Plaza
Tulsa, Oklahoma 74103

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Spper Boulevard
Denver, Colorado 80204

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 6 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 90-117-M A. C. No. 54-00001-05503 BOY
v.	:	
MAR-LAND INDUSTRIAL CONTRACTOR, INCORPORATED, Respondent	:	Ponce Cement or Ponce Cement Plant

DECISION

Appearances: Jane S. Brunner, Esq., U. S. Department of Labor, Office of the Solicitor, New York, New York, for the Secretary;
Daniel Dominguez, Esq., Miguel A. Maza, Esq., Dominguez and Totti, Hato Rey, Puerto Rico, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Proposal for Assessment of Civil Penalty in which the Secretary (Petitioner) alleged that the Operator (Respondent) violated 30 C.F.R. § 56.15005. Pursuant to notice, the case was heard in Hato Rey, Puerto Rico on December 3, 1990. Anibal Colon Deffendini, Johnny Torres Garcia, German Matos Hernandez, and Roberto Torres-Aponte testified for Petitioner. Jose Luis Ortiz Gonzalez, Miguel A. Garcia, and Sidney Kaye testified for Respondent. Petitioner filed Proposed Findings of Fact and a Memorandum of Law on January 13, 1991. Respondent filed a Legal Memorandum and Proposed Findings of Fact on February 22, 1991.

Findings of Fact and Discussion

I.

On February 19, 1990, Cecilio Caraballo, a rigger employed by Respondent, was performing construction work in the conversion area of Respondent's work site at Puerto Rican Cement. Caraballo, who was working approximately 50 feet off the ground, was wearing a safety belt to which a rope was attached. He

wrapped another rope around a beam to which he attached the rope portion of the belt that he was wearing. He either leaned back or attempted to descend, and then fell to the ground, and was killed. Roberto Torres-Aponte, an inspector employed by MSHA, was the only witness who testified that he actually had examined the safety belt and ropes used by Caraballo. He described the condition of the belt and ropes tied to it as "good" (Tr. 84, 85) Thus, taking into account the fact that there is no evidence that there was anything wrong with the condition of either the belt or ropes, and considering the fact that Anibal Colon Deffendini, Johnny Torres Garcia, and German Matos Hernandez, all of whom witnessed the accident, indicated that the belt and the ropes fell to the ground along with Caraballo, I conclude that the belt was not properly secured to the beam. Hence, the belt was not being worn and used in a safe fashion. Accordingly, I find that Respondent herein did violate Section 56.15005 as alleged in the Citation issued to Respondent by MSHA Inspector Roberto-Torres Aponte.

II.

Clearly the violation herein contributed to the risk of falling. Further, inasmuch as the violation herein led to the death of Caraballo, I conclude that the violation was significant and substantial. (See, Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

III.

Inasmuch as the violation herein resulted in a fatality, I conclude that the violation was of a high level of gravity.

IV.

Essentially it is Respondent's position that it was not negligent with regard to the violation at issue. For the reasons that follow, I disagree.

According to the testimony of three of Respondent's riggers, Deffendini, Hernandez, and Jose Luis Ortiz Gonzalez, Respondent's supervisors conducted weekly meetings, at which time the use of safety belts was discussed. These employees did not testify to any specific instructions or information that was provided at these meetings. No testimony was adduced from any of Respondent's supervisors as to the specific content of the weekly safety meetings pertaining to the use of the belts. Hence, the record before me fails to establish specifically what Respondent told his employees with regard to the use of safety belts, and more importantly, the specific manner in which they were to be

properly secured.[1]/ According to Gonzalez, Victor Vega, Respondent's supervisor, conducted a safety meeting on the morning of February 19, the date of the accident at issue, and talked about how to use safety belts, and the use of other equipment. However, neither Gonzalez nor any other witness testified with regard to the specific instructions or information that was imparted. Thus, the record does not support a finding that any specific instructions were provided by Respondent on February 19, with regard to the need to secure the safety belts and the correct manner to do so.[2]/

There is no evidence that Respondent provided Caraballo or its other employees with any written instructions on the usage of safety belts. Indeed, Respondent's only written safety policy does not mention the use of safety belts (Joint Exhibit A). Additionally, there is no evidence that supervisors were present to observe or supervise the manner in which Caraballo wrapped the rope around the beam, and attached his belt to it. In this connection, I find the testimony of Gonzalez that Vega conducted a safety meeting on February 19, 1990, by itself, insufficient to rebut the testimony of Deffendini, Hernandez, and Johnny Torres Garcia, that, in essence, when Caraballo attached or attempted to attach his belt to the beam there were no supervisors present.

Also, Respondent had notice that its employees were not securing their belts, as it had been served with two imminent danger orders for violations of Section 56.15005, supra, on the ground that employees wearing belts had not tied them off.[3]/

---

[1]/ Indeed, according to Johnny Torres Garcia, he had been working for Respondent for approximately a month prior to February 19,1990, and had not received any instructions from Respondent concerning the use of safety belts.

[2]/ Respondent relies on Colon's testimony that, when Caraballo was hired, he (Colon) informed him of the need to wear a belt and instructed him in the manner in which it was to be used. This testimony does not establish that Respondent discharged its obligation to instruct on the usage of safety belts, as there is no evidence that Colon, when he instructed Caraballo, was acting pursuant to directions from management rather than on his own initiative.

[3]/ The most recent such order was issued February 18, 1989.

There is no evidence that Respondent took any action in response to such notice to ensure that employees properly secure their safety belts.[4]/

Considering all of the above, I conclude that Respondent was highly negligent in not adequately instructing and supervising its employees in proper methods to be used in securing safety belts.

A toxicological analysis of Caraballo's urine indicated the presence of .30 mcg/ml benzoylecgonine, a substance the liver metabolizes from cocaine, evidencing the fact that Caraballo had ingested cocaine at some time before his death. (The report indicated that the examination of the nasal passages was negative for cocaine and there was no cocaine detected in Caraballo's blood). As explained by Sidney Kaye, an eminent toxicologist, in essence, once ingested cocaine has been metabolized to benzoylecgonine, as was the case with Caraballo, it would cause depression which could be "deep" (Tr. 129). The depression can produce confusion, tiredness, muscle spasm, anxiety, restlessness, and a lessened ability to concentrate and remember. However, Kaye indicated that he had no way of knowing how much cocaine Caraballo had taken and how long he had taken it prior to the accident. Also, no evidence was adduced with regard to a correlation between the level of benzoylecgonine present in the urine and the degree of impairment in concentration. Thus there is nothing in the record to indicate that the level of benzoylecgonine in Callaballo's urine was of a sufficient amount to have caused a significant deterioration in his concentration and memory so as to have significantly impaired his ability to properly perform the task of securing his safety belt. Thus, I find that although Caraballo's concentration and memory might have been impaired due to the ingestion of cocaine, the record is insufficient to predicate a finding as to the degree of impairment in these functions as a consequence of the ingestion of cocaine. Hence, the presence of .30 mcg/ml of benzoylecgonine

---

[4]/ Miguel A. Garcia, Respondent's President and Project Manager at the subject site, testified that Respondent, in general, had a policy of issuing warnings for safety infractions. Also, Gonzales testified that Respondent had reprimanded him for failing to tie off his belt. I find this evidence is insufficient to establish that Respondent had either provided specific instruction in the requirement and manner of securing a belt or taken any supervisory action to monitor that belts were being secured properly.

in Caraballo's urine does not, per se, diminish Respondent's negligence to any significant degree. Accordingly, I conclude that the violation herein was as a result of Respondent's high level of negligence.[5]/

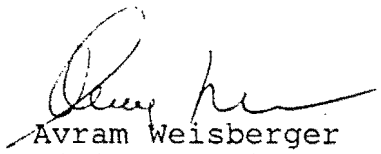
Taking into account the remaining statutory factors as stipulated to by the Parties, I conclude that a penalty of $5000 is appropriate for the violation found herein.

5/ Respondent has cited North American Coal Corp., 3 IBMA 93 (April 1974), and Peabody Coal Corp.,, not officially reported, 1 MSHC 1676 (Judge Koutras, August 30, 1978) for the principle that an employer can not be held responsible for insubordinate acts of its employees, where the former has a policy promoting safety which it consistently applies. I do not find these cases to relevant to the instant proceeding. In North American, supra, the Operator was cited for violating 30 C.F.R. § 75.1720(a), which mandated that miners are required to wear safety goggles. Accordingly, the Commission held that a violation did not occur where the failure to wear goggles is entirely the result of the employees' negligence or disobedience. In contrast, in the case at bar, the evidence does not establish that the violation was entirely the result of Caraballo's negligence or misconduct. The Commission in North American, supra, in essence, held that an Operator is in compliance with the mandate of requiring miners to wear goggles when it establishes a safety system to assure the wearing of such equipment.

In Peabody Coal Corp., supra, the Operator was cited for a violation of 30 C.F.R. § 77.1710 which mandates that miners shall be required to use safety belts and lines where there is a danger of falling. In holding that a violation did not occur, Judge Koutras noted that a miner who was not wearing a belt, was acting contrary to posted and published instructions. In the case at bar, the evidence fails to establish posted and published instructions with regard to the need to secure a safety belt and the proper manner to do so. Davis Mechanical Construction, Inc., 5 OSHC 1789 (June 2, 1977), and Constructora Maza, Inc., 2 OSHC 3079 (July 8, 1974), involve alleged violation of safety standards set forth in Title 29 of the Code of Federal Regulations, and hence are not binding in the present proceeding which involves a violation of a differently worded regulation set forth in Title 30 of the Code of Federal Regulations.

ORDER

It is **ORDERED** that, within 30 days of this Decision, Respondent pay $5000 as a Civil Penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Jane S. Brunner, Esq., Office of the Solicitor, U. S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014 (Certified Mail)

Daniel Dominguez, Esq., Miguel A. Maza, Esq., Dominguez and Totti, P. O. Box 1732, Hato Rey, PR 00919 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 6, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 90-126 A. C. No. 01-00323-03638
v.	:	Chetopa Mine
DRUMMOND COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Douglas N. White, Esq., and Carl C. Charneski, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia; and George D. Palmer, Esq., and William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Petitioner. Thomas C. Means, Esq., and J. Michael Klise, Esq., Crowell and Moring, Washington, D.C.; David M. Smith, Esq., Maynard, Cooper, Frierson and Gale, Birmingham, Alabama; and J. Fred McDuff, Esq., Drummond Company, Inc., Birmingham, Alabama, for the Respondent.

Before: **Judge Merlin**

Statement of the Case

This action is a petition for the assessment of six civil penalties filed by the Secretary of Labor against Drummond Company, Inc., under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), hereafter referred to as the "Act".

Drummond Company, Inc., hereafter referred to as the "operator", has filed a motion to remand for reassessment by the Secretary of proposed civil penalties and a memorandum in support thereof. The Secretary has filed a motion and brief in opposition to the motion to remand. Thereafter the operator filed a reply brief. On February 28, 1991, oral argument was heard on the motions.

The parties have agreed to the following stipulations which were accepted at the oral argument (Tr. 3): (1) the operator is the owner and operator of the subject mine; (2) the operator and the mine are subject to the provisions and jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) the Administrative Law Judge of the Federal Mine Safety and Health Review

Commission has jurisdiction in this case; (4) only the proposed penalties in Docket No. SE 90-126 are the subject of the motion to remand; the Secretary agrees that the stipulations and exhibits are true and accurate, but objects to the consideration and/or admissibility of the same on the grounds of relevancy; (5) Program Policy Letter No. P90-III-4, is a true and accurate copy of the policy implemented by the Mine Safety and Health Administration, hereafter referred to as "MSHA", in assessing the penalties in this case; (6) as set forth in the letter and as was applied herein, excessive history is defined as "11 or more repeat violations of the same health or safety standard in a preceding 1-year period"; (7) as set forth in the letter and as was applied herein, if the excessive history of each citation consisted of between 11 and 25 violations inclusive, then the proposed penalty was increased 20%. If the excessive history of each citation consisted of between 26 and 40 violations inclusive, then the proposed penalty was increased 30%; (8) the foregoing policy was implemented in this case resulting in four citations being increased by 20% and two citations being increased by 30%.

Issue

The operator challenges the method whereby the Secretary arrived at the amount of penalties she has proposed in this case pursuant to section 110(a) of the Act, supra. In particular, the operator disputes the use made by the Secretary of the operator's prior history of violations in reaching the proposed penalties.

Applicable Law and Policy

Section 110(a), supra, directs the Secretary to assess a civil penalty for every violation. Section 105(a), 30 U.S.C. § 815(a), provides that the Secretary shall notify the operator of the proposed penalty and of appeal rights. Section 105(b)(1)(B), 30 U.S.C. § 815(b)(1)(B), directs the Secretary in determining the proposed penalty to consider the following six factors: the operator's history of previous violations, the appropriateness of the penalty to the size of the operator's business, negligence, the effect on the operator's ability to continue in business, gravity, and demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Section 105(a), supra, allows the operator 30 days to notify the Secretary of its intention to contest a proposed penalty assessment. If the operator does not contest the proposed assessment within the time allowed, the proposed assessment is deemed a final order of the Commission not subject to review by any court or agency. Under section 105(d), 30 U.S.C. § 815(d), when the operator notifies the Secretary of its intention to contest the proposed assessment, the Secretary must immediately

advise the Commission and the Commission must afford an opportunity for a hearing under the Administrative Procedure Act.

Pursuant to section 110(i), 30 U.S.C. § 820(i), the Commission has the authority to assess all penalties provided for in the Act and in so doing it must consider the same criteria that the Secretary considers in proposing penalties.

In implementation of her responsibilities under sections 105(a) and (d) and 110(a), supra, the Secretary adopted 30 C.F.R. Part 100. These regulations establish a tripartite scheme for calculating the amount of proposed civil penalties.

The first method is the $20 single penalty assessment. 30 C.F.R. § 100.4. This applies where a violation is not reasonably likely to result in a reasonably serious injury, hereafter referred to as "non S&S", and is abated within the time set by the inspector. As discussed infra, under the single penalty assessment the remaining four criteria, including history of violations, are not individually analyzed in each case.

The second method is the regular assessment formula. 30 C.F.R. § 100.3. The penalty computation is based upon the six factors in section 105(b)(1)(B), supra. Points are given on a sliding scale for each of the criteria and a penalty conversion table translates the points into a dollar amount. Of particular interest for present purposes is the fact that as originally enacted, a history of single penalty assessments was expressly excluded from an operator's history of previous violations when the regular formula was used. 30 C.F.R. § 100.3(c).

The third method is the special assessment which provides that MSHA may waive the regular or single penalty assessments if it determines that conditions surrounding the violation warrant a special assessment. 30 C.F.R. § 100.5. Some types of violations may be of such a nature or seriousness that an appropriate penalty cannot be determined by the first two methods. Under such circumstances, eight categories are identified and are to be reviewed to determine whether a special assessment is appropriate. Special assessments are also to take into account the six criteria.

The genesis of the issues presented in this case is to be found in the decision of the Court of Appeals for the District of Columbia in Coal Employment Project, et al. v. Dole, 889 F.2d 1127 (1989), where the validity of the single penalty assessment was challenged on the ground that under that method individualized consideration was not given to all six statutory criteria. As set forth above, a single penalty assessment of $20 is

levied for a non S&S violation that is timely abated, but where separate consideration is not given to the other criteria.

The court of appeals held that the Secretary was not required to adopt an individualized approach to all six criteria and that as a general matter assessment of penalties according to group classifications based upon the presence or absence of specific criteria was a reasonable interpretation of the Act. The court approved the use of a non-generalized approach with respect to the operator's size, ability to continue in business, and negligence. Id. at 1134-1136.

The court however, expressed far different views regarding prior history of violations which it described as an especially important criterion in Congress' eyes. Id. at 1136. The court cited the legislative history of the Act to demonstrate that Congress had been concerned with repeat offenders and it said that Congress intended that civil penalties provide an effective deterrent against all offenders and particularly against offenders with records of past violations. The court then pointed out that violation history figured in the validity of the single penalty assessment in two ways: (1) its presence or absence in the single penalty assessment under section 100.4; and (2) the omission of single penalty assessments from history in application of the regular and special assessment formulas. Id. at 1136.

The court then turned to two scenarios to illustrate its concerns. In the first situation, an operator who commits a series of non S&S violations that are timely abated would only incur a string of $20 penalties. The court believed this was contrary to Congress' intent that the more prior infractions incurred, the higher the current penalty should be and that there was no evidence Congress did not mean this approach to apply to violations governed by the single penalty assessment. Unpersuaded by MSHA's representations about how the penalty scheme was in fact administered, the court held that the scheme must take into account the operator's history of violations whether they are significant and substantial, hereafter referred to as "S&S", or non S&S. MSHA regulations were, therefore, held unreasonable because they did not provide a method for imposing higher penalties against operators who commit numerous non S&S violations. Id. at 1136-1138. Accordingly, the court's decision may be fairly interpreted to hold that the failure to take account of previous non S&S violations in determining the assessment of a current non S&S violation was error.

In the second situation described by the court, an operator commits an S&S violation after a series of single penalty assessments. Section 100.3(c) provided that the history of single penalty assessments would not be included in a penalty computation under the regular assessment formula. Contrary to the

regulations, MSHA represented to the court that where an S&S violation was repetitious, i.e. similar to the prior non S&S violation, it could be subject to special assessment. Even assuming this were true, the court pointed out that if the later S&S violation was not repetitious of the earlier non S&S violation, only a regular assessment would be generated which would not take into account prior non S&S violations. Id. at 1138.

Therefore, the court remanded the case to (1) resolve the inconsistencies between MSHA's regulations and its representations to the court so as to insure that MSHA took account of past single penalty violations in deciding whether a special assessment is required when a current violation itself might qualify for a single penalty assessment and (2) to amend or establish regulations to clarify how administration of the single penalty standard would take account of the history of both S&S and non S&S violations. In the interim until MSHA formally complied with the remand, it was directed to instruct field personnel (1) to consider an operator's history of non S&S violations in assessing a single penalty assessment and (2) to consider an operator's history of past single penalty assessments when imposing regular assessments against an operator who commits an S&S violation after having committed a series of non S&S violations. Id. at 1138.

MSHA initially responded to the court's order by issuing interim regulations. 54 Fed. Reg. 53609 (1989). These instructions (1) called for a special assessment review of non S&S violations involving high negligence and excessive history of the same type of violation and (2) suspended the sentence in section § 100.3(c) which excluded prior single penalty assessments from the regular assessment formula. In a per curiam opinion dated April 12, 1990, the court disapproved the use of a high negligence factor, but did not disturb the partial suspension of section 100.3(c), noted herein. The court also told MSHA to devise a suitable interim replacement responding to the court's concerns within 45 days and noted MSHA's intention to publish a proposed final rule by August, 1990. Coal Employment Project v. Dole, 900 F.2d 367, 367-368 (D.C. Cir. 1990).

Thereafter on May 29, 1990, MSHA issued Program Policy Letter No. P90-III-4. This letter states it is implementing a program of higher penalties for violations that meet a new "excessive history" criteria. For each violation both an overall history of violations and a repeat history of the same mandatory standard are calculated. Excessive history is defined as (1) 16 or more penalty points as derived from the table appearing in section 100.3(c) for the calculation of prior history points under the regular assessment formula or (2) 11 or more repeat violations of the same standard within a preceding one year period.

The program policy letter further provides that non S&S violations with excessive history are no longer eligible for the single penalty assessment and that MSHA elects to waive the single penalty in such cases and to assess penalties under the regular formula. In addition, S&S violations with excessive history that previously would have received a regular formula assessment will now receive a special history assessment, since MSHA elects to waive the regular formula assessment and assess under the special assessment method. Finally, the special history assessments for S&S violations are based on the regular formula point system plus a percentage increase for excessive history which will be added to the penalty. The percentage increases consist of three progressive increments of 20% to 40% based upon overall history points or number of repeat violations.

In the instant case the six contested violations were specially assessed pursuant to the program policy letter. Four violations cited under 30 C.F.R. § 75.503 were subject to a 20% increase in their regular assessments and two violations of 30 C.F.R. § 75.400 were subject to a 30% increase. (Stipulation No. 8).

The operator does not question the court's decision or directives in Coal Employment Project, et al. v. Dole, supra. Rather, it alleges that the program policy letter goes beyond what the court ordered, that the letter is contrary to the court's decision as well as to the Act and regulations, and that the letter was promulgated without notice and comment as required by the Administrative Procedure Act.

Jurisdiction

The threshold issue is whether or not I have jurisdiction to entertain the issues presented. In this respect, the Commission's decision in Youghioghney & Ohio Coal Company, 9 FMSHRC 673 (1987), is instructive. In that case the operator argued that since the Secretary had not complied with the Part 100 regulations in proposing penalties the case should be remanded to MSHA for reconsideration of the penalties. 9 FMSHRC at 679. The Commission held that since the administrative law judge had conducted an evidentiary hearing on the merits, no compelling legal or practical purpose would be served by requiring the Secretary to undertake again the proposing of the penalties. In the Commission's view, a preferable record had already been developed which allowed the Commission to assess penalties under its de novo authority. Once a hearing had been held, the

determination by the Commission or one of its judges that the Secretary failed to comply with Part 100 did not require affording the Secretary further opportunity to propose penalties. The Commission however, also stated:

> * * * * We further hold, however, that in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations.
>
> * * * *
>
> We further conclude, however that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings.* * * *

Id. at 679-680.

In the instant case there has been no hearing on the merits. At the very outset the operator raised the issue of the validity of the method pursuant to which the Secretary proposed the six penalties involved here. Therefore, this case falls within the Commission's pronouncement that where there is no record, the Commission can require the Secretary to re-propose penalties if the operator proves the Secretary has not followed Part 100. (Operator's Reply Brief, p. 2).

The Solicitor's argument that the Commission's statements regarding jurisdiction are only suggestions cannot be accepted. (Solicitor's Brief, pp. 8-9). As set forth above, the Commission described its declaration as a holding and a conclusion. And its statements regarding what may be done in a situation like this case are straightforward and definitive. As for the Solicitor's assertion that the Commission is wrong in this respect, it need only be remembered that decisions of the Commission are binding upon its judges. I have previously rejected as mischievous any notion that I am at liberty to depart from Commission teachings. U. S. Steel Mining Company, Inc., 5 FMSHRC 746 (May 1986). The Solicitor's further assertion that this case is distinguishable

from Youghiogheny & Ohio, because it does not involve the Secretary's failure to abide by her own penalty regulations, also must be rejected. (Solicitor's Brief, p. 9). The operator contends that the Secretary's present attempt to propose penalties is based upon the invalid instructions of the program policy letter. (Operator's Brief, pp. 4-5; Operator's Reply Brief, pp. 2-4). If the instructions are found invalid, the Secretary must then propose penalties in accordance with Part 100 without recourse to the instructions. In other words, the operator's allegation is that at present the Secretary is not following Part 100 without the added instructions of the program policy letter which the operator believes are illegal. This case is therefore, within the purview of Youghiogheny & Ohio.

Accordingly, I conclude I have jurisdiction to consider the issues presented.

The Court's Interim Mandate

We turn now to the validity of the method whereby MSHA has proposed penalty assessments in the instant case. This inquiry depends in the first instance upon whether the method used by MSHA as set forth in the May 29, 1990, Program Policy Letter conforms to the court's decision and order in Coal Employment Project v. Dole, supra. As already noted, the operator does not contest the court's instructions to MSHA. The questions presented are what the mandate means and whether MSHA's letter complies with it. As explained heretofore, the court approved the single penalty assessment with respect to three of the four statutory criteria which received group classification treatment. The court however, took a different stance with respect to history of prior violations. The court emphasized that this factor was of singular significance in the adoption and administration of the Act and directed its attention to the effect given by Part 100 to a prior history of single penalty assessments, i.e. non S&S violations that are timely abated. It noted that 30 C.F.R. § 100.4 made no provisions for taking such history into account when proposing a single penalty assessment and that one sentence in 30 C.F.R. § 100.3(c) provided that in proposing regular assessments, a prior history of single penalty violations would not be counted.

The court held first that the regulations were unreasonable because when assessing a current non S&S violation they did not provide a reasonable and consistent method for imposing higher penalties against operators who had committed numerous past non S&S violations. The court further held that with respect to current S&S violations which are not repetitious of earlier non S&S violations, MSHA regulations and policies were deficient because they implied that the current violations would result only in regular assessments which would not reflect the earlier violations. Accordingly, the court ordered MSHA, inter alia, to

establish regulations to clarify how the single penalty assessment would take account of both a non S&S and an S&S history. In the interim the court required MSHA (1) in assessing single penalties to consider an operator's history of non S&S violations and (2) to consider a past history of single penalties when imposing regular assessments against operators who have a current S&S violation.

The May 29, 1990, Program Policy Letter establishes a new element which the Secretary must take into account when proposing civil penalties under the Act. As already explained, this element, entitled "excessive history", comes into existence either when an operator has more than 16 penalty points as derived from Table 6 in section 100.3 of the regulations or more than a given number of repeat violations of the same health and safety standard. In its "Background" discussion the letter states that increased assessments at mines with an excessive history of both S&S and non S&S violations should serve as a more effective deterrent. Clearly, therefore, excessive history encompasses both categories of violations.

The program policy letter's adoption of an excessive history standard which includes both S&S and non S&S violations, exceeds the court's interim mandate. To be sure, the court conducted a wide ranging analysis of the crucial part played by prior history in proposing and assessing penalties. But in considering the challenge before it to the single penalty assessment, the court focused upon the history of single penalty assessments as that history relates to assessments of current S&S violations and current non S&S violations. The first hypothetical given by the court was of an operator who commits a series of non S&S violations and receives only a string of $20 penalties, i.e. an operator with a current non S&S violation after of history of previous non S&S violations. The second hypothetical was concerned with an operator who commits a current S&S violation (non-repetitious) after an earlier series of non S&S violations. With these examples in mind, the court directed the Secretary as an interim matter to consider an operator's history of non S&S violations both in assessing current single penalties and imposing current regular assessments. The program policy letter goes beyond the court's interim instructions because it deals not only with the operator's history of non S&S violations but also with its S&S history.

In light of the foregoing, the program policy letter's declaration that non S&S violations with excessive history are no longer eligible for the single penalty assessment cannot be accepted as within the confines of what the court allowed MSHA to undertake immediately.

So too, the program policy letter's pronouncement that S&S violations with an excessive history will now receive a special

history assessment, as set forth heretofore, with percentage increments in penalty amounts also cannot be approved. The terms of the interim mandate are clear and the program policy letter goes beyond them.[1]

Finally, it must be recognized that the court in Coal Employment Project v. Dole, supra, contemplated that there would be rulemaking to bring Part 100 in line with the legislative history and purposes of the Act. The second portion of the court's remand directs MSHA "to amend or establish regulations" to clarify how administration of the single penalty standard would take account of a history of violations that did and did not pose significant and substantial threats to miner safety. The court issued its interim mandate for limited agency action until MSHA "formally" complied with the remand. One must not lose sight of the clear distinction between the remand and the interim instructions. The interim instructions concern only the role of a prior non S&S history, whereas the remand, which envisages formal procedures, encompasses a history of both types of violations, S&S and non S&S.

I find unconvincing the Solicitor's representations that the rulemaking now undertaken by the Secretary with respect to prior history and other matters, is voluntary. (Solicitor's Brief, p. 17); 55 Fed. Reg. 53481 (1990). The notice of proposed rulemaking makes clear that it is being undertaken pursuant to the court's remand. The program policy letter is an attempt to put new rules regarding the treatment of history of prior violations on a fast track without reference to the court's intent regarding new regulations which would be adopted pursuant to formal compliance with its remand. In addition, the prospective nature of the proposed rulemaking which applies only to citations and orders issued after January 1, 1991, undercuts the fast track approach of the letter.

Administrative Procedure Act

The next inquiry is whether the program policy letter can stand on its own without reliance upon the court's interim

---

[1] In this connection it is noted that the first interim instructions supra, were plainly correct in suspending the sentence in section 100.3(c) which had excluded timely paid single penalty assessments from an operator's history for regular assessment purposes. The history covered was only that of non S&S violations and the offending sentence was specifically identified by the court. As already set forth, the court's per curiam decision let stand the suspension.

mandate. This depends upon whether notice and comment are required under the Administrative Procedure Act.

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, hereafter referred to as the "APA", provides that when an agency proposes to engage in rulemaking, it must publish notice of the proposed rulemaking in the Federal Register, give interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments with or without opportunity for oral presentation, and publish the final rule incorporating a concise statement of its basis and purpose 30 days before its effective date.

Section 551(4), 5 U.S.C. § 551(4), defines a rule as follows:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

An exception to the notice and comment requirement is however, given by section 553(b)(A), 5 U.S.C. § 553(b)(A):

> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice.

Essential to a proper determination of the instant case is recognition and acknowledgment of the important purposes served by notice and comment. One purpose of the rulemaking process is to insure a thorough exploration of relevant issues culminating in application of agency expertise after interested parties have submitted their arguments. Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33, 39 (D.C. Cir. 1974). Another purpose is to provide that the legislative function of administrative agencies is so far as possible exercised only upon public participation and notice as a means of assuring that an agency's decisions are both informed and responsive. American Bus Association v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). Also, public participation and fairness must be reintroduced to affected parties after governmental authority has been delegated to unrepresentative agencies. Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980). Finally, notice and comment

are necessary to the scheme of administrative governance established by the APA because they assure the legitimacy of administrative norms. Air Transport Association of America v. Department of Transportation, 900 F.2d 369, 375 (D.C. Cir. 1990).

It is likewise critical to recognize the characteristics of "legislative" or "substantive" rules which can only be issued after notice and comment. Substantive rules establish binding norms which determine present rights and obligations. American Bus Association v. United States, supra, at 532. They are rules which carry the force of law and in so doing grant rights, impose obligations or produce other significant effects on private interests. Batterton v. Marshall, supra, at 701-702. Such rules have a present binding effect. Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987).

A particularly salient characteristic of agency action subject to notice and comment is the reduction or elimination of agency discretion. The following are instances where for this reason notice and comment were required. Parole Board guidelines reduced the decision maker's field of vision and defined a fairly tight framework, thereby circumscribing the agency's statutorily broad power. Pickus v. United States Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974). An agency policy letter immediately lifted restrictions against certain carriers and did not even hint to decision makers that they could exercise discretion. American Bus Association v. United States of America, supra, at 531-532. A statistical methodology adopted for computation of unemployment statistics was a formula which left no discretion to weigh or alter contributing elements. Batterton v. Marshall, supra, at 707. A part of an agency's program letter limited state discretion and imposed a new obligation on the states by establishing a mathematical formula for determining contributions to pension funds. Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982). Rules establishing allowable levels of food contaminants cabinned agency enforcement discretion by precluding prosecution of certain producers. Community Nutrition Institute v. Young, supra, at 948. Agency orders shaped and channeled enforcement by eliminating certain specific obligations regarding airline advertising. State of Alaska v. U.S. Department of Transportation, 868 F.2d 441, 447 (D.C. Cir. 1989).

Section 553(b)(A) of the APA, supra, establishes exceptions to notice and comment, one of which is for general statements of policy. In analyzing whether an agency action falls within one of the exceptions under section 553(b)(A), the courts have established certain general principles. Exceptions to notice and comment requirements are to be narrowly construed and only reluctantly recognized. Air Transport Association of America v. Department of Transportation, supra, at 375; American Hospital Association v. Bowen, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987); Batterton v. Marshall, supra, at 704; American Bus Association v.

United States, supra, at 528. In addition, an agency's characterization of its action is given some but not overwhelming deference. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-538 (D.C. Cir. 1986). Thus, an agency's description of an act as a policy statement provides some indication, but an announcement is not necessarily a policy statement because the agency has so labelled it. Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983); General Motors Corporation v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984); Chamber of Commerce v. Occupational Safety and Health Administration, 636 F.2d 464, 468-469 (D.C. Cir. 1980); Pacific Gas and Electric Company v. Federal Power Commission, supra, at 39.

With these precepts in mind, the courts have paid much attention to the attributes of a particular exception. In the case of a general statement of policy, courts have examined whether the statement establishes a binding norm and is finally determinative of the issues or rights to which it is addressed. Pacific Gas and Electric Company v. Federal Power Commission, supra, at 38. Those agency actions that are not binding or finally determinative are viewed as policy statements. Another attribute of a general statement of policy is agency discretion. Just as the absence of agency discretion is a hallmark of a substantive rule, so the presence of such discretion connotes a general statement of policy. A policy statement genuinely leaves the agency and its decision makers free to exercise discretion. American Bus Association v. United States, supra, at 529. Guidelines adopted for use in citing operators and independent contractors under the Mine Safety Act did not constitute a binding substantive regulation, because the language of the guidelines was replete with indications that the Secretary retained discretion to cite operators or contractors as he saw fit. Brock v. Cathedral Bluffs Shale Oil Co., supra, at 538. An agency statement that there were no grounds to delay awarding certain licenses by random selection, i.e. lottery, was not a binding rule but only interpretative, since the agency was not bound to any specific procedures or even to conduct a lottery. National Latino Media Coalition v. Federal Communications Commission, 816 F.2d 785, 789 (D.C. Cir. 1987).

Applying the foregoing principles to the case at hand, I conclude that notice and comment under the APA are required and that until they take place the program policy letter cannot be applied. By every measure, the precepts laid down by the letter must be held to be substantive and not merely a general statement of policy as asserted by the Solicitor. (Solicitor's Brief, p. 11). The letter sets forth the exact numerical levels at which an excessive history comes into being and the letter further details precisely what occurs when these levels are attained. Non S&S violations with excessive history are subject to the regular assessment formula and S&S violations with excessive history are subject to a special history assessment formula

containing prescribed percentage increments in penalty amounts. The Secretary's broad authority under the Act to propose penalties in accordance with the six criteria is channelled, shaped, and indeed circumscribed in a tight framework. Air Transport Association of America v. Department of Transportation, supra; Community Nutrition Institute v. Young, supra; Pickus v. United States Board of Parole, supra. Absent is agency discretion with respect to a large number of cases involving prior history of violations and in place is a rigid mathematical formula which allows no room for maneuver either with respect to the existence or consequences of an excessive history. Batterton v. Marshall, supra; Cabais v. Egger, supra.

Accordingly, if an operator has a certain number and type of violations within a given period it is charged with an excessive history and when it has such a history, its civil penalty liability is increased along prescribed lines. That is what happened in this case. The provisions of the letter were applied and the operator owed more money. Such circumstances demand that interested persons be given notice and opportunity to participate in rulemaking before the letter becomes final. MSHA should welcome the input of those who would be so directly and seriously affected by the dictates of the letter. Without such input the letter lacks requisite legitimacy.

I have carefully reviewed the arguments advanced by the Solicitor with respect to notice and comment, but cannot accept them. The assertion that notice and comment are not required because the letter does not change the penalty proposal and assessment scheme is not persuasive. (Solicitor's Brief, pp. 12-14). Admittedly, the letter does not alter the steps through which each penalty proposal and assessment pass, e.g., assessment conference. 30 C.F.R. § 100.6. However, this case has nothing to do with the procedural framework for determination of individual penalty amounts, or with the division of functions between the Secretary and the Commission, or with the independent authority of the Commission to assess penalties de novo. Rather this case involves imposing additional monetary obligations upon operators pursuant to a new method of penalty calculation without allowing said operators to be heard first with respect to the propriety of the new method.

I also find misplaced the Solicitor's proposition that notice and comment are not required because the Secretary's penalty proposals are not final. (Solicitor's Brief, pp. 13-14; Oral Argument Tr. 38-41, 52-54). The appealability to the Commission of the Secretary's penalty proposals does not mean that notice and comment are unnecessary. The Secretary's proposal function is an indispensable part of the Act's civil penalty scheme. In addition, section 105(a) of the Act, supra, provides that penalty proposals of the Secretary which are not appealed are final and not subject to any kind of review. In fact, almost

all the Secretary's penalty proposals become final under this provision. The appeal rate to the Commission from MSHA proposed assessments were 3.2% in FY'88, 3.7% in FY'89, 4% in FY'90 and 6.7% for the first four months of FY'91.[2] The realities of how the civil penalty system actually works cannot be ignored. Even in cases that come before the Commission, the Solicitor submits sufficient information for the Commission to approve settlements in the amount of the original assessment in a significant percentage of all settlement cases. Thus, in FY'90 the Commission approved settlements in the amount of the Secretary's original proposal in 29% of all settlement cases.[3] The Solicitor's purported distinction regarding finality notwithstanding, Batterton v. Marshall, supra, is precisely on point and its holding that notice and comment are necessary for a methodology of mathematical calculations signifies how this case should be decided. (Solicitor's Brief, p. 16; Operator's Reply Brief, pp. 5-6).

Nor does Air Transport Association of America v. Department of Transportation, supra, support the Solicitor. (Solicitor's Brief, pp. 14-15). The significance of that case is to be found in the extension of notice and comment requirements to the adoption of a procedural framework for adjudication of civil penalties before the Federal Aviation Administration. The majority of the court refused to countenance an exception to the notice and comment requirements for an agency's rules of procedure. What is significant for our purposes is that both the majority and dissent in Air Transport agreed that changes in substantive criteria such as those embodied in the program policy letter are subject to notice and comment. Air Transport, supra, at 375-376, 382.

In this connection also, the Solicitor's representations regarding the allegedly voluntary nature of the proposed rulemaking which the Secretary has undertaken regarding citations issued after January 1, 1991, are not persuasive. As set forth herein, judicial precedent makes clear that notice and comment under the APA are required for the changes the Secretary wants to make. The proposed rulemaking recognizes this and is inconsistent with the attempt of the program policy letter to act without reference to the safeguards of the Administrative Procedure Act.

Finally, notice and comment cannot be excused on the basis of the "good cause" exception. 5 U.S.C. § 553(b)(3)(B). As noted above, the Secretary's initial response to the court's mandate in Coal Employment Project, et. al. v. Dole, supra, was

---

[2] See, Solicitor's response filed February 12, 1991.

[3] See, Memorandum dated February 25, 1991, from Chief Docket Clerk, which was admitted into the record at the Oral Argument as ALJ Exhibit No. 1. (Tr. 4).

interim regulations which relied upon the immediacy of the court's instructions as constituting good cause for dispensing with notice and comment. The court struck down that portion of the interim regulations which it perceived as contrary to its decision. The program policy letter is, of course, not an interim regulation and does not even refer to the good cause exception. The Solicitor's argument that the good cause exception applies because the letter accomplishes the result ordered by the court, must fail in light of the fact that, as held above, the letter goes far beyond the court's interim instructions. (Solicitor's Brief, pp. 18-19).

In light of the foregoing, I conclude that notice and comment under the Administrative Procedure Act are necessary before the program policy letter can be effective.

Conclusion

The foregoing is dispositive of the claims made by the parties. It is noted that the operator also attacks the program policy letter on its merits. The substantive validity of pending changes in the treatment of prior history is presented in the proposed rulemaking. In light of the several holdings rendered herein, it is neither necessary nor appropriate to consider the merits.

Order

In light of the foregoing, it is **ORDERED** that the operator's motion for remand be **GRANTED.**

It is further **ORDERED** that the Secretary recalculate her proposed penalties without reference to Program Policy Letter No. P90-III-4.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

Douglas N. White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, Room 414, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Carl C. Charneski, Esq., Acting Counsel, Appellate Litigation, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Thomas C. Means, Esq., J. Michael Klise, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, NW., Washington, DC 20004-2505 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

J. Fred McDuff, Esq., Drummond Company, Inc., Post Office Box 10246, Birmingham, AL 35202 (Certified Mail)

Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 6, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 90-125 A. C. No. 01-00515-03761
v.	:	Mary Lee No. 1 Mine
DRUMMOND COMPANY, INCORPORATED, Respondent	:	Docket No. SE 90-127 A. C. No. 01-00821-03677
	:	Mary Lee No. 2 Mine
	:	Docket No. SE 90-131 A. C. No. 01-00515-03763
	:	Mary Lee No. 1 Mine
	:	Docket No. SE 91-2 A. C. No. 01-00323-03642
	:	Chetopa Mine
	:	Docket No. SE 91-3 A. C. No. 01-00821-03681
	:	Mary Lee No. 2 Mine
	:	Docket No. SE 91-4 A. C. No. 01-00515-03768
	:	Docket No. SE 91-15 A. C. No. 01-00515-03770
	:	Docket No. SE 91-20 A. C. No. 01-00515-03772
	:	Mary Lee No. 1 Mine
	:	Docket No. SE 91-21 A. C. No. 01-00821-03682
	:	Mary Lee No. 2 Mine
	:	Docket No. SE 91-29 A. C. No. 01-00515-03775
	:	Mary Lee No. 1 Mine

DECISION

Appearances: Douglas N. White, Esq., and Carl C. Charneski, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia; and George D. Palmer, Esq., and William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Petitioner. Thomas C. Means, Esq., and J. Michael Klise, Esq., Crowell and Moring, Washington, D.C.; David M. Smith, Esq., Maynard, Cooper, Frierson and Gale, Birmingham, Alabama; and J. Fred McDuff, Esq., Drummond Company, Inc., Birmingham, Alabama, for the Respondent.

Before: **Judge Merlin**

In accordance with the decision rendered this day in Secretary of Labor v. Drummond Company, Incorporated, Docket No. SE 90-126, it is hereby **ORDERED** that the operator's motions for remand in these case be **GRANTED.**

It is further **ORDERED** that the Secretary recalculate her proposed penalties in these cases without reference to Program Policy Letter No. P90-III-4.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

Douglas N. White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, Room 414, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Carl C. Charneski, Esq., Acting Counsel, Appellate Litigation, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Thomas C. Means, Esq., J. Michael Klise, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, NW., Washington, DC 20004-2505 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

J. Fred McDuff, Esq., Drummond Company, Inc., Post Office Box 10246, Birmingham, AL 35202 (Certified Mail)

Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

/gl

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

MAR 6 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-202-M
v.	:	
IDEAL CEMENT COMPANY, Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

On November 27, 1990, the Commission reversed in part the Judge's decision and remanded this case for further consideration.

In its order of remand the Commission ruled that the absence of side screens on the operator's uni-loader constituted an equipment defect within the meaning of 30 C.F.R. § 56.9002. Specifically, the Commission ruled that:

> Although Allied Chemical Corp. [6 FMSHRC 1854, August 1984] focused on a relatively common type of equipment defect--one affecting the functioning of the equipment--we have no difficulty in concluding that the term 'equipment defect' can also extend to a defective or missing component that does not affect the operation of the equipment. (Slip Opinion at 6).

The Commission further remanded the case for findings of fact and conclusions thereon as specified in the order of remand.

At the hearing the following individuals testified for the Secretary:

Robert E. Stinson, metal and non-metal Inspector for the State of Montana.

Vincent J. Schafer, Ideal maintenance man.

Stephen M. Carey, Ideal heavy equipment operator.

Steven L. Livingood, Ideal control chemist.

Archie Huenergardt, control room operator and lab technician at the time of the accident, now an Ideal electrician.

Marvin Doornbos, Ideal maintenance man.

Stanley Veltkamp, Ideal maintenance man.

Eric Shanholtz, mine safety and health inspector for MSHA.

Darrell Woodbeck, metal and non-metal inspector for MSHA.

The following individuals testified for respondent:

Bert Todd, Ideal yard foreman.

Gary Huls, Ideal production supervisor.

William Fairhurst, Ideal mill supervisor.

Arlene Sherman, Ideal Personnel and Industrial Relations Administrator responsible for plant safety.

Based on a preponderance of the substantial, reliable and probative evidence I enter the following:

FINDINGS OF FACT

1. The side guards on the uni-loader are especially designed in the ROPS to prevent contact with the lifting arms. Mr. Bertagnolli would not have been killed if the side screens had been in place. (Stinson, 254, 257).

2. There were no eyewitnesses to the accident but Inspector Woodbeck concluded Mr. Bertagnolli's head and part of his torso were outside of the uni-loader when the arms raised and pinned him against the top of the ROPS. Side screens would have prevented him from being in this position. (Woodbeck, 357, 375).

3. The purpose of the side screens is to keep your arms out from underneath the loader while you are operating it. (Todd, 404).

4. When the operator sits in the uni-loader everything is "pretty close". (Doornbus, 171).

5. The overall width of the uni-loader was 54 inches. The width between the lifting arms was 45.4 inches. (Specifications pamphlet, Exhibit P-24, third page).

6. Prior to the accident Ideal modified its 1835 Case Uni-loader in the following manner:

a) the ROPS were lowered four inches (Stinson, 320; Sherman, 455).

b) the tires, originally 10 to 11 inches wide, were replaced with 6 to 7 inch wide tires (Schafer, 38; Sherman 445).

c) the company also manufactured a jack hammer attachment. This was not standard equipment from the Case company (Todd, 406).

d) a piece of plywood was attached to the front of the uni-loader (Schafer, 42, 43).

7. Screens on the uni-loader have a tendency to interfere with the operator's side vision, especially to the left. An equipment operator testified he had to see the rear tires to back the equipment out of the kiln. The ramp is only so wide. Side screens prevented him from seeing the rear tire (Livingood, 138, 139).

8. The air hammer itself was attached to a backing plate. The inspector found that with the jack hammer raised he could not see the drill point (Stinson, 254).

9. During the kiln job some workers wanted the side screens on the uni-loader; others did not (Carey, 111; Fairhurst, 426-429).

10. The decision to use or not use side screens was left to the equipment operators (Carey, 111; Fairhurst, 429).

11. The side screens were either on and off from time to time, both for yard and kiln work (Huenergardt, 147, 148; Schafer, 41; Woodbeck, 356, 373).

12. Supervisors did not require or prevent the use of side screens (Carey, 103-104).

13. Ideal's plant manager told Inspector Stinson that the side screens had been removed for some time (Stinson, 247).

14. The company's safety manual contains the following provision:

> Machine guards and other safety devices are provided for your protection. Guards shall not be removed except for making repairs, cleaning, dressing, oiling or adjusting and then only by authorized persons when machines are stopped. Replace guards when work is completed and before lock outs are removed.

(Fairhurst, 432; Exhibit P-29, page 9, paragraph 5).

DISCUSSION AND FURTHER FINDINGS

The evidence is essentially uncontroverted: prior to acquiring the Case uni-loader in 1981 or 1982 it was necessary to remove the cage on Ideal's loader to get it inside the kiln (Tr. 455). Due to width and height restrictions the 1835 Case Uni-loader was modified by lowering the ROPS and installing smaller tires (Tr. 455).

In the cylindrical kiln the lights were not too good. The kiln itself is 300 feet long and 10 to 12 feet wide. The uni-loader was estimated at 12 feet long and 3-1/2 to 4 feet wide (Tr. 39, 125, 141).

In the kiln area the operator of the uni-loader uses the jack hammer attachment to knock out the overhead bricks (Tr. 91). After a sufficient number of worn out bricks are removed the kiln is then rotated and the top becomes the bottom (Tr. 63).

In knocking down the 4 inch by 8 inch bricks the operator maneuvers the loader over the fallen brick to reach more bricks (Tr. 34, 75).

Immediately before the accident it appeared to witness Veltkamp that Mr. Bertagnolli could not get the machine in position (Tr. 175). It seemed to witness Doornbos that Mr. Bertagnolli was having trouble knocking the brick down. He testified bricks are hard to get out, especially the first brick (Tr. 161).

Given the above scenario it appears that the lack of side screens affected safety since Mr. Bertagnolli was crushed by the lifting arms while he was operating the uni-loader. Given the lighting conditions, his work, the difficulty of seeing what he was trying to accomplish and the lack of side screens I conclude that Mr. Bertagnolli leaned outside the confines of the uni-loader at the same time the lifting arms were being raised (or lowered). The presence of side screens would have prevented this accident.

The presence of side screens also prevent any bricks from striking the operator. As heavy equipment operator Carey aptly stated "when you're knocking brick out, you always had a chance of catching a brick coming into your lap or whatnot" (Tr. 88). Carey was one of the workers who would go to the garage for the screens and put them on; however, there were times, other than the kiln job, when he operated the uni-loader without side screens (Tr. 88).

There is no evidence of the precise measurements of the distance between the side arms and the operator's cab. However, the photographs indicate and confirm witness Doornbus' testimony that when the operator sits in the cab everything is "pretty close" (See and Compare Exhibits P-9, P-16, P-17, R-2 and the drawings in Exhibit P-24).

The specifications do not indicate the distance from the arms to the operator's cab. But the total distance between the lifting arms, at mid-point, is shown as 45.4 inches.

One of the three principal uni-loader operators who testified complained that the side screens interfered with his view of the rear tires when backing the equipment out of the kiln. In view of the obvious width restrictions in the kiln I find Mr. Livingood's testimony to be credible. However, at the time of the accident Mr. Bertognolli was attempting to remove brick. He was not backing out the uni-loader.

Any problem that exists in connection with backing up the equipment may be solved by constructing a wider entrance ramp to the kiln. (Exhibit P-2 shows present ramp.)

Ideal's safety policies did not prevent the removal of the side screens (Facts 9-14).

The witnesses essentially all testified the placement or removal of side screens was left to the individual equipment operators.

If Ideal had a policy requiring the use of side screens it was not enforced.

The record contains no evidence of any industry or manufacturer's policy regarding the removal of the side screens and the circumstances under which the side screens could be removed without impairing safety.

In its order of remand the Commission noted that in interpreting and applying broadly worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing Canon Coal Co., 9 FMSHRC 667, 668 (April 1987), Quinland Coal, Inc., 9 FMSHRC 1614, 1617-18 (September 1987).

The Commission further emphasized that the reasonably prudent person test contemplates an objective--not subjective--analysis of all the surrounding circumstances and factors bearing on the inquiry in issue, Great Western Electric Company, 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January

1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982).

From the total record I conclude that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized its requirements. In particular, the removal of worn-out brick from a kiln takes place three to four times per year (Tr. 35). Each clean-out takes two to three days (Tr. 35).

A reasonably prudent operator would recognize the requirements since, in the work process, the company would observe two areas that would affect the safety of the operator.

The initial area involves the bricks themselves as they are chipped from overhead. Some bricks can end up in the lap of the operator. Side screens, which came as standard equipment on the Case Uni-loader, would have prevented the operator from being struck by any falling bricks.

The second area involved the lifting arms and the hydraulic ram. An operator might not necessarily be leaning outside of the uni-loader but with the lifting arms and ram in close proximity, an operator's arms could be caught or pinched by the lifting arms and ram. See Exhibits P6, P9, P10, P11, P12, P13, P16, P17, R2 and compare with P18 (with screens attached).

The presence of side screens would have prevented Mr. Bertognolli from leaning out of the uni-loader. Side screens would also have prevented any lesser injuries to an operator.

Some evidence establishes that the presence of the side screens adversely affected safety. This occurred when the uni-loader operator was backing the equipment out of the kiln and down the ramp. As previously stated this problem might well be handled by the construction of a wider ramp, (See Exhibit P-3, Entrance to ramp). In any event, backing the equipment down the ramp was not the work being done when Mr. Bertagnolli was crushed.

The Commission has ruled the missing screens constituted an equipment defect within the meaning of the regulation. Since I conclude the defect affected safety and since I further find the regulation was applicable to Ideal it follows that the citation should be affirmed.

CIVIL PENALTY

Inasmuch as the citation is to be affirmed it is appropriate to assess a civil penalty.

The statutory criteria to assess such penalties are contained in § 110(i) of the Act, 30 U.S.C. § 820(i).

The operator's history, as evidenced by Exhibit P-27, indicates Ideal received 35 citations between January 1986 and April 1987. I consider this an average adverse history. Under the broad scope of prior favorable history I note the plant received safety awards. One was in 1982 for 3000 consecutive days without an accident (Tr. 443, Exhibit R7). Further, since the 1950s the Trident plant has, on two occasions, worked over 4000 days without an accident (Tr. 442).

Ideal appears to be a medium sized operator. Its 80 employees at the Trident plant annually produce 300,000 tons of cement.

The Trident plant is one of nine plants nationwide (Tr. 23, 440). In view of its size it appears the penalty hereafter assessed is appropriate.

Ideal was negligent. The uni-loader received an exceptional amount of attention due to its many modifications. The company should have known of the probability that the equipment operator could be struck by falling brick or pinched by the arms or ram of the equipment. These factors cause me to conclude that the operator's negligence was high since it took no remedial action.

The record indicates Ideal was in debt and close to bankruptcy three years ago (Tr. 439). However, Ideal did not present any information concerning its financial condition at the time of the hearing. Therefore, in the absence of any facts to the contrary, I find that the payment of penalties will not cause Ideal to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974).

Mr. Bertagnolli died when he was crushed by the lifting arm. In view of this the gravity of the violation is apparent.

Ideal demonstrated its statutory good faith by abating the violative condition.

Considering all of the statutory criteria I deem that a civil penalty of $8000 is appropriate.

For the foregoing reasons, I enter the following:

ORDER

Citation No. 2649413 is **AFFIRMED** and a civil penalty of $8000 is **ASSESSED.**

John J. Morris
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80290 (Certified Mail)

James J. Gonzales, Esq., HOLLAND & HART, 555 - 17th Street, Suite 2900, P.O. Box 8749, Denver, CO 80201 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-2 A. C. No. 11-00586-03642
v.	:	Murdock Mine
ZEIGLER COAL COMPANY, Respondent	:	

DECISION

Before: Judge Merlin

Pursuant to an order previously entered in this matter, the above-captioned docket number now contains only Citation No. 03406060 which presents the issue of the validity of the Secretary's instructions regarding "excessive history" which are to be followed in proposing penalties under the Mine Act.

The briefs and motions filed in the instant case on this issue are virtually identical to those filed in Drummond Company Inc., Docket No. SE 90-126. On March 6, 1991, a decision was rendered in Drummond.

In accordance with the decision in Drummond, it is hereby **ORDERED** that the operator's motion to remand be **GRANTED** and that the Secretary **RECALCULATE** the proposed penalty without reference to Program Policy Letter No. P90-III-4.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Douglas White, Esq., Counsel, Litigation, Office of the Solicitor, U. S. Department of Labor, Room 414, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Gregory S. Keltner, Esq., Zeigler Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 8 1991

GATLIFF COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 89-242-R Citation No. 3178703; 8/3/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. KENT 89-243-R Citation No. 3178704; 8/3/89
	:	Docket No. KENT 89-244-R Order No. 3178706; 8/3/89
	:	Docket No. KENT 89-245-R Citation No. 3178707; 8/3/89
	:	Docket No. KENT 89-246-R Citation No. 3178708; 8/3/89
	:	Docket No. KENT 89-247-R Citation No. 3178709; 8/3/89
	:	Docket No. KENT 89-248-R Citation No. 3178710; 8/3/89
	:	Docket No. KENT 89-249-R Order No. 3178711; 8/3/89
	:	Docket No. KENT 89-250-R Citation No. 3178712; 8/3/89
	:	Docket No. KENT 89-251-R Citation NO. 3178713; 8/3/89
	:	Docket No. KENT 89-252-R Order No. 3178714; 8/3/89
	:	Gatliff No. 1 Mine
	:	Mine ID # 15-04322

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 90-100 A.C. No. 15-04322-30530
v.	:	Docket No. KENT 90-215 A.C. No. 15-04322-30531
GATLIFF COAL COMPANY, INC., Respondent	:	Gatliff No. 1 Mine

DECISION

Appearances: Robert I. Cusick, Esq., Wyatt, Tarrant and Combs, Louisville, Kentucky, for Gatliff Coal Company, Inc.;
Anne Knauff, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under sections 105(d) and 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to contest citations and withdrawal orders issued by the Secretary of Labor to Gatliff Coal Company, Inc., (Gatliff) and for review of civil penalties proposed by the Secretary for those violations of mandatory standards alleged therein.

Citation No. 3178703 alleges a violation of the standard at 30 C.F.R. § 50.10 and charges as follows:

> A fatal accident occurred at 3:20 a.m. and the victim was pronounced dead at local hospital at 5:00 a.m. The company never reported this accident to MSHA. An employee heard the announcement on the radio around 8:00 a.m. and contacted the subdistrict manager. The first company contact with MSHA was by Freddie Maggard at 8:30 a.m., on 8/1/89, returning a call from the MSHA subdistrict manager.

The standard at 30 C.F.R. § 50.10 provides as follows:

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

The testimony of MSHA Inspector James P. Payne, Sr., in

regard to the instant citation, is undisputed. The accident giving rise to this citation occurred at 3:20 a.m., on August 1, 1989. According to Payne the first contact from Gatliff came from Freddie Maggard, an official of Gatliff, when he returned a call to the MSHA office in Barbourville, Kentucky around 8:30 that morning. Payne also acknowledged that the MSHA subdistrict manager had received information relating to the accident earlier that morning and indeed that information had been relayed to Inspector Payne around 8:00 that morning. Payne testified that after receiving this information he did not report to the mine site until about noon that day. It did not appear that the accident site had been altered. Indeed Payne acknowledged that he would not have done anything differently had he been informed of the accident earlier. Payne also acknowledged that had an MSHA office had been contacted by 7:00 that morning he would not have cited Gatliff for the instant violation.

The testimony of Gatliff Safety Director John Blankenship is not inconsistent. Blankenship first learned of the accident while home in bed when he received a call around 4:00 a.m. He arrived at the mine site around 4:30 a.m. after the ambulance had already departed with victim, Boyd Fuson. Concerned about the Fuson's condition, Blankenship went immediately to the hospital where he learned that Fuson had died.

Around 5:40 that morning Blankenship first made efforts to telephone the MSHA offices but without success. He later telephoned the MSHA office around 5:45 a.m. and again around 6:00 a.m., but again without success. Blankenship testified that he was aware that a toll free telephone number appeared in the Code of Federal Regulations but that his copy of the code was in his office some 40 miles away. He then succeeded in reaching a state mine safety official, Leroy Gross, and he thought Gross would call the MSHA District Office.

The evidence shows that the accident at issue occurred about 3:20 a.m. on August 3, 1989, and that Gatliff officials did not execute direct contact with MSHA officials until about 8:30 on that morning. I therefore conclude that Gatliff failed to "immediately contact" an MSHA office as required by the cited standard. I find however, under the particular circumstances of this case, that Gatliff officials made good faith efforts to make timely contact with MSHA offices which were not open during the early hours of August 1. I also take into consideration that the accident scene was admittedly not tampered with and Gatliff officials cooperated in the MSHA investigation. Under these particular circumstances the violation was not of significant gravity nor did it involve significant negligence. Considering the criteria under section 110(i) of the Act it is apparent that a penalty of $20 would be appropriate for the instant violation.

Citation No. 3178704, issued pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1605(k) and charges as follows:[1]

> The haulage road leading to the backfill ramp was not provided with sufficient berm, as required. The berm ranged from 0-2 feet in height and the truck axle was three feet in height. A fatal haulage accident occurred when a Euclid R-50 rock truck travelled through the berm and down a 120 foot embankment. The driver was thrown from the vehicle.

The cited standard provides that: "[b]erms or guards shall be provided on the outer bank of elevated roadways."

It is not disputed that the area cited was the outer bank of an elevated roadway. According to Inspector Payne the berm in the area cited was from 0 to 2 feet high. Payne opined that an axle-high berm, at least i.e. 3 feet high, may have been adequate although he conceded that even a 3 foot berm would not have stopped a truck such as that involved herein when fully loaded. Payne observed however that such a berm would have turned the wheels of the truck away from the embankment. Payne believed that the operator was highly negligent because any prudent person should have observed this inadequate berm. He also opined that the violation was "significant and substantial" because an

---

[1]Section 104(d)(1) provides 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 significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation memory accordingly has been abated.

accident had in fact occurred resulting in fatal injuries. The violation was abated by the dumping of refuse along the outer bank to form a berm 3 to 3 1/2 feet high.

According to Gatliff Safety Director John Blankenship, the area of the accident had been for the most part bermed except for one turn-around area. Blankenship testified that Operator's Exhibit No. 5, a photograph, depicts the area where the truck passed over the berm. He observed, based on tests performed at the mine site, that even a 5 foot berm with the same type truck under similar circumstances would not prevent overtravel.

Based on the undisputed evidence alone however it is clear that there was no berm in place in at least some portion of the outer bank of the cited roadway. Under the circumstances the violation is proven as charged. In reaching this conclusion I have not disregarded Respondent's argument that under the cited standard a reasonably prudent mine operator could not have known what size berm was required. However in this case the evidence shows that at least some areas of the cited elevated roadway had no berm at all. Accordingly the Respondent's argument that it did not know what size berms were required is inapposite to the specific facts herein. The violation was also "significant and substantial". While the truck herein apparently passed through an area of roadway that may have had a two-foot berm, clearly in the areas of elevated roadway where no berm existed the violative condition was even more serious. Clearly fatal injuries were reasonably likely. See Mathies Coal Company 6 FMSHRC 1 (1984).

I also find that the violation herein was the result of "unwarrantable failure". The complete absence of berms over sections of the cited elevated roadway in this case may reasonably be inferred to have resulted from a lack of supervision. It is not disputed that there was no supervisor on site in this area during the shift at issue. This omission is of such an aggravated nature as to constitute gross negligence and "unwarrantable failure". See Emery Mining Company, 9 FMSHRC 1997 (1987). Considering the factors under section 110(i) of the Act I find that the proposed civil penalty of $4,000 is indeed appropriate.

Order No. 3178705, also issued pursuant to section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 77.1701 and charges as follows:

> Emergency communications were not available at the Colonel Hollow Job Number 75. Communications with the services that provide emergency medical assistance and transportation were discontinued when the company vehicle with the company radio left the mine property. On 8/1/89, following a serious accident which occurred at approximately 3:20 a.m., employees were required to

travel approximately 2 1/2 miles to a public telephone to summons an ambulance.

The cited standard, 30 C.F.R. § 77.1701 provides as follows:

> (a) Each operator of a surface coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency. (b) The emergency communication system required to be maintained under paragraph (a) of this section may be established by telephone or radio transmission or by any other means of prompt communication to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of paragraph (a) of this section.

According to the undisputed testimony of Inspector Payne, the foreman's truck, which carried a radio sufficient to provide emergency communication, had departed the mine site around 5:30 or 6:00 p.m., the evening before the accident leaving only a bulldozer with a citizen band radio. Payne observed that the citizen band radio was incapable of reaching the mine office the hospital or the police station because of its limited range. He also noted there were no telephones at the job site and the nearest telephone was 2 1/2 miles away. Payne also maintained that the subject accident had occurred around 3:20 a.m., so that there purportedly had been no radio communications since 6:00 p.m. the night before. Payne acknowledged however that a citizen band radio could provide adequate means of communication under the cited regulation if it was properly monitored.

According to James Meadors, a Gatliff foreman, the men at the Colonel Hollow Job No. 75 were able to communicate by citizen band radio to the mechanics' trucks the lube truck and/or to the foreman's truck within a 3 mile range. Each of those trucks carried a radio sufficient to communicate with the mine office and thereupon police and ambulance emergency services could have been called by telephone. According to Meadors the lube truck with such radio was at the job site three miles from the Colonel Hollow Job site.

Donald Hopkins was one of two miners travelling to the nearest telephone that morning to call for an ambulance. Hopkins testified that he did not think to use the citizen band radio. Safety Director Blankenship testified that indeed emergency notification was then available by radio from the lube truck to Gatliff offices where telephones were located to further communicate as necessary for emergency services. According to Blankenship the lube truck was at the adjacent job site on the

morning of the accident only three miles from the accident.

Within this framework of evidence I cannot find that the Secretary has sustained her burden of proving the violation charged herein. While Inspector Payne testified that there was no radio at the Colonel Hollow Job site at the time of the accident sufficient to communicate with the mine office some 15 miles away, he failed to consider the citizen band radio then at that job site which was capable of communicating with the lube truck radio which could then communicate with the mine office where it is undisputed there was a telephone. Under the circumstances Order No. 3178705 must be vacated.

Citations 3178707, 3178708, 3178709 and 3178710 all charge violations of the regulatory standard at 30 C.F.R. § 77.1710(i). That standard provides in relevant part as follows:

> Each employee working in a surface coal mine ... shall be required to wear protective clothing and devices as indicated below:
>
> ***
>
> (i) Seat belts in a vehicle where there is a danger of overturning and where roll protection is provided.

In particular, Citation No. 3178707 charges as follows:

> It was evident that seat belts were not being worn on the R-50 rock truck and that the driver was thrown from the vehicle when it overturned. The belts were dirty and it did not appear that they had been worn for some time. This vehicle was travelling over hazardous terrain where there was danger of overturning. These conditions were observed on 8/1/89, during a fatal accident investigation.

Gatliff does not dispute that the cited trucks were operating in areas subject to the danger of overturning but maintains that the R-50 rock trucks do not need seat belts under that standard in any event because "roll protection" is not provided in those vehicles. Even assuming, arguendo, that haulage trucks such as the one at issue are not required by the standard at 30 C.F.R. § 77.403(a) to have "roll protection" it is nevertheless apparent that the truck at issue in fact did have "roll protection".

In this case the credible evidence shows that the apron of the truck dump bed overhung the cab of the truck in a manner which provided some roll protection when in the lowered position. While the apron may not have provided the best possible protection it provided sufficient protection to even meet the definition set forth in 30 C.F.R. § 77.2(w). Since the apron did provide "roll protection" seat belts were required to be worn in

accordance with the cited standard.

It may also reasonably be inferred from the evidence in this case that the victim was not wearing a seat belt at the time the cited truck overturned. He was thrown from the truck and the undisputed testimony was that the steering wheel was bent upwards as his body exited. The seat belt was also found unclasped behind the driver's seat. Under the circumstances it may reasonably be inferred that the victim was not wearing his seat belt at the time his truck overturned. Accordingly I find that the violation is proven as charged. I also find that the violation was "significant and substantial". See Mathies Coal Company, supra. The fatal accident in this case provides ample support for this conclusion.

I do not however find that the Secretary has proven her claims of high negligence. There is insufficient evidence that this driver's failure to wear a seat belt was the result of inadequate training, discipline or supervision. According to Mr. Blankenship he had restated to his employees in the annual refresher training the previous June the necessity to wear seat belts. The victim was present at this training. Blankenship also testified that he had never seen the victim not wear his seat belt.

Under the circumstances and considering the criteria under section 110(i) of the Act I find that a civil penalty of $400 is appropriate for this violation.

Citation No. 3178708 charges as follows:

> It is evident that the seat belt is not being used in the Euclid R-50 rock truck, company No. 3027. The belt is dirty and was coupled behind the driver's seat and air hoses were stacked on top of the belt. This vehicle was travelling over hazardous terrain where there is danger of overturning. These conditions were observed 8/1/89, during a fatal accident investigation.

According to Inspector Payne the cited truck had been operating earlier on the shift during which the fatal accident occurred, had been parked some two to three hours before the accident and was not then being used. Payne surmised however from the evidence that the belt was dirty, that it was coupled behind the driver's seat, and that air hoses were stacked on top of the belt, that the seat belts had not been used when the truck was in operation earlier on that shift.

According to John Blankenship however, it was common practice to buckle the belts behind the seats to keep the belts from the mud on the truck floors. He noted that the cited truck had been out of service for some time when the inspector examined

it and that it was therefore implicitly not surprising that the belts were in a dirty condition. Blankenship also noted that the fact that air hoses may have been stacked on top of the belts in a truck that had been taken out of service hours before the inspection does not necessarily lead to the inference that the seat belts had not been used when the truck was last operated.

The fact that the seat belts were dirty, that the belts were buckled behind the driver's seat, and that air hoses were stacked on top of the seat belts is not sufficient from which to infer that seat belts were not used 12 hours earlier while the truck was operating. The truck had been taken out of service 2 or 3 hours before the accident at issue and Inspector Payne admittedly did not arrive at the accident site for nearly 12 hours after the truck had been withdrawn from service. The Secretary's suggested inference is therefore not reasonable under the circumstances and the required nexus between the evidentiary facts and the ultimate fact to be inferred does not exist. See Mid-Continent Resources, 6 FMSHRC 1132 (1984), Garden Creek Pocahontas, 11 FMSHRC 2148 (1989). Under the circumstances I find that the Secretary has failed to sustain her burden of proving the alleged violation and the citation must be vacated.

Citation No. 3178709 charges as follows:

> It is evident that the seat belt is not being used in the Michigan 475 end loader company No. 2035. The seat belt is dirty and was placed behind the operator's seat. This vehicle was travelling over hazardous terrain where there was a danger of overturning. These conditions were observed on 8/1/89, during a fatal accident investigation.

Again, according to Inspector Payne the citation at issue was based upon his conclusion that the seat belts on the cited equipment were dirty and that they were "placed behind the operator's seat". Payne did not observe any of the equipment in operation without seat belts and never asked the equipment operator's whether they indeed used seat belts. Again, under the circumstances I do not find a sufficient nexus between the evidentiary facts and the ultimate facts the Secretary seeks to have inferred. Under the circumstances there is insufficient evidence to support the alleged violation and this citation must also be vacated.

Citation No. 3178710 charges as follows:

> It is evident that the seat belt is not being used in the bull dozer. The seat belt is dirty and was placed behind the operator's seat. This vehicle was travelling over hazardous terrain where there was danger of overturning. These conditions were observed

on 8/1/89, during a fatal accident investigation.

This citation is also purportedly based upon Inspector Payne's inference (from dirty seat belts and that the seat belts were found behind the operator's seat) that the seat belts were not being used. For the reasons already stated I find this evidence insufficient. Citation No. 3178710 must therefore also be dismissed. In reaching this conclusion I have not disregarded the admission of bulldozer operator Donald Hopkins that he did not wear his seat belt all the time. The citation alleges a violation on August 1, 1989, however and there is no evidence to connect this admission of Hopkins to the alleged failure to wear his seat belt on August 1, 1989. The Secretary has therefore failed to meet her burden and Citation No. 3178710 must therefore also be vacated.

Withdrawal Order No. 3178706 was issued pursuant to section 107(a) of the Act. That section provides in part as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout where the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. In this case it is charged that a "practice" rather than a "condition" existed i.e. "a common practice at this operation to not wear the seat belt provided in the mobile equipment."

In Rochester and Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159 (1989), the Commission set forth the analytical framework for determining the validity of imminent danger withdrawal orders issued under section 107(a) of the Act. The Commission indicated that it is first appropriate for the judge to determine whether the Secretary has met her burden of proving that an "imminent danger" existed at the time the order was issued. The Commission also observed however that even if an imminent danger had not then existed, the findings and decision of the inspector in issuing a section 107(a) order should nevertheless be upheld "unless there is evidence that he has

abused his discretion or authority". Rochester and Pittsburgh, supra. at p.2164 quoting Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 at p.31 (7th Cir. 1975).

There is no evidence that the issuing MSHA inspector ever observed any of the cited mobile equipment operators without seat belts. However the credible evidence is that the victim of the accident involving the Euclid haulage truck was not wearing a seat belt. In addition it is undisputed that bulldozer operator Donald Hopkins admitted that he did not wear his seat belt while operating equipment "all the time". This evidence I find sufficient to conclude that the failure to wear seat belts was a sufficiently established "practice" within the meaning of section 3(j) of the Act which could "reasonably" be expected to cause death or serious physical harm before such practice could be abated. That "practice" therefore constituted an imminent danger and the order at bar must be affirmed.

Order No. 3178711 issued pursuant to section 104(d)(1) of the Act, fn.1 supra, alleges a "signficant and substantial" violation of the standard at 30 C.F.R. § 77.1001 and charges as follows:

> Loose overhanging material, (i.e. dirt, trees, loose rock) was observed on and above the highwall on the drill bench (Jellico Seam) and above the spoil pit (Blue Gem Seam). A highwall drill, endloader, bulldozer, and 2 rock trucks were working in these areas. These conditions were observed on 8/1/89, during a fatal accident investigation.

The cited standard, provides that "[l]oose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

According to Inspector Payne, at the time of his inspection at the Colonel Hollow Job No. 75, on August 1, 1989, there was a tree overhanging the high wall from the Jellico Seam level and loose material had not been cleaned off. He also observed fractured and loose rock on the Blue Gem Seam level. He noted that equipment was working next to the highwall at the Blue Gem level and that the highwall was from 60 to 70 feet high. The tree was lying flat ready to slide down. He concluded that the material was loose because he observed cracks in it. There was also activity around the highwall evidenced by drill holes and, on the lower level, coal had been loaded at the Blue Gem Seam level.

The inspector concluded that the violations were the result of aggravated conduct, high negligence and "unwarrantable failure" on the grounds that he believed the foreman should have observed these conditions during his preshift examination. He also concluded that the violation was "significant and substantial" because the material could likely fall off the highwall injuring drillers and other workers below. He noted that the large rocks and the tree (approximately 18 to 20 inches in diameter) could cause such injuries. It was "highly likely" for an accident to occur because of its position on the highwall. Moreover persons loading holes and drill operators were unprotected without cabs or other devices. It is noted however that Inspector Payne apparently did not inquire and did not determine whether work was actually being performed in the pit area.

James Meadors, the day shift foreman, maintains that he told the night shift workers not to work in the pit area because of the apparently dangerous highwall conditions and told them that the conditions would be corrected on the following day shift. There is no evidence however that Meadors "dangered off" the area.

Within this framework of essentially undisputed evidence it is clear that the violation is proven as charged. Since there was no effective barricade of the endangered area I also find that the violation was "significant and substantial". While the day shift foreman may very well have warned some of the workers present at the time he left the mine site not to work in the endangered pit area, that warning was clearly not sufficient in itself. Without barricades, other persons later entering the mine site could easily wander beneath the dangerous highwall with a reasonable likelihood that they would suffer serious injuries. The violation was therefore "significant and substantial". Mathies Coal Company, supra. The failure of Meadors or other supervisory personnel to have "dangered off" or physically barricaded the acknowledged dangerous area also constitutes negligence of such an aggravated nature as to constitute "unwarrantable failure". Emery Mining Company, supra. Within this framework and considering the criteria under section 110(i) of the Act it is clear that the proposed civil penalty of $800 is warranted.

Citation No. 3178712 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.207 and charges as follows:

> Sufficient illumination was not provided in the pit for a bulldozer pushing down spoil and an end-loader loading rock trucks. The only illumination available was the headlights and backup lights of the equipment. These vehicles were working in close

proximity to a 70-60 foot highwall. These conditions were observed 8/1/89, during a fatal accident investigation.

The cited standard, 30 C.F.R. § 77.207, reads as follows:

> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

While the issuing inspector acknowledged that he did not observe the cited conditions under night conditions he nevertheless inferred from prior night experience that the existing illumination from vehicle lights alone would not be sufficient. He noted that while the trucks had four lights and the endloader had lights on both ends there would nevertheless be unlighted blind spots during night operations. He noted that the bulldozer was pushing spoil into the pit at the Blue Gem Level and that vehicles below including the trucks and loader, were working within 20 to 30 feet of the highwall. Without adequate illumination of the highwall these operators would be unable to see material falling off the highwall.

Safety Director John Blankenship disagreed with this assessment and noted that another MSHA Inspector had previously examined this site during night operations and had never issued citations for insufficient lighting. Within the above framework of evidence however it may reasonably inferred that indeed there was insufficient illumination of the highwall during night operations. Clearly the face of the highwall could not be sufficiently illuminated merely by vehicle lighting as the vehicles moved about. In light of the equivocal testimony of the inspector however I am unable to conclude that the violation was "signficant and substantial".

Moreover in light of the undisputed evidence that MSHA inspectors had previously observed this site during evening hours and had never previously cited this condition I cannot find that the operator is chargeable with significant negligence. Within the above framework and considering the criteria under section 110(i) of the Act I find that a civil penalty of $50 for the violation is appropriate.

Citation No. 3178713 similarly alleges a "significant and substantial" violation of 30 C.F.R. § 77.207 and charges as follows:

> Sufficient illumination was not provided at the backfill dumping ramp for the rock trucks to dump. The only illumination provided was the headlights and backup lights of the rock trucks. These conditions

were observed on 1/1/89, during a fatal accident investigation.

There does not appear to be any direct evidence in the record concerning this alleged violation. I am, moreover, unable to infer from testimony that any such violation occurred. The citation must accordingly be vacated.

Order No. 31788714, issued pursuant to section 104(d)(1) of the Act, (See, fn. 1 supra.) alleges a violation of the standard at 30 C.F.R. § 77.1713 and charges as follows:

> Adequate and sufficient examinations for hazardous conditions to eliminate such conditions were not being conducted on the second shift by a certified person. Numerous violations were observed during a fatal accident investigation which occurred at 3:20 a.m., on 8/1/89. It was a practice for the day shift foreman to make an on-shift examination just prior to leaving work each day. This one examination was usually conducted around 5:30 p.m. to 6:00 p.m. The second shift crew then worked from 5:30 p.m. until 4:00 a.m., without any further examinations. Violation Nos. 3178704 through 3178713 were issued. These conditions were observed on 8/1/89 and 8/2/89 during a fatal accident investigation.

The cited standard, 30 C.F.R. § 77.1713, provides in relevant part as follows:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

The issuing inspector based this order upon his observation of the existence of the violations charged in the citations and orders previously discussed. He concluded that this violation was also "significant and substantial" because of those violations. He also concluded that this alleged violation was the result of "unwarrantable failure" on the grounds that the evening shift foreman, who was the only person certified to perform the required examinations, had left the mine site at 6:00 p.m. the evening before and there was no foreman remaining on the job at a time when the violative conditions should have been discovered by proper inspection. While it is apparent from the previous discussion in this decision that I do not agree that all of the violations cited by the issuing inspector were valid, I

nevertheless have found sufficient violations from which I can conclude that the Secretary has proven there was an insufficient examination performed at this job site. Indeed the existence of admittedly dangerous highwall conditions without "dangering off" or barricading the area to prevent entry is sufficient alone to warrant the conclusion that an insufficient examination was performed and that the failure to perform such an examination was the result of an aggravated omission constituting gross negligence and "unwarrantable failure" Failure to properly conduct examinations and therefore allowing such dangerous conditions to remain also warrants the conclusion that this violation was "significant and substantial".

Inasmuch as there is redundancy between the underlying substantive violations subject to separate civil penalties and the violation herein I conclude that a reduced civil penalty of $500 is warranted considering the criteria under section 110(i) of the Act.

At hearing the parties presented a settlement agreement with respect to Citation No. 2996585 in which it was agreed that full payment of the proposed penalty of $20 would be paid. I have considered the representations and documentation submitted in support of the motion and conclude that the proffered settlement is appropriate under the Act.

ORDER

Citation/Order Nos. 3178705, 3178708, 3178709, 3178710 and 3178713 are vacated. Citation/Order Nos. 3178703, 3178704, 3178707, 3178711, 3178712, 3178714 and 2996585 are affirmed. Imminent Danger Order No. 3178706 is affirmed. Gatliff Coal Company Inc., is accordingly directed to pay civil penalties totalling $5,790 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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

Robert I. Cusick, Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202 (Certified Mail)

nb

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

MAR 11 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-72-M A.C. No. 04-01695-05515
v.	:	Azusa Plant
TRANSIT MIXED CONCRETE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT AFTER REMAND

Before: Judge Morris

On February 7, 1991, the Commission remanded the above case.

The record discloses a Decision Approving Settlement was entered on October 11, 1990. However, the decision on said date did not include the agreed settlement of Citation No. 3466442 for the proposed civil penalty of $600.

After the order of remand, the Judge advised the parties he would issue a decision approving their agreement and reaffirming the disposition entered on October 11, 1991. No objection was filed to the entry of such an order.

Accordingly, I enter the following:

ORDER

1. The settlement is **APPROVED**.

2. Citation No. 3466442 and the proposed penalty of $600 are **AFFIRMED**.

3. The decision approving the settlement entered October 11, 1990, is **REAFFIRMED**.

John J. Morris
Administrative Law Judge

Distribution:

John C. Nagle, Esq., Associate Regional Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Mr. Gene Wade, TRANSIT MIXED CONCRETE CO., 4760 Valley Boulevard, Los Angeles, CA 90032 (Certified Mail)

ek

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

MAR 11 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-38 A.C. No. 29-00845-03534
v.	:	York Canyon
THE PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary E. Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Ray D. Gardner, Esq., Pittsburg & Midway Coal Mining Company, Englewood, Colorado, for Respondent.

Before: Judge Cetti

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

After notice to the parties, a hearing was held in Pueblo, Colorado, on September 21, 1990. At the hearing, both parties presented oral and documentary evidence on Citation No. 3240566 concerning the alleged improper grounding of a guy wire, and Citation No. 3240567 concerning a drag line trailing cable.

At the hearing, testimony was taken from the following witnesses:

1. **MELVIN SHIVELEY**, MSHA coal mine inspector,

2. **WILLIAM BECK**, electrical supervisor at York Canyon Pittsburg Midway Coal Complex, and

3. **EDWARD BOLTON**, Respondent's senior electrical engineer. At the end of a full day of hearing, the case had to be continued. Before the matter was reset for further hearing, the parties advised they had reached an amicable settlement of all matters at issue. In the settlement agreement filed March 4, 1991, Petitioner moved to amend Citations 3240567 and 3240566 to delete the "significant and substantial" designation.

The parties stated that Respondent withdrew its Notice of Contest to the violation alleged in Citation 3240565 and its related proposed penalty of $91.00.

Based upon my review and evaluation of the evidence presented at the hearing, I find the settlement agreement to be reasonable, in the public interest, and consistent with the statutory criteria in Section 110 of the Act. The settlement agreement is approved.

ORDER

1. Citation Nos. 3240566 and 3240567 are **MODIFIED** to delete the designation "Significant and Substantial" and, as so modified, are **AFFIRMED.**

2. Citation No. 3240565, alleging a violation of 30 C.F.R. § 77.400(a), including its finding that the violation was "Significant and Substantial," is **AFFIRMED.**

3. Respondent, if it has not previously done so, is **ORDERED** to pay to the Secretary of Labor within 30 days from the date hereof the sum of $273.00 as and for a civil penalty for the above Citations. Upon such payment, this proceeding is **DISMISSED.**

August F. Cetti
Administrative Law Judge

Distribution:

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

Ray D. Gardner, Esq., Pittsburg & Midway Coal Mining Company, 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991 (Certified Mail)

Mr. Robert Butero, International Health and Safety Representative for UMWA District 13, 228 Lea Street, Trinidad, CO 81082 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-26 A. C. No. 41-01192-03531
v.	:	Big Brown Strip
TEXAS UTILITIES MINING COMPANY, Respondent	:	

DECISION

In response to the February 11, 1991, show cause order, the parties agreed that subject case should be stayed pending a decision by the undersigned in Drummond Co. Inc., Docket No. SE 90-126.

However, before a stay order could be issued herein, a decision was rendered on March 6, 1991, in Drummond granting the operator's motion to remand the penalty to the Secretary. The decision in Drummond is dispositive of this case, which involves one violation where the excessive history criteria in Program Policy Letter No. P90-III-4 was used to calculate the amount of the penalty.

In light of the foregoing, it is **ORDERED** that the operator's motion for remand be **GRANTED**.

It is further **ORDERED** that the Secretary recalculate her proposed penalty without reference to Program Policy Letter No. P90-III-4.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, Room 414, 4015 Wilson Boulevard, Arlington, VA 22203 (Hand Delivered)

Christopher R. Miltenberger, Esq., Worsham, Forsythe, Sampels & Wooldridge, Thirty Two Hundred, 2001 Bryan Tower, Dallas, TX 75201 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 12 1991

DAVID THOMAS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-13-D
v.	:	
	:	BARB CD 88-16
AMPAK MINING, INC., GEARY BURNS AND PEGGY A. KRETZER, Respondents	:	Mine No. 1
GEORGE ISAACS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-14-D
v.	:	BARB CD 88-34
AMPAK MINING, INC., GEARY BURNS AND PEGGY A. KRETZER, Respondents	:	Mine No. 1

DECISION AND ORDER AWARDING COSTS AND DAMAGES

Before: Judge Melick

Pursuant to the Default Decision and Order issued February 7, 1991, and the unopposed Supplemental Statement of Attorney Fees and Expenses filed herein, it is hereby ORDERED that within 30 days of the date of this decision Respondents' Geary Burns and Peggy A. Kretzer (who are jointly and severally liable) pay to Tony Oppegard, the attorney for Complainants' David Thomas and George Isaacs, attorney fees and expenses of $7,802.39, in addition to previously awarded damages and costs (ordered to be paid by Ampak Mining, Inc. on March 9, 1990) plus interest in accordance with the Commission's decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988). This decision represents the final disposition of these proceedings before this judge.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)

Graham Martin, Esq., Main Street, United Federal Building, Hindman, KY 41822 (Certified Mail)

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

Ms. Peggy Kretzer, HC 83, Box 172, River, KY 41254 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

KENNETH L. CHANDLER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 90-107-D
	:	MSHA Case No. VINC CD 90-04
ZEIGLER COAL COMPANY, Respondent	:	Zeigler No. 11 Mine

DECISION

Appearances: Mr. Kenneth L. Chandler, Tilden, Illinois, pro se, for the Complainant;
Timothy M. Biddle, Esq., Claire S. Brier, Esq., CROWELL & MORING, Washington, D.C., for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant, Kenneth L. Chandler, against the respondent Zeigler Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated June 6, 1990, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a complaint with the Commission.

A hearing was held in St. Louis, Missouri, and the parties were afforded an opportunity to file posthearing briefs. The respondent filed a brief, but the complainant did not. However, the complainant did file an undated letter received on January 6, 1991, and a second letter received February 4, 1991, in which he explains the circumstances of the incident which precipitated his complaint and cites an arbitrator's decision and a decision by a State unemployment referee with respect to two cases which he believes are relevant to his case. I have considered all of the

posthearing arguments and submissions made by the parties, including their oral arguments made on the record in the course of the hearing, in my adjudication of this matter.

The complainant, who is still employed by the respondent, alleges that he was suspended for 5 days without pay on October 18, 1989, after requesting mine management to provide him with dry clothing after riding a man cage into the mine on October 16, 1989, during an unusual and heavy rainfall which resulted in his becoming "soaking wet and cold." The complainant further alleges that his suspension was "in retaliation for my health and safety efforts for myself and other employees." He requests back pay for the 5-day suspension period, and the removal of all references of the suspension action from his personnel records.

The respondent denies that it has discriminated against the complainant, and maintains that the complainant did not engage in protected activity under section 105(c) of the Act because his refusal to work in wet clothing was unreasonable and not made in good faith. The respondent asserts that it disciplined the complainant for legitimate business reasons and that he was suspended for insubordination for failing to follow an order to go to work on October 16, 1989, and "for acting in concert when leaving the mine in a group exit" with other miners on his working unit prior to the end of the normal work shift that day.

Issues

The issues in this case include the following: (1) whether the complainant was engaged in protected activity when he requested dry clothing on October 16, 1989; (2) whether his leaving the mine prior to the end of his normal work shift constituted a reasonable and protected "work refusal" for health or safety reasons; (3) whether the complainant communicated any health and safety concerns to mine management prior to his leaving the mine; and (4) whether the 5-day suspension disciplinary action by the respondent was a bona fide and legitimate business reason made in good faith, or whether it was carried out to retaliate against the complainant for his engaging in any protected health or safety activity. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following (exhibit ALJ-1):

1. Zeigler Coal Company is subject to the Federal Mine Safety and Health Act of 1977 ("the Act").

2. The Federal Mine Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and subject matter of this case under sections 105(c) and 113 of the Act, 30 U.S.C. §§ 815(c) and 823.

3. Respondent Zeigler Coal Company is the operator of the Zeigler No. 11 Mine.

4. At all times relevant to this case, Complainant Kenneth L. Chandler worked at the Zeigler No. 11 Mine as a miner as defined in section 3(g) of the Act, 30 U.S.C. § 802(g).

5. Mr. Chandler reported to work for the second shift at the Zeigler No. 11 Mine on October 16, 1989.

6. On October 16, 1989, there was a rainstorm at the beginning of the second shift and all of the miners working that shift got wet while on their way to the mine.

7. Mr. Chandler and the seven other miners working on his crew on October 16, 1989, left the mine property before the end of the second shift.

8. None of the other miners working the second shift on October 16, 1989, left the mine property before the end of the shift.

9. On October 18, 1989, Mr. Chandler and the seven other miners who left the mine before the end of the second shift on October 16, 1989, were disciplined for insubordination and for leaving the mine prior to the end of their shift. Mr. Chandler and five of the miners were suspended for 5 days, one of the miners was discharged, and another was suspended for 2 days after admitting insubordination.

10. Mr. Chandler filed a complaint with the United States Department of Labor, Mine Safety and Health Administration ("MSHA") on November 17, 1989.

11. MSHA subsequently notified Mr. Chandler that its investigation of his November 17, 1989, complaint did not reveal any violation of section 105(c) of the Act.

12. On July 6, 1990, Mr. Chandler filed a complaint with the Commission against Zeigler Coal Company.

13. This complaint was properly served on Zeigler Coal Company on July 25, 1990.

Complainant's Testimony and Evidence

Kenneth L. Chandler, the complainant, testified that on October 16, 1989, he was working as a face man on the second shift (4:00 p.m. to midnite). He stated that "it was raining cats and dogs, really pouring down," and that he ran approximately 100 yards from the surface dressing area to reach the shaft cage to go underground. He stated that it took approximately 4 to 7 minutes to reach the underground area on the "open cage" which had no top and large overhead holes. The temperature was approximately 42 degrees, and after an 18-minute ride on the man trip, he reached the working section "sopping wet and cold."

Mr. Chandler stated that during the man-trip ride he and the other miners asked face foreman Lawrence Rainey whether they would get dry clothing, and Mr. Rainey left to "make the faces." Mr. Chandler then proceeded to the transformer area and took his coat off and was putting it on the transformer when Mr. Rainey returned and informed him that he could not allow him to stand by the transformer "because they'll fire me." Mr. Chandler asked Mr. Rainey again about getting coveralls, and Mr. Rainey left to make a phone call.

Mr. Chandler stated that Mr. Rainey returned and that "the words I caught he said was go to work or go home, we are not going to give you no coveralls" (Tr. 18). Mr. Chandler stated that he did not know whether Mr. Rainey called mine manager Shan Thomas, or assistant superintendent William Patterson, but understood or "speculated" that he called Mr. Patterson. Mr. Chandler and seven other miners then went to the man trip to leave the area.

Mr. Chandler stated that after arriving on the surface, he and the other miners went to the "tool crib shack" and spoke to Ms. Carla Lehr who was on duty. She told them she would return in 15 or 20 minutes and left, but did not return. Mr. Chandler then went to the mine foreman's office, and after finding no one there, he returned to the locker room, took a shower, and went home. On his way out, he looked into the foreman's office, and saw mine superintendent Mike Smart there (Tr. 22).

Mr. Chandler stated that he returned to the mine the next day, October 17, put on his work clothes, and proceeded to the man cage to go to work, but was met by mine manager Shan Thomas who told him "to stand aside." Mr. Thomas informed Mr. Chandler and the other seven miners who left the mine the previous day, that their "work assignment was in the office." They were then taken to a room at the mine office, and Mr. Chandler and each miner were interviewed privately and individually (Tr. 23-25).

Mr. Chandler confirmed that Mr. Smart, Mr. Patterson, Mr. Rainey, and a labor relations representative (Nick) were all present as management representatives during his interview, and that two union representatives, or committeeman, were also present (Tr. 27). Mr. Chandler believed that he was at the mine office for 5-1/2 hours, and after he was interviewed, he was told to go home, and he left the mine. He confirmed that the other miners on his work shift "walked out when they took us in the office" and there was a "wildcat strike" because he and the other seven miners were not allowed to go to work. Mr. Chandler stated that the strike began when Mr. Thomas "stopped us from getting on the cage," and that the second shift did not work on October 17 (Tr. 30-31).

Mr. Chandler stated that he next returned to the mine on October 18, and was kept in the locker room. Several union representatives were present, and they informed him that mine management was considering discharging him. The union president produced a "letter," which he refused to sign. He was then given another letter informing him that the respondent was suspending him for 5 days (Tr. 33-34; exhibit C-1).

Mr. Chandler believed that the mine was idle for approximately 3 days "over this--trying to make people work with sloppy clothing and stuff like that, you, know, safety," but that the miners returned to work under a court injunction (Tr. 38).

Mr. Chandler confirmed that he completed his 5-day suspension and was not paid his hourly rate of $14 or $15 for these days. He further confirmed that he filed a grievance for loss of pay on October 16, and 17, and received pay for 4-1/2 hours, which settled and ended part of the grievance, but did not settle that part "on wet, sloppy clothing; whether a company could make me work in wet sloppy clothing for 8 hours" (Tr. 41).

Mr. Chandler stated that he was given an unexcused absence for October 16, which is still on his record, but that "neither side said nothing" about the "wet clothes issue" (Tr. 43). He confirmed that in 1983 the respondent supplied him with boots and coveralls when he was "sopping wet," that he came out of the mine on another occasion to get some coveralls when he was saturated

with oil when a hydraulic line broke, and that on September 12, 1989, another miner was saturated with oil and came out of the mine, showered, and returned to work with no lost time (Tr. 45).

Mr. Chandler stated that pursuant to a union/management agreement, boots or "waders" are made available to miners, and that the respondent furnishes rain gear when bolting is done in wet areas. He confirmed that he keeps a supply of personal clothes at the mine, that he is paid an annual clothing allowance of $190 by the respondent, but does not keep an extra set of work clothes at the mine (Tr. 46-47).

Mr. Chandler stated that there were no raincoats to wear on October 16, before he went to the cage, and in order to obtain a raincoat he would have "to go outside and back around to the crib," and he did not know whether he would have been permitted to do so. He confirmed that since the incident in question, the day shift has been provided with plastic trash bags for protection against the rain, but he did not consider this to be "raingear" (Tr. 49). He stated that the dry clothes issue has not been bargained by the union, and that the October 16, rainfall was the first time it has rained so hard (Tr. 50).

On cross-examination, Mr. Chandler confirmed that he could have remained in the dressing area at the start of his shift rather than going to the cage, that he did not ask the foreman to hold the cage, and made no attempt to ask anyone for rain gear before going to the cage (Tr. 53). He stated that the distance to the cage "might be 100 feet" rather than 100 yards, and that he could have gone to the supply room by walking through an inside office rather than walking outside if he had obtained permission to do so. He confirmed that he did not ask for permission (Tr. 55). He confirmed that there are no restrictions as to how he spends his clothing allowance, that he could have purchased a spare set of clothing to keep at the mine, and that he had an extra coat and extra pair of shoes at the mine on October 16 (Tr. 56).

Mr. Chandler confirmed that the union advised him that it would not pursue the dry clothing issue part of his grievance any further after the pay issue concerning his pay for October 16 and 17, was resolved, and that he disagreed with the union's decision (Tr. 56-57).

Mr. Chandler confirmed that "one of the main issues" with respect to the wildcat strike was the termination of one miner (Burnett), a member of his crew who left the mine on October 16 (Tr. 60). He confirmed that eight miners and a foreman were assigned to his work shift unit on October 16, and there are two additional units and a labor crew, or a total of 38 to 40 men on the shift. He confirmed that everyone on the shift got wet, and

that everyone stayed and worked on that shift except for the seven miners on his unit who left the mine (Tr. 62).

Mr. Chandler stated that boots and rain gear are available at the mine, but that he has not been "sopping wet" in the past, and would only want a full change of clothes when he is "sopping wet" (Tr. 64). He confirmed that he left the mine at 6:30 p.m., on October 16, 5-1/2 hours before his normal work shift ended. When asked whether he had permission to leave, he stated as follows at (Tr. 65):

> Q. So if it was 6:30, then you left the mine five and a half hours then before the shift ended?
>
> A. Right.
>
> Q. And you didn't have permission to leave the mine from anybody on the property, is that correct?
>
> A. I'd say so, when the mine manager come there and asked me what my trouble was, yeah.
>
> Q. And the mine manager gave you permission to go home?
>
> A. He didn't tell me I couldn't go or I could go. He never said nothing. All he said was that I'm sorry you're wet.
>
> Q. And you construed that as permission that you could go home?
>
> A. Yeah.

Mr. Chandler identified exhibits R-1 and R-1(a), as the respondent's rules concerning "early outs," and confirmed that they were in effect on October 16, 1989 (Tr. 67). He conceded that he left work early that day, but stated that he notified the mine manager that he was leaving the mine. He explained that he notified foreman Rainey that he wanted to leave and go home, and that Mr. Rainey "gave me the ultimatum to go to work or go home, so he give me a choice" (Tr. 70). However, Mr. Chandler further stated that he did not tell mine manager Shan Thomas that he was going home, but did tell him that "I'm wet, sloppy clothing, I'm froze, I'm going to try and get some dry clothing" and that he was "going to the top to see if I can get some dry clothing." He then conceded that he did not say anything to Mr. Thomas about going home (Tr. 69-71).

Mr. Chandler confirmed that he saw mine superintendent Smart as he left the mine office to go home on October 16, and believed that Mr. Smart saw him. He confirmed that he did not speak to

Mr. Smart or say anything about going home. Mr. Chandler confirmed that he is a licensed plumber, performs plumbing work on his own, and has worked at that job when he was wet (Tr. 74).

Mr. Chandler stated that except for Mr. Burnett who was terminated, and Mr. Smith, who signed a letter, all of the other miners who left the mine over the "wet clothes" issue were suspended by the respondent with a loss of pay (Tr. 75-76). He confirmed that he was interviewed and questioned on October 17 about why he had left the mine on October 16, and that union and management personnel were present during the interview. He confirmed that he discussed the wet clothing issue and that he came out of the mine because he was wet and cold (Tr. 77-79).

In response to further questions, Mr. Chandler confirmed that when Mr. Thomas spoke to the miners leaving on the man trip on October 16, he told Mr. Thomas that he was wet and cold and wanted some dry clothing (Tr. 82). He confirmed that Mr. Thomas said nothing about working or going home, and that he (Chandler) heard Mr. Rainey make the statement "go to work or go home." Mr. Chandler stated that he heard Mr. Rainey make this statement after he had made a phone call, and he believed that "someone else told him to say this," but he did not know who Mr. Rainey may have called (Tr. 82-85).

Mr. Chandler stated that prior to getting on the cage on October 16, to go underground, "no one said don't get on it or get on it," but that he has been told that when the signal is given "when they run two cages," he is supposed to get on it and go to work (Tr. 86). He was told that miners on another unit who also rode the cage and were wet and cold were allowed to dry their clothes underground on the transformers by their foreman (Tr. 88). He did not know why he failed to say anything to the foreman, mine manager, or superintendent before riding the cage down and being exposed to the rain (Tr. 89-90).

Mr. Chandler confirmed that at the time the miners on his unit decided to leave the mine on October 16, he was not aware that other miners on another unit were allowed to dry their clothes on the transformers, and that he learned about this the next day or so when it was brought out at a union meeting (Tr. 91). He further confirmed that the union would not take the dry clothing issue further to formal arbitration, and he did not know the reason for not doing so and was given no reason by the union (Tr. 92).

Mr. Chandler stated that on October 16, after reaching the bench and transformer area, he and his crew were standing around, and had placed their jackets on the transformer to dry. Several of the miners may have been drinking coffee and eating sandwiches and no one had started to work. Mr. Rainey came to the area, and Mr. Chandler stated that "I just hollered and asked him -- I said

are we going to get any wet (sic) clothing? And, you know, are coveralls down here, or raingear or something to put on? And somebody else asked him something; I don't know who it was" (Tr. 95-100).

Mr. Chandler stated that working in wet clothing would present a safety risk because "handling the electric cable with wet, sloppy clothing you can get electrocuted," and that the wind at the face would be "coming to you which is about 60,000 cubic feet per minute, you're working in air, you get chilled. You can get pneumonia, and you get sick, you're going to miss work" (Tr. 101). He confirmed that he had never previously worked under such conditions, and although he has gotten wet, it was "not sloppy wet like that." He further confirmed that he said nothing to the mine manager or mine superintendent about the hazards which he testified to, and said "I'm sopping wet and just wanted dry clothes. * * * you know, I'm chilled. That's it. That's what I kept asking" (Tr. 102).

In response to a question as to whether he ever asked the mine manager or superintendent for permission to go and change clothes, Mr. Chandler stated as follows (Tr. 102).

> A. We said something to him about going up and getting dry clothing, you know. We'll see if we can get dry clothing on top. That's why we made the effort to go to Carla before I told him. I don't know if they would have let me went back down or not, but if I would have got dry clothing --
>
> Q. What dry clothing would this Carla have given you? What would the mine have had there?
>
> A. Coveralls.

Mr. Chandler confirmed that the minimum amount of air permitted at the face is 3,000 cubic feet, and that 60,000 would be in the main intake. He stated the cable was all high voltage cable which is insulated, and that he will not touch a cable with his bare hands if he is "real wet," and will use gloves, but that he will touch it if he is "a little wet" (Tr. 109). He will not touch a cable with wet boots or if he were standing in water.

William I. Patterson, was called as an adverse witness by the complainant, and he confirmed that he is presently the mine superintendent, and was serving as the general mine manager in October, 1989. He stated that if a miner leaves work early with the permission of management, it is an excused absence. However, if a miner tells the shift mine manager that he needs to leave because he is sick or for family business, the manager has no authority to prevent him from leaving, but the next day, management will determine the reasons for the absence and will deal

with it. If the absence is legitimate, such as a doctor's slip, the leave will be considered to be an excused absence, and not an "early out." An "early out" is charged when there is no proof of sickness or someone leaves with no prior authorization, and the miner would then be subject to a written warning and "progressive steps from there" (Tr. 114-120).

Mr. Patterson confirmed that since Mr. Chandler had no proof of any sickness or injury, or prior authorization to leave the mine pursuant to the respondent's early out policy, he was charged with an unexcused absence on October 16, when he left the mine (Tr. 120-121). Mr. Patterson did not believe that working wet was hazardous, and he confirmed that one can get electrocuted when dry or wet, and that it would possibly be hazardous for someone to stick their hand in an energized power box, but that "our people are all well trained enough not to encounter those situations" (Tr. 121-122).

Mr. Patterson confirmed that he handled the grievances, and he confirmed that Mr. Chandler filed a grievance for 4-1/2 hours of pay for the day he was kept at the mine on October 17, and that the grievance was settled and he was paid for these hours. Mr. Chandler was charged with an unexcused absence on October 16, was not paid for that day, and he did not grieve this action (Tr. 126-127).

Mr. Patterson confirmed that Mr. Rainey telephoned him on October 16, and informed him that "he had an employee who wanted some dry clothing." However, Mr. Rainey interrupted the conversation and said "forget that, here comes the rest of the crew and they all want dry clothing also" (Tr. 128). Mr. Patterson denied that he told Mr. Rainey to instruct the miners to go to work or go home, and he stated that "our management people are trained very well not to make those statements," and he assumed that Mr. Rainey "probably did not state it in that fashion." Mr. Patterson stated that there was no way he could have supplied everyone on the second shift with clothing, and that he instructed Mr. Rainey to tell his men to go to work (Tr. 129, 131).

Mr. Patterson stated that supervisors who have made statements "go to work or go home" have "open themselves up to enable people to go home. * * * That is why our people are trained not to ever make those comments" (Tr. 132). Mr. Patterson denied that he ever suspended Mr. Rainey, but confirmed that he suspended another foreman when he found that miners on his crew were losing from 10 to 25 minutes from work by drinking coffee and eating before starting any work (Tr. 133-134).

Mr. Patterson stated that at the time Mr. Chandler was questioned on October 17, he (Chandler) contended that Mr. Rainey had said "go to work or go home," but Mr. Rainey "flatly denied

it" in the presence of Mr. Chandler (Tr. 142). Mr. Patterson denied that Mr. Rainey had ever been suspended for lying to a superintendent, but confirmed that he had been suspended for other reasons (Tr. 143).

Mr. Patterson stated that Mr. Chandler does not have a bad work record and that Mr. Wisdom is a fine employee. He stated that he is responsible for running the mine, and that it is not out of the ordinary for people to work wet (Tr. 147). He stated that the respondent is not responsible for furnishing dry clothing, but that there have been instances when a miner was allowed to change clothing if he were saturated with oil or chemicals. He confirmed that he did not know how hard it was raining on October 16, and was not paying particular attention to the rain (Tr. 150-152).

Mr. Patterson stated that the union could have taken the issue of dry clothing to arbitration before an arbitrator but chose not to take it beyond the step three suspensions issue when the matter was withdrawn by the union (Tr. 155). Mr. Chandler confirmed that this was the case, and he stated "That's why I'm here. Because the company nor the union has ever given me an answer on wet, sloppy clothing" (Tr. 155). Mr. Patterson confirmed that Mr. Chandler did not ask him for rain gear or to delay the cage on October 16 (Tr. 168).

William M. Simon, shuttle car operator, confirmed that he worked on the same crew with Mr. Chandler on October 16, 1989, and was also suspended for 5 days as a result of the same incident (Tr. 171). He stated that the respondent has furnished him with boots "when we hit water down below" and with raincoats while washing off equipment. He confirmed that he filed for unemployment because of his suspension, and that the State of Illinois, Department of Employment Security found "that there was no misconduct in our part for wanting to get dry clothes," and although he was not paid unemployment, he was given "credit for a waiting week" of unemployment and was not disqualified from receiving such credit (Tr. 172-174, exhibit C-2).

Mr. Simon stated that he has worked in the past while wet, but that the rainfall on October 16, was unusual and that he was "soaked all the way to the skin." He confirmed that he was paid for 5 hours for the time spent at the mine during the interviews of October 17, but that he was charged with an unexcused absence on October 16, and that he was suspended for insubordination, and not for unexcused leave on that day (Tr. 189-190).

Mr. Simon stated that when Mr. Rainey came to the transformer area on October 16, "everybody said well, we want--we'd like some dry clothes." Mr. Rainey left to make a phone call, and when he returned "he said that Bill Patterson wasn't going to send any dry clothes to you, to go work or go home" (Tr. 190).

Mr. Simon stated that given that choice, he decided to go home and not work in wet clothes because he had pneumonia twice during the prior year. He confirmed that he said nothing to Mr. Patterson or to Mr. Rainey about his pneumonia while he was underground (Tr. 191).

Mr. Simon stated that after speaking with Shan Thomas, the mine manager, at the man trip, and informing him that he wanted dry clothes, he and the other miners went to the surface and to Mr. Patterson's and Mr. Smart's offices, but they were not there. He then went to the supply room and asked Carla Lehr if she had dry coveralls and she informed him that she did, but did not know how many. She then left, and after waiting for 10 to 15 minutes for her to return, he took a shower and went home (Tr. 193). Mr. Simon stated that he would have returned to work in his street clothes but could not find anyone to allow him to do this, and he doubted that he would have been permitted to do so (Tr. 192-195). He confirmed that he saw Mr. Patterson in an office on his way out of the mine, but they did not speak to each other (Tr. 196).

On cross-examination, Mr. Simon confirmed that he was in the supply room where raingear is kept before riding the cage underground, and that he did not try to get a foreman to sign it out to him because no foreman was there and he had no time because he had to take the first cage trip. He also confirmed that he had an opportunity to speak with Mr. Patterson before leaving the mine, but did not do so, and that Mr. Patterson made no attempt to speak with him (Tr. 199-200).

In response to further question, Mr. Simon stated that he may have been present when Mr. Rainey spoke to Mr. Chandler after telephoning Mr. Patterson. It was his understanding that Mr. Rainey informed the miners that it was Mr. Patterson who told Mr. Rainey to inform the miners to either go to work or go home. He confirmed that he said nothing to Mr. Rainey about his prior pneumonia, and did not hear Mr. Chandler say anything to Mr. Rainey about his working without raingear. He also did not hear Mr. Chandler make any safety complaints to Mr. Rainey (Tr. 201-203). Mr. Simon stated that he raised the question of his prior pneumonia with management for the first time during his interview on October 17 (Tr. 204). He confirmed that he and the other miners who went home and were suspended filed discrimination complaints with MSHA, "but we lost and they didn't agree with us" (Tr. 205). He stated that he took no further appeal because he did not file it in time (Tr. 205). He confirmed that he knew it was raining before he left the supply room and went to the cage, and that he would probably get wet in the rain. His fear of pneumonia did not prevent him from going out in the rain, because it was "not as bad as my fear of getting fired for not going out there" (Tr. 207).

Lowell D. Wisdom, shuttle car operator, testified that in October, 1989, he was working as a roof bolter, and that he said nothing to Mr. Patterson or Mr. Smart about the rain on that day, and they said nothing to him. He stated that he made several attempts to locate them in the office when he first came to the surface and before showering and going home, but could not find them. He also indicated that he was reluctant to speak to Mr. Smart "because of his practice of punishment and writing people up and everything," but that he would not now hesitate to ask Mr. Patterson if it was necessary for the men to go down the cage in the rain because the "circumstances has changed tremendously since Mr. Patterson has become our superintendent" (Tr. 209-212). He stated that several years ago when he was wet he was allowed to go to the surface to put on overalls and return to work, and that the company has provided him with raingear and boots when he requested them (Tr. 209, 213).

On cross-examination, Mr. Wisdom confirmed that the purpose of the October 17, meeting with management was to explain what had happened the previous day. He identified a copy of his suspension letter, and confirmed that the letter says nothing about wet clothes. He also confirmed that during the time in question there was tension at the mine over the manner in which Mr. Smart was managing the mine, but he did not believe that the "Pittson Strike" which was in progress at that time had anything to do with the situation at the mine (Tr. 214-219).

In response to further questions, Mr. Wisdom stated that he has never engaged in any wildcat strike, and that if he had received "good, dry clothing" on October 16, he would have gone to work (Tr. 219). He stated that his opinion of Mr. Patterson has not changed since October, 1989, but that Mr. Patterson was not in charge of the mine as he is at the present time (Tr. 220). He confirmed that he did not hear Mr. Rainey state that Mr. Patterson instructed him to tell the men to go to work or go home. Mr. Wisdom also confirmed that he never heard Mr. Chandler or Mr. Simon raise any safety questions with Mr. Rainey or indicate that working in wet clothes put them at risk, and that he made no such complaint (Tr. 222).

Mr. Wisdom stated that he had no idea why his union did not pursue the "dry clothes issue" further, and he produced a newspaper article of November 1, 1989, concerning the wildcat strike (exhibit C-3, Tr. 225). He also confirmed that the union did not pursue his suspension further, and that the union district representative told him that he did not want to take the case to an arbitrator "because the arbitrator might rule against us and fire us" (Tr. 227). Mr. Simon stated that it was his understanding that the "insubordination" which resulted in his suspension was "for refusing to go to work, I guess. And it says for leaving the mine" (Tr. 229). He further explained that he was not suspended for taking an unexcused absence, but that he was

charged with an unexcused absence for October 16, and was not paid for that day. He failed to understand how he could subsequently be suspended for not taking orders on the day that he received no pay. He conceded that assuming he were told by a foreman to go to work, and he instead went home, this would be insubordination, but that "if they didn't pay me, I don't feel like they had any business giving me any orders." He further conceded that he did not work on October 16, but expected to be paid for the 1 hour he was underground before going home, and that "I feel like they would have been more right in issuing me a letter for insubordination had they been paying me" (Tr. 230-231).

Respondent's Testimony and Evidence

William I. Patterson, mine superintendent, testified that he has been employed by the respondent for 17 years and that on October 16, 1989, he was serving as the general mine manager responsible for the underground operation of the mine. He confirmed that the UMWA represents the miners, and that pursuant to contract, the mine has safety committees for dealing with employee safety complaints. A safety committeeman is available for each of the three working shifts at the mine, and he confirmed that he has had dealings with the safety committee numerous times. He confirmed that there was an ongoing strike at the Pittson Coal Company in October, 1989, and that a few of the respondent's miners were given permission, through their union district office, to participate in that strike, and to attend a union "solidarity" rally held on October 15. He stated that as a result of the strike, he "could see a change with some people" at the mine, but not all of them (Tr. 238-243).

Mr. Patterson stated that during the day shift on October 16, while he was underground, he "noticed a lot of dissension among some of the employees" on that shift, and informed superintendent Smart that "things just don't feel right." He was not sure whether this had anything to do with the events of October 16, on the second shift (Tr. 244). He confirmed that he was in the "lamp room" at the beginning of the second shift, knew it was raining, but not how hard, and that he did not see the men get on the cage at the start of the shift. He stated that no one asked him to delay the cage from going underground, and he did not speak with Mr. Chandler at that time, and no one asked him for any raingear (Tr. 246).

Mr. Patterson confirmed that he received a telephone call from unit 3 section foreman Lawrence Rainey from an underground phone on October 16, and Mr. Rainey told him that one of the miners, Dale Burnett, wanted dry clothing and that he had clothes in his basket and wanted dry clothes. Before he could finish the conversation, Mr. Rainey said "forget that--the whole unit wants clothes now" (Tr. 248-249). At that point in time, Mr. Patterson

stated that he realized that there were three working units and some "outby people" underground, comprised of approximately 40 to 45 miners, and although there may have been 8 to 12 pair of winter coveralls which are usually available for people working outside in cold weather, he knew that he could not supply all of the miners and told Mr. Rainey that he did not have clothes on the surface and to order his people to go to work (Tr. 250).

Mr. Patterson stated that he was positive that he did not tell Mr. Rainey to order the men to go to work or go home because "through years of training, our supervisors have been trained that you do not give people options, that you do not say those things" (Tr. 251). Mr. Patterson stated that during the October 17, interviews with the miners who went home the previous day, they were each interviewed separately, and only two of them indicated that Mr. Rainey had said "go to work or go home," and the rest of the individuals said they did not hear Mr. Rainey make such a statement. Those individuals stated that Mr. Rainey informed them that "it was my orders for them to go to work," and Mr. Rainey assured them that he did not make such a statement (Tr. 251-253).

Mr. Patterson stated that the respondent does not furnish dry clothes to miners, and that they have occasion to get wet in the ming during their normal work duties in the mine where water is encountered. He explained that raincoats or boots may be requested when a miner is working under muddy conditions or is working in a wet entry, and that there are 8 to 10 rainsuits available at the mine, and that he would purchase more if needed. He stated that raincoats are different than dry clothes, and that it was his understanding that the miners were asking Mr. Rainey for dry clothes. He stated that "I really don't know what they was asking for because I think most of the people knew that I could not supply dry clothing" and that there was possibly four to five sets of winter overalls available for their use (Tr. 255).

Mr. Patterson stated that he has never supplied dry clothing for anyone who was wet with water, but that persons who have been wet with oil or a chemical would be able to get a pair of coveralls, but he considered these circumstances to be different from a situation where someone is wet from water. He confirmed that the miners are given an unrestricted clothing allowance, and there are no rules against bringing or storing clothes at the mine. He has never had an entire working unit ask for dry clothes during his employment at the mine (Tr. 257).

Mr. Patterson stated that after speaking with Mr. Rainey on October 16, he went to the supply room and confirmed that he did not have enough coveralls. He then informed Carla Lehr, who was on duty, that some employees had requested dry clothing but that he did have them available, and that "if anything else becomes of

this," she was to summon him from a training class which he and Mr. Smart were attending at the mine (Tr. 258). Shortly thereafter, he was summoned out of the class by the surface supervisor, and he went to the supply room and Ms. Lehr informed him that "people had come out of the mine" (Tr. 261). He heard the showers running and surmised "that the men had already got into the shower." He returned to his office and then went to another office which has a view of the exit from the bath house. He then observed Mr. Chandler walking by the doorway to the office, and they did not speak. Mr. Chandler was the first person to leave the mine, and he was subsequently followed by the other miners who left together. Mr. Patterson stated that he was writing down the names of the miners who he recognized, and when asked why he did not speak to Mr. Chandler when he passed by the office, he responded as follows (Tr. 263-264, 266-267):

> A. It was my view that these people had taken their initial stand on what they was going to do. I have given the order to go to work. It's my job to manage the mine. I could not give them all dry clothing. I could not give the whole shift dry clothing.
>
> And I had issued an order for them to go to work. They had decided to leave the mine, leave the property. And at this point in time, I felt it better to -- because I felt maybe there was some dissention, maybe the next day in the meeting find out the whole story.
>
> * * * * * * *
>
> Q. -- had you had any other complaints from any other units underground about wet clothing?
>
> A. No, sir.
>
> Q. After these men left, and I assume -- let me not assume anything. Did you try to talk to any of the other men? You said Mr. Chandler left; did you try to talk with any of the other men?
>
> A. No, sir.
>
> Q. As they left?
>
> A. No, sir, I did not.
>
> Q. Did any of them try to talk to you?
>
> A. No, sir.

Mr. Patterson stated that after Mr. Chandler and the other miners on his unit left the mine on October 16, he and Mr. Smart

met with Mr. Thomas and Mr. Rainey to find out what had occurred. Mr. Rainey explained that he encountered the unit underground at the power center, or transformer, and that some of the men were having coffee and sandwiches, and were drying their coats by laying them on the transformer. Mr. Rainey knew that he (Patterson) had recently suspended a foreman for allowing this to go on, and informed the miners about this action and told them they could not stand around and needed to go to work. One individual, Dale Burnett, asked Mr. Rainey for dry clothes and stated that "I want dry clothes or a ride out." Mr. Rainey then made the phone call and informed the men that he (Patterson) had ordered them to go to work. Rather than going to work, the men got on the man trip and Mr. Thomas arrived on the scene and spoke with them and asked Mr. Rainey about what was going on. Mr. Rainey informed Mr. Thomas that he had instructed the men to go to work, and after Mr. Thomas reminded them that they had been given an order to go to work, "they again said we're leaving. We want dry clothes or whatever, and we're leaving" (Tr. 271). The men then left on the man trip and came to the surface, but the rest of the working shifts, except for unit 3, completed their work shift without incident (Tr. 272).

Mr. Patterson stated that the next day, October 17, he instructed Mr. Thomas to inform the miners on unit 3 who had left the mine the previous day to "step aside" and not enter the cage to go underground and to tell them that "their work assignments for that day was in the front office." The miners were brought to an office and a supervisor was posted to wait with them "so that everyone couldn't start talking and get the same story together" (Tr. 273). Mr. Patterson stated that the purpose of the meeting was to investigate why the men had disobeyed a work order and left the mine the prior day, and that no decision had been made as to any disciplinary action until all of the facts were known. In addition to himself, Mr. Patterson confirmed that Mr. Smart, at least two union committeemen, and human relations representative Dennis Niziolkiewicz, were present during the individual interviews with the miners, and Mr. Rainey was present "during part of it" (Tr. 275). Mr. Chandler was given an opportunity to explain his actions, and apart from the different accounts by two miners as to what Mr. Rainey purportedly told the miners underground on October 16, with respect to the statement "go to work or go home," Mr. Patterson agreed that after hearing the testimony of Mr. Chandler and Mr. Wisdom during the hearing in this case, his recollection and their recollection of the events of October 16, were essentially "pretty close" (Tr. 276).

Mr. Patterson stated that he learned that the remainder of the second shift on October 17, "had wildcatted," either before or after the meeting and interviews began, and that the men on the shift "had pulled an unauthorized work stoppage" and did not go underground. The wildcat strike lasted for 6 days, and the miners were out 6 to 8 days, and it took a court order to get

them back to work (Tr. 279). Mr. Patterson confirmed that none of the men who were interviewed on October 17, mentioned any concern about any safety hazard because of being wet underground, but he did recall that Mr. Simon mentioned something about "a cold or pneumonia" (Tr. 277).

Mr. Patterson stated that the disciplinary suspension decision with respect to Mr. Chandler and the other miners who left the mine on October 16, was a collective decision by himself, Mr. Smart, and Mr. Niziolkiewicz, and he explained the basis for that decision as follows (Tr. 279):

> A. The basis for the decision was the people had acted irresponsibly and had left their place of work and left the mine property with no prior authorizations. They engaged in a group effort of leaving the mine. And some of the information we gathered through the investigation of some of the things that did happen led to the final form of discipline.

Mr. Patterson confirmed that Mr. Burnett was discharged because he played a "big role" in the incident of October 16, and "got the bandwagon rolling in some of his comments of give me dry clothes or a ride out, and carrying on." He also was in trouble over absenteeism, and under these circumstances, he received a much stiffer punishment than the suspensions without pay given Mr. Chandler and the other miners (Tr. 280-281, exhibits R-3 through R-7). Mr. Patterson explained that the failure by Mr. Chandler and the other miners who were suspended to follow his order to go to work on October 16, constituted insubordination. Mr. Patterson also considered the "group exit" from the mine on that day to be an unauthorized work stoppage or strike by each of the individuals who left the mine (Tr. 285).

Mr. Patterson confirmed that Mr. Jim Smith was given a 1 or 2-day suspension after accepting the respondent's offer for a suspension based on his admission of guilt for leaving the mine on October 16, and he signed a letter to this effect. Mr. Chandler and the other miners were given the same opportunity to sign such a letter, but they refused (Tr. 290-296). Mr. Patterson was present during the suspension grievances filed by Mr. Chandler and the other miners and he explained that the grievance concerned the issue of pay for the miners summoned to the office on October 17, and the suspensions. The pay issue was resolved by paying the miners for the time spent during the investigation, and the suspensions were resolved when the union district officials withdrew the grievances. Mr. Patterson confirmed that he became aware of Mr. Chandler's discrimination complaint when he received a copy in the mail several weeks after the grievances were concluded (Tr. 296-298).

Mr. Patterson confirmed that he had the authority to hold the man cage on October 16, before Mr. Chandler and his crew went underground, but that no one requested him to do so, that none of the miners made any requests for raincoats, nor did they inform him that they intended to leave the mine. He confirmed that during his interviews with the miners on October 17, they all informed him that they had left the mine because they were wet (Tr. 302-304).

On cross-examination, Mr. Patterson stated that Mr. Rainey told him that Mr. Chandler's entire working unit wanted dry clothing, and that he (Patterson) instructed Mr. Rainey to inform the men to go to work and that he had no dry clothing (Tr. 307). He confirmed that Mr. Burnett took his discharge to arbitration and it was affirmed by the arbitrator (Tr. 313, exhibit C-4). In response to questions concerning Mr. Rainey's purported statement to "go to work or go home," Mr. Patterson responded as follows (Tr. 330-331):

> * * * but if Rainey told me to go to work or go home, how would you interpret it? Is that a direct order? Or would you say that's two orders?
>
> A. Mr. Chandler, we know through the history of the coal mining and other industries that the orders to go to work or go home have been used down the road in several cases for an individual to sidestep the real cause of the meaning of that. And I think it's been upheld before when people make those statements such as that, it's been upheld that possibly it is an order.
>
> So you yourself knowing this to be a fact, you know, and I only can deal with what Mr. Rainey told me, and hopefully he told me the truth and everybody else the truth that he did not make those statements. He made the statement directly as I said it.
>
> * * * * * * *
>
> Now, lets assume that that was a fact, that Rainey gave them the alternative. What would your view be then on whether or not this was insubordination?
>
> THE WITNESS: If a supervisor gives a man an alternative to go to work or go home, I would probably be forced with no other stand to take but the man was following an order to go home.

Mr. Patterson confirmed that Mr. Chandler and the other miners were not suspended because of unexcused absences, and he explained the respondent's policy concerning "early outs" and unexcused absences (Tr. 341-344).

Shan Thomas, testified that he has been employed by the respondent for 21 years, that he is a shift mine manager, and served as the second shift manager on October 16, 1989. He stated that he rode the man cage underground on that day with the work crews, that it was raining hard, and that no one said anything about waiting for the rain to stop before proceeding underground. After arriving underground, the men left on the mantrip to go to their working units and he waited for the second cage to come down with the rest of the men. He confirmed that everyone, including himself, was wet from the rain, but that no one asked for dry clothing at that time (Tr. 348-351).

Mr. Thomas stated that he proceeded to Mr. Chandler's No. 3 unit area and found that the miners were getting into the mantrip to leave the area. Section foreman Lawrence Rainey informed him that the men were leaving and that he had spoken to Mr. Patterson about the matter and that Mr. Patterson instructed him to instruct the men to go to work. Mr. Thomas then informed the men in the mantrip that they were aware of the fact that they were told to go to work, and he called the No. 5 unit and determined that "everything was running o.k." and that no other miners left the mine. Mr. Thomas confirmed that at no time did Mr. Rainey inform him that anyone on Mr. Chandler's unit had voiced any health or safety complaint, and that after the men left, Mr. Patterson instructed him and Mr. Rainey to come to the surface so that he could find out why the men had left their working area (Tr. 352-354).

Mr. Thomas stated that on October 17, 1989, Mr. Patterson instructed him to inform the miners who left their work area on the previous day to report to his office. Mr. Thomas then went to the man cage and instructed Mr. Chandler and the other seven miners on his crew to stand aside and not get on the man cage, and he informed them that their work assignments for that day "was in the office." At that point in time, the rest of the miners who were waiting to ride the man cage underground went to the lamp room and put up their lamps. Mr. Thomas stated that he gave them direct orders to go to work but they ignored him, and he concluded that their refusal to go to work constituted a strike or work stoppage. Mr. Thomas confirmed that he did not participate in the disciplinary action decision taken against Mr. Chandler and the other seven miners on his working unit (Tr. 354-357).

On cross-examination, Mr. Thomas confirmed that Mr. Rainey told him that he had spoken with Mr. Patterson by telephone on October 16, about the situation underground, and Mr. Thomas considered Mr. Chandler and the other "group" of men on his unit to be "a good bunch to work with" (Tr. 359).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

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

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence,

> circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

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

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

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted 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.

Mr. Chandler's Protected Activity

It is clear that Mr. Chandler has a right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; 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). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985). The reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In his posthearing submissions in support of his case, Mr. Chandler asserts that on October 16, 1989, "the fact that I was wet and cold caused a dispute to arise involving concern of my health and safety" (letter received January 8, 1991). Mr. Chandler cites a January 22, 1990, decision by a State of Illinois unemployment compensation referee in connection with Mr. Simon's claim for benefits during his 5-day suspension period (Exhibit C-2). The referee found that Mr. Simon and the other miners who left the mine "were not unreasonable in refusing to work in wet clothing in a cold and windy location," and that this refusal "was not misconduct, as the employer's demands were unreasonable." The referee concluded that since the employer did not carry its burden of proof that Mr. Simon's suspension resulted from "misconduct," he was not disqualified under state law from receiving unemployment benefit credits.

Mr. Chandler also cites a September 25, 1984, arbitration award in the case of Peabody Coal Company, Riverking #1 Underground, UMWA Local No. 1670, John Lambert and Sylvester Frisch, Case No. 81-12-84-1445 (Exhibit ALJ-1). Mr. Chandler stated that Mr. Lambert and Mr. Frisch decided to leave the mine early after becoming wet and cold, and that they were charged with an unexcused "early out." Mr. Chandler asserts that "the arbitrator ruled that they were wet, chilled and concerned about their own health, and to some degree, safety, and did not act insubordinately in making their decisions." Mr. Chandler suggests that his case is identical, and that he too was wet and cold on October 16, 1989, and was concerned about his health and safety and did not act insubordinately in making his decision to leave the mine.

In a subsequently filed letter of February 4, 1991, Mr. Chandler enclosed a copy of a West Virginia Law Review article titled "Protected Work Refusals Under Section 105(c)(1) of the Mine Safety and Health Act," 89 W. Va. L. Rev 629 (1987), co-authored by the respondent's counsel Timothy Biddle, and a two-page excerpt from an unidentified source, listing several work refusal decisions, and a discussion of "Four prerequisites

for refusal to work." Mr. Chandler asserts in the letter that he communicated his complaint to his immediate supervisor "Lawrence Raines," but that when he left the mine on October 16, 1989, "I did not know what the law was on Safety & Health disputes," and that he acted in good faith in complaining about a reasonable health and safety concern.

Congress created a unique statutory scheme under section 105(c) of the Mine Act to preserve a miner's right not to be discriminated against for engaging in protected activity. The issues and standards of proofs presented in arbitration proceedings pursuant to collective bargaining agreements, or in state unemployment compensation proceedings brought before adjudicators and referees, are not the same as those presented in discrimination cases adjudicated pursuant to the Mine Act. An employee's rights pursuant to a collective bargaining agreement, or an applicant's qualification or disqualification from receiving unemployment compensation benefits, are different from the statutorily protected safety rights of miners. Accordingly, the weight to be accorded arbitrator's decisions is within the sound discretion of the Commission's trial judge, on a case-by-case basis. Although the judge is not bound by such decisions, he may nonetheless give deference or weight to an arbitrator's "specialized competence" in labor-management matters. See: Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

In the Peabody Coal/Lambert and Frisch arbitration case cited by Mr. Chandler two miners who were specifically assigned to wash down some mine face machinery with a high pressure hose asked management for rainsuits to protect them from getting wet while doing this work. The miners were told that rainsuits were not available, and they were informed that they could use some brattice cloth as make-shift rain ponchos and could use some available "community boots" to protect their feet. They declined to do either, and during the process of washing down the equipment, they got wet and soaked. After advising management that they were wet and cold, the miners left the mine and they were assessed with an "early-out" and given an unexcused absence. They were also docked for pay for the period they were absent.

The issue before the Lambert-Frisch arbitrator was whether or not the brattice make-shift rain gear and community boots offer by management constituted suitable protective safety equipment which the company was required to provide pursuant to Article III, section (m) of the labor/management contract. Management took the position that the miners got wet because they failed to use the make-shift equipment available to them, and the

union took the position that the miners were put in an improper situation and that getting wet was a natural incident to being assigned the job in question.

The Lambert-Frisch arbitrator found that the company had to do more than provide make-shift equipment, and that pursuant to the contract provision in question, the company was required to make available to employees, who are assigned washing duties, protective rain gear and over boots that adequately protect them from getting wet. In assessing a grievance penalty, the arbitrator concluded that the miners who left the mine took some responsibility for their action and knew that their unauthorized leaving would be charged as an unexcused absence or worse. Under the circumstances, the arbitrator denied their requests for pay during the time they were absent from work. However, after finding that there was never any direct confrontation between the miners and management about their leaving the mine, and after commenting that the miners "were wet, chilled, concerned about their own health, and to some degree, safety," the arbitrator concluded that they did not act insubordinately in making their decision to leave, and he ordered that the unexcused "early-out" be removed from their records.

I find that the facts presented in the aforementioned arbitration decision cited by Mr. Chandler are distinguishable from the facts in his instant discrimination case. The case before the arbitrator concerned a direct challenge and interpretation of a wage agreement provision requiring the mine operator to furnish protective clothing to miners under certain specific work assignment conditions, and the arbitrator's finding that the miners were not insubordinate was based on a lack of any evidence of any "confrontation" with management. Even so, the arbitrator held the miners accountable for leaving work without authorization. In Mr. Chandler's case, the union did not pursue any "dry clothes" contractual dispute, there is no evidence that Mr. Chandler's work assignments would have otherwise exposed him to any wet mine conditions, and his leaving the mine early did result in a "confrontation" with management. Under the circumstances, I have given little weight to the arbitration decision in question.

I have given no weight to the state unemployment compensation referee's finding that Mr. Simon was not disqualified from eligibility for receiving unemployment compensation during his 5-day suspension period. As stated earlier, the issues presented in state unemployment compensation proceedings are different from those litigated pursuant to the anti-discrimination provisions of the Mine Act. I take note of the fact that the referee's finding in Mr. Simon's case was based on his conclusion that the mine operator had not established any "misconduct" on the part of Mr. Simon. Mr. Chandler's suspension was based on "insubordination," and not "misconduct."

At the hearing in this case, Mr. Chandler submitted a copy of the arbitration decision of November 6, 1989, denying Mr. Burnett's discharge grievance. The decision reflects that foreman Rainey, mine manager Thomas, and mine superintendent Patterson appeared at the grievance hearing on behalf of the respondent, and that Mr. Simon, Mr. Wisdom, and three of the other suspended miners appeared on behalf of Mr. Burnett. Mr. Chandler's name is not included among those who appeared.

In sustaining Mr. Burnett's discharge, the arbitrator found that he and "the other crew members were guilty of refusing a direct order to go to work" by foreman Rainey (Exhibit C-4, Finding #1, pg. 4). The arbitrator also found that Mr. Burnett's telling Mr. Rainey that he wanted dry clothes or a ride out "set up a confrontation situation with Management in the form of giving an ultimatum to Management," and that "this occurred after the issuance of the direct order by Mr. Rainey" (Exhibit C-4, Finding #2, pg. 4). The arbitrator also stated as follows at page 6 of his decision:

> We are well aware that mining coal is dangerous, hard work and conditions are often undesirable. Getting wet in a mine or working wet is one of those uncomfortable situations and we are not unsympathetic to any miner, Union or Management, under such circumstances. The Arbitrator has worked in extremely uncomfortable conditions, both in heavy industry and in military service. However, most assuredly Management cannot be blamed for a 50 or 100 year rainstorm (as described by the Union) which got employees wet before going into the mine. Mr. Burnett and the rest of the crew acted in defiance of Management's right to operate its facilities. The other employees at the mine worked.

Safety Complaints

There is no evidence that Mr. Chandler or any of the other miners on his unit made or communicated any health or safety complaints to foreman Rainey or to any other member of mine management on October 16, 1989, when they requested dry clothes, or before leaving the mine. Although Mr. Chandler stated in his complaint that he was protecting his "health and safety rights" when he made his request for dry clothes, that he "got soaked completely" while walking from the supply building to the man cage, and that he was "very cold" when he arrived underground, he did not contend that these conditions constituted any health or safety hazards, nor did he assert that he communicated any such concerns to his foreman or any other members of mine management. Indeed, the record establishes that while Mr. Chandler had ample opportunity to communicate any safety or health concerns to the section foreman, mine manager, and mine superintendent, he did not do so.

Shuttle car operator Simon, who testified that he had a previous case of pneumonia, confirmed that he raised no safety issue with the section foreman or mine superintendent before leaving the mine on October 16, 1989, and he conceded that he did not hear Mr. Chandler make any safety complaints. Shuttle car operator Wisdom confirmed that he made no safety complaints on October 16, and he confirmed that he never heard Mr. Simon or Mr. Chandler raise any safety questions with the section foreman or indicate that working in wet clothes placed them at risk. The Burnett arbitration decision is totally devoid of any references to any safety complaints or safety issues raised by the miners in connection with their mine exit of October 16, 1989.

Mr. Chandler's belated claim that working in wet clothes posed a hazard to him was raised for the first time at the hearing, when he testified that his wet clothes presented a possible electrocution hazard if he were to handle electric cable "with wet sloppy clothing," and that he could get "chilled, catch pneumonia, and get sick and miss work" if he were working in the face area where there was 60,000 cubic feet of air per minute (Tr. 101). Mr. Chandler had not previously mentioned these safety or health concerns in his prior MSHA or Commission complaints. Further, at the hearing, Mr. Chandler conceded that at no time did he mention these asserted hazards to foreman Rainey, mine manager Thomas, or superintendent Patterson, and that he simply stated that he was "sopping wet and just wanted dry clothes" (Tr. 102).

Having viewed Mr. Chandler during the course of the hearing, particularly with respect to the manner in which he handled himself in presenting his pro se case, he impressed me as a rather astute individual. In his posthearing letter received February 4, 1991, Mr. Chandler asserts that he communicated his complaint to foreman Rainey, that he acted in good faith in complaining about a reasonable health and safety concern, and that when he left the mine on October 16, 1989, he was ignorant of the law concerning safety and health disputes. Mr. Chandler's arguments are rejected. I believe that Mr. Chandler realized too late during the hearing that any viable claim of discrimination pursuant to the Mine Act with respect to a protected work refusal must be based on a bona-fide and sincere showing of a health or safety hazard. On the facts here presented, I cannot conclude that Mr. Chandler has made such a showing, and I find his belated claims to be less than candid and lacking in credibility.

Even if I were to accept Mr. Chandler's assertions concerning his belated claims of hazards associated with working in wet clothes, there is absolutely no evidence that he ever communicated these concerns to mine management, even though he had more than an ample opportunity to do so. It has consistently been held that a miner has a duty and obligation to communicate any

safety complaints to mine management in order to afford management with a reasonable opportunity to address them. See: Secretary of Labor ex rel. Paul Sedgmer 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.

In Secretary of Labor ex rel. Paul Sedgmer, Jr., et al., v. Consolidation Coal Company, supra, the Commission affirmed a Judge's dismissal of a complaint filed by several miners who received a suspension with intent to discharge after concluding that the mine operator had a good faith belief that the complaining miners had engaged in a work slowdown. The disciplinary action taken by the operator was based on its conclusion that the suspended miners had engaged in a slowdown and had violated a number of employee conduct rules governing insubordination and participation in a work stoppage or slowdown. In addressing the issue as to whether or not the miners conduct (operating equipment at a slow speed) was predicated on a reasonable, good faith belief that it would have been unsafe to operate it at a greater speed, the Commission accepted the judge's finding discrediting one of the miner's assertion that he raised safety concerns prior to the incident which precipitated the disciplinary action. The Commission observed that none of the other complainants raised any safety concerns with mine management before, during, or after, the conduct in question. In affirming the judge's dismissal of the case, the Commission stated as follows at 8 FMSHRC 309, with respect to the failure by the complaining miners to communicate any safety concerns to management:

> While such communications are not only expected, in ordinary course, in work refusal situations, their absence also lends weight to the conclusion that the disagreement here as to operating speed did not have a sound basis in safety concerns. (Citing Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397 (June 1984).

In Miller v. FMSHRC, supra, the Seventh Circuit Court of Appeals upheld a Commission Judge's dismissal of a discrimination complaint involving a section foreman's refusal to start up a longwall mining machine which he believed was in an unsafe condition. The miner took no steps to report his refusal to start the machine to his supervisor, and in holding that the work refusal was not protected activity, the court stated as follows at 687 F.2d 196:

* * * * * * *

> Thinking our way as best we can into the minds of the Senators and Representatives who voted for the 1977 amendments, we can imagine them wanting to allow miners to complain freely about the conditions of safety and health in the mine without having to worry about retaliation if the complaint was later determined to have been frivolous yet at the same time not wanting to render mine operators powerless to deal with miners who, simply by alleging a hazard to safety and health, claim a privilege to walk off the job without notice. We are unwilling to impress on a statute that does not explicitly entitle miners to stop work a construction that would make it impossible to maintain discipline in the mines.

As the complainant in this case, Mr. Chandler has the burden of establishing by a preponderance of the evidence that he made and communicated any safety complaints to mine management, that management knew or had reason to know about the complaints, and that the adverse action (suspension) which followed was the result of the complaints and therefore discriminatory. In short, Mr. Chandler must establish a connection between the complaints and his suspension. 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). I cannot conclude that Mr. Chandler has established such a connection.

The Work Refusal

After careful review and consideration of all of the evidence and testimony in this case, I cannot conclude that Mr. Chandler had a reasonable, good faith belief on October 16, 1989, that to work in wet clothes constituted a health or safety hazard, when he refused his foreman's directive to go to work, and opted instead to leave the mine. The record establishes that Mr. Chandler and the rest of his working unit were dry when they arrived for work, and got wet when they left the shelter of the supply room and walked to the man cage in an unusual downpour of rain. Mr. Chandler conceded that he could have remained at the supply building, rather than walk in the rain to the man cage, or he could have asked the foreman to hold the cage until the rain ended. He did neither. Even though he was in close proximity to the supply room where some rain gear was stored, Mr. Chandler conceded that he made no attempts to ask anyone for rain gear before walking out in the rain. Although the entire working shift, consisting of three working units, were also exposed to

the soaking rain and got wet, there is no evidence that any of these other units asked for dry clothing, and they went to work without incident.

Although Mr. Chandler claimed that the respondent, as a matter of practice in the past, routinely supplied dry clothing to employees, the evidence shows otherwise. What the company did supply was extra coveralls if an employee were exposed to oils or other contaminants, or rain gear and boots to those employees who were assigned work which would expose them to getting wet, or to employees who were expected to work in wet and muddy mine areas. I find no evidence that the respondent was obligated to otherwise furnish employees dry clothing or wearing apparel upon request. Under the union contract, the respondent was required to furnish safety equipment, but not personal wearing apparel such as clothing, shoes, boots where worn as part of normal footwear, hats, belts, and gloves. Instead, each employee, including Mr. Chandler, receives an annual clothing allowance of $150 to spend at their discretion. Mr. Chandler confirmed that he does not keep an extra set of work clothes at the mine, but does keep some items of personal clothing there.

Mr. Chandler confirmed that he would not expect the respondent to furnish him with a top coat, gloves, and ear muffs to keep him warm if he were working in 15 degree temperature, but he believed that working in wet clothes was a different situation (Tr. 165). He further conceded that he would not expect the respondent to furnish him dry items of work clothes such as a shirt, overalls, and underwear, but would expect the respondent to furnish him with coveralls.

Mr. Chandler testified that if he were furnished dry coveralls, he would have removed all of his wet clothing and worked only in his coveralls (Tr. 103). He confirmed that he has worked under wet mine conditions in the past, and had gotten wet while working, but not "sopping wet." He stated that he would only want a full change of dry clothes if he were "sopping wet" and that the degree of wetness would make a difference (Tr. 64).

Although I sympathize with Mr. Chandler's desire to perform his work in comfort and with dry clothing, based on all of the testimony and evidence adduced in this case, I conclude and find that at most, Mr. Chandler has established that working in "wet, sloppy, clothing" presented an uncomfortable working condition, rather than a working condition that presented any real safety or health hazard. As noted earlier by the arbitrator in rejecting Mr. Burnett's grievance, "getting wet in a mine or working wet is one of those uncomfortable situations and we are not unsympathetic to any miner, Union or Management, under such circumstances." In addition, the Commission recently held that discomfort is not a hazard justifying a protected work refusal.

See: Paula Price v. Monterey Coal Co., 12 FMSHRC 1505 (August 1990), where the Commission stated as follows at 12 FMSHRC 1515:

> Mining is not the most comfortable of professions. Many items of basic miner's apparel or gear such as clothing, personal protection equipment and other safety accessories (e.g., cap lamps and batteries, self-rescuers, hard-toed shoes and hard hats) contribute to the general discomfort of laboring in an underground mining environment. It is problematic, however, to compare such discomfort, in either type or degree, to the hazards heretofore at issue in work refusal cases brought before the Commission.

In the final analysis, I am not persuaded that the "dry clothing" dispute which culminated in the group work refusal and exit from the mine by Mr. Chandler and the rest of the miners on his working unit had anything to do with any bona fide safety or health concerns. As noted earlier, there is no evidence that Mr. Chandler or any of the other miners who testified in this proceeding ever raised any safety concerns or registered any safety complaints in connection with their wet condition, and there is no evidence that any health or safety issue was raised in the Burnett grievance. I believe that the dispute, which the evidence strongly suggests was instigated by Mr. Burnett, and which came about during a period of mine tension and labor unrest because of the ongoing Pittston strike, was based on a somewhat tenuous belief by the miners that the respondent had some duty or obligation to provide them with dry clothing before requiring them to go to work. Their requests, which management found unreasonable and impossible to fulfill, soon escalated into a full-blown work refusal and group exit from the mine, followed by a wildcat strike by the entire work force which shut down the mine and forced the respondent to obtain a court injunction to return the miners to work.

Mr. Chandler agreed that the union could have pursued arbitration to seek redress of the dry clothing issue, but that it did not do so. Mr. Chandler was obviously unhappy with the union's decision not to pursue the matter further when he stated "That's why I'm here. Because the company nor the union has ever given me an answer on wet, sloppy clothing" (Tr. 155). In this context, and in the absence of any evidence of discrimination within the parameters of section 105(c) of the Mine Act, I am of the view that such disputes are best left to the union/management collective bargaining and grievance processes. It is not my function, nor is it within my jurisdiction, to mediate or arbitrate such disputes under the aegis of the Mine Act.

The Respondent's Motivation for Mr. Chandler's Suspension

The respondent's policy and guidelines concerning "Early Out" (employees leaving work shift early), dated August 29 and September 15, 1989, state as follows:

> [E]mployees are expected to work their full shift unless prior authorization has been granted by management. Unauthorized early outs will subject employees to disciplinary action up to and including discharge. Disciplinary action will be determined on a case by case basis. (Exhibit R-1).
>
> Employee's leaving work early without notifying management, who participate in any group exits, claim sickness to avoid work assignments, or participate in a concerted effort to leave work early may be disciplined up to and including discharge under the relevant provisions of the Wage Agreement. (Exhibit R-1-A).

The respondent's credible and unrebutted testimony establishes that Mr. Chandler was suspended for insubordination and for leaving the mine as part of a group exit prior to the end of his regular work shift. Mr. Chandler's suggestion that Mr. Thomas gave him permission to leave the mine is rejected. Mr. Chandler conceded that Mr. Thomas said nothing to him about leaving the mine, and I find no support for Mr. Chandler's conclusion that Mr. Thomas authorized him to leave the mine before his normal work shift ended. As for the insubordination charge, I find that the evidence clearly supports a conclusion that Mr. Chandler refused a direct order by foreman Rainey to go to work, and that this conduct by Mr. Chandler constitutes insubordination.

In the course of the hearing, and in his posthearing letter received January 8, 1991, Mr. Chandler argued that he was not insubordinate because foreman Rainey gave him the option of going to work or going home, and he opted to go home. Mr. Chandler testified that after he requested dry clothing, Mr. Rainey made a phone call, and when he finished the call, Mr. Chandler claims he heard Mr. Rainey make the statement "go to work or go home," but he believed that someone else instructed him to make that statement (Tr. 82-85). Mr. Chandler had earlier testified that "the words he caught" from Mr. Rainey were "go to work or go home" (Tr. 18). Mr. Wisdom testified that he did not hear Mr. Rainey make the statement, and Mr. Simon testified that he may have been present when Mr. Rainey spoke with Mr. Chandler, and that it was his understanding that Mr. Rainey informed the working unit that Mr. Patterson had instructed him to tell the men to go to work or go home (Tr. 201-203; 221).

Superintendent Patterson denied that he ever instructed Mr. Rainey to give Mr. Chandler and the other miners an option to go to work or go home, and he indicated that such a statement was contrary to years of supervisory training and instructions that such options are never given. Mr. Patterson confirmed that Mr. Rainey denied making such statements. Although Mr. Patterson's testimony in this regard is hearsay, I find it credible and relevant and it is admissible. See: Secretary of Labor v. Kenney 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). I also take note of the following findings of the arbitrator in Mr. Burnett's grievance case (Exhibit C-4, pg. 4):

> 1. Dale Burnett and other crew members were guilty of refusing a direct order to go to work which was issued by Foreman Lawrence Raines (sic) at the power center.
>
> 2. Dale Burnett's telling Lawrence Raines (sic) (at the power center) that he wanted dry clothes or a ride out set up a confrontation situation with Management in the form of giving an ultimatum to Management. It is important to note that this occurred after the issuance of the direct order by Mr. Raines (sic). Mr. Rainey told Mr. Burnett in the presence of the crew that he didn't have the authority to get him dry clothes but he could get him a ride out. (Emphasis added).

After careful consideration of all of the testimony and evidence, I find Mr. Chandler's testimony with respect to the purported "work or go home" option by Mr. Rainey to be unreliable and less than credible. Mr. Wisdom did not hear the statement attributed to Mr. Rainey, and Mr. Simon's testimony is too equivocal and speculative, and there is no indication that Mr. Simon personally heard the statement. There is no evidence that Mr. Chandler, Mr. Simon, or Mr. Wisdom said anything to mine manager Thomas about going home, even though they had an opportunity to do so when he met them at the man trip as they were leaving the section to go to the surface (Tr. 70-71). Mr. Thomas testified credibly that he reminded Mr. Chandler and the other men in the man trip that they had been instructed to go to work, and the Burnett arbitrator found that the crew refused a direct order by Mr. Rainey to go to work, and that Mr. Burnett's request for dry clothing or a ride out of the mine came after Mr. Rainey had issued his direct order. Having viewed Mr. Patterson in the course of his testimony, he impressed me as a credible and straightforward witness, and taking into account Mr. Wisdom's favorable opinion of Mr. Patterson as a superintendent, I believe that Mr. Patterson testified truthfully when he denied that he ever instructed Mr. Rainey to give Mr. Chandler and the other

miners an option "to go to work or go home," and when he testified that Mr. Rainey denied ever making such a statement.

I find no evidentiary support for Mr. Chandler's contention that his 5-day suspension was the result of management's intention to retaliate against him for any health or safety efforts on behalf of himself and other employees. Nor do I find any evidence of any disparate treatment of Mr. Chandler. With the exception of Mr. Burnett, who was dealt with more severely because of his work record, and Mr. Smith who willingly took a 1-day suspension (an option also available to Mr. Chandler), all of the remaining miners on Mr. Chandler's work crew who refused to go to work and left the mine received the same 5-day suspension as Mr. Chandler.

On the basis of the foregoing findings and conclusions, I conclude and find that mine management suspended Mr. Chandler for a violation of a company rule against leaving work early without authorization, and for insubordination for refusing a direct work order given to him by his foreman. I further find and conclude that management had good and sufficient business and disciplinary reasons for suspending Mr. Chandler, and that the suspension was justified. See: Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982); Paula Price v. Monterey Coal Co., 12 FMSHRC 1505 (August 1990); Secretary of Labor/Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 51 (D.C. Cir. 1983).

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

Mr. Kenneth L. Chandler, Box 174, Tilden, IL 62292
(Certified Mail)

Timothy M. Biddle, Esq., Claire S. Brier, Esq., CROWELL & MORING, 1001 Pennsylvania Avenue, N.W., Washington, DC 20004-2505
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 15 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-147-M A.C. No. 41-02976-05525 A
v.	:	
	:	Helotes Mine
CARL STRATING, EMPLOYED BY SOUTH TEXAS AGGREGATES INCORPORATED, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-148-M A.C. No. 41-02976-05524 A
v.	:	
	:	Helotes Mine
JINKS COLEMAN, EMPLOYED BY SOUTH TEXAS AGGREGATES INCORPORATED, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Petitioner;
Carl Strating, South Texas Aggregates, Inc., Knippa, Texas, Pro se, and on behalf of Jinks Coleman.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Carl Strating and Jinks Coleman as officers and agents of a corporate mine operator, South Texas Aggregates, Inc., (South Texas) with knowingly authorizing, ordering, or carrying out two violations

by the named mine operator.[1]

Neither Strating nor Coleman dispute that they were both officers and agents of the cited corporate mine operator however they both dispute that they "knowingly authorized, ordered, or carried out" the cited violations of the corporate mine operator. The issues before me therefore are whether indeed there were violations as alleged and, if so, whether either Coleman or Strating, or both, acting as officers or agents of the corporate mine operator "knowingly authorized, ordered, or carried out" such violations. If it is determined that either Strating or Coleman, or both, acted in such manner then a civil penalty must also be assessed considering the appropriate criteria under section 110(i) of the Act.

Strating and Coleman, are first charged in Dockets No. CENT 90-147-M and CENT 90-148-M respectively with knowingly authorizing, ordering or carrying out the alleged violation of the corporate mine operator as charged in Citation No. 3278307. That citation reads in relevant part as follows:

> Excessive hydralic [sic] leaks due to chaffing [sic] high pressure, (2500 psi) lines in the engine compartment of the 275B Michigan front loader and the subsequent rupture of one of these lines caused the unit to explode in flames on December 14th, 1988. Flames rapidly engulfed the operator's cab due in part to missing protective panels. The operator jumped 7 1/2 feet to escape the flames breaking both ankles. The hydralic [sic] leaks had been reported repeatedly on pre-shift inspection reports. This is an unwarrantable failure.

Since Section 110(c) of the Act predicates individual liability of a corporate agent or officer upon the finding of a violation of a mandatory health or safety standard by the corporate operator I am strictly limited in determining whether there indeed was individual liability under section 110(c) of the

---

[1]Section 110(c) of the Act reads as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowlingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), 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).

Act to evaluation of only the precise allegations in the citations themselves and not allegations or charges of other violations that may have been stated elsewhere in the petitions for civil penalty.

The essence of the charge in the citation is "excessive hydraulic [sic] leaks due to chaffing [sic] high pressure, (2500 psi) lines in the engine compartment of the 275B Michigan front-loader and the subsequent rupture of one of these lines causing the unit to explode in flames on December 14, 1988".

At hearings, however, the Secretary conceded that, despite thorough investigation of the explosion/fire on the cited loader, she was unable to determine the cause of the accident. Indeed she further conceded at trial that the one chafed hydraulic hose discovered after the fire was not in itself a safety defect for which the operator was chargeable--apparently because of its nearly inaccessible location on the loader. In light of these concessions it is clear that the Secretary has not proven the essential allegations in Citation No. 3278307. The charges herein against Strating and Coleman, based upon those allegations, must accordingly be vacated.

In any event even if the Secretary had proven the existence of the cited violation, there is insufficient evidence that either of the Respondents had the requisite knowledge of such conditions before the accident at issue. The Commission defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

> "Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence ... We believe this interpretation is consistent with both the statutory language and the remedial intent of the coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

While there is credible evidence that some management personnel including the victim's father, Billy Tucker, were apprised of some hydraulic oil leakage on almost a daily basis (and most certainly on December 12, 1988, two days before the

accident) there is no direct and insufficient circumstantial evidence that either Respondent herein was aware of uncorrected unsafe hydraulic oil leakage on the cited loader on the morning of the accident. While there is indeed credible evidence that both had been apprised from time-to-time of hydraulic oil leakage from the cited Michigan loader, the evidence does not show that they had been recently apprised of this problem or that previous efforts had not been made to correct this problem. Indeed even the loader operator himself acknowledged that the last and only time he reported such leakage directly to Mr. Strating was 1 or 2 months before the accident and to Mr. Coleman some 3 or 4 weeks before the accident. In addition, while the service person responsible for replacing the lost hydraulic oil, Fred VanWinkle, reported in a statement to investigators that he had complained to Carl (Strating) and Jinks (Coleman) about the so-called excessive leakage of hydraulic oil, the statement is ambiguous as to when VanWinkel complained specifically to the Respondents.[2] VanWinkle also reported in that statement that the first line manager responsible for repairing the loader was Frank Bluemel, the mine superintendent.

The evidence also shows that the Michigan loader was frequently undergoing repairs to correct hydraulic oil leakage problems and was worked on as recently as the Saturday before the accident. It is also clear that it was in the economic self interest of the Respondents, because of the high cost of hydraulic oil, to remedy any excessive hydraulic oil leakage.

The service records in evidence (Exhibit S-10, reproduced herein as Appendix A) for the cited Michigan loader do not, moreover, support the Secretary's position that there was such excessive daily oil leakage and such an absence of repairs that the Respondents should have had knowledge of uncorrected leakage in close proximity to the time of the accident. Indeed, the records show that on the day of accident, December 14, no hydraulic oil was added before the loader was operated and that on the day before only five gallons was added. While ten gallons had been added on December 12, the records show that none was added over the four preceding days. Thus, according to the Secretary's own evidence the average daily consumption of hydraulic oil over that seven day period was only 2.1 gallons--well within the limits of expected normal consumption. Even if the loader had not been used over that preceding weekend, and therefore eliminating those two days from the calculations, the average consumption of hydraulic oil over the preceding week was only three gallons per day--still within the normal range of expected consumption.In addition, mechanic Mo Garcia testified credibly that he had repaired a hydraulic leak on the loader only the Saturday before the accident.

---

[2]VanWinkle did not appear or testify at trial.

While several of the Secretary's witnesses also suggested that the consumption of hydraulic oil on the Michigan loader was about 25 gallons per day, the service records introduced by the Secretary (covering the period from November 2, 1988 to December 14, 1988) show that on only one day was as much as 25 gallons of hydraulic oil added to the cited Michigan loader--and that for the following two days none was added.

This documentary evidence is important for several reasons. One, it sheds doubt on the credibility of several of the Secretary's key witnesses and suggests that they may have been exaggerating the consumption of hydraulic oil on the Michigan loader, and, two, that the consumption over the week prior to the accident was within the acccepted normal range for such equipment. Accordingly, it cannot reasonably be inferred that the Respondents herein should have been on notice of any significant hydraulic oil leakage around the time of the accident for the simple reason that the records produced by the Secretary show that indeed there was not significant consumption of such oil during that time. Thus I cannot find that the Secretary has, in any event, met her burden of proving that either Respondent Coleman or Strating "knowingly authorized, ordered, or carried out" the cited violation even assuming that there was a violation. Accordingly the charges that Strating and Coleman "knowingly authorized, ordered, or carried out" a violation as charged in Citation No. 3278307 must for this additional reason be vacated and dismissed.

In each of these cases (Dockets No. CENT 90-147-M and CENT 90-148-M) Mssrs. Strating and Coleman were also charged with having "knowingly authorized, ordered, or carried out" the violation of the corporate mine operator charged in Order No. 3063887. That Order, as modified, reads in pertinent part as follows:

> Defects on the Hough 560 front end loader were not corrected prior to continued operation which were hazardous to persons. The equipment was taken out of service for repairs to be completed but put back into service prior to completion. Defects are: Leaks in Hydraulic system, leaks in bucket cylinder-right side, leak in steering cylinder, hydraulic tank leaking, oil filter leaking, fuel system leak, brake fluid storage tank both left and right rear wheel cylinders leaking, inspection plates missing, both left and right hoist cylinder pressure hoses rubbed threw [sic] to inside metal covering, fuel/stop linkage disabled which required operator to dismount loader, walk to opposite side of machine and manually cut off engine.

The Secretary's evidence regarding these allegations against Strating and Coleman is again insufficient. Whether or not there was a violation as charged, the evidence does not show that either of the Respondents had any knowledge or reason to know that the cited loader was placed in service on January 5, 1989, after having been taken out of service and parked for repairs. Indeed the fact that the cited loader had been taken out of service in the first place shows recognition by someone that defects indeed needed correction. The credible evidence shows that the pit foreman, Billy Tucker, approached mine superintendent Frank Bluemel that day advising him that a "shovel" had broken down and that he needed the cited Hough loader. The credible record shows that, without consulting anyone, Bluemel authorized Tucker to use the cited loader. Under these circumstances the fact that both Respondents may have previously been aware of hydraulic oil leakage and other problems with the Hough loader is immaterial. The credible evidence shows that it was Bluemel alone, or Bluemel and Billy Tucker together, who authorized the use of the Hough loader. Therefore, whether or not there was a violation of the mandatory standard charged in Order No. 3063887, there is insufficient evidence that either Respondent Coleman or Strating, "knowingly authorized, ordered, or carried out" any such violation. The charges in the captioned cases relating thereto must accordingly be dismissed.

ORDER

Civil Penalty Proceedings Docket Nos. CENT 90-147-M and CENT 90-148-M are hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203 (Certified Mail)

Mr. Carl Strating, South Texas Aggregates, Inc., P.O. Box 217, Knippa, TX 78870 (Certified Mail)

Mr. Jinks Coleman, South Texas Aggregates, Inc., P.O. Box 217, Knippa, TX 78870 (Certified Mail)

nb

APPENDIX A

Date and Day of Week		Gallons of Hydraulic Oil Added	
		LR-5 Hough 560 Loader	(Z230) 175B Michigan Loader
W	12/14	15	0
T	12/13	5	5
M	12/12	0	10
S	12/11	20	0
Sa	12/10	0	0
F	12/9	20	0
Th	12/8	15	0
W	12/7	15	20
T	12/6	10	15
M	12/5	0	5
S	12/4	- no record -	- no record -
Sa	12/3	0	5
F	12/2	- no record -	- no record -
Th	12/1	- no record -	- no record -
W	11/30	- illegible -	- illegible -
T	11/29	10	0 ("OK")
M	11/28	20	7
S	11/27	- no record or illegible -	
Sa	11/26	- no record or illegible -	
F	11/25	- no record or illegible -	
Th	11/24	- no record or illegible -	
W	11/23	- no record or illegible -	
T	11/22	0	15
M	11/21	5	10
S	11/20	- no record -	- no record -
Sa	11/19	0	0
F	11/18	- illegible -	0
Th	11/17	10	25
W	11/16	15	- illegible -
T	11/15	10	0
M	11/14	- no record or illegible -	
S	11/13	- no record or illegible -	
Sa	11/12	- illegible -	- illegible -
F	11/11	20	0
Th	11/10	- illegible -	- illegible -
W	11/9	- illegible -	- illegible -
T	11/8	7	0 ("OK")
M	11/7	- no record or illegible -	
S	11/6	- no record or illegible -	
Sa	11/5	- no record or illegible -	
F	11/4	5	20
Th	11/3	- illegible -	- illegible -
W	11/2	- illegible -	10

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 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 90-160
	:	A.C. No. 46-06887-03519
v.	:	
	:	Docket No. WEVA 90-180
MACK ENERGY COMPANY, Respondent	:	A.C. No. 46-06887-03520
	:	
	:	Montague Mine

DECISIONS

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Gerald P. Duff, Esq., HANLON, DUFF & PALEUDIS, St. Clairsville, OH 43950 (Certified Mail)

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Docket No. WEVA 90-160, concerns alleged violations of mandatory safety standards 30 C.F.R. §§ 77.410(a)(1), and 71.803(a), and Docket No. WEVA 90-180, concerns two alleged violations of mandatory safety standard 30 C.F.R. § 77.1605(b).

The respondent filed timely notices of contests and hearings were held in Charleston, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these cases.

Issues

The issues presented are (1) whether the cited conditions or practices constitute violations of the cited standards;

(2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violations were the result of the respondent's unwarrantable failure to comply with the cited standards; and (4) the appropriate civil penalties to be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

2. Sections 104(d)(1) and 110(1) of the Act.

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

Pretrial Rulings (WEVA 90-160)

By motions received on Friday, November 30, 1990, the respondent moved to dismiss this case on the ground that the petitioner's proposals for assessment of civil penalties were untimely filed, and that one of the citations (No. 9960563), initially listed an improper section of the regulation.

In the course of a pretrial telephone conference held with the parties on November 30, 1990, respondent's counsel was reminded of the fact that Chief Judge Paul Merlin issued a prior ruling on August 2, 1990, accepting the late filing of the petitioner's proposal for assessment of civil penalty. Respondent's counsel acknowledged that his file was incomplete and that he was unaware of this ruling when the motion was filed. I informed counsel that the record reflects that the petitioner's proposals were filed 20 days late, and that in the absence of any showing of prejudice, and in view of the decision in Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981), Judge Merlin's prior ruling would stand and I reaffirmed it and denied the respondent's motion.

With regard to the motion to dismiss Citation No. 9960563, on the ground that the citation initially cited an improper section of the Part 70 standards, counsel was reminded of the fact that the inspector subsequently modified the citation to cite section 71.803(a), instead of 70.508(a), and that the respondent has paid the proposed civil penalty assessment of $20 for the violation. Counsel confirmed that including this issue as part of his motion was an oversight and it was withdrawn.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is the operator of the Montague Mine.

2. The respondent and the mine are subject to the Act.

3. The presiding judge has jurisdiction to hear and decide these matters.

4. MSHA Inspector Sherman Slaughter was acting in his official capacity when he issued the contested citation and orders.

5. True copies of the citation and orders were properly served on the respondent or its agent.

6. With regard to Docket No. WEVA 90-160, the respondent's history of prior violations consists of 41 assessed violations which were issued during 42 inspection days. The violation frequency rate is .97 assessed violations per inspection day, and reflects a moderate history of prior violations.

7. With regard to Docket No. WEVA 90-180, the respondent's history of prior violations consists of 43 assessed violations issued during 45 inspection days. The violation frequency rate is .95 assessed violations per inspection day, and reflects a moderate history of prior violations.

8. The cited conditions and practices were abated by the respondent within the times fixed by the inspector.

9. The respondent is a moderate size mine operator with a company annual production of 222,031 tons, and a mine production of 209,000 tons.

10. With regard to Docket No. WEVA 90-180, petitioner's exhibit G-4, is a true copy of the preshift examination report concerning the No. 71, R-50 rock truck.

The parties agreed that the respondent has paid a $20 civil penalty assessment for section 104(a) Citation No. 9960563, issued by MSHA Inspector James M. Wills on January 11, 1990, for a violation of 30 C.F.R. § 71.803(a), and that this violation is no longer in issue in Docket No. WEVA 90-160.

Discussion

Docket No. WEVA 90-160

This case concerns a section 104(d)(1) "S&S" Citation No. 3334094, issued by MSHA Inspector Sherman Slaughter on December 4, 1989. The inspector cited a violation of mandatory safety standard 30 C.F.R. § 77.410(a)(1), and the cited condition or practice is described as follows:

> The R-50 Euclid rock truck (Co. No. 76) being used to haul spoil at the mine was not equipped with an automatic alarm that would give an audible alarm when the truck was put in reverse or any other type of warning device (sic). This mine had ten citations issued during an eight month period (10/1/88 to 6/30/89) for violations of 77.410, 30 CFR according to violation history contained in UMF.

Docket No. WEVA 90-180

This case concerns two section 104(d)(1) "S&S" orders issued by Inspector Slaughter on January 4, 1990. Section 104(d)(1) "S&S" Order No. 3334014, issued on January 4, 1990, cites a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), and the cited condition or practice is described as follows:

> The Euclid R-50 rock truck (Co. No. 71) being used at the mine to haul spoil was not equipped with adequate brakes in that the truck could not be brought to a stop on the inclined haulroad where it was being used with a load and when the service brakes were applied and the truck was rolling before they were applied. The equipment operator's preshift safety check list showed that the operator of the truck had reported the condition by checking the column "needs corrected" for "foot brakes." The check list was dated 1/4/90 and signed by the equipment operator who according to the foreman, Grover Riddle, was the competent person who inspected the truck before it was placed in operation.

Section 104(d)(1) "S&S" Order No. 3334015, issued on January 4, 1990, cites a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), and the cited condition or practice is described as follows:

> The Euclid R-50 rock truck (Co. No. 71) being used at the mine to haul spoil was not equipped with an adequate parking brake in that when the truck was stopped in the inclined area of the haulroad with the bed loaded and the transmission in neutral (the truck

backed up the incline and then put the truck in neutral) and the park brake applied the truck would roll off. The equipment operator's preshift safety check list showed that the operator of the truck had reported the condition by checking the column "needs corrected" for "parking brakes." The check list was dated 1/4/90 and signed by the equipment operator who according to the foreman, Grover Riddle, was the competent person who reported the truck before it was placed in operation.

Petitioner's Testimony and Evidence - WEVA 90-160

MSHA Surface Coal Mine Inspector Sherman Slaughter testified as to his experience, training, and prior private industry work experience which included the operation of rock trucks. He confirmed that he has conducted several inspections at the mine beginning in June, 1989, and has spent in excess of 20 days at the mine during these inspections. He described the mine as an open pit surface mining operation with primarily level terrain and indicated that the coal is located approximately 65 to 70 feet below the surface, and the coal is mined by removing the overburden and mining the coal "lift." He further stated that the mine has approximately 42 employees, and operates on two production shifts. The mine has six mechanics, and 13 to 16 people work the evening shift, and there are approximately 20 pieces of mining equipment at the mine at any given time (Tr. 9-15).

Mr. Slaughter stated that based on his review of the respondent's compliance and violation history, which includes "quite a few citations," he believed that the respondent had a compliance problem which required "special emphasis" by MSHA's "target mines" program. He concluded that the respondent has an "above average" compliance record for an operation of its size.

Mr. Slaughter confirmed that he conducted an inspection at the mine on December 4, 1989, and he identified exhibit G-1, as a copy of his inspection notes for November 16, 1989, when the inspection began, as well as December 4, 1989, when he issued Citation No. 3334094 (exhibit G-2). He confirmed that foreman Bud Connor accompanied him during the inspection (Tr. 16-20).

Mr. Slaughter stated that he went to the pit area and observed a back hoe, a dozer, scrapers, and surface personnel coming in and out of the pit. He also observed the cited R-50 Euclid truck in operation, and he requested the driver to operate the truck in reverse, and when he did, the reverse backup alarm did not work. Mr. Slaughter stated that the alarm is usually installed at the rear of the truck, and that when he and Mr. Connor looked for it they discovered that the truck had no alarm at all installed on it. Since section 77.410(a)(1)

required the truck to be equipped with a warning alarm which gives an audible alarm when it is put in reverse, Mr. Slaughter issued the citation (Tr. 20-22).

Mr. Slaughter stated that he based his significant and substantial (S&S) finding on the fact that the pit where he observed the truck in operation was a small area with not much room, and the haulroad leading to the pit was congested. There were approximately six people working in the pit, and two haulage trucks were operating on their normal "haul cycle," and they would have to pull in and out of the pit area ramp while loading.

Mr. Slaughter stated that he further considered the fact that service personnel would be in the pit area servicing the equipment, and if the trucks needed to be serviced they would direct the trucks to back up to be available for servicing. He also stated that personnel working in the pit would take their lunch breaks at the pit area, and that the haulage trucks would be the last vehicles to come in for the lunch period. The employees taking lunch, as well as a dozer operator, would be on the ground during this time. He confirmed that the citation was issued during the lunch hour, and while he observed people on foot, he could not recall whether any of the trucks were operating at that time.

Mr. Slaughter stated further that service personnel signalling the truck would be on foot and that the driver sometimes eats his lunch in the truck with the engine running. If he decided to back up, the lack of a reverse alarm may not serve to alert personnel on foot that the truck would be backing up. He also indicated that a foreman drives a small pickup truck in and out of the pit and may not be paying attention to a truck which may be backing up (Tr. 22-30).

Mr. Slaughter stated that the truck in question weighs approximately 100,000 lbs and has a rated payload capacity of 50 tons. The tires are approximately 6 feet high, and he confirmed that he has driven such a truck. He stated that the driver's view to the rear through the rear-view mirrors would be obscured for a large distance, but that he could see out of the side windows. Based on all of these factors, Mr. Slaughter concluded that given the weight of the truck, the congested pit area, and the presence of other equipment and people on foot, it was reasonably likely that a fatal accident would occur if it were to back over someone. If the truck struck another piece of equipment, he believed it was reasonably likely that a "lost-time" accident, rather than a fatality, would occur (Tr. 30-33).

Mr. Slaughter further stated that he was aware of at least one fatal accident incident in his district where a dozer operator left his machine on a haulage road and was killed when he got

behind a truck and was run over. He also alluded to an MSHA "fatalgram" which reflected a fatal accident when a rock truck backed over a pickup truck. He confirmed that the rock trucks "back up all the time" at the mine for different reasons (Tr. 33-36).

Mr. Slaughter stated that he based his "high negligence" findings and belief that the respondent engaged in "aggravated conduct" on the fact that the respondent had been previously cited 10 times for violations of section 77.410, which should have made it aware that it had a problem which needed to be corrected and that an inspection program was needed. He also believed that the lack of an alarm would be obvious to the back-hoe and dozer operator. He confirmed that the work shift began at 6:30 a.m., and that he issued the citation at 12:30 p.m. (Tr. 36-40).

Mr. Slaughter believed that the 10 prior citations for violations of section 77.410, was "high," and he confirmed that he discussed this with mine management and advised them that there was a need to develop a safety program to address the problem and that if this were not done any future citations for violations of this standard would be "unwarrantable" violations (Tr. 44-45).

Mr. Slaughter stated that he discussed the matter with mine superintendent Jack Wilfong. Mr. Slaughter confirmed that the respondent had a safety program, and it was his understanding that it was communicated to employees by giving them copies with their pay checks. He also confirmed that the respondent used its equipment operators as the competent persons to inspect their equipment, but he believed that the respondent needed to instruct the operators as to how they should conduct these inspections and needed to retrain them to report equipment conditions which needed attention (Tr. 45-49).

Mr. Slaughter stated that during his discussions with the superintendent, the superintendent informed him that he was having problems with equipment break downs, and that "he tried to fix these things when they occurred on a priority basis" (Tr. 49).

On cross-examination, Mr. Slaughter confirmed that he was aware of no fatalities or injuries at the mine attributable to the lack of a reverse alarm on a piece of equipment. He also confirmed that the respondent's truck operators were competent and well-trained in the operation of their equipment. He further confirmed that with the exception of the lunch hour, there was not much foot traffic in the pit area, and that those people on foot would generally observe a truck, and that service personnel would have their attention directed to the truck (Tr. 50-52).

Mr. Slaughter confirmed that he did not see any preshift inspection report concerning the cited truck. He reiterated that the truck was not equipped with a reverse alarm, but if it were so equipped, and did not sound when the truck was operated in reverse, he would have cited subsection (c) of section 77.410. He confirmed that he and foreman Connor looked for the alarm on the cited truck but could not find one installed on the truck. He agreed that a reverse alarm could break down after 6 hours of use (Tr. 53-56).

Mr. Slaughter again confirmed that the equipment operators were used to inspect their equipment, and that in the event they did not report a condition which needed attention, mine management might not know about the condition. He confirmed that he was never present during any safety meetings at the mine, but conceded that they may have been held (Tr. 56).

Mr. Slaughter confirmed that he terminated the citation on December 14, and he did not know whether the respondent may have corrected the condition earlier. All that he knew was that the reverse alarm was working properly when he again inspected the truck to terminate the citation. He believed that a reverse alarm on a truck would "get a person's attention to be on the look-out" for a truck operating in reverse. Mr. Slaughter does not recall speaking with the truck driver or what he may have said about the reverse alarm (Tr. 57-62).

Petitioner's testimony and Evidence - WEVA 90-180

Inspector Slaughter confirmed that he conducted a spot inspection at the mine on January 4, 1990, and he identified copies of his inspection notes of January 2 and 4, 1990 (Exhibit G-4). He also confirmed that he issued two section 104(d)(1) orders for inadequate service brakes and the parking brake on the cited truck in question (exhibits G-5 and G-6).

With regard to Citation No. 334014, concerning the inadequate service brakes, Mr. Slaughter stated that he went to the mine to conduct a spot inspection of a back hoe. He noticed that the cited truck was in operation and he spoke with the driver and requested him to test the truck after he left the pit with a load. He asked the driver to apply the brakes when he drove down the inclined portion of the roadway, and when the driver applied the brakes the truck would not stop. The inspector confirmed that the driver informed him that the brakes would not hold or stop the truck.

Inspector Slaughter stated that the procedure he followed for testing the truck was a normal method followed by MSHA inspectors and that this functional test is routinely done by inspectors to test the adequacy of brakes on an inclined portion of a roadway where a truck is normally used. He further stated

that the term "adequate" brakes means that a truck driver can stop and control a loaded truck while traveling on his normal route of travel after applying the service brakes, and in this case, he confirmed that the service brakes would not stop the truck when the driver applied the brakes (Tr. 84-90).

With regard to Citation No. 334015, concerning the truck parking brake, Inspector Slaughter stated that the driver put the truck in neutral gear on an inclined portion of the roadway, and the brake would not hold. He confirmed that he requested the driver to apply the parking brake a second time under similar circumstances, and when he did, the brake would still not hold the truck. Mr. Slaughter confirmed that it was sometimes necessary to stop and park the truck on an incline when there was a breakdown. He confirmed that foreman Grover Riddle was with him when the truck was tested (Tr. 90-94).

In support of his significant and substantial (S&S) finding with respect to the truck service brakes, Mr. Slaughter stated that he considered the fact that the haul road over which the truck operated was "up and down" and that there was a "swag" at the intersection with a roadway used as a normal approach to the pit. He also indicated that the main roadway would not allow two trucks to pass each other, and one truck would have to pull over and wait for the other one to pass. He also considered the fact that the left side of the roadway was elevated, as well as inclined, at an approximate grade of 7 to 10 percent, and that the swag area near the pit roadway was a "blind spot" except for a distance of 100 feet prior to the intersection (Tr. 94-99).

Mr. Slaughter stated that the speed of the truck while traveling down the inclined portion of the roadway approaching the pit roadway intersection would be approximately 20 miles per hour, and that dozers, scrapers, and other rock trucks would be operating at the intersection as they exited the pit. Although the primary roadway was bermed with 40-to-45-inch high berms, he believed that a loaded truck traveling down the inclined roadway with inadequate brakes would travel through the berm. He also believed that a truck driver who attempted to position his truck close to the pit hill to facilitate the loading of the truck would be exposed to a hazard of going over the hill if the brakes would not hold (Tr. 99-100).

Mr. Slaughter confirmed that the trucks are equipped with transmission retarders which could serve as a braking device but that they are disconnected for longer transmission torque life and that there is no requirement for the use of the retarders. Given the size of the truck, including its load, he believed that a fatal accident was reasonably likely and that one person would be at risk (Tr. 101-102).

With regard to the parking brake citation, Mr. Slaughter confirmed that he based his S&S finding on the fact that the truck is parked at different mine areas for different reasons. Although the driver informed him that the parking brake would not hold the truck and that he tried to park it in a low spot when it was necessary, Mr. Slaughter believed that the truck may be parked in an inclined area and "roll off" (Tr. 103).

Mr. Slaughter stated that a truck driver may or may not get out of his truck when it is parked, and that he has observed trucks which were out of commission parked with the operator out of the truck. He confirmed that service trucks go the pit area to service equipment, and that employees eat their lunch at the pit. If a truck was to run over someone, he believed that it was reasonably likely that it would result in a fatal injury. Further, if a driver found what he believed was a "low spot" to stop and park his truck, this may not be the case, and if the truck rolled and struck someone, it would be reasonably likely that a fatality would occur.

With regard to his "high" negligence findings with respect to both violations, Mr. Slaughter stated that the truck driver, Harold Johnson, informed him that he had reported the fact that the brakes would not work for "the past three days." Mr. Slaughter identified exhibit G-7 as the equipment check-lists filled out by the truck driver, and he confirmed that Mr. Johnson provided him with a copy of his checklist for January 4, 1990, and that he (Slaughter) only became aware of the checklists dated January 2 and 3, 1990, shortly before the hearing.

Mr. Slaughter confirmed that Mr. Johnson was designated by the respondent as the competent person to inspect the trucks, and that Mr. Johnson told him that he operated the truck because he would not have any other work to do and would be sent home if he did not drive it. Mr. Slaughter further confirmed that he discussed the matter with mine foreman Grover Riddle, but he could not recall what was specifically discussed. He further confirmed that he did not know what was wrong with the brakes and terminated the orders after finding that the service brakes and parking brakes would stop and hold the truck (Tr. 117-125).

On cross-examination, Mr. Slaughter stated that there are no MSHA guidelines for determining the adequacy of brakes pursuant to section 77.1605(b), and that he relies on his experience with the equipment to make such a determination. He confirmed that the driver, Mr. Johnson, was alone in the truck and that he (Slaughter) did not know how hard Mr. Johnson applied the brakes or whether he in fact made an honest effort to apply the brakes. He confirmed that he knew that Mr. Johnson applied the brakes because he heard the noise made by the air valves. He further confirmed that the truck brakes were air-over-hydraulic, and that

he did not ride in the cab with the driver because the truck only has one seat.

Mr. Slaughter confirmed that the truck driver on the first shift (Roach) also filled out check-lists for his inspections of the truck and found nothing wrong with the brakes. He further confirmed that he did not speak with Mr. Roach or have him test the brakes during his shift. He stated that he was not aware that the prior citations involved any injuries or fatalities at the mine as a result of improper brakes on any of the respondent's trucks, and he confirmed that the check-lists filled out by Mr. Johnson do not state that the truck was inoperative.

Respondent's Testimony and Evidence

Jerry Gomer, respondent's secretary and treasurer, identified exhibit R-A as a summary of the repairs made to the cited truck for December, 1989, and he stated that this reflects that extensive brake work was done on the truck. He also identified exhibit R-B as an MSHA Safety award presented to the respondent in 1988, and exhibit R-C as a financial statement prepared by the respondent's accountant reflecting an accrued loss of $540,000. Mr. Gomer believed that the payment of civil penalty assessments "would affect the viability" of the respondent (Tr. 158-163).

On cross-examination, Mr. Gomer stated that payment of the proposed civil penalty assessments in these proceedings would probably not put the respondent completely out of business (Tr. 164). Respondent's counsel confirmed that Mr. Gomer had no personal knowledge of the cited conditions or practices in these cases (Tr. 166). Mr. Gomer stated that the respondent has a safety program instituted by the State of West Virginia Department of Energy, that it is reviewed annually, and that he makes sure that each employee receives a copy of the respondent's safety program annually with their pay checks (Tr. 166).

Findings and Conclusions

Fact of Violation

Section 104(d)(1) "S&S" Citation No. 3334094, December 4, 1989, (Docket No. WEVA 90-160)

In this case, the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.410(a)(1), for failure to equip the cited rock truck with an automatic backup alarm that would give an audible alarm when the truck was put in reverse. The cited standard provides as follows:

§ 77.410 Mobile equipment; automatic warning devices.

(a) Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that --

(1) Gives an audible alarm when the equipment is put in reverse; * * *

I take note of the fact that section 77.410(a)(1), is presently included in MSHA's Part 77 regulations, which were revised as of July 1, 1990. The citation was issued on December 4, 1989, and section 77.410, which was included under the Part 77 regulations revised as of July 1, 1989, provided as follows:

> Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

Although the inspector cited section 77.410(a)(1), rather than section 77.410, he testified that section 77.410(a)(1), became effective in September, 1989, and the requirements of both standards with respect to backup alarms are identical (Tr. 53). I find no procedural defect in the citation, nor can I conclude that the respondent has been prejudiced by the inspector's citation of the revised standard, rather than the previous standard which was in effect at the time the citation was issued.

The inspector testified that when he observed the truck in operation, respondent's foreman, Bud Connor, was with him. The inspector requested the driver to operate the truck in reverse, and when he did, the alarm did not sound. The inspector confirmed that when he and the foreman looked for an alarm, which is usually installed on the rear of the truck, it was discovered that no alarm was installed on the truck. The inspector's notes, made in the course of his inspection on December 4, 1989, reflect that upon inspection of the cited truck he noted that "the backup alarm would not work. (There was none on it)" (Exhibit G-1, pg. 32).

In its posthearing brief, the respondent argues that the citation issued by the inspector is not clear as to whether there was an alarm on the truck and it was not working, or whether there was no alarm. Respondent also asserts that the preshift report did not show that the alarm was missing or inoperative.

With regard to the preshift report, the inspector testified that he never reviewed any such report (Tr. 52). Further, the report is not a matter of record, and the respondent never

produced it at the hearing. Under the circumstances, the respondent's argument is rejected. The truck driver and the foreman who accompanied the inspector did not testify in this case, and the inspector's testimony, which I find credible, is unrebutted.

The inspector confirmed that he cited a violation of section 77.410(a)(1), because the cited truck was not equipped with a backup alarm that would give an audible alarm when the truck was operated in reverse (Tr. 53). He confirmed that if the truck were equipped with such an alarm, and simply did not function, he would have cited a violation of section 77.410(a)(c), which requires that such an alarm function (Tr. 53).

With regard to the clarity of the citation, the respondent's counsel pointed out at the hearing that the statement on the face of the citation that the truck "was not equipped with an automatic alarm that would give an audible alarm when the truck was put in reverse" lends itself to different interpretations and could be construed to mean that an alarm was on the truck, but that it simply did not function. Counsel asserted that it has always been the respondent's impression that this was the case (Tr. 54-55, 91). I take note of counsel's statement that "we don't have any evidence on that point," and he asserted that the respondent's defense deals with the asserted "significant and substantial" and "unwarrantable failure" findings made by the inspector with respect to the violation (Tr. 82).

In its answer of July 24, 1990, the respondent suggests that the cited truck may have been equipped with an alarm, but that it was simply inoperative. The answer was filed by the respondent's corporate president, Michael B. McCort, and he asserts that it was difficult to maintain backup alarms in proper working order because of strong equipment vibrations and bumps inherent in surface mining operations. Mr. McCort stated that "we know that the inspector had been informed by the operator of the piece of equipment, on several citations, that the backup alarm was working when he put the equipment in the dirt at the start of the shift. The inspector choose (sic) not to make note of that." However, Mr. McCort did not testify in this case, and as noted earlier, the respondent presented no testimony with respect to the violation, nor did it present any evidence to support Mr. McCort's suggestions that backup alarms may be breaking or malfunctioning because of broken wires due to any adverse working conditions. I also take note of Mr. McCort's statement in his answer that "removing a piece of equipment from service for backup alarm repairs is economically difficult."

In view of the foregoing, I conclude and find that the petitioner has established a violation of section 77.410(a)(1), by a preponderance of all of the credible and probative testimony and evidence adduced in this case. Accordingly, the violation IS AFFIRMED.

Fact of Violation

Section 104(d)(1) "S&S" Order No. 334014, January 4, 1990 (Docket No. WEVA 90-180)

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), for inadequate service brakes on the cited rock truck. The cited standard provides as follows:

> § 77.1605 Loading and haulage equipment; installations.
>
> * * * * * * *
>
> (b) Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

The inspector testified that he observed the cited truck in operation during the course of his inspection, and that since it had been out of service when he conducted a prior inspection, he decided to inspect it. He informed foreman Grover Riddle, who was with him, that he would inspect the truck (Tr. 88). The inspector then spoke with the driver and informed him that he wanted to determine whether the brakes were adequate. The inspector asked the driver to load his truck, and that after he left the pit with his load, he was to tram up a steep incline on the haulroad, and after reaching the top of the hill "knoll," he was to apply his service brakes as he came down the roadway on the other side. The inspector testified that he positioned himself so that he could observe the truck, and when the truck came down the hill, the driver could not stop the truck with the service brakes and it rolled down into the hill "swag." The inspector confirmed that he then spoke with the driver, and the driver informed him that the brakes would not hold or stop the truck (Tr. 89).

The inspector testified that it is difficult to determine whether the service brakes on a truck are working by simply examining and looking at the truck, and that for this reason, a "functional test" is conducted on an inclined roadway where the truck is used. In his opinion, the phrase "shall be equipped with adequate brakes" found in section 77.1604(b), means "that this equipment would have brakes that will operate and stop coal loading equipment with the size loads that it carries" (Tr. 90). Since the truck service brakes would not stop the truck in question on the inclined roadway, he believed that they were not adequate within the meaning of the cited standard (Tr. 90).

The inspector confirmed that he simply observed the driver in the truck, and that he (the inspector) did not try the brakes

(Tr. 92). The inspector confirmed that when he reinspected the truck to abate the violation, he found that the brakes would hold the truck after another similar "functional test." However, he had no knowledge of any brake repairs and did not know what was done to render them serviceable again (Tr. 129-131).

The inspector confirmed that there are no firm guidelines for determining the adequacy of service brakes, and that any determination in this regard must be based on "your experience with the equipment" (Tr. 132). He further confirmed that he was not in the truck with the driver at the time the test was conducted, and although he did not know whether the driver pressed down on the brakes "easily" or "all the way," he knew that he applied the brakes because he could hear the brake air valve (Tr. 135). The inspector stated that he had confidence in what the driver was doing, and that "I was confident by the test that I gave on the truck that those brakes weren't good" (Tr. 138). He confirmed that MSHA's policy does not permit an inspector to get into a truck and try the brakes himself (Tr. 139), and that the truck in question only has seating for one person (Tr. 144).

The inspector confirmed that he had no reason to question the competence of the driver with respect to his ability to inspect and drive the truck (Tr. 142). He stated that the driver was seated in a normal position in the truck, and he did not believe that it was difficult for him to apply the brakes (Tr. 142). He confirmed that the "functional test" which he conducted by observing the driver operate the truck after instructing him to apply the brakes, was an acceptable MSHA method that he has regularly used (Tr. 145).

The inspector could not state precisely how fast the fully loaded truck was traveling down the incline during the test, and he stated that the truck "was free rolling all the way and stopped in the swag. He didn't have any brakes on the truck" (Tr. 149). He reiterated that he knew that the driver had applied the brakes because he could hear the air valves and that the truck did not stop and eventually came to a stop in the bottom of the swag (Tr. 150).

The respondent argues that contrary to the cited truck driver's belief that the brakes "need corrected," the day shift driver of that same truck listed the brakes as "OK" and that neither driver refused to operate the vehicle or to take it out of operation by "red tagging" it. The respondent concludes that since the day shift driver found the truck "OK," this is proof from a competent driver that the brakes were adequate. The respondent also concludes that its answers to petitioner's interrogatories show that the brakes were indeed adequate.

The respondent takes the position that the test conducted by the inspector in support of the violation was inappropriate and

flawed in that the inspector was not in the truck with the driver, did not know whether the driver in fact fully depressed the brake, and simply relied on what the driver had told him. The respondent argues further that the inspector was speculating that the brakes would not hold the truck, and was not acting on his own personal knowledge, and made a subjective, rather than an objective determination with respect to the adequacy of the brakes. The respondent concludes that the cited standard sets no objective standard for such a determination, that the petitioner has failed to carry its burden of proof, and that its research "has not turned up any reported cases on facts such as are present here."

With regard to the respondent's answers to the interrogatories in question, I find nothing in those responses which may serve as an evidentiary basis to support any conclusion that the cited brake were adequate, and the respondent's conclusions in this regard are rejected. The answers are simply denials and assertions that the brakes were adequate "all circumstances considered," that the driver was experienced, and that "no accident of such a speculative nature has occurred." Such statements are hardly proof of the adequacy of the brakes. Further, although the truck driver and foreman who was present with the inspector when he conducted his test are readily identified by name, the respondent failed to call them as witnesses.

The respondent's conclusion that the foot brakes were adequate because the day shift driver (Harold Roach) indicated on his preshift safety check lists that they were "OK" and that neither driver refused to operate the truck or to take it out of service are rejected. The day shift driver, as well as the driver who was driving the truck, did not testify in this case, and the inspector's credible testimony that the truck would not stop, and continued to roll freely when the driver applied the brakes, stands unrebutted. The inspector's notes made at the time of the inspection reflect that the service brakes would not stop the truck when it started down the inclined portion of the roadway where the inspector observed it (Exhibit G-4, pg. 6).

The respondent's arguments attacking the credibility and reliability of the "function test" conducted by the inspector in support of the violation are not well taken and they are rejected. In a number of reported cases interpreting the meaning of the term "adequate brakes," such determinations were made by the inspectors through their inspections of the braking systems where certain defects were noted, or by tests conducted on the trucks by operating them on inclines to determine their braking or stopping capability. These cases are discussed in my January 15, 1988, decision in Highwire Incorporated, 10 FMSHRC 22 (January 1988), and a summary of these cases follow below.

In Concrete Materials, Inc., 2 FMSHRC 3105 (October 1980), and Medusa Cement Company, 2 FMSHRC 819 (April 1980), Judge Melick and Judge Cook affirmed violations for inadequate brakes on haulage trucks based on tests conducted by the drivers by driving the trucks on inclines to determine their braking and stopping capability. In the Medusa Cement case, an MSHA inspector defined the term "adequate" as "capable of stopping and holding a loaded haul unit on any grade on the mine property." Judge Cook found that the test conducted by the inspector and his interpretation of the results obtained sufficiently established a prima facie case for inadequate brakes.

In Minerals Exploration Company, 6 FMSHRC 329, 342 (February 1984), Judge Morris affirmed an "inadequate brake" violation based on an inspector's observation that the cited water truck was "pulling very hard to the right." Testimony by the operator's foreman reflected that the brakes on the truck had been relined 2 weeks before the citation was issued.

In Turner Brothers, Inc., 6 FMSHRC 1219, 1259 (May 1984), and 6 FMSHRC 2125, 2134 (September 1984), I affirmed violations of section 77.1605(b), for inadequate parking brakes on a coal haulage truck and an endloader based on tests which consisted of parking the equipment on an incline and setting the brakes to determine whether they would hold. In both instances, the brakes would not hold the equipment, and I concluded that the brakes were inadequate. Judge Melick made similar findings in another Turner Brothers, Inc., case, 6 FMSHRC 1482, 1483 (June 1984).

In Wilmot Mining Company, 9 FMSHRC 684, 688 (April 1987), the Commission affirmed a judge's finding of a violation of section 77.1605(b), for inadequate defective brakes on a Terex front-end loader which was involved in a fatal accident. The judge's finding was based on evidence which indicated that the brake master cylinder and an auxiliary brake cylinder were very low in brake fluid, even though the brakelines, wheel cylinder and hydraulic brake lines were intact, i.e., they had not leaked because of the accident. When tested at operating speed, the loader would not stop within the normal expected distances. Rejecting the operator's contention that the evidence did not support the judge's finding as to the cause of the inadequacy of the brakes, the Commission stated in pertinent part as follows at 9 FMSHRC 688:

> To prove a violation of this standard, however, the Secretary is not required to elaborate a complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. * * * Whatever the precise cause of the breaking defect, the evidence amply supports the judge's finding that the Terex was not "equipped with adequate brakes," in violation of the cited standard (emphasis added).

I conclude and find that the unrebutted and credible testimony of the inspector, including the brake functional test which was performed under his supervision and observation, and which I find was reliable, proper, and reasonable in the circumstances, establishes that the cited truck service brakes were inadequate within the intent and scope of section 77.1605(b). While it is true that section 77.1605(b), which requires trucks to be equipped with adequate brakes has no specific requirement that the brakes be serviceable, I conclude and find that any reasonable interpretation of the intent of this standard requires that the brakes perform the function for which they are normally designed when they are on the truck, namely to stop the truck under normal operating conditions when the brakes are applied. Under the circumstances, I further conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the violation IS AFFIRMED.

Fact of Violation

Section 104(d)(1) "S&S" Order No. 3334015, January 4, 1990 (Docket No. WEVA 90-180)

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), for an inadequate parking brake on the same truck which was cited for inadequate service brakes. The cited standard required the truck to be equipped with parking brakes.

The inspector testified that after completing his test concerning the service brakes, and after the truck had come to a stop in the roadway swag, he asked the driver to back the truck up the incline and to put the truck in neutral gear and to apply the park brakes. When he did, the parking brake would not hold the truck and the truck "rolled back off" (Tr. 91). This test was conducted more than once, and each time, the brake would not hold the truck, and the driver informed him that the parking brake would not hold the truck. The inspector's notes made on January 4, 1990, reflect that the truck would not stop when the parking brakes were applied (Exhibit G-4, pg. 7).

As noted earlier, the respondent called no witnesses for any testimony concerning any of the violations in these proceedings, and the inspector's testimony stands unrebutted. The respondent's arguments with respect to the inadequate parking brake violation are the same as those advanced with regard to the inadequate service brakes violation. The respondent argues that section 77.1605(b) simply requires that a truck be equipped with a parking brake, and does not require that such a brake be adequate. I have previously rejected identical arguments made in connection with violations of section 77.1605(b). See: Turner Brothers, Inc., 6 FMSHRC 1219, 1253-154 (May 1984), where I

concluded and found that a reasonable application of this standard requires that a parking brake perform the function for which it is intended, namely, to hold the truck against movement while it is in a parking mode, regardless of where it is parked. See also: Thompson Coal & Construction, Inc., 8 FMSHRC 1748, 1758 (November 1986), upholding a violation for a defective parking brake on an end loader, where I stated as follows:

> Although the language of the standard implies that brakes other than parking brakes are to be adequate, I believe the clear intent of the standard is to be insure that all braking systems on such a piece of equipment be maintained serviceable and functionable so as to insure the margin of safety intended by the installation of these braking systems. Further, since the standard is obviously intended for the protection of the miners, any other interpretation would be contrary to the intent and purposes of the Act. * * * *

For the reasons stated in my findings and conclusions, concerning the inadequate service brakes violations, which I herein adopt and incorporate by reference, including my prior decisions in Turner Brothers, Inc., and Thompson Coal & Construction, Inc., supra, with respect to the interpretation and application of section 77.1605(b), to a parking brake on a piece of mobile equipment, the respondent's arguments in defense of the violation are rejected. In the instant case, the credible and unrebutted testimony of the inspector establishes that when the parking brake on the cited truck was applied by the driver with the truck stopped in neutral gear on an incline, the brake would not hold or prevent the truck from moving or rolling. Under all of these circumstances, I conclude and find that a violation has been established by a preponderance of the evidence, and IT IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In Halfway, Incorporated, 8 FMSHRC 8 (January 1986), the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

The respondent asserts that the inspector's "S&S" findings with respect to all of the violations "are rather incredible." In support of its conclusion, the respondent argues that the mining areas in question are remote, with little, if any, pedestrian traffic, and that the cited trucks are large and heavy

pieces of "off road" equipment that travel slowly. The respondent asserts that the miners are knowledgeable and experienced workers who do not customarily come near the trucks or place themselves at risk by going behind them. Under these circumstances, the respondent concludes that it is highly unlikely that any miners would be careless around the trucks, and that any accidents are highly unlikely. The respondent cites the testimony of the inspector who confirmed that there has never been an accident or injury at the mine due to faulty brakes or the lack of a backup alarm, and the inspector's confirmation of the fact that the truck drivers are competent. The respondent also produced a copy of a safety award issued by MSHA in 1988, for its "Outstanding Safety Record" for a number of employee hours worked without a lost workday injury (Exhibit R-B).

The respondent further argues that there was no indiscriminate foot travel near the cited trucks, and that except for service personnel, everyone would be in their vehicles. The respondent points out that the only time anyone would be near the trucks on foot would be during the lunch hour, and it finds "preposterous" and "incredible," the inspector's belief that miners or service personnel would be eating their lunch behind a truck while it was idling or that a driver would get in the truck and drive it in reverse during this time. The respondent concludes that the inspector's belief that an injury would result from the cited brake conditions is speculative and that the inspector admitted that "This is not a normal thing, but it can happen" (Tr. 92).

Backup Alarm Violation (Citation No. 3334094)

The inspector's unrebutted and credible testimony reflects that at the time of his inspection, two rock trucks, a backhoe, dozers, and scrapers were working in the pit where the cited truck was operating, and that the backhoe was loading the trucks with fill material which would be hauled out to another area. The inspector described the pit area as "small and congested," and he indicated that one truck had to wait on a ramp outside the pit while another one was being loaded in the pit. He confirmed that during the course of a shift, the cited truck would be backed up "on numerous occasions" (Tr. 24, 28, 36). He stated that a backup alarm emits a "loud, piercing-type alarm," that anyone hearing it would "automatically know something is backing up," and that the intent of an alarm is to prevent an accident in the pit area where the truck is working in close proximity of other equipment (Tr. 60, 63). The inspector confirmed that he has operated the same type of truck which he cited, and he stated that while one can see to either side of the truck through the rear view mirrors, the driver's view to the rear would be obscured and he cannot see directly behind him for any long distance (Tr. 31).

The inspector confirmed that when he was inspecting the backhoe during the lunch hour, he observed service personnel, and dozer and backhoe operators on foot, but he could not recall whether any of the trucks were in operation at that time (Tr. 25). He further confirmed that with the exception of service personnel and the other equipment operators, who would be on foot during the lunch hour, any other miners in the pit area would be in their vehicles (Tr. 50). The inspector expressed his concern with the people who would congregate for lunch near the truck, particularly since the truck was usually the last piece of equipment to come into the pit and park during the lunch hour. He indicated that the truck driver would either pull into the area where the miners were eating their lunch, or would back the truck up to park (Tr. 27-28). Although the inspector agreed that the people having lunch would see the truck coming into the area if they were looking at it, it was possible they would not see it if there was a lot of noise and they were not looking at it (Tr. 51). The inspector believed that any miners who may be in the proximity of the truck during the lunch hour could be run over if the driver, who sometimes leaves the engine running while having lunch, were to pull out and run over them (Tr. 63-65).

Aside from any hazard exposure to the miners having lunch, the inspector believed that the greater hazard associated with the absence of a backup alarm on the cited truck was in regard to service personnel who would be greasing, fueling, or otherwise servicing the truck in the pit. He confirmed that service personnel usually are on foot next to their own vehicles when they signal the truck driver to either pull in or back in for servicing, and he indicated that they may not be paying attention to the truck or the driver, but would have their attention on the truck while it was being serviced (Tr. 24, 28, 52). The inspector also confirmed that during the hauling and loading cycle in the pit areas, which he has observed, trucks regularly backed into position next to the backhoes and dozers while loading and dumping, and the equipment operators are usually on foot when the trucks are being positioned, or they may be on foot preparing to go to lunch (Tr. 23-24; 62).

The inspector further testified that in the course of normal mining operations, he has observed smaller vehicles operating in the pit, including a pickup used by the foreman who is regularly in and out of the pit, and small trucks used by the personnel who service the larger trucks. He confirmed that he has observed these smaller vehicles operating in the pit "a lot of times in and around these trucks" (Tr. 29-30). He believed that these smaller vehicles would be exposed to a hazard if they pulled in behind a truck and were not paying attention to it, or did not know whether the truck was preparing to move. The inspector believed that any injury to someone on foot or in a smaller vehicle which may be run over by a large rock truck "tends to be a fatal type injury" (Tr. 32). A rock truck backing over a

dozer, which is equipped with a protective canopy, would likely result in a "lost time accident rather than a fatality (Tr. 33).

Although the inspector agreed that the equipment operators working in the pit area, including the truck driver, were well-trained and competent operators, he confirmed that he was aware of two fatal accidents at other mining operations in his district. In one incident, a dozer operator backed up behind a coal truck and was run over and killed when he left his dozer and the truck backed over him. In the second, incident, a rock truck similar to the one he cited backed over a small pickup and killed the individual who was in it (Tr. 34-35). No testimony was forthcoming from the inspector as to whether or not the trucks involved in these incidents were equipped with backup alarms.

The inspector believed that it was reasonable to expect that the cited truck, which operated in the small and congested pit area where other equipment was also operated, could back over someone if they failed to hear the backup alarm (Tr. 22). Taking into consideration the congested pit area where the truck and other equipment would be operating, the presence of foot traffic and other smaller vehicles, and the hazard exposure which would be present in the absence of a backup alarm, the inspector concluded that it was reasonable to expect "that some time or other this truck would back over someone that wasn't aware that it was backing up because it had no alarm on it" (Tr. 32).

After careful consideration of the testimony of the inspector with respect to the hazard associated with the miners who were on foot in the pit area during their lunch break, I cannot conclude that there was a reasonable likelihood of an accident or injury with respect to these individuals. The inspectors conclusions that an accident or injury was reasonably likely in this scenario was based on a number of speculative variable, including the possibility that the miners would not see the truck if they were not looking at it, particularly if there were a lot of noise, and the possibility of the truck driver pulling out after completing his lunch and running over the other miners eating their lunch. There is no evidence as to the source of the "noise" alluded to by the inspector, and since the equipment would be idle while the operators were eating lunch, the only other possible noise source would be the truck pulling into the area. I have difficulty believing that the miners having lunch would not see the truck or would deliberately place themselves at risk by eating their lunch in close proximity to a truck with its engine running while it was parked or while it was backing in.

I conclude and find that the credible and unrebutted testimony of the inspector establishes that during a normal working shift before and after the lunch hour, the dozer and backhoe operators, as well as service personnel servicing the truck, would at various times be on foot in close proximity of the rock

truck which would be backing in for loading and dumping, and possibly for servicing. In the context of continuing mining operations, and in the absence of a backup alarm to alert or warn these individuals that the truck was backing up, particularly in a situation where the truck is operating in a small and congested pit area, and where the truck driver's view to the rear of the truck is obstructed because of the size of the truck, I believe that one may conclude that it would reasonably be likely that a serious injury or accident would result if the truck were to strike a dozer, backhoe, or the equipment operators on foot in close proximity to the truck. I further conclude and find that the inspector's conclusion that the violation was significant and substantial was proper and reasonable in the circumstances presented, and his finding in this regard IS AFFIRMED.

Service Brakes Violation (Order No. 3334014)

The inspector testified that the inclined haulroad where the truck operates was elevated approximately 45 to 50 feet from the bottom of the pit on the left-hand side of the road at an estimated grade of 7 to 10 percent. He stated that after a truck travels over the high knoll and proceeds down the roadway into the swag, the road intersects at that point with another approach road to the pit where there is "cross traffic" consisting of other equipment and other rock trucks. The haulroad is not wide enough to permit trucks to pass at all locations, and the intersection at the approach road is a "blind area" where one truck would have to stop in order to see another truck coming down the inclined roadway. Any equipment or personnel going into the pit area would use the approach road, and the "blind area" would be "more or less 100 feet" from the intersection (Tr. 94-97).

The inspector estimated that a loaded rock truck would be traveling 15 to 20 miles an hour down the inclined roadway, and that any traffic approaching the intersection would be traveling 20 miles an hour. In addition to the rock trucks using the roadway, the inspector stated that dozers, scrapers, and service personnel and foremen would be working in the approach road area or would be using that road at different times, and they would be exposed to a collision hazard as a result of inadequate service brakes on the cited truck in question (Tr. 98-100). The inspector also believed that the truck would be at risk when it was in the pit fill area while the driver was attempting to get as close to the edge of the fill as he can to dump, and although there is a berm at that location, if the driver cannot stop because he has no brakes, he could back over the edge of the fill (Tr. 100). Further, although the roadway is bermed with 40 to 50 inch berms, if the driver were to get into the berm he could go through it because a berm is only intended to retain a vehicle, and it is not high enough to prevent a loaded truck from going through it (Tr. 100-101).

The inspector confirmed that the service brakes were the only means of stopping the truck, and that the transmission retarders are not used (Tr. 101). In view of the weight and size of the truck, and the speed at which it would be traveling, it was his judgment that any truck collision would probably result in a fatality to anyone struck by the truck (Tr. 102).

Based on the credible and unrebutted testimony of the inspector, I conclude and find that the lack of adequate brakes capable of stopping the cited truck on the inclined portion of the roadway where it would normally travel in the course of a working shift presented a reasonable likelihood of an accident which would reasonably and likely be expected to result in injuries to the driver as well as to the other equipment operators and mine personnel exposed to such a hazard. The evidence establishes that the truck driver would be at risk if he were to travel over the edge of the pit fill area where he normally dumped his load if his brakes would not stop the truck, and he would also be at risk if he were to leave the inclined portion of the haulroad with a loaded truck and go through the berm. Further, both the driver and the other equipment operators using the pit approach road which intersected the haulroad on which the truck would be traveling would be at risk in the event of any collision resulting from the failure of the truck to stop because of inadequate service brakes. Under all of these circumstances, I conclude and find that the inspector's significant and substantial finding was reasonable in the circumstances presented, and IT IS AFFIRMED.

Parking Brake Violation (Order No. 3334015)

The inspector testified that while it was not normal for a truck driver to stop or park his truck on an inclined portion of the haulroad, "it happens lots of time" if the truck were to break down or break a drive shaft coming out of the pit (Tr. 92). The inspector confirmed that the mine terrain before any pits are developed is flat, but once the coal seam itself is developed, the pits are inclined areas and trucks hauling in and out of the pit area are operating in areas which are not level. He indicated that service work may be performed on the haulroad, but that the trucks normally load, travel, and dump from one end of the pit to the other end of the pit where the fill area is located (Tr. 67-68).

In his inspection notes of January 4, 1990, the inspector noted that according to the driver of the cited truck, the truck was usually parked in a dip area were it would not "roll off" (exhibit G-4, pgs. 7, 8). However, the inspector also noted that "if for some reason the truck had to be parked elsewhere (maybe catch on fire or break down) then there was not a brake to hold it. This made it reasonable to expect an occurrence. If the

truck did roll off the most severe injury that would occur would be fatal."

The inspector testified that one of the reasons which contributed to his "S&S" finding was the admission by the truck driver that he knew the parking brake would not hold the truck and that he had to find a "dip or low point" to park the truck so that it would not roll off (Tr. 103). The inspector also testified that the truck is parked near the backhoe if that piece of equipment is down for any reason, and that the truck is also parked in a number of areas where it may be serviced, and when the driver eats lunch. The transmission will not hold the truck while it is parked, and the service brake is the only means of holding the truck while it is parked (Tr. 103). If the truck were parked in the pit area, service personnel and other equipment operators who may be parked behind the truck would be exposed to a hazard if the truck were to roll. The inspector stated that the only level area in the pit "is right on the coal," and that the pit entrances and exits are inclined (Tr. 105).

The inspector suggested that a truck driver may leave his vehicle parked unattended if he were to have a break down, or that he may leave the truck to talk to people, or for some other reason. He believed that a driver might park his truck in an area that he believes is a low place, but that it may be slightly inclined and the truck might roll back to a lower place. He confirmed that he has observed a truck parked in a position where it could roll off while it was being serviced (Tr. 106-110). The inspector also believed that a truck parked in the area where miners are eating their lunch could roll off and place these miners at risk if they were down grade from the truck and the truck was pointed in their direction (Tr. 111-112). However, the inspector conceded that he did not observe any miners eating lunch within the "zone of danger" of the truck which he cited, but he confirmed that he has observed this situation with other rock trucks (Tr. 112). There is no evidence as to whether these other trucks had any inadequate brakes, and the inspector conceded that the driver of the cited truck informed him that he used special precautions as to where he parked the truck because he knew the parking brake would not hold (Tr. 106).

The inspector testified that it would be reasonable to expect that a fatality would occur if the truck were to roll off while it was parked because "if this truck runs over a person, it's more than likely he will kill that person" (Tr. 116). The inspector stated that the driver finds what he thinks is a low spot and stops the truck and that "if he is right, it will sit there, and if he's wrong, it will move" (Tr. 116). He believed that it would be reasonably expected that a truck would roll off

in the pit area where there are not many actual level spots (Tr. 116). The inspector confirmed that the mine has never experienced any accident or injuries because of any inadequate making brakes or service brakes, and that based on the history of any such incidents at the mine in question, no accidents have occurred (Tr. 141). The inspector also confirmed that he had no reason to question the driver's competency to inspect or operate the cited truck (Tr. 142).

After careful consideration of all of the testimony of the inspector, which stands unrebutted, I conclude and find that his determination that the violation was significant and substantial is correct. Although the inspector had no reason to question the driver's competency to drive or inspect the truck, I have serious reservations about the competency of a driver who would consciously operate a truck knowing that the parking brake (and service brakes) were inadequate. Although the driver indicated to the inspector that he normally does not park on an incline, and took special precautions in this case because the brakes would not hold, the fact remains that in the normal course of business, the driver would be traveling down an inclined roadway with inadequate parking brakes, as well as inadequate service brakes, and would likely place himself and others at risk.

There is no evidence to establish whether or not the area where the truck was parked during the lunch hour was inclined or level, and I find no reasonable basis for any conclusion that those miners were exposed to any hazard. Indeed, the inspector conceded that these miners were not within the "zone of danger." However, the inspector's testimony establishes that most of the pit areas where the truck would be stopped for servicing, or while loading and dumping, were inclined and not level, and he confirmed that he has personally observed trucks parked in a position where they could roll off and injure someone. Further, while it may be true that a truck may not normally be serviced on an inclined haulroad, in the event of an emergency or a breakdown on the inclined portion of the haulroad, the lack of an adequate parking brake, which was the only means of holding the truck while it was stopped or parked, would place the driver, and possibly other vehicle drivers who used the haulroad, at risk. Further, if the truck were parked or stopped in an inclined pit area in close proximity of other servicing and operational equipment, it could roll off and collide with such equipment. Under all of these circumstances, I conclude and find that this violation was significant and substantial, and the inspector's finding IS AFFIRMED.

The Unwarrantable Failure Issues

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided

under the 1969 Act, and it held in pertinent part as follows at 7 IBMA 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several subsequent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Backup Alarm Violation

The respondent argues that there is no proof of any unwarrantable failure in that the cited backup alarm was not proven to have been listed as broken or absent, and it is not known how long it was not in compliance--if at all. The petitioner argues that the circumstances presented indicates that the respondent displayed a high degree of negligence amounting to aggravated conduct in allowing the violation to occur. In support of this conclusion, the petitioner points out that on November 16, 1990 (sic), the inspector discussed the requirements of section 77.410(a)(1) with mine management and indicated his concern with the respondent's previous compliance with this standard, as reflected in its history of prior violations, and instructed the respondent that it needed to take affirmative steps to improve its compliance with this standard. I take note of the fact that the violation in question was issued on December 4, 1989, and considering the petitioner's assertion that only "days later" after the inspector spoke with management, the respondent permitted the truck to be operated without a backup alarm, the petitioner's statement that the inspector spoke to management on November 16, 1990, appears to be a clerical error.

The petitioner further argues that the situation presented is not one in which the alarm was present, and simply failed to function for mechanical reasons. Petitioner points out that the alarm, which should have been situated on the rear of the truck, in plain sight, was simply not there, and that the truck was operated for at least 6 hours on the day in question under conditions which should have made the violation obvious to everyone in the area.

The inspector testified that his review of the "mine file" prior to his inspection reflected that the respondent had previously been cited 10 times over an 8-month period "for this condition" (Tr. 36). His inspection notes confirm that he reviewed the history of prior violations, and found 10 prior citations of section 77.410, and he noted that "violations of 77.410 should be unwarrantable based on this history" (Exhibit G-1). The inspector testified that based on this history, he concluded that the respondent had failed to make an effort or take steps to develop and implement an equipment inspection program to preclude such violations. He stated that the history "exhibits what we call aggravated conduct on their part and we determined it to be unwarrantable conduct" (Tr. 36).

The inspector confirmed that he had a pre-inspection conference with the two representatives of mine management when he started his inspection on November 16, 1989, and that he discussed the respondent's safety program and the examination of its equipment, and pointed out that the respondent had received the 10 prior citations. The inspector confirmed that he advised

management that "if a condition did exist, it was an unwarrantable type condition," and that if a safety program was not developed any future citations "would have to be unwarrantable" (Tr. 16, 44-45). The inspector testified that when he began his inspection in November, the respondent did not have a safety program posted, but that a copy was found by the superintendent and it was then posted. The superintendent informed him that copies of the program were distributed to the employees with their pay checks, but the inspector indicated that he never saw the checks or the safety statements (Tr. 45).

The inspector further testified that any safety program should include some instructions or meetings with the equipment operators "to let them know when they have a problem" (Tr. 46). He confirmed that management informed him that safety meetings were held, and he confirmed that a safety program which was in booklet form, and which the respondent had "for a long period of time," was in fact posted (Tr. 47). The inspector confirmed that he never attended any safety meetings, and was unaware of any written materials concerning section 77.410, but he conceded that safety meetings may have been held (Tr. 47). He further confirmed that foreman Conner informed him that there were a lot of equipment breakdowns and repairs to be made and that he tried to "fix these things when they occurred on a priority basis" (Tr. 49). Although the inspector indicated that he was unaware of any retraining for the equipment operators with respect to section 77.410, he confirmed that they were well trained and competent equipment operators (Tr. 47, 50).

The inspector confirmed that the respondent utilizes the equipment operators to conduct the preshift of the equipment, and he agreed that if an operator does not inform management of any condition that needs attention, or does not record it, management would be unaware of it unless it were verbally communicated by the operator (Tr. 55-56). However, the inspector believed that the lack of a backup alarm should have been obvious to the backhoe and dozer operators working the pit, and that the working shift had been in operation for 6-hours prior to his inspection of the truck. He could not recall where the foreman was located on the day in question (Tr. 38).

The inspector confirmed that in the case of an alarm which may have been rendered inoperative because of a loose or pulled wire, he attempts to ascertain what may have happened. However, in the instant case, since he did not find any alarm on the truck, he could not recall any conversation with the foreman or the driver explaining the absence of the alarm (Tr. 70). He confirmed that the driver is required to examine his equipment before he operates it, and is required to fill out a pre-inspection safety checklist. However, in this case, he was not sure that the driver filled one out, and the foreman could not find one which is normally placed in his mailbox. The inspector

stated that the checklists filled out by the equipment operator at the start of his shift is placed in the box to be picked up at the end of the shift (Tr. 70-71). He also confirmed that this checklist system used by the respondent is required by state law (Tr. 72).

The inspector stated that section 77.404(a) requires the removal of unsafe equipment from operation, and that section 77.1606(c) requires the inspection of equipment for defects, and the recording of needed repairs. However, he did not cite the truck in question with any of these violations, but did cite some other pieces of equipment (Tr. 73).

The 10 previously issued section 77.410, citations reflects that they were all issued as section 104(a) citations. Six of the citations were "S&S," and they were issued at least 1 year earlier than the contested citation in this case. Four were non-"S&S" and were issued 7-months prior to the contested citation. The remaining violations for other standards were all issued as section 104(a) citations. This record does not reflect a history of unwarrantable failure violations.

The inspector confirmed that the respondent has approximately 20 pieces of mobile equipment on the day shift that are required to be equipped with backup alarms, and he considered the previously issued 10 citations for violations of section 77.410, over an 8-month period to be "unusually high" (Tr. 42-43). However, copies of these prior citations were not produced by the petitioner, and the conditions which resulted from those violations are not known, and there were is no evidence that any of these prior citations involved rock trucks. Absent such information, I am unable to determine whether or not the previously cited conditions resulted from the absence of a backup alarm, or whether the alarms were on the equipment, and simply did not function for some reason. In the context of negligence, such information would be relevant in determining whether or not the respondent totally ignored the requirement for installing backup alarms on its mobile equipment, or whether the alarms were installed, but failed to sound because of any adverse working conditions or unforeseen mechanical malfunctions.

On the facts of this case, I cannot conclude that the evidence presented by the petitioner establishes that the violation was an unwarrantable failure. Although the foreman and driver were both present, there is no evidence that the inspector made an attempt to ascertain why the alarm was missing, or the duration of its absence. Aside from the absence of any daily preshift report, which is apparently turned in by the driver at the end of the shift, there is no evidence that the inspector made any attempt to review any prior reports to determine whether or not the missing alarm had ever been reported, and there is no evidence that the driver was aware of the fact that the alarm was

missing, or whether he had reported it to the foreman. While it may be true that the absence of the alarm should have been noted during the course of the shift, the inspector apparently made no effort to interview any of the other equipment operators who may have been working in proximity of the truck while it was in the pit, and there is no evidence to establish that management was aware of the condition.

Notwithstanding the petitioner's arguments to the contrary during the course of the hearing, on the facts of this case, I believe that the inspector was strongly influenced by the fact that the respondent had been previously cited for violations of section 77.410. I further believe that the inspector's finding of unwarrantable failure borders on a per se finding based on prior history. In my view, unwarrantable failure and negligence are distinct concepts, and the application of prior history to these determinations must be considered in context, and not in the abstract. Although prior history may be relevant in any finding of unwarrantable failure or the degree of negligence, Youghiogheny & Ohio Coal Company, supra, at 9 FMSHRC 2011, I believe it is but one ingredient which may be considered, but it is not the sole determining factor. I reject any notion that simply because a mine operator has been previously cited for a violation of a mandatory standard, he may at some future time be considered per se guilty of "aggravated conduct" for any repeat violations, regardless of the time frames or the facts and the circumstances associated with those prior violations.

As noted earlier, the prior section 77.410 citations were issued 7 months or a year prior to the contested citation in this case, and the facts and circumstances surrounding the issuance of those citations are not in evidence. There is no evidence that any of those prior violations involved circumstances similar to those which were present in this case.

I find no credible evidentiary support for the inspector's belief that the respondent had no safety program, held no safety meetings or discussions with its equipment operators, and that the operators were not retrained. The inspector himself confirmed that the respondent had a long standing and posted safety program, and that the equipment operators were well-trained and competent. The unrebutted testimony of the respondent's only witness reflects that the respondent has a safety program, that its preshift inspection system was in compliance with state law, and that MSHA had bestowed a safety award on the company for an accident free safety record. With regard to the asserted lack of safety meetings, the petitioner simply has not met its burden of proving that safety meetings were not held, and the inspector apparently spoke to no equipment operators or other mine personnel in this regard.

I find no credible or probative evidence of aggravated conduct by the respondent in connection with this violation, and I conclude and find that the petitioner has failed to establish an unwarrantable failure violation. To the contrary, I conclude and find that the violation resulted from mine management's inattention and failure to exercise reasonable care. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) citation which he issued IS MODIFIED to a section 104(a) citation with significant and substantial findings, and as modified, the citation IS AFFIRMED.

Service and Parking Brake Violations

The respondent argues that the day shift truck operator repeatedly listed the brakes "OK," and that it is uncontested that the respondent had made extensive repairs and maintenance on the equipment in December, 1989, and that only minor adjustments were made after the violation was issued (exhibits R-1 and G-8). Under these circumstances, the respondent concludes that the truck was not neglected. The respondent also relies on my bench comments concerning the prior backup alarm citation, and whether or not a history of 10 prior citations may or may not support an unwarrantable failure violation (Tr. 76), in support of its argument concerning the cited brake conditions in this case.

The petitioner points out that section 77.1606(a) requires the inspection of haulage equipment by a competent person before the equipment is used, and that any equipment defects affecting safety must be recorded and reported to the mine operator. Section 77.1606(c) requires that all equipment defects affects safety be corrected before the equipment is used. The petitioner argues that the respondent selected truck driver Harold Johnson to inspect the truck in question, and that on January 2, 3, and 4, 1990, Mr. Johnson reported defects in both the service brakes and the parking brakes in his preshift examination reports (exhibit G-7). Since the reports are signed by foreman Grover Riddle, the petitioner concludes that mine management had actual knowledge of the defects, but took no action to correct the defects before the truck was used again.

In response to the respondent's contention during the hearing that there is no proof that a defect affecting safety was reported because the form filled out by Mr. Johnson merely indicates that the parking and service brakes "need corrected," the petitioner argues that the form provides space for equipment operators to remark on "any other mechanical or safety defects," and that the plain meaning of this language is that this space is used to remark on mechanical or safety defects other than those already listed on the form. The petitioner points out that the form is one which is used by the respondent to record and report safety defects as required by section 77.1606(a), and it concludes that when taken as a whole, the part which was filled out

by Mr. Johnson is intended to be used for the reporting of safety defects.

The "narrative findings" of the special assessment officer who assessed both of the brake violations, which are included as part of the pleadings filed by the petitioner, contain statements that "numerous citations have been issued during previous inspections at this mine for failure to maintain adequate service brakes and adequate parking brakes on mobile equipment."

Two memorandums dated March 6, 1990, from MSHA's district manager to the director of the Office of Assessments, state as follows:

> Operating unsafe defective equipment at this mine appears to be normal and allowed by the operator. MSHA inspectors have issued numerous citations for these conditions in the past and the operator has not initiated any corrective action to assure adequate brakes (and adequate parking brakes) are maintained on the equipment; therefore, an extraordinarily high degree of negligence was determined.

The petitioner's assertions that the cited brake violations were repetitious and that "numerous citations" have been issued at the mine for failure to maintain adequate service brakes and parking brakes are unsupported by any credible evidence and I have given it no weight. Aside from the fact that the petitioner produced none of the prior citations, the computer print-out reflecting the respondent's history of prior violations, submitted in WEVA 90-160, reflects no prior citations for violations of section 77.1605(b). Although the parties stipulated in WEVA 90-180, that the respondent has a "moderate history of prior violations" consisting of 43 assessed violations, no further information or evidence was forthcoming with respect to those violations. Further, the "assessed violations" history served on the respondent by the petitioner during discovery simply list the total number of assessed violations issued during 1987 through 1989, and it does not include a breakdown of those violations.

After careful review of all of the evidence and testimony adduced in this case, the only support that I can find for the inspector's unwarrantable failure findings lies in the equipment safety check lists signed by truck driver Johnson and countersigned by foreman Riddle. The inspector testified that when he spoke with Mr. Johnson on January 4, he informed him that the brakes were not working that day, as well as the previous two shifts, and that he had reported this on his checklists for all of these days (Tr. 127-128). The inspector's notes for January 4, reflect the following notation with respect to his conversation with Mr. Johnson: "When asked how long this condition had existed he said several shifts, specifically 1/4/90 and

the two preceding shifts. He said he had reported it each day on the check list" (Exhibit G-1, pg. 7). With respect to the preshift report of January 4, 1990, which Mr. Johnson showed to the inspector, the inspector's notes contain the following notation: "The condition was on the preshift check list and the company knew about it" (Exhibit G-1, pg. 9).

The inspector confirmed that he discussed the brake conditions with foreman Riddle on January 4, but he could not recall the specifics of that conversation. With regard to the daily examination record books, the inspector's notes contain the following notations: "When Grover Riddle was asked to show the daily examination record book he did not have one. He said the book was in Jack Wilfong's truck which was not at the mine and he did not have any other book at the mine" (Exhibit G-1, pg. 10). The notes reflect that the inspector issued a citation, and I assume it was for not having the examination book at the mine.

The inspector confirmed that he did not speak with the day shift truck driver Roach, and that he did not see the safety check list reports filled out by Mr. Roach, or the check lists filled out by Mr. Johnson for January 2 and 3, until the hearing in this case. Even if he had seen them, they would not have changed his mine because he was confident that the truck tests indicated that "those brakes weren't good" (Tr. 137-138).

The inspector further confirmed that Mr. Riddle informed him that superintendent Wilfong picked up the checklists from the mailbox and took them with him when he left the mine on the evening of January 4, (Tr. 152). The inspector explained that except for the January 4, check list which Mr. Johnson showed him that day, and since the other reports were not at the mine, he did not at that time know that Mr. Riddle had countersigned the previous reports and had no reason for discussing them with him. With regard to Mr. Johnson's January 4, check list report, the inspector stated that Mr. Johnson produced it that same day and that Mr. Riddle signed it at the time it was produced by Mr. Johnson (Tr. 154). The inspector confirmed that Mr. Riddle then informed him that he was not aware that the brakes would not hold the truck on the hill, but that he did not discuss with Mr. Riddle the reasons for his failure to do anything about it earlier (Tr. 154).

The record reflects that the day shift driver Roach marked his check lists for January 2, 3, and 4, 1990, "OK" in the spaces provided for reporting the condition of the service brakes and parking brakes, and that evening shift driver Johnson marked each of his lists for those same days "Needs Corrected" (Tr. 119-122). In explaining the contradictory reports made by the two drivers of the same truck, the inspector stated "some operators just won't report that stuff, some will. That's the reason" (Tr. 122). With regard to the earlier backup alarm violation, the

inspector suggested that an equipment operator may not report a defective condition because there may not be an extra truck for him to drive, and if he were unable to do any work, he would be sent home (Tr. 106-107).

The evidence in this case reflects that the safety check list system used by the respondent required the equipment operator to check his equipment and to fill out the form at the beginning of his shift and to turn it in at the end of the shift. With regard to Mr. Johnson's check list for January 4, 1990, it would appear from the inspector's testimony that Mr. Johnson produced this report before his shift ended and after the inspector asked about it, and that Mr. Riddle signed it immediately. Under these circumstances, insofar as that day is concerned, I cannot conclude that Mr. Riddle had prior knowledge that Mr. Johnson had checked the brake conditions as "Needs Corrected."

With regard to the check lists signed by Mr. Johnson on January 2 and 3, 1990, they are both countersigned by Mr. Riddle, and they were received in evidence without objection. Absent any evidence to the contrary, and based on the unrebutted testimony of the inspector, I conclude and find that Mr. Johnson submitted these reports to mine management and that foreman Riddle, for at least two working shifts prior to the inspection, knew or should have known that the service and parking brakes needed attention, or "Needs Corrected," as that phrase appears on the face of the forms. Under these circumstances, and as the responsible foreman, Mr. Riddle had a duty to at least inquire further as to the condition of the brakes, or to otherwise take corrective action to insure that the brake conditions which had been reported to him over a 2-day period were taken care of. Although a maintenance work report reflects that some work had been done on the cited truck on January 2 and 3, 1990 (Exhibit G-8), I find nothing on that report to establish that any brake work was done on those days.

The fact that day shift driver Roach marked his safety check lists "OK" for the two prior shifts of January 2 and 3, 1990, is in my view irrelevant to the question of foreman Riddle's prior knowledge of the brake conditions as reported by Mr. Johnson. Mr. Roach and Mr. Riddle worked on different shifts, and Mr. Roach's check lists are countersigned by superintendent Wilfong, and not Mr. Riddle. Under the circumstances, there is a strong presumption that Mr. Riddle had no knowledge that Mr. Roach found the truck brakes "OK," and any suggestion by the respondent that it relied on Mr. Roach's "OK" assessment of the brake conditions, or that this excuses Mr. Riddle's failure to act, is rejected. Insofar as Mr. Riddle is concerned, I conclude and find that his failure to act after he knew that the truck brakes in question needed attention was inexcusable and constituted a lack of due diligence to follow up on some potentially

hazardous brake conditions which he knew or should have known existed for at least two shifts prior to the inspection of January 4, 1990. I further conclude and find that Mr. Riddle's failure to take any action constitutes aggravated conduct with respect to both brake violations. Under the circumstances, the inspector's unwarrantable failure findings with regard to the service brakes and parking brake violations ARE AFFIRMED.

The Unwarrantable Failure "Chain"

In its posthearing brief, the respondent argued that the petitioner failed to prove the section 104(d) "chain" as to all three violations. Section 104(d)(1) of the Act authorizes an inspector to issue an unwarrantable failure citation if he finds a violation of any mandatory safety standard which does not constitute an imminent danger, but does involve conditions which the inspector believes are significant and substantial and which he believes resulted from an unwarrantable failure by the mine operator to comply with the requirements of the cited standard. Section 104(d)(1) further authorizes the inspector to issue an unwarrantable failure order if, during the same inspection, or any subsequent inspection conducted within 90 days after the issuance of the initial unwarrantable failure citation, he finds another violation of any mandatory safety standard which he believes was also caused by an unwarrantable failure by the operator to comply.

The record in this case reflects that the section 104(d)(1) unwarrantable failure citation issued by the inspector was issued on December 4, 1989. The two unwarrantable failure orders were subsequently issued by the inspector 30 days later on January 4, 1990, and in each instance the inspector noted on the face of the orders that they were based on the previously issued underlying section 104(d)(1) citation. The inspector's unrebutted and credible testimony establishes that there were no intervening "clean" inspections, that "90 days did not go by without another order. The 90 day period has to elapse before you get off that chain." Under all of these circumstances, I conclude and find that the citation and orders issued by the inspector were procedurally correct, and that all of the "chain" requirements found in the Act for the issuance of such citations were followed by the inspector. However, in view of my vacation and modification of the initial underlying section 104(d)(1) citation relied on by the inspector to support his subsequently issued section 104(d)(1) orders, those orders ARE MODIFIED to section 104(d)(1) citations, with "S&S" findings, and as modified, they ARE AFFIRMED.

History of Prior Violations

The parties have stipulated that the respondent has a moderate history of prior violations and I have taken this into account in these proceedings.

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

The parties stipulated that the respondent is a moderate size mine operator. Although the respondent's secretary/treasurer Gomer believed that payment of the proposed civil penalty assessments will affect the "viability" of the company, he conceded that it would probably not put it out of business. Although the financial balance sheets produced by Mr. Gomer show an accrued loss, the accompanying letter by the C.P.A. who prepared the reports contains a disclaimer with respect to any opinion concerning the financial statements taken as a whole, and the respondent has not produced any tax returns or net worth statements relative to its current financial condition. In the absence of any further credible evidence to the contrary, I cannot conclude that payment of the civil penalty assessments which I have made for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

Negligence

On the basis of my unwarrantable failure findings and conclusions with respect to the two brake violations, I conclude and find that these violations resulted from a high degree of negligence on the part of the respondent, and the inspector's findings in this regard are affirmed. With regard to the backup alarm violation, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary and moderate negligence.

Gravity

In view of my "significant and substantial" (S&S) findings, I conclude and find that all of the violations which have been affirmed were serious.

Good Faith Compliance

The parties stipulated that the violations were timely abated by the respondent, and I have taken this into consideration in these proceedings.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate.

Docket No. WEVA 90-160

Citation No.	Date	30 C.F.R. Section	Assessment
3334094	12/04/89	77.410(a)(1)	$275

Docket No. WEVA 90-180

Citation No.	Date	30 C.F.R. Section	Assessment
3334014	01/04/90	77.1605(b)	$650
3334015	01/04/90	77.1605(b)	$350

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions and order. Payment is to be made to MSHA, and upon receipt of payment, these cases are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Gerald P. Duff, Esq., HANLON, DUFF & PALEUDIS CO., LPA, 46457 National Road West, St. Clairsville, OH 43950 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 15, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-303
	:	A. C. No. 46-01452-03746
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the two violations involved in this case. The originally assessed penalty was $384 and the proposed settlement is $200. The Solicitor discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3314744 was issued for a violation of 30 C.F.R. § 75.316. The approved ventilation plan was not being complied with at the 9 north and 10 north air course regulators because the wooden portions of the regulators had not been painted with fire resistant material. The proposed settlement would modify the citation to reflect that the violation was not significant and substantial. The originally assessed penalty was $192 and the proposed settlement is $100. The Solicitor represents that the reduction and modification are warranted because gravity was not as severe as had been first estimated. According to the Solicitor, the regulators in question were not located near any ignition source and were not likely to be exposed to flame or excessive heat except during a significant mine fire or explosion. In addition, there were no conditions in the mine at the locations of the regulators to suggest that such an event was likely to occur. I accept the Solicitor's representations and based upon them find that gravity was less than originally thought. Accordingly, I approve the recommended settlement and find that the citation should be modified as requested.

Citation No. 3314753 was issued for a violation of 30 C.F.R. § 75.316. The approved ventilation plan was not being complied with because one hundred eighty feet of energized power cable for the muck pump located at the No. 2 conveyor belt transfer was not support on well-insulated insulators. The inspector noted that the cable was lying on the damp pavement and that insulators had

not been installed. The proposed settlement would modify the citation to reflect that the violation was not significant and substantial. The originally assessed penalty was $192 and the proposed settlement is $100. The Solicitor represents that the reduction and modification are warranted because gravity was not as severe as had been originally thought. According to the Solicitor, the power cable was not usually handled or touched by miners and was in good shape. Moreover, the cable was fully protected by an undamaged outer jacket of hard rubber material. I accept the Solicitor's representations and based upon them find that gravity was less than originally thought. Accordingly, I approve the recommended settlement and the citation should be modified as requested.

Accordingly, it is **ORDERED** that Citation Nos. 3314744 and 3314753 be **MODIFIED** to delete the significant and substantial designations.

It is further **ORDERED** that the proposed settlement be **APPROVED** and the operator **PAY** $200 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:
Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Mr. David Myers, UMWA, Route 1, Box 47-A, Morgantown, WV 26505 (Certified Mail)

Mr. Barry Dangerfield, Consolidation Coal Company, P. O. Box 100, Osage, WV 26543 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 15, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-307
	:	A. C. No. 46-01968-03878
v.	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the four violations involved in this case. The originally assessed penalty was $924 and the proposed settlement is $672. The Solicitor discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 2708200 was issued for a violation of 30 C.F.R. § 75.316. The intake escapeway of the 12 L longwall panel did not have a constant air pressure from the intake escapeway to the track from the No. 2 block through the No. 23 block and including the area of the air lock haulage doors at No. 21 block. The proposed settlement would modify the citation to reflect that the violation was not significant and substantial. The originally assessed penalty was $450 and the proposed settlement is $300. The Solicitor represents that the reduction and modification are warranted because gravity was not as severe as had been first estimated.

By way of background, the Solicitor discusses the requirements of the operator's approved ventilation and dust control plan for the Blacksville No. 2 Mine. The plan requires that the operator maintain a constant air pressure from the intake escapeway to the track haulage entry on the 12L longwall panel. This provision was adopted because the operator elected to install air lock doors between the track entry and the intake escapeway entry to facilitate the movement of supplies to the working face of the section. The constant air pressure provision is intended to maintain the integrity of the intake escapeway in the event the air lock doors become damaged or open during a fire or other emergency in the track entry. In order to maintain the positive pressure differential, the operator hung a check curtain in the intake side of the longwall. Damage to the check curtain by the movement of equipment and men caused the violation.

According to the Solicitor, the violation was detected only when the air lock doors were open and that the when the doors were closed the violation was not readily apparent. The Solicitor further advises that the inspector was unable to quantify the volume of the air passing from the track entry to the intake escapeway when the air lock doors were not in use. And it is possible that the volume was small since the violation was abated by simply tightening the check curtain on the intake side of the section. In addition, the Solicitor avers that the air lock doors were only in use two or three times a shift for relatively short periods of time and that it was not likely that a fire or other emergency would occur in the track entry during the short period of time that the doors were utilized. I accept the Solicitor's representations and based upon them find that gravity was less than originally thought. Accordingly, I approve the recommended settlement and modification of the citation.

Citation No. 3314981 was issued for a violation of 30 C.F.R. § 75.515 because the conduit to the flow control switch of the No. 2 Peerless pump, located in a crosscut two blocks down the empty track from the rotary dump, had been pulled out of the fitting leaving the insulated wires loose to rub on the metal frame. The proposed settlement would modify the citation to reflect that the violation was not significant and substantial. The originally assessed penalty was $227 and the proposed settlement is $125. The Solicitor represents that the reduction and modification are warranted because gravity was not as severe as originally thought. According to the Solicitor, the ground flow switch is not on the pump but rather is a permanent installation surrounded by water, and, therefore, not generally handled by miners. The Solicitor further states that the switch is protected by a separate ground fault device. I accept the Solicitor's representations and based upon them find that gravity was not as severe as originally estimated. Accordingly, I approve the recommended settlement and the citation should be modified as requested.

Citation No. 2708384 was issued for a violation of 30 C.F.R. § 45.4(b) because the management failed to maintain in writing the information required for certain trucking companies serving as independent contractors. The originally assessed penalty was $20. Citation No. 3314695 was issued for a violation of 30 C.F.R. § 75.303(a) because an adequate preshift examination had not been performed for the morning shift on the 6 north loaded track area. The originally assessed penalty was $227. After investigating these matters, the Solicitor believes the evidence at trial would support the fact of the violations and the inspector's evaluations of gravity and negligence. Settlements in the amount of the original assessments are sought for these citations. I accept the Solicitor's representations and approve the proposed penalties.

Accordingly, it is **ORDERED** that Citation Nos. 2708200 and 3314981 be **MODIFIED** to delete the significant and substantial designations.

It is further **ORDERED** that the proposed settlement be **APPROVED** and the operator **PAY** $672 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Mr. Merie M. Myers, UMWA, Route 2, Box 147, Rivesville, WV 26588 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 13 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WILLIAM McDONALD, Complainant	:	DISCRIMINATION PROCEEDING Docket No. PENN 90-249-DM PITT CD 90-24
v.	:	Hamilton Strip
AL HAMILTON CONTRACTING CO., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On March 14, 1991, the Secretary of Labor filed a motion to withdraw the complaint of discrimination filed on behalf of William McDonald.

On March 5, 1991, McDonald entered into a settlement agreement with Respondent by which Respondent agreed to post a notice at the mine that it would not discharge or otherwise discriminate against any miner in violation of the Mine Act. It also agreed to pay McDonald three days back pay with interest, to expunge any reference to the discipline imposed on McDonald involved in this proceeding from its personnel records and to pay a civil penalty of $500. In return, McDonald agreed to withdraw his discrimination complaint.

I conclude that the motion and the settlement agreement effectuate the purposes of Section 104(c) of the Act and should be approved.

Accordingly, the motion is **GRANTED**, and, subject to the completion performance by the parties of the settlement agreement, this proceeding is **DISMISSED**.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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

Alan F. Kirk, Esq., Kriner, Koerber & Kirk, 110 North Second Street, P.O. Box 1320, Clearfield, PA 16830 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 90-166
Petitioner	:	A.C. No. 46-06647-03553
v.	:	
	:	Docket No. WEVA 90-228
BETHEL FUELS INCORPORATED,	:	A.C. No. 46-06647-03552
Respondent	:	
	:	No. 1 Deep

DECISIONS APPROVING SETTLEMENTS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner has filed motions pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlements of the matters. The citations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. WEVA 90-166

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3311311	11/14/89	75.1704-2(e)	$600	$400

Docket No. WEVA 90-228

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3311578	11/08/89	75.202(a)	$600	$600

Discussion

In support of the proposed settlements, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the citations in question, and a reasonable justification for the approval of the settlements.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motions ARE GRANTED, and the settlements ARE APPROVED.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above within thirty (30) days of the date of these decisions and order. Payment is to be made to MSHA, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Mr. Thomas Stockdale, Safety Coordinator, Bethel Fuels, Inc., Route 7, Box 510, Morgantown, WV 26505 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1991

LONNIE JONES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 91-78-D
	:	MSHA Case No. BARB CD 91-05
DEER PATH CORPORATION	:	
Respondent	:	No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Fauver

At a conference call on March 14, 1991, with the judge, the Complainant, and counsel for Respondent, the Complainant moved to withdraw his complaint and dismiss this case.

The motion is GRANTED, and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

Mr. Lonnie Jones, 730 Highway 26, Williamsburg, KY 40769 (Certified Mail)

Mr. Michael E. Demski, General Manager, Deerpath Corporation, P.O. Box 759, Jellico, TN 37762 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1991

ARNOLD R. SHARP, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 89-147-D
v.	:	
	:	PIKE CD 89-08
BIG ELK CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Joe T. Roberts, Esq., London, Kentucky for the Complainant;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Louisville, Kentucky for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Arnold R. Sharp under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging unlawful discharge on February 28, 1989, by the Big Elk Creek Coal Company (Elk Creek) in violation of section 105(c)(1) of the Act[1].

---

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

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

More particularly Mr. Sharp alleges in his Complaint as follows:

> On February 28, 1989, I was discharged from my job for missing too much work and for not signing a medical authorization form concerning an accident I had at work on January 20, 1989. The days I have missed worked [sic] were mostly due to my becoming sick after working in terrible weather conditions and I have always gave [sic] them doctor's statements. In regard to the request for a medical release, I filled out an accident report, submitted emergency room records and submitted a doctor's statement from Dr. Ratliff.
>
> Since I won a previous discrimination case against this company and was put back to work, I have continually been harassed and have been wrongfully fired. I request reinstatement and all other relief to which I am entitled.

In his post hearing brief the Complainant appears to have abandoned this assertion that his discharge was the result of the settlement of a previous discrimination case against this mine operator and he makes new claims of certain additional protected activity, namely that he "complained to his supervisors and also to MSHA about the unsafe conditions of the burm [sic], truck, sweeper, and steam jenny as well as the health hazard to the sweeper and steam jenny".

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall 663 F.2d, 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-818 (1981).

The mine operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse

---

cont'd fn.1

> to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity. Pasula, supra, Robinette, supra; See also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6 Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). See NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), approving a nearly identical test under the National Labor Relations Act.

While it has never been clearly articulated, it appears from the "statement of the case" in the Complainant's Brief that he is now maintaining that his discharge by Elk Creek on February 28, 1989, was a discriminatory response to the following protected health and safety complaints and activities:

* * *

> (1) After Claimant, Mr. Sharp, went back to work on January 25, 1989, he went back to running the same steam jenny and also ran a blue and white broom, which sweeps the coal, and known as a coal sweeper, which had no doors, windows, roll bar protection, and no heater, and while running the broom, Mr. Sharp would get soaking wet with freezing ice covering his body and clothing and further that the sweeper had no windshield and did not have protective goggles and therefore, debris, dirt and coal came into the cab of the broom actually hitting Mr. Sharp. (Tr.28)
> Mr. Sharp complained to the foreman, Harlen Couch, that the broom sweeper was unsafe and Mr. Couch told Mr. Sharp that he would run it or be fired and Mr. Sharp also complained to the superintendent Mr. M.C. Couch about the broom being unsafe and was told "you will run it or be fired." Then Mr. Sharp complained to Jim Meese at the Lexington Office and explained the situation to Mr. Meese and the condition of the broom sweeper and was told by Mr. Meese, "you will work, Mr. Sharp, or you will be fired." (Tr. 29)
> The broom sweeper had no doors, no windows, no heater, and no roll bar protection and therefore Mr. Sharp, after exhausting his reports of the unsafe conditions to the company, finally reported it to the Federal Mine Safety people, and the government issued a citation but Mr. Sharp was filed [sic] before he could observe whether the unsafe conditions on the broom could be corrected by the company. (Tr. 29-30) on February 20, 1989. (Tr. 31)

Mr. Sharp also, between January 20, and February 28, 1989, complained to his supervisors and to the Federal Mine Safety people that the steam jenny was unsafe and was a health hazard,

* * *

Mr. Sharp had previously been fired and made complaint and after hearing/trial, he was ordered reinstated by the Administrative Law Judge and went back to work in September, 1987, and was supposed to go back to work on the rock truck, but at that time they put him on the steam jenny through September and October and in October, 1987, the steam jenny was parked and anti-freezed, and covered with plastic and Mr. Sharp was then put back on the rock truck in November of 1987, and from November until January 5, 1988, Mr. Sharp was the sole driver of the rock truck and at that time made complaints about the brakes, horn and lights to his foreman, Willie Martin, and the problems were not taken care of by the company, and then Mr. Sharp complained to MSHA in November of 1987 and an inspector came and looked at the truck, and Mr. Sharp also complained about the burm [sic] on the edge of the hollowfill, and the inspector wrote up a citation on the truck and on the burm [sic]. (Tr. 57-62)

* * *

(3) when he [Mr. Sharp] went back to work on February 22, 1988, he went back to work on a new rock truck in which he drove up until June and he was taken off the new truck and placed on the truck that he had previously operated and made prior complaints about which still had no horns, neither front nor rear, and the brakes were metal against metal, which had never been fixed since he had reported and MSHA had issued a citation and this was truck number 621, and again Mr. Sharp complained to Mr. M.C. Couch, Herlan Couch, and Jim Meese, who were all his immediate superiors about the safety of the truck and which they did nothing about and,

* * *

(4) Since Mr. Sharp began working for the Respondent he has driven a rock truck, helped operate an auger, a steam jenny and a coal sweeper and Mr. Sharp has made complaints to his fellow employees, foremen, supervisor, and administrators, as well as to MSHA about the unsafe conditions of all the equipment that he has operated or helped operate for the Respondent and also has made complaints about unsafe conditions of the burm [sic] where the rock trucks dump into the hollowfill, and Exhibit C-5, shows that MSHA wrote a citation on the broom for being unsafe and a health hazard which Mr. Sharp had reported on

February 20, 1989, and Mr. Sharp was fired on February 28, 1989. (Tr. 104-106).

* * *

It is noted preliminarily that several of the above allegations of protected activity and harassment have been the subject of previous complaints under section 105(c) of the Act. Those complaints have been considered and rejected by the Department of Labor's Federal Mine Safety and Health Administration and, in those cases pursued to this Commission, by a Commission administrative law judge, and have since become final.[2]

I do however find in this case credible evidence to support many of Sharp's claims of protected safety and health complaints. While Harlen Couch denied at hearing that Sharp had ever made complaints to him neither M.C. Couch nor Willie Martin, two of Sharp's former supervisors, were called to testify. Sharp's allegations of complaints to them therefore stand unrebutted. In addition, Elk Creek Administrator, James Meese, was candid in acknowledging that not only did Sharp complain to him about alleged unsuitable rain gear and about alleged unsafe conditions on the steam jenny (Tr.189) but also that Sharp regularly told him of complaints he was making to MSHA (Tr.200).

Sharp has failed however to sustain his burden of proving that Elk Creek was thereby motivated by such activities in discharging him. According to the credible testimony of James Meese he was the person who made the final decision to fire Sharp and his decision was based solely on Sharp's attendance problems and refusal to sign the medical information release. He

---

[2]Those prior 105(c) complaints were as follows:

1. BARB-CD 87-53 -- A Complaint concerning a lack of training and not being reinstated to the proper job. This was withdrawn on August 19, 1988, and approved by Judge George Koutras.

2. PIKE-CD 88-10 -- A Complaint about warnings for missing work, dismissed March 20, 1989 by Judge Koutras.

3. PIKE-CD 88-18 -- A complaint of harassment for Sharp's not reporting to work as scheduled following a training session on First Aid. this was dismissed at Sharp's request on March 30, 1989 by Judge Koutras.

4. PIKE-CD 89-02 -- A Complaint about a warning concerning absenteeism for staying home with his wife, dismissed by Judge Koutras on August 22, 1989.

5. PIKE-CD 89-07 -- A Complaint filed by Sharp alleging he was assigned to the steam jenny in retaliation for his earlier 105(c) Complaints. this was dismissed by MSHA on March 30, 1989, and no further review was sought by Sharp.

specifically denied placing any reliance on Sharp's record of making health and safety complaints to the company and to MSHA. I find this testimony completely credible.

This conclusion is strongly reinforced by the evidence that Elk Creek's justification for its discharge of Sharp was based upon credible, documented and well-founded unprotected business reasons. This evidence supports both the finding that his discharge was not motivated by any protected activity but also that even assuming, arguendo, Sharp had established a prima facie case, it would have been rebutted. Robinette supra.

In this regard the letter of discharge to Mr. Sharp dated February 28, 1989, states as follows:

> We have given you ample time since your first notice on November 15, 1988, to improve your attendance at Big Elk Creek Coal Company. On January 17, 1989, you were advised for the second time in two months that your attendance was unacceptable and that for the following 90 days your attendance would be closely reviewed. Since your second notice on January 17, 1989, you have missed another 5 days for various illness or personal reasons.
> Also, on January 29, 1989, you claim you injured a muscle in your right leg in an alleged on-the-job injury but did not report it to your foreman at the time. You missed 4 days for this claimed injury. We have repeatedly asked you to sign a medical authorization so that we could obtain information from your doctor about this claimed injury. As recently as February 24, 1989, you were advised that if you didn't return the form, signed, you would be subject to discipline up to and including discharge. You have refused to sign and return the form.
> At this time, we feel you have missed too much time during the 90-day period and, in view of all of this, we have no alternative but to terminate your employment effective February 28, 1989. (Exhibit No. C-10)

The credible evidence supports the allegations in the above letter. In particular the credible evidence shows that from the week ending November 11, 1988 through February 25, 1989, Sharp was absent from work 26 days out of 94 workdays (excluding excused absences and "injury" days) or about 25 percent of his scheduled work days. The evidence further shows that on January 17, 1989, Sharp was advised by Elk Creek for the second time in two-months that his attendance was not acceptable and that it would be closely monitored for the next 90 days. Following the second notice on January 17, 1989, the evidence shows that Sharp indeed missed another five days for various illnesses or for personal reasons. It can reasonably be inferred

from the evidence in this case that three of those days were unexcused and indeed that Sharp was falsely claiming a medical excuse for those absences on January 21, through 23, 1989.

The discharge letter also refers, as a separate ground for discharge, Sharp's refusal three times to sign a release to permit review by Elk Creek of medical reports relating to that absence. The reports provided to the operator by Sharp are not legible and appear to offer contradictory diagnoses. Under the circumstances the operator was justified in seeking further explanation.

This procedure was even more warranted in light of Sharp's previous history of attendance deficiencies and of his predictions purportedly made to Elk Creek Administrator, James Meese, shortly before the absence, that he might very well get hurt working on the task that he was then performing. According to the credible and undisputed testimony of Meese, Sharp complained to him on January 21, 1989, about working the steam jenny and predicted that he might get hurt.

Under all the circumstances I do not find that Mr. Sharp has sustained his burden of proving that he was discharged in violation of Section 105(c)(1) of the Act.

ORDER

Discrimination Complaint Docket No. KENT 89-147-D is DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

Joe T. Roberts, Esq., Roberts Building, 405 South Main Street, London, Kentucky 40741 (Certified Mail)

Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, Kentucky 40202 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 28 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 90-442
	:	A.C. No. 15-13576-03506
v.	:	
	:	Ely Fuel Company
ELY FUEL COMPANY, Respondent	:	

DECISION

Appearances: Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Frank Stewart, President, Ely Fuel Company, Pineville, 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," in which the Secretary has proposed civil penalties for two alleged violations by the Ely Fuel Company (Ely) of mandatory standards. The general issues before me are whether Ely committed the violations as alleged and, if so, the amount of civil penalty to be assessed.

Citation No. 3380133 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.502-2 and charges that "the co. has not conducted a monthly examination and recorded it in an approved MSHA record book by a qualified person."

The standard at 30 C.F.R. § 77.502-2 is requires that "the examinations and tests required under the provisions of this section 77.502 shall be conducted at least monthly." The standard at 30 C.F.R. § 77.502 provides as follows:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such

examinations shall be kept.

In its Answer and at hearings in this case Ely acknowledges that the violation occurred as charged but denies that an injury or illness was likely to result from the violation and denies that it was a "significant and substantial" violation. According to Inspector Richard Saylor of the Federal Mine Safety and Health Administration (MSHA), during the course of his regular inspection on June 20, 1990, he examined the record books for the monthly electrical examinations at the subject mine and found that the monthly examination had not been performed. Ely Foreman, J. C. Smith, acknowledged that they had not performed the monthly exam. According to Saylor an injury was "reasonably likely" and it was "very likely that something could happen and cause a person to get hurt or injured." He noted that the purpose of an electrical inspection is to determine that nothing is wrong with the electrical system. Saylor testified that if a person "got in electricity it would have to be serious". He noted that there were electrical motors, and transformers on the crushers and it involved high voltage. More particularly he noted that a motor could get "shorted out" and you would "get power on" the person. He opined that injuries would occur to only one person that being the person operating the tipple.

Ely President Frank Stewart denied at hearing that the violation was serious. He observed that the tipple is run only five months a year and he is given a day or two notice by his contractor to run the tipple. It is only upon such notice that he arranges for the electrical inspection. On this occasion Stewart maintains he called his regular electrical inspector, Donald Dunn, the day before the citation was issued to inspect the tipple. According to Stewart, Dunn was late showing up and the MSHA inspector arrived first. Dunn purportedly showed up later. Neither Inspector Saylor nor Dunn apparently found any electrical defects in the equipment.

Stewart also testified that the requisite electrical inspection had been made early the month before and that his foreman J.C. Smith, though not a certified electrician had 35 years electrical experience and regularly inspects the tipple himself.

It is noted that Ely had previously been cited for a violation of the same standard at issue herein for failing to conduct the required monthly electrical examination under 30 C.F.R. § 77.502-2, only four months before. It is also apparent that Ely management including foreman J.C. Smith knew that the required electrical inspection had not been performed when they commenced operation of the tipple knowing that such an examination was required. The violation was therefore the result of high negligence.

While there was no record of any violative electrical condition existing on the date of the citation it may nevertheless reasonably be inferred that the violation was "significant and substantial". The circumstances expected in continuing mining operations may be considered in the evaluation of whether a hazard would be reasonably likely. Under the circumstances I conclude that the violation was indeed "significant and substantial". See Mathies Coal Company, 6 FMSHRC 1 (1984).

Considering the criteria under section 110(i) of the Act I concur with proposed civil penalty of $36.

Citation No. 3380134 alleges a violation of the standard at 30 C.F.R. § 77.1707 and charges that "the company didn't have an adequate first aid kit at the tipple and that some items were missing."

The cited standard, 30 C.F.R. § 77.1707 provides in part as follows:

> (a) Each operator of a surface coal mine shall maintain a supply of the first aid equipment set forth in paragraph (b) of this section at or near each working place where coal is being mined, at each preparation plant and at shops and other surface installations where ten or more persons are regularly employed.
> (b) The first aid equipment required to be maintained under the provisions of paragraph (a) of this section shall include at least the following:
> (1) One stretcher;
> (2) One broken-back board (if a splint-stretcher combination is used it will satisfy the requirements of both paragraph (b)(1) of this section and this paragraph (b) (2);
> (3) Twenty-four triangular bandages (15 if a splint-stretcher combination is used);
> (4) Eight 4-inch bandage compresses;
> (5) Eight 2 inch bandage compresses;
> (6) Twelve 1-inch adhesive compresses;
> (7) An approved burn remedy;
> (8) Two cloth blankets;
> (9) One rubber blanket or equivalent substitute;
> (10) Two tourniquets;
> (11) One 1-ounce bottle or aromatic spirits of ammonia
> (12) The necessary complements of arm and leg splints or two each inflatable plastic arm and leg splints.
> (c) All first aid supplies required to be maintained under the provisions of paragraphs (a) and (b) of this section shall be stored in suitable, sanitary, dust tight, moisture proof containers and such supplies

shall be accessible to the miners.

Ely does not dispute the violation but maintains that there were only a few items missing from the first aid kit and argues that the allegation in the citation was "so frivolous that it defies belief".

Inspector Saylor acknowledged that the violation was of low gravity and that only a few items were apparently missing from the first aid kit but noted that he does not have the discretion to overlook violations even when they are not serious. Indeed Saylor has noted on the citation that the violation herein was not serious and the Secretary has proposed only a nominal penalty of $20. There is, in addition, little evidence in this case of operator negligence. Under the circumstances and considering the relevant criteria under section 110(i) of the Act I find the Secretary's proposed penalty of $20 to be appropriate.

ORDER

Ely Fuel Company is hereby directed to pay civil penalties of $56 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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

President Frank Stewart, Ely Fuel Company, P.O. Box 980, Pineville, KY 40977 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 28 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 90-258
	:	A.C. No. 36-05658-03681
v.	:	
	:	Urling No. 3 Mine
KEYSTONE COAL MINING CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a petition for assessment of a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

WHEREFORE, IT IS ORDERED that the motion for approval of settlement is GRANTED, and Respondent shall pay the approved penalty of $135 within 30 days of this decision. Upon such payment this case is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

William M. Darr, Esq., Keystone Coal Mining Corporation, P.O. Box 792, Indiana, PA 15701 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 28 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 90-79-M
	:	A.C. No. 31-01869-05525
v.	:	
	:	Miller Hill Quarry
CALDWELL STONE COMPANY, INC., Respondent	:	

DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Mr. Dale Caldwell, President, Caldwell Stone Company, Inc., Hudson, North Carolina, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of $650 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.14107(a). The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Hickory, North Carolina. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record in the course of the hearing.

Issues

The issues presented in this case are (1) whether the respondent violated the cited mandatory safety standard, and (2) the appropriate civil penalty to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

2. 30 C.F.R. § 56.14107(a).

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

Stipulations

The parties stipulated that the Commission has jurisdiction in this matter and that the respondent is a small mine operator (Tr. 4).

Discussion

The contested section 104(a) non-"S&S" Citation No. 3254968, issued by MSHA Inspector William T. Hall on February 6, 1990, cites an alleged violation of mandatory guarding standard 30 C.F.R. § 56.14107(a), and the cited condition or practice states that "The head pulley and drive unit were not guarded on the surge conveyor."

Petitioner's Testimony and Evidence

MSHA Inspector William T. Hall testified as to his education, experience, and training, and he confirmed that he holds a bachelor's degree in industrial technology and occupational safety and health from the University of Kentucky (Tr. 10-12). He confirmed that he conducted an inspection at the respondent's mining operation on February 6, 1990, and that foreman John Cline accompanied him (Tr. 13).

Mr. Hall stated that he issued the citation in question after finding that the surge conveyor head pulley and drive unit, which constituted moving machine parts, were not guarded. In view of the numerous inspections he has conducted, Mr. Hall could not specifically recall or describe the area where the violative conditions were present. However, he confirmed that the hazard concerned exposed moving machine parts which could cause injury to only one employee, namely, a plant utility clean-up man who would be in the area. Under the circumstances, he concluded that an injury was unlikely, and that the violation was non-"S&S" (Tr. 14).

Mr. Hall confirmed that subsection (b) of section 57.14107, provides an exception which does not require a guard if the exposed moving part is at least 7 feet away from any walking or working area. However, in the instant case, there was a material spillage buildup of approximately 1-foot under the conveyor and this placed the unguarded head pulley within 6 feet of the

spillage and outside of the exception. He confirmed that he is 6-foot one and a-half inches tall, and when he stood on the material he was "looking right at the head pulley" which he estimated was 6 feet above the material on which he was standing (Tr. 14-15).

Mr. Hall could not recall that foreman Cline made any comments about the violation, and he confirmed that it was abated (Tr. 15). He stated that he based his "high negligence" finding on the respondent's prior violation history of the guarding standard. He confirmed that the unguarded pulley was readily observable, and it appeared that a competent person had not inspected the workplace for a hazard. Under the circumstances, he found no mitigating circumstances with respect to the respondent's negligence (Tr. 16).

Although Mr. Hall agreed that someone would have to make a deliberate effort to reach the unguarded pulley, he nonetheless believed that anyone walking on the material spillage buildup could slip and fall into the pulley. However, he believed that an injury was unlikely, and that the violation was not significant and substantial because only one person was in the area. Mr. Hall confirmed that he recommended a "special civil penalty assessment" for the violation because of the respondent's past history of violations of the guarding standard in question (Tr. 17-18).

On cross-examination, Mr. Hall stated that if someone tripped on the material spillage pile he could fall into the head pulley which would be 6 feet above ground at this location (Tr. 19). He confirmed that he did not measure the distance between the top of the pile and the unguarded pulley because "I could walk right up to it and see it was 6 feet above the ground" (Tr. 20).

After reviewing several photographs of the conveyor produced by the respondent, Mr. Hall stated that he could not identify the cited unguarded pulley in question because he could not specifically recall it because "it's been over a year ago and things could have changed on the property" (Tr. 21-22; exhibits R-1 through R-4).

Referring to photographic exhibit R-3, the respondent's representative, Dale Caldwell, stated that Inspector Hall listed the wrong conveyor in his citation, and he believed that Mr. Hall mistook the tail pulley of the No. 2 surge conveyor for the head pulley. However, Mr. Caldwell explained that the surge conveyor cited by the inspector is a part of the "second phase" of the surge conveyor which is "the belt coming out of the tunnel" (Tr. 33). Inspector Hall could not recall the head pulley and drive unit that was cited (Tr. 33). Although he identified a drive

unit in the photograph, Mr. Hall reiterated that due to the passage of a year, he could not recall the specific situation (Tr. 34).

In response to further questions, Mr. Hall stated that he relied on a computer print-out of the respondent's history of prior violations which is on file in his office. He believed that he issued some of the prior guarding citations, and although he could not recall reviewing the prior citations at the time of his inspections, he believed that he did because he is required to review the mine file. He stated that he was not influenced by the delinquency letters reflected in exhibit P-1, because the computer print-out in the mine file was not the same as the one in evidence in this case and he would not have had the delinquent payment information when he made his negligence finding in this case (Tr. 27).

Mr. Hall confirmed that in view of the exception found in section 56.14107(b), the question of whether a guard was required would depend on whether there was a material spillage buildup on the ground below the pulley, and that the requirement for a guard could change from day-to-day depending on the existence of spillage which may result in the moving part being less than 7 feet above the spillage pile. If there was no spillage, the unguarded pulley would have been 7 feet above the ground and it would not require a guard (Tr. 27-29).

Mr. Hall stated that the conveyor is supposed to be locked out when maintenance work or greasing is performed, but he did not know the procedures followed by the respondent in this regard (Tr. 29-30).

Respondent's Testimony and Evidence

Dale Caldwell, respondent's president, testified that Inspector Hall cited an unguarded surge conveyor head pulley and drive unit, and referring to photographic exhibits R-1 and R-3, he identified the location of these moving parts as the circled equipment on the conveyor shown at the top of the photographs. However, he indicated that what the inspector actually observed was an unguarded tail and head pulley on the number 2 conveyor, and he identified this piece of equipment as the conveyor closest to the ground as shown in exhibits R-1 and R-3 (Tr. 34-35).

Mr. Caldwell believed that Inspector Hall was looking at the bottom conveyor when he issued the violation, and that he incorrectly identified it as the surge conveyor when he wrote the citation. Mr. Caldwell stated that he knew that Mr. Hall had the wrong conveyor "because my foreman took me out there and showed me the conveyor" (Tr. 36). Mr. Caldwell stated that the surge conveyor head pulley and drive unit shown in exhibits R-1 and R-3

were probably 7 or 8 feet above the material buildups shown in the photographs (Tr. 36).

Mr. Caldwell confirmed that he was not with Inspector Hall when he issued the citation, but that his foreman was. He also confirmed that he discussed the citation with Mr. Hall, but did not point out that he may have cited the wrong conveyor. In explaining why he did not point this out to the inspector, Mr. Caldwell stated that "I'm glad when he leaves," but that the $650 fine "got my attention," and that he reviewed the citation and "I realized that he had the wrong conveyor down there" (Tr. 41).

Mr. Caldwell stated that foreman Cline informed him that Mr. Hall had cited the wrong conveyor after they returned to the plant to discuss abatement. Mr. Caldwell stated that regardless of whether the head pulley or tail pulley were correctly cited, he still believes that someone would have to deliberately reach or jump up to contact the unguarded equipment (Tr. 42).

On cross-examination, Mr. Caldwell confirmed that the four photographic exhibits were taken the day before the hearing of January 23, 1991. Although he agreed that the amount of spillage shown in the photographs is not the same observed by the inspector during his inspection, Mr. Caldwell believed that the area where the material drops below the conveyors is the same area (Tr. 47).

Mr. Caldwell reiterated that foreman Cline told him that Inspector Hall issued the citation for the unguarded tail pulley of the No. 2 belt, and that the surge conveyor is the conveyor that feeds onto the No. 2 belt (Tr. 48). Mr. Caldwell agreed that it was not unusual to have material spillage in the area where both conveyors are located (Tr. 49).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory guarding standard 30 C.F.R. § 56.14107(a), for failing to provide a guard for the cited surge conveyor head pulley and drive unit. Section 57.14107, provides as follows:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades; and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

Subsection (b) of the standard provides an exception for guards, and it provides that no guard is required if the exposed moving parts are at least 7 feet away from walking or working surfaces. In this case, Inspector Hall confirmed that he issued the citation and found a violation because the accumulated material spillage under the exposed conveyor pulley and drive unit placed them within 7 feet of the spillage (Tr. 30). The petitioner's counsel agreed that this was the case, and he pointed out that if the spillage had been cleaned up no guard would have been required and the respondent would have been in compliance (Tr. 31).

Mr. Caldwell asserted that he contested the citation because he believed that the proposed civil penalty assessment for the violation was excessive (Tr. 5). He contended that the inspector identified the wrong pulley in the citation and that he mistook the tail pulley of the No. 2 surge conveyor for the head pulley. Mr. Caldwell confirmed that he was not with Mr. Hall when he inspected the conveyor and issued the citation, and he indicated that foreman Cline told him that Mr. Hall had incorrectly identified the cited piece of equipment.

Inspector Hall testified that he cited the unguarded surge conveyor head pulley and drive unit, but in view of the fact that the citation was issued over a year ago, and the many intervening inspections he has conducted, Mr. Hall could not recall the specific piece of equipment which he cited, nor could he identify it in any of the photographic exhibits.

Mr. Caldwell did not produce foreman Cline to testify in this case. Further, Mr. Caldwell confirmed that he discussed the violation with Inspector Hall when he issued the citation but that he said nothing to him about citing the wrong conveyor (Tr. 40), and I take note of the fact that Mr. Caldwell said nothing to suggest that Mr. Hall may have cited the wrong piece of equipment when he filed his answer of July 2, 1990, in this case. I also take note of Mr. Caldwell's testimony that the head pulley cited by Mr. Hall, and the tail pulley referred to by Mr. Caldwell were "both at the same area" and that he believed that someone would have to deliberately reach up to contact them (Tr. 41). I further note the fact that the photographs produced by Mr. Caldwell were taken almost a year after the citation was issued.

The respondent's argument that Mr. Hall incorrectly identified the cited pulley in question is rejected, as less than credible. I find Mr. Hall to be a credible witness, even though he had no present recollection of all of the details surrounding

the issuance of the violation. I conclude and find that the petitioner has established a violation of the cited standard, and the citation issued by the inspector IS AFFIRMED.

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

The parties stipulated that the respondent is a small operator. Mr. Caldwell testified that the quarry in question is his only mining operation and that he employs 11 miners. He confirmed that his annual production in 1990 was approximately 200,000 tons of crushed stone (blue granite), and that the quarry worked approximately 19,163 man-hours (Tr. 4-5). I have taken this into consideration in assessing the civil penalty for the violation in question.

In the absence of any evidence to the contrary, I cannot conclude that the payment of the civil penalty which I have assessed for the violation will adversely affect the respondent's ability to continue in business.

History of Prior Violation

The respondent's history of prior violations is reflected in a computer print-out covering the period February 2, 1988, through February 5, 1990 (exhibit P-1; Tr. 8). The information in the print-out shows that the respondent was assessed for 65 violations, and that the proposed civil penalty assessments for these violations totalled $6,476. The respondent paid civil penalty assessments in the amount of $1,681.19, for 26 of the violations. The remaining unpaid violations resulted in delinquency letters from MSHA and referrals of several violations to the United States Attorneys Office for collection action (Tr. 18). Mr. Caldwell stated that he is currently making payments on the delinquent assessments (Tr. 8).

I take note of the fact that forty (40) of the prior assessed violations were section 104(a) non-"S&S" citations. Eight (8) of the prior violations were for violations of section 56.14107, and two (2) of these were non-"S&S," and six (6) were "S&S."

For an operation of its size, I cannot conclude that the respondent has a particular good compliance record, particularly with respect to the non-payment of assessed civil penalties which has resulted in a number of MSHA delinquency letters, and several referrals to the U.S. Attorneys Office for collection. I have considered this compliance record in assessing the civil penalty for the violation.

Gravity

Inspector Hall confirmed that due to the passage of time, he could not recall the specific conditions which prevailed at the time he issued the citation (Tr. 14, 19). He stated that the conveyor is required to be locked out when it is greased or maintenance is performed, and there is no evidence that this was not done. Under the circumstances, and in view of the inspector's non-S&S finding, I conclude and find that the violation was non-serious. I find it unlikely that the one employee who may have been in the area would walk or stand on top of the accumulated spillage under the conveyor and place himself at risk by contacting the unguarded equipment in question.

Good Faith Compliance

The record reflects that the violation was abated 1-hour prior to the time fixed by the inspector on the same day the citation was issued. Abatement was achieved by cleaning up the spillage under the conveyor, thereby placing the unguarded equipment at least 7 feet above the ground (Tr. 31). Under the circumstances, I conclude and find that the respondent abated the violation rapidly and in good faith, and I have taken this into consideration in the assessment of the civil penalty for the violation.

Negligence

Inspector Hall made a finding of "high negligence," and he testified that he based this on the respondent's prior history of violations of the guarding standard (Tr. 15). He found no mitigating circumstances, and indicated that the unguarded equipment was in plain view and that a competent person should have noticed the violation (Tr. 16).

The inspector could not recall the circumstances surrounding the issuance of the prior eight guarding violations. Mr. Caldwell conceded that violations have occurred in the past, but he pointed out that no injuries have ever resulted from any of these violations, and that he has always corrected any cited violative conditions (Tr. 5-6). The petitioner and the inspector had no information to the contrary regarding the respondent's accident-free record (Tr. 43-44).

Mr. Caldwell testified that he had never been cited for any similar conditions during the entire time he has been in business since 1979, and that all conveyor moving parts have always been above ground level (Tr. 20, 24).

Contrary to the inspector's "high negligence" finding, which I find is unsupported, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Civil Penalty Assessment

The record in this case reflects that the non-"S&S" violation was "specially assessed" at $650, and the special assessment officer noted that the respondent "had been cited numerous times for similar conditions during previous inspections at the mine." The petitioner's counsel confirmed that MSHA has changed its civil penalty assessment policy in light of a recent Federal district court decision, and that "stiffer penalties" have been assessed based on "prior history" (Tr. 38).

In this case, MSHA's computer print-out reflects eight prior citations for violations of section 56.14107, over a 2-year period of time. However, copies of the prior citations were not produced by the petitioner, and the inspector could not recall the circumstances under which those prior violations were issued (Tr. 8, 26).

It is clear that I am not bound by MSHA's proposed civil penalty assessment, or the penalty assessment procedures found in Part 100, Title 30, Code of Federal Regulations. Contested civil penalty cases are heard de novo by the presiding judge, and any civil penalty assessment is made in accordance with the criteria found in section 110(i) of the Act.

With regard to MSHA's "excessive history" civil penalty assessment policy, I take note of the fact that the Commission's Chief Judge, Paul Merlin, recently ruled that the policy is invalid because of the Secretary's failure to adopt such policy through rulemaking. See: Secretary of Labor (MSHA) v. Drummond Company, Inc., Docket No. SE 90-126, March 6, 1991. Apart from this ruling, and although I have concluded that the respondent does not have a particularly good overall compliance record and have taken this into consideration in assessing the civil penalty for the violation which has been affirmed, I cannot conclude that the respondent's history of prior guarding violations is such as to warrant any additional increase in the civil penalty assessment.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $125 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $125, for a violation of 30 C.F.R. § 56.14107(a), as stated in section 104(a) non-S&S Citation No. 3254968, February 6, 1990. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Leslie John Rodriguez, Esq., Office of the Solicitor, U.S. Department of Labor, Room 339, 1371 Peachtree Street, N.E., Atlanta, GA 30367 (Certified Mail)

Mr. Dale Caldwell, President, Caldwell Stone Company, Inc., P.O. Box 765, Hudson, NC 28638 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 28 1991

WAYNE C. TURNER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 90-51-D
NEW WORLD MINING INC., Respondent	:	NORT CD 90-08
	:	No. 1 Strip

DECISION

Appearances: Donald E. Earls, Esq., Norton, Virginia, for the Complainant;
Karen K. Bishop, Esq., Wise, West Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed on August 24, 1990, by Wayne C. Turner (Complainant) alleging, in essence, that he was discriminated against by New World Mining Incorporated (Respondent), in violation of Section 105(c) of the Federal Mine Safety Act of 1977 (the Act). Respondent filed an Answer on September 27, 1990, and the case was subsequently assigned to me on October 4, 1990. In a telephone conference call initiated by the undersigned, between Complainant and Counsel for Respondent, the former indicated that he intended to be represented by an attorney. On October 23, 1990, in a telephone conference call initiated by the undersigned, between Counsel for both Parties, it was agreed that this case be set for hearing on November 27, 1990. Subsequently, Respondent requested an adjournment which was not opposed by Complainant. The case was rescheduled and heard in Abingdon, Virginia, on December 13, 1990. At the hearing Michael D. Sturgill, Wayne Turner, and Mark McGuire testified for Complainant. Henry M. Yates, Edward Edmond Stanley, and Francis Salyers testified for Respondent.

At the conclusion of the hearing, the Parties were granted the right to file Briefs and Proposed Findings of Fact, 3 weeks subsequent to the receipt of the transcript of the hearing. Volume I of the Transcript was filed on January 24, 1991, and Volumes II and III were filed on January 28, 1991. To date,

neither Party has filed any posthearing submission. Nor has either Party requested an extension of time to file a Brief and Proposed Findings of Fact.

Findings of Fact and Discussion

Wayne C. Turner (Complainant) had been employed by Respondent for approximately 3 years until he was fired by his foreman, Francis Salyers, on Monday, April 30, 1990. It is Complainant's position that his discharge by Respondent was in violation of Section 105(c) of the Act, which, as pertinent, provides that it is unlawful to discharge a miner because of the exercise by such miner ". . . of any statutory right afford by this Act."

Discussion

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, in Goff, supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and 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).

In the period at issue, Turner operated a drill from inside a cab located on a platform (table). The drilling operation produced large amounts of dust, but the drill apparatus was equipped with a water system, dust collector, and bushings to prevent dust from entering the cab where the drill operator worked. In addition, the cab itself was equipped with an air conditioner to allow proper ventilation in the cab, should it be closed to keep out dust. Turner indicated that none of this equipment worked properly, and that specifically the bushings had worn out, allowing quantities of dust to enter the cab. According to Turner, on numerous occasions he complained to his foreman, Francis Salyers, about these conditions. Salyers, while disputing that Turner complained to him about the worn bushings,

did acknowledge that Turner had complained to him two or three times about dust on the drill, and specifically had complained about the air conditioning not functioning. Henry M. Yates, Respondent's superintendent, who is the supervisor of Salyers, indicated that Turner had complained to him approximately two or three times about dust.

Thus, inasmuch as Respondent, in essence, has not rebutted Turner's testimony that he had complained to Respondent's managers with regard to the presence of dust in his work environment, I conclude that Turner engaged in protected activities.

II.

a. Respondent's Reaction to Turner's Complaints

On direct examination, Turner was asked what "would they" say to him when he complained about the air conditioner and the fact that he had to "breathe that dust" (Tr. 58). Turner answered that Salyers said "You're like a woman, you bitch more than a woman does about the dust on these drills" (Tr. 58). This statement by Salyers constitutes the only evidence adduced relative to any manifested adverse reaction by Respondent to Turner's protected complaints. On the other hand, Salyers indicated that on the Friday prior to the Monday on which Turner was fired (April 30), in response to the complaints as to dust that Turner had made that day, he spent the whole day purchasing and installing insulation in order to seal the cracks in the air conditioner. Also, Yates indicated that in response to Turner's complaints about dust, he ordered bushings to be made. Turner, in essence, testified that at times he had been provided with dust collectors. In essence, he also said that when he complained about the dust coming through the bushings, he was told by Salyers that he would get a replacement bushing as soon as he could. He also indicated that when he complained about the water system, Salyers indicated to him that he would get it fixed, but in fact never did. Thus, Complainant has failed to establish that Respondent manifested any significant animus towards him as a consequence of his having complained about exposure to dust.

b. The Firing of Turner

In general, the work week at Respondent's mine is Monday through Friday, with work being required on Saturday on an "as needed basis." (Claimant's Exhibit 1). On Friday, April 27, Yates informed Salyers that work was required on Saturday. There is a conflict in the record between Complainant's witnesses and Respondent's witnesses Edward Edmond Stanley, the night foreman, and Salyers, as to whether the latter had informed Turner and his

crew (Michael D. Sturgill and Michael McGuire) that they were expected to work the following day i.e., Saturday. On Saturday, April 28, neither Turner nor Sturgill worked.[1]/

On the morning of Monday, April 30, 1990, when Sturgill and Turner arrived at the work site, there is a conflict in the evidence between the testimony of Complainant's witnesses and that of Salyers, as to whether the latter initiated cursing at Sturgill and Turner for not having reported to work on Saturday. However, both Complainant's witnesses and Salyers are consistent in testifying that a heated discussion ensued between Turner and Sturgill on the one hand, and Salyers on the other. According to Turner, Salyers told him that "if you're copping an attitude to me, I will fire you right now" (Tr. 71). Turner indicated that he responded by saying "well, you can take a flying leap and kiss my ass . . ." (Tr. 71), and then leaving. Sturgill indicated that there was cussing back and forth with regard to whether he and Turner were told on Friday to work on Saturday. Sturgill, in essence, corroborated Turner's version.

Salyers indicated that he told Sturgill and Turner not to curse, and whereas Sturgill then kept quite, Turner continued to curse. Salyers indicated that he told Turner that if he (Turner) continued to curse him, he (Salyers) would fire him. Salyers said that Turner said "f--- you, Buck if you're going to fire me, go ahead and fire me," and then he (Salyers) fired Turner (Tr. 274). On cross-examination Salyers said that when Turner said to him, "Buck you're a M. F." (Tr 328), it led to his termination. In rebuttal, Sturgill and Turner denied that the latter called Salyers a "M. F.," but they did not rebut Salyers' testimony that Turner had said "f--- you."

Salyers indicated that the cursing of him by Turner was the sole reason he fired Turner. Salyers further indicated specifically that Turner was not fired for not having worked on Saturday. In this connection, McGuire corroborated that this was what Salyers had said on April 30, when Turner was fired.

c. Motivation

In evaluating whether the firing of Turner was motivated in any part by his protected activities, i.e., complaints about exposure to dust, it is not necessary to make a determination as to whether Turner had been notified by Salyers that he had to work on Saturday, and whether Salyers or Turner initiated cursing. A determination of these matters does not have any bearing on the main issue herein, i.e., the nexus if any between Turner's protected activities, and his firing. I find that

---

[1]/ McGuire was called by Salyers early that morning and did subsequently report to work.

Salyers manifested a slight degree of animus toward Turner's complaints about exposure to dust. However, the weight of the evidence establishes that Turner continued to curse Salyers after having been warned in this regard by the latter. I find that the evidence establishes, accordingly, that Salyers would have fired Turner in any event based on Turner's cursing him.[2/] Accordingly, I find that it has not been established herein that Respondent discriminated against Complainant in violation of Section 105(c) of the Act.

ORDER

It is hereby ORDERED that this case be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

Distribution:

Donald E. Earls, Esq., 940 Park Avenue, P. O. Box 710, Norton, VA 24273-0710 (Certified Mail)

Karen K. Bishop, Esq., P. O. Box 1438, Wise, VA 24293 (Certified Mail)

dcp

[2/] This conclusion is not negated by the testimony of Complainant's witnesses, that other employees had cursed Salyers. I find this testimony alone insufficient to establish that Turner received disparate treatment. Specifically, the record fails to establish that there were any specific instances in which other employees had similarly cursed, not in jest, at Salyers after having been warned in that regard, and that these employees were not disciplined.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 29 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-198 A. C. No. 46-01456-03826
v.	:	
	:	Federal No. 2 Mine
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

I.

On February 23, 1990, I issued a Decision in this case wherein I found, inter alia, that Respondent's violation of 30 C.F.R. § 75.400 was not a result of its "unwarrantable failure." On February 7, 1991, the Commission, pursuant to the granting of Petitioner's Petition for Discretionary Review, issued a Decision remanding the issue of unwarrantability ". . . for further analysis and consideration" consistent with its Decision (Eastern Associated Coal Corp., 13 FMSHRC ____, Docket No. WEVA 89-198, slip op., February 7, 1991).

On February 19, 1991, in a telephone conference call initiated by the undersigned with Counsel for both Parties, the latter were granted until March 12, 1991, to file Briefs. Subsequently, pursuant to Respondent's request, which was not objected to by Petitioner, the date to file Briefs was extended to March 19, 1991. On March 14, 1991, Petitioner filed a Brief on Remand. Respondent filed a Brief on March 25, 1991.

II.

In its Decision, supra, slip op. at 10, the Commission noted as follows with regard to matters not addressed in my original Decision:

> Evidence seemingly unaddressed by the judge in his analysis is relevant in considering the question of unwarrantable failure. The judge appears to have found that a leak was the source of the problem. See 12 FMSHRC at 242. Thus, he apparently rejected the testimony of Eastern's witnesses that the most

> plausible explanation for what occurred was either a spill or overfill. The judge, however, made no finding concerning how long the leak had continued unabated. If the leak had actually continued unabated from February 6, as Merchant testified, a lack of care on Eastern's part would appear to be present. Tr. 205-06. The area was fire-bossed daily and involved at least 12 to 15 inspections (preshift and onshift) by four or five different people over the period February 6-8. Tr. 209, 233, 235; R. Exh. 6. (Emphasis added.)

The rationale for the remand by the Commission in its Decision appears to be set forth as follows: "The fact that the judge did not reconcile his findings with respect to negligence and unwarrantable failure requires that we vacate his conclusion that no unwarrantable failure existed and remand this proceeding to the judge for further analysis and consideration." (Eastern Associated, supra, slip op., at 10.)

III.

I have considered the arguments set forth in Respondent's Brief. However, I have limited my analysis and decision to the issues raised by the Commission in its rationale for the remand, and in its discussion of the deficiencies in the original Decision as set forth, infra, p. 1-2.

Upon further analysis of the record, I find it establishes that Respondent was highly negligent with respect to the cited violations. The reasons for this conclusion are set forth in the original Decision (12 FMSHRC at 242). Additionally, I note that Merchant indicated that on the 2 days prior to February 8, the date of the Citation at issue, the tipple was not leaking less. Further, in this regard, Merchant, the tipple operator, testified as follows on direct examination:

> Q. The previous two days did you put in an amount that was equal to the normal amount you would put in a tipple that's running well?
>
> A. You would put three to five cans in, which is from 15 to 25 gallons in per shift (Tr. 206).

Respondent did not adduce any testimony regarding the leak at the tipple for the period February 6-8. Hence, based on the testimony of Merchant that was not rebutted or impeached, I conclude that the leak at the tipple continued unabated from February 6. Since, as noted by the Commission in its Decision, (slip op, supra, at 10), the area was fire bossed daily and involved at least 12 to 15 inspections by four or five people over the period February 6-8, I thus conclude that the evidence establishes a significant lack of care on Respondent's part in not detecting the leak.

For the above reasons, upon reconsideration, I conclude that Respondent's high level of negligence reached the level of aggravated conduct. As such, I find that the violation herein was the result of Respondent's unwarrantable failure (see, Emery Mining Corp., 9 FMSHRC 1997, 2004, (1987)); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987)).

ORDER

It is **ORDERED** that Citation No. 3100463 be converted to the original Section 104(d)(2) withdrawal order.

Avram Weisberger
Administrative Law Judge

Distribution:

Glenn M. Loos, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Thomas L. Clarke, Esq., 800 Laidley Tower, Post Office Box 1233, Charleston, WV 25324 (Certified Mail)

dcp

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204
March 19, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 90-320
	:	A.C. No. 42-00121-03725
v.	:	Docket No. WEST 90-321
	:	A.C. No. 42-00121-03726
UTAH POWER AND LIGHT COMPANY, MINING DIVISION, Respondent	:	Deer Creek Mine
	:	Docket No. WEST 90-322
	:	A.C. No. 42-01944-03578
	:	Docket No. WEST 90-323
	:	A.C. No. 42-01944-03579
	:	Docket No. WEST 90-324
	:	A.C. No. 42-01944-03580
	:	Cottonwood Mine

ORDER DENYING RESPONDENT'S MOTION TO REMAND

Respondent UPL's Motion to Remand (dated November 16, 1990) the above five dockets (containing 30 challenged enforcement documents, i.e., Citations or Orders) to the Secretary of Labor (MSHA) for recomputation (reassessment) of the proposed penalties in accord with the Secretary's regulations (30 C.F.R. Part 100), is opposed by the Secretary (Opposition to Motion to Remand dated January 30, 1990).

Summary of Contentions:

UPL contends:

1. That the 30 proposed penalties were calculated on the basis of rules that MSHA "unlawfully implemented without public notice and comment as required by the Administrative Procedure Act," i.e., its Program Policy Letter P90-III-4. [1] Related to

---

[1] After receiving a directive of the Circuit Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989) to do so, MSHA promulgated its three-page MSHA Policy Program Letter P90-III-4 (herein PPL) which issued and became effective May 29, 1990, the stated purpose of which was to implement a program for higher civil penalty assessments at mines with an "excessive history" of violations.

this contention, is UPL's argument that MSHA did not follow its own (pre-existing the PPL) regulations pertaining to penalty assessment.

2. The PPL exceeds the scope of the Court's Order in Coal Employment Project.

3. MSHA's "excessive history" penalties under the PPL provisions are unlawfully retroactive since all but 1 of the 30 subject citations were issued prior to the effective date of the PPL, May 29, 1990; the new PPL "policy" is detrimental to a mine operator since the mine operator is deprived of a knowing choice between contesting or paying earlier "single penalty assessments and other violations."

MSHA contends:

1. The Commission lacks jurisdiction to order MSHA to reassess a proposed penalty.

2. a. The PPL was properly applied by MSHA in proposing the penalties involved here because it is not subject to the notice and comment provisions of the Administrative Procedure Act (herein APA).

b. Assuming arguendo that the "notice and comment" requirements of the APA apply to the PPL, the directive of the Circuit Court in Coal Employment Project, supra, places the PPL within the "good cause" exception [5 U.S.C. 553(b)(B)] which provides that the notice and comment provisions are not applicable "when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." [2]

c. As to 22 of the 30 subject citations and orders, such were the subject of "special assessments" under 30 C.F.R. 100.5 and were proper and consistent with such regulation since it provides that "some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under" the regular assessment formula (Section 100.3) or the single penalty assessment formula (Section 100.4)."

---

2 I subsequently conclude that the PPL complied with the triggering provisions of the "good cause" exception. See also Fn. 13, Secretary's Opposition dated January 30, 1991.

(i) Section 100.5 clearly provides that "MSHA may elect to waive" the regular assessment formula if it determines that conditions surrounding the the violation warrant a special assessment.

(ii) Types of violations qualifying for special penalty assessment are identified in Section 100.5(h) as those involving:

a) a high degree of negligence
b) a high degree of seriousness
c) unique aggravating circumstances. [3]

3. The "excessive history" provisions of the PPL were not retroactively applied since:

a. the critical time consideration is when the alleged violations were assessed by MSHA, not when the citations were issued; when the 30 subject penalty proposals (assessments) were issued the PPL provisions were in place.

b. the "excessive history" provisions do not constitute a "rule" within the meaning of the APA, and assuming arguendo they were applied retroactively, since they were not a rule the APA prohibitions against retroactivity do not apply.

Decision

MSHA's contention that the Commission lacks general jurisdiction to order the requested remand is rejected. Absent change of policy in the future, the Commission has ruled on this question. Thus, while the Commission has previously determined that the Secretary's penalty regulations are not binding on the Commission, Sellersburg Stone Co., 5 FMSHRC 287 (1985), aff'd, 736 F.2d 1147 (7th Cir. 1984), the Commission has specifically held

---

[3] MSHA contends that the "special history" assessment provisions of the PPL qualify as implementation of the special assessment provision under 100.5 since a mine operator's history of numerous violations can be such as to constitute "aggravating circumstances." Although not the crux of this decision, I emphatically concur with this argument.

that a mine operator may, prior to hearing, raise and, if appropriate, be given the opportunity to establish, that in proposing penalties the Secretary failed to comply with her Part 100 penalty regulations. Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679-680 (1987). Given the Commission's independent penalty assessment authority, the scope of the inquiry is limited: whether the Secretary had arbitrarily proceeded under a particular provision of her penalty regulations. Secretary v. Missouri Rock, Inc., 11 FMSHRC 136 (Feb. 1989). What the Commission actually stated in Youghiogheny, in terms of the purposes of and restrictions for remand is significant:

> We further conclude, however, that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings. However, given that the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations, and given the Commission's independent penalty assessment authority, the scope of the inquiry into the Secretary's actions at this juncture necessarily would be limited. (Emphasis added).

Summing up:

1. The motion for remand must be made prior to a hearing to obtain "possible avoidance of full adversarial proceedings" and to obtain Secretarial fidelity to assessment regulations;

2. the Secretary need only defend on the ground that she "did not arbitrarily proceed under a particular provision" of the regulations; and

3. the scope of the inquiry, in view of the Commission's de novo assessment authority, is limited.

Under its own rules announced in Youghiogheny, supra, is the Commission's jurisdiction to remand to MSHA for penalty reproposal authorized, that is, did the Secretary (MSHA) arbitrarily proceed under the Part 100 regulations? Assuming for the sake of argument that the Commission remand is found warranted under Youghiogheny, whether such remand should be ordered in view of the Circuit Court's pending jurisdiction over the questions would seem to be a policy matter for the Commission which I do not directly entertain here. Nevertheless, the possibility is recognized that Commission remand might well turn--as UPL urges--on the invalidation of the PPL, an action the Circuit Court has not yet taken.

I am unable to conclude that the action of the Secretary in proposing penalties calculated under the formula of the PPL is arbitrary. It remains to be seen whether or not such formula will ultimately be determined to be inconsistent with both

(a) its Part 100 regulations as they were interpreted prior to the assertion of the Circuit Court's jurisdiction in Coal Employment Project, and

(b) the Circuit Court's directive and mandate in Coal Employment Project.

What is clear is that the PPL is MSHA's direct attempt at compliant response, i.e., a reinterpretation of certain of its Part 100 regulations, to the Court's directives in Coal Employment Project. See **Per Curiam Opinion** (No. 88-1708) filed April 17, 1990, in this section (Ex. R-8 to UPL's Memorandum), wherein in the Court indicated that it was dissatisfied with MSHA's interim regulation (prior to the PPL):

> In particular, we are troubled by the scenario of repeated low negligence violations. By our reading of the MSHA interim regulation, unless MSHA determined that such repetition amounted to high negligence, the offending mine operator would be assessed only a series of single penalties.... In light of MSHA's substantial discretion in determining what constitutes "high negligence," we fear that even a series of identical non-S&S violations may not require MSHA to invoke the violation history criterion and may not generate more than a single penalty each time. Thus MSHA's "high negligence" requirement seems inconsistent with the concerns we voiced...in our opinion that even a string of non-S&S violations would generate only a series of $20 penalties.

Subsequent to the Court's Per Curiam Opinion, the PPL was issued. Thereafter, the mine operator's motion to remand to MSHA for reassessment in this matter (and at least two other such motions in similar circumstances before other administrative law judges) have been filed.

There is no question but that the penalty assessments here under the PPL are calculated differently from and are higher (the augmentation being based on increases stemming from ("excessive history" calculations) than they would have been under pre-Coal Employment Project and pre-PPL Part 100 formulations. Thus, the question of arbitrariness--and Commission jurisdiction to remand --appears to rest on whether (1) the Court's assertion of jurisdiction over MSHA and its penalty assessment regulations, and (2) its resultant directives to MSHA, justify such changes. There is no reason to conclude that MSHA's promulgation and application of the PPL was instigated by any consideration other than the Circuit Court's mandate. [4] The increases in UPL's 30 assessments here result from the Court's instructions to MSHA. In such circumstances can MSHA's complained-of action be said to be arbitrary? [5]

---

4 The authority of the federal court, once having been exercised in a particular matter, guards against deviation. See City of Cleveland v. Federal Power Commission, 561 F.2d 344 (D.C. Cir. 1977).

5 The word "arbitrary" is not synonymous with "correct." American Petroleum Institute v. E.P.A., 661 F.2d 340, 349 (5th Cir. 1981). Black's Law Dictionary (5th Ed. 1979) defines "arbitrary" as follows:

> **Arbitrary.** Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; Cornell v. Swisher County, Tex. Civ. App., 78 S.W.2d 1072, 1074. Without fair, solid, and substantial cause; that is, without cause based upon the law, U.S. v. Lotempio, D.C.N.Y. 58 F.2d 358, 359; not governed by any fixed rules or standard. Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be on performed

I think not and, in agreement with the Secretary's well-delineated position, I find that it was proper and not arbitrary for the Secretary in this case, in response to the Court's directive in Coal Employment Project to consider UPL's "excessive history" of violations, not only in determining whether 8 of the 30 violations qualified for single penalty assessment, but also whether the remaining 22 violations should be assessed under the special assessment formula of Section 100.5 instead of the regular assessment formula of Section 100.3. To do otherwise would result in inconsistent enforcement of the Mine Act: recividous mine operators (or operators with otherwise unsatisfactory compliance track records) would be able to evade the consequences of their "excessive history" of violations solely because their conduct was too serious to be considered for a single penalty assessment. Application of the Secretary's excessive history policy only to violations whch might qualify for single penalty assessment, and not to violations which otherwise would be reguarly assessed, would result in a situation where the more serious violations (i.e., the regularly assessed violations) are treated more leniently than violations which pose a lesser threat to the miners' safety and health (i.e., the singly assessed violations). Given the Court's concern in Coal Employment Project about assigning proper weight to an operator's history of violations and the need for civil penalties to serve as a deterrent to future violative conduct, the Secretary's policy of considering whether an operator's history is sufficient to raise a regular assessment is consistent with the holding in Coal Employment Project as well as with the Mine Act.

(continued from previous page)

without adequate determination of principle and one not founded in nature of things. Huey v. Davis, Tex. Civ. App. 556 S.W.2d 860, 865.

Certainly, MSHA, in attempting to carry out the Circuit Court's will, cannot be accused of bad faith or acting in a capricious, tyrannical, irrational, or absolutistic way. Whether or not it is determined in the future that it proceeded at the time of its passage of the PPL in accordance with all of the numerous requirements being placed on it from several different directions begs the question. There is no basis to find that it acted without substantial cause or without good reasons.

The related argument of UPL bears scrutiny. At page 9 of the Memorandum supporting its Motion, UPL contends:

> The computations of the proposed penalties for the 22 alleged S&S violations have characteristics of both regular and special assessments, but are in fact neither. The proposed penalties are based in part on penalty points computed by using the criteria in 30 C.F.R. § 100.3, like the regular assessment, including penalty points for history of previous violations, with the unenhanced proposed penalties reported on the standard MSHA Form 1000-179, as though they were regular assessments. ... Yet, like special assessments, these proposed penalties come with "Narrative Findings for a Special Assessment," which expressly waive the regular assessment formula MSHA in fact just used, invoke the special assessment regulation, and state that the penalty amount has been increased by a certain percentage for "excessive history." ... Thus, rather than "waive the regular assessment formula (§ 100.3)," and impose a special assessment as § 100.5 provides where "it is not possible to determine an appropriate penalty under [the regular assessment formula or the single penalty provision]," MSHA instead did compute the penalty under the regular assessment formula but then also added to it an additional penalty under § 100.5.

This contention is found hypertechnical and is rejected. Specifically, it appears that MSHA, following the temporary interim procedure outlined in the PPL did for all intents and purposes waive the regular assessment formula and did impose a special assessment under Section 100.5. The PPL itself indicates: "MSHA has elected to waive the regular formula assessment and assess them under the special assessment provisions of 30 C.F.R. § 100.5." The clear--and stated--purpose of the PPL is to implement a program for higher civil penalties at mines with an excessive history of violations and this directly deals with the concerns of the D.C. Circuit Court in Coal Employment Project, supra.

It is found that the special-history assessment provisions of the PPL fall within the special penalty assessment formula of C.F.R. § 100.5. The Secretary's assessing 22 of the 30 violations at issue under the special penalty assessment provisions of Section 100.5 is consistent with her 30 C.F.R. Part 100 regulations. Thus Section 100.5 specifically provides that "MSHA may elect to waive the regular assessment formula (§ 100.3) or the

single assessment provision (§ 100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment." (Emphasis added).

Some of the types of violations which the Secretary has identified as qualifying for a special penalty assessment appear in Section 100.5(h), to wit: "Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances." (Emphasis added). The special-history assessment provisions challenged by UPL constitute a proper method for implementing this special category. The special-history provisions of the PPL were reasonably adopted by the Secretary to ensure that the penalty fits the infraction where an operator's history of violations is such that it properly constitutes an "aggravating circumstance." It is held that "excessive history" (like excessive negligence and excessive gravity) fits within the category of "aggravating circumstances" and that there exist reasoned bases for this judgment of the Secretary.

Finally, and once again assuming arguendo, that the "notice and comment" provisions of the APA apply to the PPL, since the PPL accomplishes the result mandated by Coal Employment Project, to properly consider the operator's history of violations--the PPL falls within the "good cause" exemption of the APA. Specifically, the notice and comment provisions of the APA do not apply when the agency, as here, "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). (Emphasis added). See Mid-Tex Elec. Co-op, Inc., v. F.E.R.C., 822 F.2d 1123 (D.C. Cir. 1987), involving as here, an "interim" order of a temporary nature. In the instant case, the overwhelming fact of the D.C. Circuit Court's control over and directions to MSHA would seem sufficient to trigger the applicability of the "good cause" exemption of the APA to the PPL, and, if sufficient for that purpose, would negate the presence of caprice, whim, bad faith, and arbitrariness in MSHA's issuance of the PPL.

Conclusion

There is no basis asserted in the record to find that the Secretary has proceeded arbitrarily under any provision of her penalty regulations. As the Secretary argues, this case involves the manner in which MSHA "weighs" the "history of violations" criterion--a mandatory statutory penalty assessment factor--and UPL's objection actually goes to the weight assigned by MSHA to an assessment criterion (the history criterion) rather than to

the arbitrary failure of the Secretary (MSHA) to follow her regulations. Respondent's motion is found to lack merit. [6]

ORDER

The Commission's standard for remand of the Secretary's penalty proposals for recomputation not having been met by Respondent UPL, its motion therefor is **DENIED.**

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Carl C. Charneski, Esq., Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 423, Arlington, VA 22203

J. Michael Klise, Esq., Thomas C. Means, Esq., CROWELL & MORING, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2505

ek

---

6 In failing to obtain remand, UPL is not left without substantial remedy. Independent de novo penalty evaluation is achievable before the Commission, should administrative or pre-trial settlement negotiation with MSHA not mitigate penalty levels. As to the propriety of the PPL penalty conformations, such are subject to challenge before the federal appellate court. Both forums presently have active jurisdiction for these respective purposes.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-171 A.C. No. 46-03805-03968
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

PARTIAL SETTLEMENT DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The respondent filed a timely contest and the case was scheduled for hearing in Morgantown, West Virginia, on March 5, 1991. However, the case was stayed on February 8, 1991, at the request of the petitioner pending a Commission decision in a related matter dealing with mandatory safety standard 30 C.F.R. § 77.404(a), the standard relied on by the inspector when he issued two of the contested citations in this case.

By motion received on February 25, 1991, and filed by the petitioner pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement of contested section 104(d)(2) "S&S" Order No. 3117257, issued on January 11, 1990, and citing an alleged violation of mandatory safety standard 30 C.F.R. § 75.305. The parties assert that the proposed settlement does not involve the pending contested citations for alleged violations of section 77.404(a), and that the stay order with respect to those citations remains in effect.

Discussion

In support of the proposed settlement of Order No. 3117257, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. The petitioner has also submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the order. The petitioner asserts that after further investigation of the factual circumstances surrounding the violation, it has agreed to modify the contested section 104(d)(2) order to a section 104(a) "S&S" citation without a finding of unwarrantability. The petitioner has also agreed that the initial proposed civil penalty assessment of $395, should be reduced to $200, and it concludes that the proposed settlement and payment of $200 is reasonable and will serve to effect the intent and purposes of the Act.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of the order in question, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, the motion for partial settlement filed in this case IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $200 in satisfaction of the modified section 104(a) "S&S" Citation No. 3117257, 30 C.F.R. § 75.305. Payment is to be made to MSHA within thirty (30) days of this partial settlement decision and order, and I reserve final disposition of the matter until payment is made in compliance with this order.

With regard to the remaining two contested citations for alleged violations of 30 C.F.R. § 77.404(a) (Citation Nos. 3112059 and 3112060), the previously issued Order Staying Proceeding, February 8, 1991, remains in effect pending further notice.

George A. Koutras
Administrative Law Judge

Distribution:

Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Ballston Towers #3, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Suite 4, 5000 Hampton Center, Morgantown, WV 26505 (Certified Mail)