

MARCH 1995

COMMISSION DECISIONS AND ORDERS

03-03-95	F.W. Contractors, Inc.	CENT 94-198-M	Pg. 247
03-03-95	Consolidation Coal Company	WEVA 92-798	Pg. 250
03-21-95	Sec. Labor/Charles Dixon v. Pontiki Coal	KENT 94-1274-D	Pg. 263
03-23-95	BSC Construction, Inc.	WEVA 94-401	Pg. 267
03-27-95	Bridger Coal Company	WEST 91-233	Pg. 270
03-27-95	Buck Creek Coal, Inc.	LAKE 94-72	Pg. 273
03-27-95	Mineral Transport, Inc.	WEVA 94-391	Pg. 276

ADMINISTRATIVE LAW JUDGE DECISIONS

02-01-95	Savage Zinc, Inc. (reprinted in entirety)	SE 95-11-RM	Pg. 279
03-06-95	Peabody Coal Company	KENT 94-524-R	Pg. 293
03-06-95	Peabody Coal Company	KENT 94-815	Pg. 294
03-06-95	Peabody Coal Company	KENT 94-1260	Pg. 296
03-07-95	KY Harlan Coal Company	KENT 94-456	Pg. 298
03-07-95	Winn Transportation Corp.	KENT 94-1318	Pg. 300
03-07-95	Winn Construction Company	KENT 94-1319	Pg. 302
03-08-95	Jerry Slone v. Hico Transport	KENT 94-1041-D	Pg. 304
03-08-95	Edward Schumacher	LAKE 94-631-M	Pg. 307
03-09-95	Carl Stoecker v. North Western Resources Company	CENT 94-200-D	Pg. 309
03-09-95	Energy West Mining Company	WEST 92-819-R	Pg. 326
03-10-95	Broken Hill Mining Company	KENT 94-1208	Pg. 338
03-13-95	Fielding Hydroseeding	WEVA 94-80	Pg. 349
03-14-95	Pittsburg & Midway Coal Mining Co.	WEST 93-182	Pg. 351
03-14-95	Richard Gawthrop v. Triplett Bros.	WEVA 94-286-D	Pg. 359
03-15-95	Buck Creek Coal Company	LAKE 93-241	Pg. 362
03-16-95	Green Coal Company, Inc.	KENT 94-521	Pg. 364
03-17-95	Costain Coal, Inc.	KENT 94-1001	Pg. 367
03-20-95	John Cullen Rock Crushing & Gravel	WEST 94-74-M	Pg. 375
03-20-95	J A L Coal Company, Inc.	WEVA 93-312	Pg. 394
03-21-95	Ebenezer Coal Company, Inc.	KENT 94-1049	Pg. 396
03-21-95	Sextet Mining Corporation	KENT 94-528	Pg. 402
03-21-95	B & S Trucking Company	KENT 94-994	Pg. 411
03-21-95	Sec.Labor/James Lamont v. Tanoma Mining	PENN 93-382-D	Pg. 416
03-22-95	JEN, Incorporated	SE 93-262	Pg. 418
03-23-95	Power Operating Company	PENN 94-247	Pg. 421
03-27-95	Sec. Labor/Keith James v. Cordero Mining	WEST 95-151-D	Pg. 437
03-28-95	Day Branch Coal Company	KENT 94-275	Pg. 440
03-28-95	Whitaker Coal Company	KENT 94-975-R	Pg. 445
03-30-95	S & H Mining, Inc.	SE 94-569	Pg. 454
03-30-95	Gary Byrge employed by S & H	SE 94-570	Pg. 456

ADMINISTRATIVE LAW JUDGE ORDERS

02-15-95	Buck Creek Coal, Inc.	LAKE 93-261	Pg. 457
03-06-95	Peabody Coal Company	KENT 94-1321	Pg. 462
03-10-95	Sec.Labor/Charles Dixon v. Pontiki	KENT 94-1274-D	Pg. 464
03-07-05	Southern Minerals, Inc., et al.	WEVA 92-15-R	Pg. 465
03-10-95	Mechanicsville Concrete Inc.	VA 95-3-M	Pg. 483
03-16-95	Jericol Mining Inc.	KENT 95-32	Pg. 486
03-16-95	Jericol Mining Inc.	KENT 95-31	Pg. 489
03-16-95	Harbor Rock, Inc.	WEST 95-64-M	Pg. 492
03-31-95	Sec.Labor/Dixon v. Pontiki Coal	KENT 94-1274-D	Pg. 494

MARCH 1995

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

Secretary of Labor, MSHA v. F.W. Contractors, Inc., Docket No. CENT 94-198-M.
(Chief Judge Merlin, unpublished Default issued December 30, 1994)

Secretary of Labor, MSHA v. BSC Construction, Inc., Docket No. WEVA 94-401.
(Chief Judge Merlin, unpublished Default issued February 21, 1995)

Secretary of Labor, MSHA v. Mingo Logan Coal Company, Docket No. WEVA 93-392.
(Judge Maurer, February 15, 1995)

Secretary of Labor, MSHA v. Mineral Transport Inc., Docket No. WEVA 94-391.
(Chief Judge Merlin, unpublished Default issued February 21, 1995)

Secretary of Labor, MSHA v. Buck Creek Coal, Inc., Docket No. LAKE 94-72, etc.
(Judge Hodgdon, Interlocutory Review of February 15, 1995 Order Continuing Stay
- published in this volume)

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

Secretary of Labor, MSHA v. Cold Spring Granite Company, Docket No.
YORK 94-14-M. (Judge Weisberger, January 23, 1995)

Secretary of Labor, MSHA v. Mingo Logan Coal Company, Docket No. WEVA 94-247.
(Judge Fauver, February 2, 1995)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 1995

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

F.W. CONTRACTORS, INC.

:
:
:
:
:
:
:

Docket No. CENT 94-198-M

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, 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). On December 30, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to F.W. Contractors, Inc. ("F.W.") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's show cause order of October 27, 1994. The judge assessed civil penalties of \$2,700.

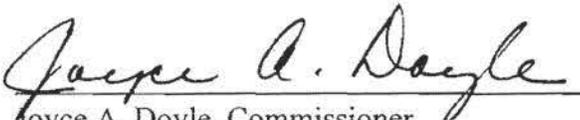
In a letter to the Commission dated January 6, 1995, F.W.'s safety director seeks relief from the default order. He asserts that F.W. had answered the Secretary's petition for assessment of civil penalty on October 20, 1994, in a letter to the Office of the Department of Labor's Regional Solicitor in Dallas, Texas.

The judge's jurisdiction over this case terminated when his default order was issued on December 30, 1994. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). F.W.'s letter was received by the Commission on February 13, after the judge's default order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). *E.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). On the basis of the present record, we are unable to evaluate the merits of F.W.'s position. In the interest of justice, we reopen the proceeding, treat F.W.'s letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See, e.g., Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (December 1986). We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

Distribution

Paul G. Johnston, Safety Director
F.W. Contractors, Inc.
P.O. Box 185219
Fort Worth, TX 76181

Jack F. Ostrander, Esq.
Office of the Solicitor
U.S. Department of Labor
525 Griffin St., Suite 501
Dallas, TX 75202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge
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 3, 1995

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 92-798
 :
CONSOLIDATION COAL COMPANY :
 :

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners

DECISION

BY: Doyle and Holen, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether a violation of 30 C.F.R. § 70.201(d) by Consolidation Coal Company ("Consol") was significant and substantial ("S&S").¹ Administrative Law Judge Jerold Feldman determined on cross motions for summary decision that the violation was not S&S. 15 FMSHRC 904 (May 1993) (ALJ). For the reasons that follow, we affirm the judge in result.

¹ 30 C.F.R. § 70.201(d) provides:

During the time for abatement fixed in a citation for violation of § 70.100 . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken.

The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard"

I.
Background

A. Factual Background

Consol operates the Blacksville No. 2 Mine, an underground coal mine in West Virginia. During December 1991, inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the mine pursuant to MSHA's "Spot Inspection Program" (the "Program"). Under the Program, inspectors were instructed to issue a citation alleging a violation of section 70.100(a) whenever the results of a respirable dust sample taken during a single shift equaled or exceeded the level set forth in an MSHA table.² S. Mot. for Sum. Dec. at 5. A citation was to be issued if a single-shift sample at the No. 2 mine showed a dust concentration of 2.5 or more milligrams of respirable dust per cubic meter of air ("mg/m³"). *Id.* at 5, 7.

On December 9 and 10, 1991, inspectors took samples over single shifts that showed the longwall jack setter had been exposed to dust concentrations of 2.5 mg/m³ and 3.1 mg/m³. 15 FMSHRC at 905 n.5. On December 11, Inspector Theodore Betoney issued to Consol a citation alleging an S&S violation of section 70.100(a) for excessive concentrations of respirable dust. The citation stated: "[t]he mine operator shall take corrective action immediately to lower the amount of respirable dust at 041 non-designated occupation [longwall jack setter], and then sample each consecutive shift until five (5) valid samples are obtained." S. Mot. for Sum. Dec. Ex. C. The abatement time was set for December 16 and was later extended to December 18. 15 FMSHRC at 905 n.3.

On December 12, Consol informed Inspector Betoney that it would decide on the appropriate corrective action after five samples were taken. S. Mot. for Sum. Dec. at 8. Those samples showed excessive dust concentration. On December 19, Inspector Betoney issued a withdrawal order, pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), alleging that Consol

² 30 C.F.R. § 70.100(a) provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air

Before the Program's initiation in July 1991, MSHA determined compliance with section 70.100(a) on the basis of dust samples taken during multiple shifts. The Commission considered the procedural validity of the Program in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994), discussed *infra*.

had failed to lower the dust concentration within the time for abatement set forth in the underlying citation. Later that day, he issued another withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging an S&S violation of section 70.201(d), caused by Consol's failure to take corrective action. That order, subsequently modified to a citation, is the enforcement action at issue. 15 FMSHRC at 904 n.1.

On December 23, Consol submitted to MSHA a plan to lower respirable dust levels, which was implemented following MSHA's approval. On December 26 and 27, Consol collected samples showing an average dust concentration of 0.9 mg/m³. S. Mot. for Sum. Dec. at 9. The section 70.201(d) citation as well as the section 104(b) failure to abate order were then terminated. *Id.*; S. Mot. for Sum. Dec. Ex. E.

B. Procedural Background

Consol challenged both citations. The section 70.100(a) citation was assigned to Administrative Law Judge Avram Weisberger as part of Docket No. WEVA 92-761; the instant citation, which alleged a violation of section 70.201(d), came before Judge Feldman.

1. Citation alleging Consol's violation of section 70.100(a)

Judge Weisberger stayed the proceedings in Docket No. WEVA 92-761, based on his determination in *Keystone Coal Mining Corp.*, 14 FMSHRC 2017, 2024-29 (December 1992) (ALJ), that the Program was procedurally invalid because the Secretary had not engaged in notice-and-comment rulemaking prior to implementing it. The Commission granted the Secretary's petition for discretionary review in *Keystone* and Judge Weisberger continued the stay in Docket No. WEVA 92-761, pending decision by the Commission in *Keystone*.

The Commission affirmed the judge's decision in *Keystone*, concluding that the Program was invalid because it constituted a legislative-type rule that had been adopted without the required notice-and-comment rulemaking. 16 FMSHRC at 10-16. The Commission's decision was not appealed. Judge Weisberger subsequently dismissed the section 70.100(a) citation based on the Commission's ruling in *Keystone*. Unpublished Order dated April 1, 1994. The Secretary did not petition for review of the judge's order and it became a final decision of the Commission. 30 U.S.C. § 823(d)(1).

2. Citation alleging Consol's violation of section 70.201(d)

In the present proceeding, the parties moved for a stay pending final resolution of *Keystone*. Judge Feldman stayed the proceedings only until Judge Weisberger issued his decision. After the Commission directed *Keystone* for review, the Secretary moved for continuance of the stay, pending the Commission's decision. The judge, however, denied the Secretary's motion. He subsequently permitted the parties to proceed on cross motions for summary decision. Unpublished Order at 2 (March 26, 1993).

Because Consol conceded the violation of section 70.201(d), the only issue before the judge was whether that violation was S&S. 15 FMSHRC at 906. In his summary decision, issued before the Commission's *Keystone* decision, the judge concluded that doubts regarding the validity of the Program and, hence, the validity of the underlying citation alleging a violation of section 70.100(a) warranted the deletion of the S&S designation. *Id.* at 907. The judge rejected the Secretary's argument that the violation of section 70.201(d) was presumptively S&S because it arose from the failure to abate an S&S violation of section 70.100(a). *Id.* at 907-08. The judge also stated that application of the Commission's S&S test set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), independently supported his determination that the violation was not S&S. *Id.* at 907. Accordingly, the judge deleted the S&S finding. He assessed a civil penalty of \$100. The Commission granted the Secretary's petition for discretionary review.

II. Disposition

A violation is S&S if, based on 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). The general test for determining whether a violation is S&S is set forth in *Mathies*, 6 FMSHRC at 3-4. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), however, the Commission held: "when the Secretary proves that a violation of [section] 70.100(a) . . . has occurred, a [rebuttable] presumption that the violation is a significant and substantial violation is appropriate." *Id.* at 899.

In his petition for review, filed before issuance of the Commission's decision in *Keystone*, the Secretary asserts, as he did before the judge, that the failure to timely correct a presumptively S&S dust violation is also presumptively S&S.³ PDR at 4. He asserts further that the judge determined that a short exposure to excessive respirable dust should not be considered presumptively S&S and that such a determination conflicts with *Consolidation*. *Id.* at 7. The Secretary urges the Commission to reject any attempt to carve out an exception to the presumption for even short periods of exposure to excessive dust. S. Br. at 10-13 & n.11. Incorporating by reference his arguments to the Commission in *Keystone*, the Secretary asserts that the judge erred in relying on his "doubts regarding 'the procedural and substantive merits of the Secretary's single shift sampl[ing] procedure.'" *Id.* at 5. He contends that the judge's doubts regarding the validity of the Program pertain only to the fact of violation and are immaterial to the S&S issue. *Id.* at 6-7. The Secretary asks the Commission to reverse the judge and remand for assessment of an appropriate civil penalty.

³ The Secretary does not argue for application of the *Mathies* test.

Consol argues that the judge was correct in his determination that the violation was not S&S. It argues further that MSHA's enforcement actions improperly imposed duplicative S&S sanctions for the same violation, an issue not reached by the judge because he deleted the S&S designation. Consol Br. at 3-6.

With regard to the Secretary's argument that the judge erred in concluding that the violation was not presumptively S&S, we note that, on its face and as found by the judge, the instant citation was based solely on the operator's failure to take timely action to correct the conditions underlying the December 11 citation. Order No. 3720751; 15 FMSHRC at 905, 907.⁴ Consequently, determination of whether the instant citation is presumptively S&S depends upon the validity of the underlying citation. The Secretary conceded this before the judge:

Resolution of . . . whether the violation should be designated S&S, is directly dependent on the validity of the single sample method. If the single sample method is invalidated, then the current citation for failure to take corrective action to lower the respirable dust concentration . . . cannot be S&S because there would be no judicially acceptable proof that the respirable dust concentration was violative.^[5]

S. Mot. for Stay at 3. The underlying citation was dismissed based on the Commission's ruling in *Keystone*. Consequently, the judge did not err in determining that the violation was not presumptively S&S. To the extent that he erred in deleting the S&S designation based on

⁴ Our dissenting colleague relies on the affidavit of Inspector Betoney in an attempt to establish that the citation, which rests explicitly on the earlier test results, was issued not only as a result of the operator's failure to take corrective action but also as a result of subsequent dust sampling. Slip op. at 8. There is no indication in the judge's decision that he credited the inspector's statement in this regard. Rather, it appears that he discredited the statement: he found that the citation was issued "for the respondent's failure to take corrective action" (15 FMSHRC at 907) and that the violation "allegedly occurred because the respondent failed to take remedial action" (15 FMSHRC at 905). Moreover, the inspector's affidavit is not appropriately construed in the Secretary's favor to support his motion for summary decision and application of the S&S presumption, as our colleague suggests. She erroneously relies on the law regarding construction of evidence *in opposition to* summary decision to support her position, which, in essence, is to grant the Secretary's motion for summary decision.

⁵ This concession served as the basis for the judge's stay order. 15 FMSHRC at 906. The dissent discounts this concession (Slip op. at 10) because it was made in a Motion for Stay, which also set forth the terms under which the case would be settled following the Commission's decision in *Keystone*. The statement was part of a legal argument made by the Secretary in support of his motion. The statement was not a factual admission made during settlement negotiations. See Fed. R. Evid. 408.

uncertainty regarding the underlying violation, that error is harmless because the Commission, in *Keystone*, invalidated that citation. See *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983).

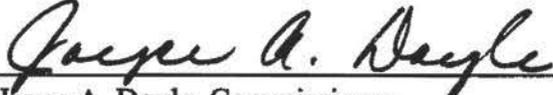
We also reject the Secretary's argument that violations of section 70.201(d) are presumptively S&S under *Consolidation*. In that case, the Commission determined that a rebuttable S&S presumption applies when the Secretary proves a violation of section 70.100(a). 8 FMSHRC at 899. Contrary to the Secretary's assertions, the Commission has not extended that presumption to violations of section 70.201(d) or to any other respirable dust or mandatory health standard. See *Union Oil Co. of Cal.*, 11 FMSHRC 289, 297 (March 1989).

A motion for summary decision is not the appropriate means for pursuing extension of the S&S presumption. We decline to decide on the present record whether violations of section 70.201(d) should also be considered presumptively S&S. In moving for summary decision, the Secretary foreclosed his opportunity to develop the type of record necessary to demonstrate the appropriateness of such a presumption. See *Union Oil*, 11 FMSHRC at 297. Cf. *Consolidation*, 8 FMSHRC at 892-94.

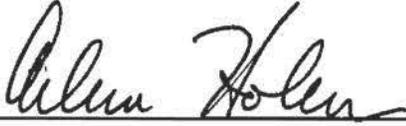
We conclude that the Secretary has failed to articulate persuasive legal grounds for overturning the judge's determination. To the extent the judge suggested that short periods of exposure to respirable dust are exempt from the presumption established in *Consolidation*, we agree with the Secretary that he erred. We do not reach the issue, raised by the operator, that the Secretary's S&S sanctions were duplicative.

III. Conclusion

For the reasons set forth, we affirm in result the judge's determination that Consol's violation of section 70.201(d) was not S&S.



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner

Jordan, Chairman, dissenting:

Unlike my colleagues, I consider *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), to be dispositive of the S&S issue in this case. Accordingly, I conclude that the judge erred in failing to apply *Consolidation*, and in granting summary decision in favor of the operator.

In *Consolidation*, the Commission was confronted with the question whether a violation of 30 C.F.R. § 70.100 based on "a single incident of overexposure" to respirable dust in an underground mine is S&S. *Id.* at 898. The Commission, modifying the general test for determining whether a violation is S&S set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), concluded that such violations are presumptively S&S.

The present case involves the conceded violation of 30 C.F.R. § 70.201(d), which requires that "[d]uring the time for abatement fixed in a citation for violation of § 70.100 . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration" In refusing to apply *Consolidation*, my colleagues rely on the fact that the violation at issue here involves section 70.201(d) rather than section 70.100. I view this as a distinction without a difference since the operator's failure to comply with section 70.201(d) resulted in the same hazard, overexposure to respirable dust, which formed the basis of the S&S presumption in *Consolidation*. That the citation involves a failure to abate a dust violation, rather than a failure to comply with the dust standard in the first instance, does not change the fact that miners in the affected area were exposed to higher levels of dust than permitted under section 70.100.

In *Consolidation* the Secretary submitted testimony by medical experts who explained why it was not possible to assess the precise contribution of a particular instance of overexposure to the development of pneumoconiosis or other disease induced by respirable dust. *See Consolidation Coal Co.*, 5 FMSHRC 378, 379-82 (March 1983) (ALJ). The medical evidence established that "the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon the concentration and duration of each exposure" *Consolidation*, 8 FMSHRC at 898. The Commission concluded that "the present state of scientific and medical knowledge, as exemplified by the present record, do not make it possible to determine the precise point at which the development of chronic bronchitis or pneumoconiosis will occur or is reasonably likely to occur." *Id.* However, given the fact that reducing the incidence of these diseases was one of the fundamental purposes of the Mine Act and recognizing that "each unit of overexposure is an important factor in contributing to either [chronic bronchitis or pneumoconiosis]," *id.* at 894, the Commission determined that a departure from the typical S&S analysis was justified:

[W]e hold that if the Secretary proves that an overexposure to respirable dust in violation of section 70.100(a) . . . has occurred, a presumption arises that the third element of the significant and

substantial test -- a reasonable likelihood that the health hazard contributed to will result in an illness -- has been established.

Id. at 899.

In the instant case, there is no dispute that the sampling conducted by the operator between December 12 and 16 showed the average concentration of respirable dust to be 2.9 mg/m³. S. Mot. for Sum. Dec. at 7-8; Aff. of Theodore Betoney ¶¶ 11-14. Inspector Betoney relied on these sampling results when he issued the citation at issue here. *Id.* The Secretary has proved, therefore, that an overexposure to respirable dust occurred. Because the operator had previously been cited under section 70.100, and had failed to take immediate steps to lower the dust level, the instant citation referred to section 70.201 as the standard violated. S. Mot for Sum. Dec. at 8-9; Betoney Aff. ¶14. In light of this, my colleagues have determined that we should not apply the S&S presumption for respirable dust violations in this case and should instead require the Secretary "to develop the type of record necessary to demonstrate the appropriateness of such a presumption." Slip op. at 6. As the record does not contain evidence of a medical breakthrough permitting precise prediction of the likelihood of contracting lung disease on the basis of a single instance of overexposure to respirable dust, I fail to see the purpose of requiring the Secretary to "prove anew" that such overexposure endangers miners' health and satisfies the four S&S elements set forth in *Mathies*. See *Consolidation*, 8 FMSHRC at 899.

The judge's decision does not even refer to *Consolidation*. Explaining he deleted the S&S designation because, inter alia, the operator's "failure to take remedial action was cited shortly after the abatement period expired," the judge concluded that "respondents' failure to timely correct the alleged underlying violation one day after the time established for abatement does not constitute a significant and substantial violation." 15 FMSHRC at 908. Even accepting the one day time frame relied upon by the judge, *Consolidation* does not indicate that an exception to the S&S presumption should apply.¹

The Commission's decision in *Consolidation* recognized that the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon "the concentration and duration of *each* exposure" 8 FMSHRC 898

¹ The judge's one-day time frame does not appear to be supported by substantial evidence. The judge computed the relevant time period from the December 18 deadline for abating the section 70.100 citation to December 19, the date the operator received the citation alleging a violation of section 70.201(d). Although the operator received the failure-to-abate citation on December 19, the record reflects that it did not abate the violation until December 23 at the earliest, when respondent submitted a plan of corrective action to MSHA. Betoney Aff. Ex. E at 2.

(emphasis added). *Consolidation* emphasized the importance that Congress placed on the fixed ceiling for respirable dust exposure levels. The Commission noted:

The respirable dust standard . . . is taken directly from section 202 of the Mine Act, 30 U.S.C. § 842, which, in turn, was carried over without significant change from the [Federal] Coal [Mine Health and Safety] Act [of 1969].

Id. at 896. The Commission stressed that:

[I]n all cases, the standard is keyed to each individual miner. The air he breathes, wherever he works in the mine, *must not contain* more respirable dust during any working shift than the standard permits.

8 FMSHRC at 897 (emphasis in original), quoting Conference Report reported at 1 *Legislative History of the Federal Coal Mine Health and Safety Act of 1969* at 1606 (1975). Because it is undisputed that the miners here were exposed to "more respirable dust . . . than the standard permits," I would find the violation to be S&S under *Consolidation*.

My colleagues' decision is also based on the dismissal of the underlying section 70.100 citation by a different judge in a separate proceeding. Slip op. at 5. That dismissal was predicated on the Secretary's use of a single-shift method for collecting dust samples. The Commission later determined that the single-shift method was procedurally invalid because the Secretary had not engaged in formal rulemaking prior to implementing it. *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-16 (January 1994). In his ruling below, handed down prior to the Commission's decision in *Keystone*, Judge Feldman concluded that "the uncertainties associated with the underlying respirable dust standard violation . . . create mitigating circumstances warranting the deletion of the significant and substantial characterization in [the citation]." 15 FMSHRC at 907.

The dismissal of the underlying section 70.100 citation precludes the Secretary from relying on the dust samples which precipitated that citation to prove that overexposure occurred in this case. But the citation involved here does *not* rely on those invalid samples. Inspector Betoney explained that he issued the section 70.201(d) citation because the operator failed to take steps to abate the previous citation issued under section 70.100, *and* because subsequent dust samples taken between December 12 and December 16 also showed a violative average dust concentration of 2.9 mg/m³. These samples were taken by the operator using the traditional multi-shift approach, and there is no dispute about their validity. Given that the operator has conceded a violation of section 70.201(d), and that samples show the violation resulted in

exposure to illegal levels of respirable dust, we should resolve the S&S issue by applying the presumption articulated in *Consolidation*.²

Because the 70.201(d) citation only refers to the operator's failure to take corrective action and does not make specific reference to the operator samples confirming the existence of illegal levels of respirable dust between December 12 and 16, my colleagues question whether these samples can properly be considered in assessing the S&S nature of the failure to abate violation at issue here. Suggesting that the judge "discredited" the portion of Inspector Betoney's affidavit which refers to these samples, they maintain that the S&S nature of the instant citation must depend upon the validity of the underlying citation. Slip op. at 5 & n.4.

The judge's decision indicates that he considered the dust samples taken between December 12 and 16 as "*not dispositive* of whether there was a basis for the issuance of [the underlying] Citation . . . [issued] on December 11, 1991." 15 FMSHRC at 907 n.9 (emphasis supplied). The judge failed to address whether Inspector Betoney's evidence provided an independent basis for concluding that the operator's failure to abate the earlier citation resulted in exposure to excessive levels of respirable dust. The judge's finding that Inspector Betoney's evidence did not cure the defective single shift sampling that had been conducted on December 11 is not the same as discrediting that evidence for purposes of showing that miners were overexposed to dust on subsequent days. Indeed, the judge would have committed error had he "discredited" the inspector's testimony.

² My colleagues rely on an asserted concession by the Secretary that the *Keystone* decision dictates dismissal of the S&S designation here. Slip op. at 5. I attach little weight to the Secretary's statement cited by the majority, given that the statement appeared in a Motion to Stay that was explicitly predicated on an offer to settle the matter based on the *Keystone* result. The settlement apparently fell through. Mot. for Stay at 5-6; Unpublished Order at 2 (March 26, 1993). In any case, the Secretary subsequently modified his position on the connection between *Keystone* and the S&S issue here, stating:

In the instant case, the five samples that the company collected on December 12, 13 and 16, 1991, prior to taking corrective action, revealed an average concentration of 2.9 mg/m³. *Thus, these samples, independent of the two single samples that were collected on December 9 and 10, 1991, demonstrate that the respirable dust concentration for the long wall jack setter far exceeded the permissible maximum of 2.0 mg/m³.*

S. Mot. for Sum. Dec. at 20 (emphasis supplied). Significantly, on review the respondent has not even cited the Secretary's earlier statement mentioned by my colleagues purporting to link the *Keystone* outcome and the instant S&S issue.

While a question of credibility may be sufficient to *forestall* entry of summary decision, a judge may not "discredit" record evidence as a means of *granting* summary decision, particularly in view of the judge's inability to assess the witness's demeanor. See 10A Wright et al., Federal Practice and Procedure § 2726 (2d ed. 1983). If the judge believed that Inspector Betoney's affidavit was inconsistent with the face of the citation, as my colleagues speculate, then he should have denied summary decision and proceeded to trial on this material factual issue. See, e.g., *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987). As the court noted in *Leonard*, "the Supreme Court has not . . . approved summary judgments that rest on credibility determinations."³ *Id.* at 294.

Accordingly, I would vacate the judge's decision and remand for application of *Consolidation*.⁴


Mary Lu Jordan, Chairman

³ My colleagues, misapprehending the dissent, conclude that I rely on the law requiring construction of the evidence in favor of the party opposing summary judgment to support my purported "position, *which, in essence, is to grant the Secretary's motion for summary decision.*" Slip op. at 5 n.4 (emphasis supplied). The issue before the Commission is *not* whether summary judgment was improperly denied to the Secretary, but whether the judge erred by refusing to apply the S&S presumption of *Consolidation*. PDR at 1. The judge was not required to enter summary decision in favor of the Secretary. See Wright, *supra*, at § 2720. However, if the judge erred by not applying *Consolidation*, as I conclude, then his grant of summary decision *in favor of the operator* must be vacated. The filing of cross-motions for summary decision does not relieve the judge of the obligation to resolve all doubts against the operator before granting that party's motion for summary decision. *Id.* at § 2727. "The court must rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the [summary judgment] standard." *Id.* at § 2720 (citations omitted). Thus, in considering whether the judge properly granted the operator's summary judgment motion, the Secretary must be treated as the party opposing entry of summary decision, and the record evidence must be construed in his favor.

⁴ I am not persuaded by the operator's argument that upholding MSHA's enforcement action imposes on respondent "two S&S special findings . . . for the very same violative condition . . ." Consol Br. at 6. The citation in the present case was for Consol's refusal to timely abate the underlying citation, not for the underlying citation itself.

Marks, Commissioner, not participating:

I assumed office after this case had been briefed and considered at a Commission decisional meeting. In light of these circumstances, I elect not to participate in this case.

A handwritten signature in black ink, reading "Marc Lincoln Marks". The signature is written in a cursive style with a large, sweeping initial "M".

Marc Lincoln Marks, Commissioner

Distribution:

Jerald Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Elizabeth Chamberlin, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Jerold Feldman
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 21, 1995

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF CHARLES H.
DIXON, et al.

Docket No. KENT 94-1274-D

vs.

PONTIKI COAL CORPORATION

ORDER

On March 8, 1995, the Secretary of Labor filed with the Commission a petition for discretionary review seeking review of Administrative Law Judge Gary Melick's February 6, 1995, Order Granting Partial Dismissal.

The petition seeks review of the judge's dismissal, for lack of jurisdiction, of the Secretary's discrimination complaint under section 105(c)(2) of the Mine Act as it pertains to the 17 individuals named in the complaint other than Charles H. Dixon. Order at 4, 6. The judge based his dismissal on the fact that only Dixon had filed a complaint with the Secretary. *Id.* at 4. The Secretary also seeks review of the judge's limitations of the complaint regarding Dixon to matters contained in his complaint to the Secretary and to acts occurring on or after April 15, 1994. Pet. at 1-2.

The Commission's Procedural Rule 70, which implements section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A), provides: "Any person adversely affected or aggrieved by a judge's decision . . . may file . . . a petition for discretionary review . . ." 29 C.F.R. § 2700.70. The Commission has held that a judge's decision is not subject to review under section 113 of the Mine Act and the Commission's rules unless it "*finally* disposes of the proceedings." *Council of S. Mountains v. Martin County Coal Corp.*, 2 FMSHRC 3216, 3216-17 (November 1980) (emphasis in original). Where a judge has disposed of less than all claims in multiple-party proceedings, the Commission has applied Rule 54(b) of the Federal Rules of Civil Procedure in

determining whether the decision is final.¹ *Emery Mining Corp.*, 11 FMSHRC 1, 2 (January 1989).

We conclude that the order is not final. The judge did not expressly direct that his dismissal of the complaint as to the other 17 individuals be entered as a final decision, nor did he find, pursuant to Rule 54(b), that there is no just reason for delay. Further, the judge subsequently modified the order and characterized it as interlocutory. *See* Amended Order

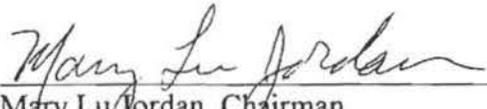
¹ Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. § 2700.1(b).

Rule 54(b) states in part:

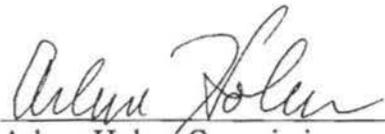
[W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates . . . the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating . . . the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

Granting Partial Dismissal (May 9, 1995). Accordingly, we dismiss the Secretary's petition for discretionary review as premature. *See, e.g., McCoy v. Crescent Coal Co.*, 3 FMSHRC 2475 (November 1981).


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

Distribution

Robin A. Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

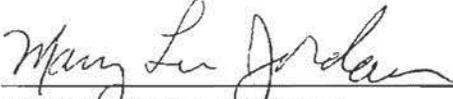
Brian W. Dougherty, Esq.
Office of the Solicitor
U.S. Department of Labor
2002 Richard Jones Rd., Suite B-201
Nashville, TN 37215

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of BSC's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

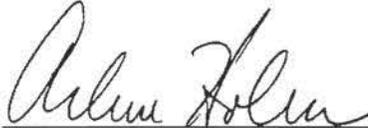
For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

Distribution

Roger L. Glover
Operations Manager
BSC Construction, Inc.
P.O. Box 945
Uniontown, PA 15401

Caryl L. Casden, 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 N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

March 27, 1995

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 91-233
:
v. :
:
BRIDGER COAL COMPANY :

ORDER DISMISSING PETITION

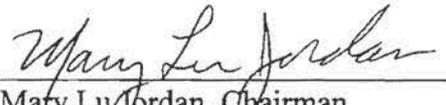
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On December 29, 1994, the Commission granted the Secretary of Labor's petition for discretionary review of the decision of Administrative Law Judge August F. Cetti, in which he vacated a citation issued to Bridger Coal Company ("Bridger"). 16 FMSHRC 2310 (November 1994).

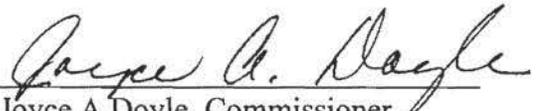
On February 24, 1995, the Secretary filed a motion for voluntary dismissal of the petition pursuant to Fed. R. Civ. P. 41 (a) and Fed. R. App. P. 42 (b), stating that the motion was made "in an effort to effectively utilize his resources."¹ Mot. at 1. The Secretary asserts that counsel for Bridger had been notified of the motion. The Commission has administratively determined that Bridger does not oppose the motion.

¹ Fed. R. App. P. 42 (b) provides in part: "An Appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court."

Commission Procedural Rule 1 (b) provides that the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure shall apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. § 2700.1(b).

Upon consideration of the Secretary's motion, we dismiss his petition for review. See generally *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 n.2 (October 1993).


Mary Lu Jordan, Chairman


Joyce A Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

Distribution

James Zissler, Esq.
Jackson & Kelly
2401 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge August Cetti
Federal Mine Safety & Health Review Commission
1244 Speer Blvd., Suite 280
Denver, CO 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 27, 1995

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. LAKE 94-72, etc.

v.

BUCK CREEK COAL INC.

ORDER

On February 17, 1994, Buck Creek Coal Inc. ("Buck Creek") filed with the Commission a petition for interlocutory review of Administrative Law Judge T. Todd Hodgdon's February 15, 1995, Order Continuing Stay (the "Stay Order").¹ The judge had previously stayed proceedings for ninety days or until the United States Attorney made a determination regarding the criminal prosecution of Buck Creek. The Commission dismissed as moot the operator's petition for interlocutory review of the judge's previous stay. *Buck Creek Coal Inc.*, 17 FMSHRC ____ (February 1995). The Stay Order continues the stay until May 16, 1995, and directs the parties to attend a status conference on that date for the purpose of deciding whether and under what conditions the stay should be continued. Stay Order at 5.

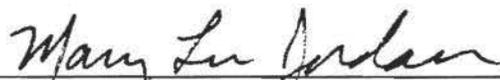
Buck Creek urges the Commission to grant interlocutory review and to grant it relief from the Stay Order so that it can defend itself against the 554 citations and orders in these consolidated dockets. Pet. at 4. The Secretary responds that the judge did not abuse his discretion in granting the stay in light of potential adverse effects on the ongoing criminal investigation. S. Opp'n at 4-6.

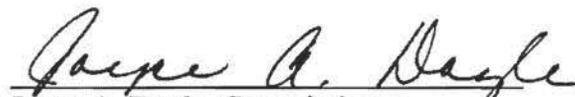
¹ The Commission held this petition in abeyance pending the judge's ruling on Buck Creek's late-filed motion for certification. *Buck Creek Coal Inc.*, 17 FMSHRC ____ (March 1995). The judge has now denied Buck Creek's motion. Order Denying Mot. for Certification at 6.

We conclude that the Stay Order involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. See Commission Procedural Rule 76(a)(2), 29 C.F.R. § 2700.76(a)(2). The Commission therefore grants Buck Creek's petition.

We find that the issues are adequately addressed in the parties' submissions. If the parties wish to file supplemental briefs, they must be received by the Commission by April 4, 1995.

At the hearing on continuing the stay, counsel for the Secretary represented that he may be prepared to address, prior to May 16, 1995, the advisability of lifting the stay as to some consolidated dockets. Tr. 17. We encourage the parties to confer promptly and report to the judge regarding how the stay might be limited or modified before its expiration. During the pendency of this matter before the Commission, the judge shall have continuing jurisdiction to lift or modify the stay based on the parties' submissions.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

Distribution

James G. Zissler, Esq.
Jackson & Kelly
2401 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037

Susan E. Long, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 27, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 94-391
	:	
MINERAL TRANSPORT, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

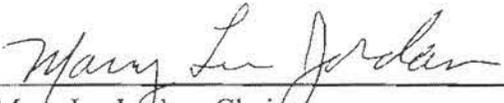
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On February 21, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Mineral Transport, Inc. ("Mineral") for failing to answer the proposal for assessment of civil penalty filed by the Secretary of Labor on October 7, 1994, or the judge's Order to Respondent to Show Cause of December 21, 1994. The judge assessed the civil penalties of \$800 proposed by the Secretary.

On March 8, 1995, the Commission received a letter from Keith Martin, Mineral's manager, in which he asserts that Mineral had sent its reply on January 5, 1995, to the Department of Labor's Office of the Solicitor in Arlington, Virginia.

The judge's jurisdiction over this case terminated when his default order was issued on February 21, 1995. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Mineral's letter to be a timely filed petition for discretionary review, which we grant. See, e.g., *Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Mineral's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

Distribution

W. Keith Martin, Manager
Mineral Transport Inc.
P.O. Box 313
Fairmont, WV 26554

Caryl L. Casden, 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

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

FEB 01 1995

SAVAGE ZINC, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 95-11-RM
	:	Citation No. 3882702; 10/14/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 95-57-RM
ADMINISTRATION (MSHA),	:	Order No. 4357221; 11/18/94
Respondent	:	
	:	Elmwood-Gordonsville Mine
UNITED STEELWORKERS OF	:	Mine ID 40-00864
AMERICA (USWA),	:	
Intervenor	:	

DECISION

Appearances: Henry Chajet, Esq., and James G. Zissler, Esq., (Maris E. McCambley, Esq., on brief), Jackson & Kelly, Washington, D.C. for Contestant; Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent; Henry Tuggle, Safety and Health Specialist, United Steelworkers of America, Pittsburgh, Pennsylvania for Intervenor.

Before: Judge Hodgdon

These cases are before me on notices of contest filed by Savage Zinc, Inc. against the Secretary of Labor and his Mine Safety and Health Administration (MSHA) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of Citation No. 3882702 to it on October 14, 1994, and the issuance of Order No. 4357221 to it on November 18, 1994. For the reasons set forth below, both the citation and the order are affirmed.

A hearing in the cases was held on December 7 - 9, 1994, in Nashville, Tennessee.¹ Randy G. Helm, Kenny G. Hensley, David Park, James B. Daugherty and Randy W. Dennis testified for the Secretary. In addition, the Secretary called Roy L. Bernard as

¹ The transcript incorrectly states that the hearing was held on "September 7 - 9, 1994."

an adverse witness. Charles E. Hays and H. John Head testified on behalf of Savage Zinc and Allan Cole, Richard E. Pulse and Martin Rosta² were called as adverse witnesses by the company. The parties have also filed briefs which I have considered in my disposition of these cases.³

BACKGROUND

The essential facts in this case are undisputed. The Elmwood-Gordonsville Mine is a random room and pillar zinc mine operated by Savage Zinc, Inc. near Franklin, Tennessee. The mine can be entered by a portal onto a roadway which continues from the portal to the Stonewall production area. The mine can also be exited through six shafts, the No. 5 Shaft in the OMZ area, the Nos. 1 and 2 Shafts in the Elmwood area, the No. 4 Shaft in the South Carthage area, and the Nos. 3 and 7 Shafts in the Gordonsville area. Some of these shafts, e.g. No. 3, are also used as entrances to the mine.

The roadway is approximately five miles long and, after an initial decline from the portal which levels off some five hundred feet below the portal, goes up hills (inclines), down hills (declines) and is level in places as it traverses through the mine. The roadway begins in the Gordonsville area of the mine, goes along the West B Drift and through the Elmwood area of the mine. From the Elmwood area of the mine, the roadway becomes known as the Stonewall Drive and terminates in the Stonewall production area. The Stonewall Drive is a decline which is about a mile long and descends, on a 15 percent grade, in elevation about 500 feet.

Development of the Stonewall Drive and the Stonewall production area was begun in 1987, and completed in 1988. Construction of the No. 6 Shaft, which goes to the Stonewall production area, was initiated in 1987 and completed in 1988.

² Mr. Rosta, who had been *subpoenaed*, did not appear at the hearing. His testimony was taken by deposition in Washington, D.C., on December 16, 1994. The deposition is admitted into evidence as Contestant's Exhibit K.

³ The Contestant has also filed a Reply Brief. The Secretary has filed a motion to strike the reply brief and his motion has been joined in by the Intervenor. Reply briefs were not contemplated in our discussion of a briefing schedule at the hearing, (Tr. 820, 834), nor provided for in my December 21, 1994, order scheduling briefs. Consequently, while I deny the motion to strike, I have given no weight to the Contestant's Reply Brief in this decision.

A hoist was installed in the shaft in November 1988. "Stonewall is the lowest elevation of the [mine] complex" (Tr.698.)

From 1988 until sometime in the spring of 1993, the Stonewall Drive and the No. 6 Shaft were designated in the mine's evacuation plan as the two escapeways from the Stonewall production area. In the spring of 1993, the mine operators concluded that the No. 6 Shaft was no longer safe, due to deteriorating ground conditions, to use as an escapeway and took it out of use.

On August 25, 1993, Savage Zinc was issued Citation No. 4092045 for failing to maintain an escape route, the No. 6 Shaft, in a travelable condition in violation of Section 57.11051 of the Secretary's Regulations, 30 C.F.R. § 57.11051. (Resp. Ex. 10.) In September 1993, the company inquired of Mr. Daugherty, the local MSHA metal and nonmetal mine supervisor, whether a refuge chamber could be used instead of a second escapeway. He advised them that he could not authorize it.

In December 1993, Savage Zinc filed a petition for modification with MSHA seeking modification of the application of Section 57.11050(a), 30 C.F.R. § 57.11050(a), to the mine by replacing a second escapeway with a refuge chamber. The petition was denied on June 23, 1994. The company then requested a hearing on the petition before an Administrative Law Judge assigned to the Department of Labor. The hearing was scheduled for November 1, 1994. At Savage Zinc's request the hearing was stayed until January 23, 1995. Savage Zinc filed an amended petition for modification on October 17, 1994.

On October 14, 1994, Inspector Daugherty issued Citation No. 3882702 to Savage Zinc for a violation of Section 57.11050(a). The citation stated that:

The mining and production area of Stonewall, the lowest level of the mine, does not have two separate properly maintained escapeways to the surface as required by 30 CFR 57.11050(a). The No. 6 shaft which was formerly designated as one of the two separate escapeways to the surface from the lowest level of the mine, is not travelable in the event of an emergency, nor is it presently designated on the mine evacuation plan as an escapeway.

(Resp. Ex. 5.) The company was given until November 14, 1994, to abate the violation.

On November 18, 1994, Inspector Daugherty issued Order No. 4357221 pursuant to Section 104(b) of the Act, 30 U.S.C. § 814(b).⁴ The order stated:

No apparent effort was made by the company to provide a second escapeway from the lowest level of the mine.

All miners shall be immediately withdrawn from the Stonewall mining and production area until a second escapeway is provided.

(Resp. Ex. 6.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Violation

Section 57.11050(a) requires that:

Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during exploration or development of an ore body.

⁴ Section 104(b) provides:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons . . . to be withdrawn from, and to be prohibited from entering, such an area until an authorized representative of the Secretary determines that such violation has been abated.

It is Savage Zinc's position that this regulation was not violated because the Elmwood-Gordonsville mine is a one level mine with seven escapeways (the six shafts and the portal), thus meeting the two escapeway requirements. The company further argues that if it is determined that the mine has more than one level, it cannot be found to have violated the regulation because: (1) The Secretary's application of the regulation denied Savage Zinc adequate notice and due process of law; (2) The Secretary's application of the regulation in this case is inconsistent, arbitrary, entitled to no deference, and denied Savage Zinc due process of law; (3) The Secretary's application of the regulation is not consistent with the requirements of other sections of Section 57.11050, 30 U.S.C. § 57.11050; (4) The Secretary's interpretation of "level" in applying the regulation constitutes improper rulemaking; and (5) The Secretary's application of the regulation diminishes safety.

I conclude that there is more than one level in the mine and that failure to provide two escapeways from the Stonewall production area violates Section 57.11050(a). I further conclude that even if it were accepted that the mine has only one level, the regulation was violated. Finally, I reject Savage Zinc's additional arguments as unconvincing.

Whether the Stonewall area of the mine is required by Section 57.11050(a) to have two escapeways must be evaluated

in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." See, e.g., *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1617-18 (September 1987).

Ideal Cement Co., 12 FMSHRC 2409, 2415 (November 1990).

As Judge Weisberger noted in *Magma Copper*, neither "level" nor "levels" are defined in the Regulations. *Magma Copper Co.*, 16 FMSHRC 327, 331 (February 1994). However, it is clear that "[a] regulation should be construed to give effect to the natural and plain meaning of its words." *Diamond Roofing v. OSHRC*, 528 F.2d 643 (5th Cir. 1976) (citations omitted).

"Level" is a common word and most people would agree with this definition from *Webster's Third New International Dictionary* 1300 (1986) that level is a "horizontal state or condition : uniform altitude." On the other hand, the dictionary also indicates that the term has a more particular meaning in mining as "a : a horizontal passage in a mine intended for regular working and transportation" or "b : the horizontal plane containing a main level and other workings." *Id.*

The Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 638 (1968), defines "level," as pertinent to this case, as:

a. A main underground roadway or passage driven along the level course to afford access to the stopes or workings and to provide ventilation and haulageways for the removal of coal or ore. . . . b. Mines are customarily worked from shafts through horizontal passages or drifts called levels. These are commonly spaced at regular intervals in depth and are either numbered from the surface in regular order or designated by their actual elevation below the top of the shaft. . . . c. In pitch mining, such as anthracite, there may be a number of levels driven from the same shaft, each being known by its depth from the surface or by the name of the bed or seam in which it is driven. . . . d. Mine workings that are approximately at the same elevation. . . . j. All openings at each of the different horizons from which the ore body is opened up and mining started. . . .

As can be seen, all of these definitions have a common element that goes back to the basic definition, that is that a "level" is essentially on the "horizontal."⁵ On the other hand, the Contestant's argument that this is a single level mine is based on a distorted definition of "level" which leaves out all references to the horizontal.

Thus, Mr. Bernard, an expert testifying for Savage Zinc, defined "level" as "a main underground passageway that connects stopes and working places and provides ventilation and haulage for the removal of ore from the mine." (Tr. 19.) Mr. Hays, the company's Safety Supervisor, defined "level" as "an underground passage or opening providing access to stopes or workings. It also provides ventilation and haulage ways for the extraction of ore." (Tr. 646-47.) Mr. Head, another expert witness for the Contestant, said that "level" "is defined as a main underground road or passageway that leads to production areas, stopes that may be above or below that level, and the main road is used for ventilation, for access, and for haulage of ore from working places." (Tr. 763-64.)

⁵ The other definition of "level" mentioned in this case, "[t]he horizon at which an ore body is opened up and from which mining proceeds. The term is often used in the same sense as a drift or to cover all horizontal workings on one horizon" found in Peele's *Mining Engineer's Handbook* § 10, 3 (3d Ed. 1941), also conforms to this central element.

Finally, in its brief, the Contestant argues that:

[t]he primary definition for "level" provided in the BOM Dictionary and discussed by Bernard and Head is related to function rather than distance or elevation. According to that definition, a "level" is:

a main underground passageway that connects stopes and working places and provides ventilation and haulage for the removal of the ore from the mine.

(Cont. Br. at 26.)

All of these definitions purport to be a paraphrase of the first definition in the *Dictionary of Mining, Mineral, and Related Terms*. All of them leave out the phrase "driven along a level course" from the definition. By leaving out these words, the most significant characteristic of "level" is removed from the definition. Followed to its logical conclusion, a mine with a continuous roadway which declined into the earth at a 15 percent grade for 5 miles and off of which were working areas at various elevations would still, by this definition, be a one level mine.

Contrary to Savage Zinc's assertions, I find that it is Savage Zinc's definition of "level" and what it means in this regulation that is irrational and inconsistent with MSHA enforcement actions, not MSHA's definition. Based on any, or all, of the definitions of level from the *Dictionary of Mining, Mineral, and Related Terms*, set out above, I conclude that the Elmwood-Gordonsville Mine has more than one level.⁶ I further conclude that the production levels found in the Stonewall area are the lowest levels of the mine.

The obvious purpose of the regulation is to insure that miners have two separate ways to get out of the mine in the event of an emergency. I conclude that a reasonably prudent person familiar with the mining industry and the purpose of this standard would find that there is only one escapeway from the Stonewall area, the Stonewall Drive, that the Stonewall area is

⁶ Unlike *Magma Copper*, which turned on whether an area was a level based on the type of activity performed in the area, 16 FMSHRC at 332-33, there is no dispute that mining is performed in the Stonewall area.

⁷ I also conclude that the Stonewall Drive is not part of the Stonewall area of the mine, although whether it is or not makes no difference to my conclusion that the Stonewall area has the lowest levels of the mine.

the lowest level of the mine, both in elevation and in location, and that the regulation requires two escapeways from the Stonewall area.⁸

It is also clear that Savage Zinc originally agreed with these conclusions. If it did not, the company's request of Inspector Daugherty in August 1993 to be allowed to substitute a refuge chamber for a second escapeway would make no sense.⁹ Nor would it's December 1993 petition for modification for a variance of the application of Section 57.11050(a) to it by having a refuge chamber instead of a second escapeway. This petition is particularly telling in that it requested relief from the two escapeway requirement, even though at that time Savage Zinc had not been cited for not having two escapeways. Additionally, there is no evidence that anyone connected with Savage Zinc ever expressed the opinion to MSHA, prior to the institution of this case, that they already complied with the two escapeway requirement. Even when the citation was issued, no such claim was made. (Tr. 498, 500.)

I further conclude that even if this were a one level mine, the standard would still be violated. Section 57.11050(a) requires that the two escapeways be "so positioned that damage to one shall not lessen the effectiveness of the others" (emphasis added). As Mr Hays testified, the Stonewall Drive is "part of the primary escapeway out of Stonewall." (Tr. 744.) Even a cursory glance at the mine map, (Resp. Ex. 1 or Cont. Ex. E), makes it clear that if the mile long Stonewall Drive is blocked or damaged, the effectiveness of any escapeways at the top of the drive is considerably lessened.

Savage Zinc's Due Process Arguments

The Contestant argues that the Secretary's witnesses were unable to agree upon a consistent application of the regulation, that this demonstrates that the Secretary's interpretation of the regulation "fails to provide legally adequate notice to operators of the standard's requirements" and that, therefore, Savage Zinc has been denied due process of law. (Cont. Br. 18.) This argument is not supported by the evidence.

⁸ An examination of the mine map makes it obvious to anyone, let alone a reasonably prudent person familiar with the mining industry, that the Stonewall area needs a second escapeway.

⁹ The establishment of a refuge chamber itself indicates that Savage Zinc believed that they needed a second escape way since the regulation requires that "[a] a method of refuge shall be provided while a second opening to the surface is being developed."

It is true that the most consistent definition of "level" was provided by Contestant's witnesses. However, as noted above, this definition consistently left out the crucial element that distinguishes a level from something that is not a level. On the other hand, the Secretary's witnesses, i.e. those employed by the Secretary even if called by Savage Zinc, were unanimous in agreeing that the Stonewall area required two escapeways. While, obviously, none of them had memorized a definition of level, they all conveyed the sense of what Section 57.11050(a) requires even if they were not able to articulate it to Contestant's satisfaction.

What the MSHA employees imparted is what a reasonably prudent person familiar with the mining industry would understand from the regulation, probably without even having to look up a definition of "level." Consequently, Savage had adequate notice of what the regulation requires and was not denied due process.

Savage Zinc next argues that the Secretary has applied the regulation inconsistently and arbitrarily in this case and that it was denied due process. This argument is based on the claim that "level" and "lowest levels" are not defined in the regulation or MSHA's *Program Policy Manual*, that in the past MSHA has not issued citations in other mines or to this mine for failing to have two escapeways from areas similar to the Stonewall area, and that for a period of time MSHA did not apply the standard to the Stonewall area.

Once again, the evidence does not support these assertions. The fact that "level" and "lowest levels" are not defined makes no difference since, as noted above, the regulation satisfies the "reasonably prudent person" test.

With regard to the disparate treatment argument, there is no evidence of disparate treatment. The general testimony given by Contestant's witnesses that the witness is familiar with areas in other mines similar to the Stonewall area and that they have not been cited for not having two escapeways provides no basis for concluding that Savage Zinc is being treated disparately or that the regulation is being applied arbitrarily. There is no way to determine how similar these other areas in other mines are to the case at hand. This is also true concerning the "229 area" in this mine, which just from looking at the mine map, the only evidence available, appears to have as many differences as similarities.

Finally, the Contestant contends that MSHA's failure to cite Savage Zinc during two periods when the Stonewall area did not have two escapeways establishes that MSHA applied the regulation arbitrarily. This claim is disingenuous. In the first place, there is absolutely no evidence to show how long, if at all, a period of time elapsed between the completion of development of

Stonewall and the installation of the hoist in No. 6 Shaft. The only evidence is that Stonewall was completed in 1988, and that the hoist was installed in November 1988. In the second place, there is no evidence to show whether or not Savage Zinc complied with the portion of the regulation set out in note 9, *supra*, while the No. 6 Shaft was being developed. Obviously, there cannot be two escapeways while the second escapeway is being developed.

The second period that Savage Zinc relies on is the time between the August 1993 citation and the issuance of the citation in this case. In effect, what the company is claiming is that the fact that MSHA gave them a break and did not seek further enforcement action while Savage Zinc pursued its petition for modification is evidence that MSHA applied the regulation inconsistently and arbitrarily. This attempt to turn MSHA's good faith forbearance against it does not merit further comment.

Savage Zinc's Whole Act Argument

The Contestant argues that MSHA's interpretation of Section 57.11050(a) makes Sections 57.11050(b) and 57.11055, 30 C.F.R. §§ 57.11050(b) and 57.11055, superfluous since they specifically deal with time and distance. Citing 2A *Sutherland Stat. Const.*, § 46.06, at 119 (5th Ed. 1992), the company asserts that this violates the "whole act rule" which requires "that an instrument is to be construed as a whole so that all of its provisions are harmonized and interpreted so as not to derogate from the force of other provisions." (Cont. Br. 23-24.) I see nothing in MSHA's interpretation of the two escapeway requirement that in any way annuls or lessens the requirement that a refuge be provided for miners who cannot exit the mine through the escapeways within one hour or the requirement that escapeways not be inclined more than 30 degrees. Consequently, I find this argument unconvincing.

Savage Zinc's Diminution of Safety Argument

The Contestant argues that the Secretary's application of Section 57.11050(a) is hazardous to the health and safety of miners and results in a diminution safety. This argument fails for two reasons. First, as the Secretary correctly notes in his brief, the Commission has held that "diminution of safety may not be raised as a defense to a violation in an enforcement proceeding unless the Secretary has first entered a finding of such diminution in a modification proceeding." *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (November 1989); *Otis Elevator Co.*, 11 FMSHRC 1918, 1923 (October 1989); *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (December 1983); *Penn Allegh Coal Co.*, 3 FMSHRC 1392, 1398 (June 1981). That has not occurred in this case.

Secondly, Savage Zinc's diminution of safety argument is a misapplication of the concept. Essentially, the company argues that putting in a second escapeway, either by rehabilitating the No.6 Shaft, sinking a new shaft or excavating a new drive parallel to the Stonewall Drive, involves work that is more hazardous than normal mining and, therefore, a diminution of safety results. In other words, it is the construction of the second escapeway that diminishes safety, not the end result of having two escapeways. Acceptance of this argument would mean no mine would ever have to put in a second escapeway, since constructing it would diminish safety.

Obviously, for the Contestant's argument to have validity, it would have to show that safety is diminished by having two escapeways. The record is devoid of any evidence to support such a theory and it would be surprising if such evidence could be found. Accordingly, this argument is rejected.¹⁰

Significant and Substantial

The inspector concluded that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *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:

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 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.

¹⁰ I have also considered and rejected the Contestant's argument that MSHA's application of Section 57.11050(a) constitutes improper rulemaking in view of my conclusion that a reasonably prudent person familiar with the mining industry would interpret the regulation as MSHA has.

See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

In *United States Steel Mining Co., 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).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

By their very nature, escapeways only become important in the event of an emergency. Therefore, continued normal mining operations, in evaluating this violation, must assume the existence of an emergency. The evidence indicates that there are several types of emergencies that might require the use of an escapeway which could occur in this mine. Among these are roof falls, fire, explosions and inundation. Further, it is not the likelihood of one or more of these disasters occurring which determines whether this violation is S&S, but the likelihood of serious injury occurring during an emergency situation when there is not a second escapeway available.

Viewing the violation in this light, I have already concluded that the violation occurred. I also conclude that the failure to have two escapeways results in a discrete safety hazard in that blockage of the primary escapeway means that the miners are trapped in the mine. I further conclude that there is a reasonable likelihood that the failure to have a second

escapeway in an emergency will result in an injury and that the injury will be reasonably serious. Accordingly, I conclude that the violation was "significant and substantial."¹¹

Reasonableness of the Abatement Period

Savage Zinc argues that it is unreasonable to have expected them to abate the violation in this case in 30 days. Consequently, the company asserts that the 104(b) order issued to it for failing to abate the violation should be vacated. Since it is uncontroverted that it would take any where from nine to 18 months to install a second escapeway, this claim has superficial appeal. However, the testimony of Inspector Daugherty makes it clear that MSHA did not expect the company to perform the impossible and complete construction in 30 days, but only that Savage Zinc begin taking steps to abate the violation. (Tr. 509-10.)

In fact, at the time the 104(b) order was issued, Savage Zinc had taken no action on the citation other than to contest it. Nor is there evidence that the company had communicated to MSHA any intention of abating the citation. Under these circumstances, I conclude that the 30 day abatement period was reasonable and that the 104(b) order was appropriate.

ORDER

I conclude that Savage Zinc, Inc. violated Section 57.11050(a) of the regulations by not having two escapeways from the Stonewall area of its Elmwood-Gordonsville Mine, and that this violation was "significant and substantial" and the result of, at least, moderate negligence. I further conclude that the time given for abatement of this violation was reasonable. Accordingly, it is ORDERED that Citation No. 3882702 and Order No. 4357231 are AFFIRMED.



T. Todd Hodgdon
Administrative Law Judge

¹¹ In reaching this conclusion, I have considered whether the presence of the refuge chamber reduces the gravity of the violation and have concluded that it does not. As everyone agrees, the best place to be in a mine emergency is on the surface. I find that it is reasonably likely that a mine emergency can be so devastating, e.g. an explosion, massive cave-in, or wide ranging fire, that a serious injury could occur to miners in the refuge chamber.

Distribution:

Henry Chajet, Esq., James Zissler, Esq., Jackson & Kelly,
2401 Pennsylvania Ave., N.W., Suite 400, Washington, D.C. 20037

Robert Cohen, Esq., Office of the Solicitor, U.S. Department of
Labor, 4015 Wilson Blvd., Arlington, VA 22203

Mr. Henry Tuggle, United Steelworkers of America, Five Gateway
Center, Pittsburgh, PA 15222

/lbk

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 1995

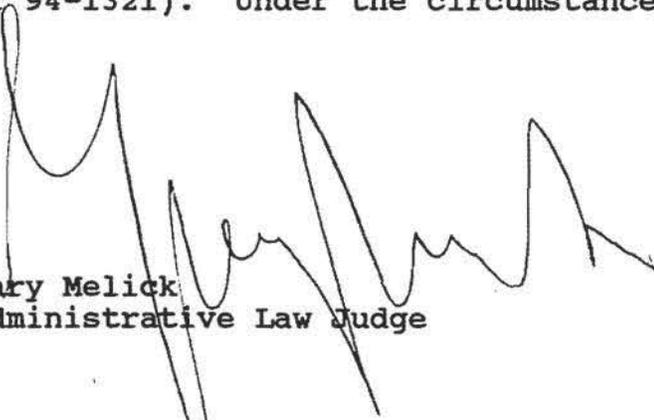
PEABODY COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 94-524-R Citation No. 3863265; 3/21/94 Martwick Underground Mine I.D. No. 15-14074

ORDER OF DISMISSAL

Appearances: Carl B. Boyd, Jr., Esq., Peabody Coal Company, Henderson, Kentucky for the Contestant;
Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Respondent.

Before: Judge Melick

At hearing on January 31, 1995, this Contest Proceeding was rendered moot by the settlement between the parties of the associated penalty proposed for the underlying section 104(a) citation (See Docket No. KENT 94-1321). Under the circumstances this case is dismissed.



Gary Melick
Administrative Law Judge

Distribution:

Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes & Boyd, 120 North Ingram Street, Suite A, Henderson, KY 42420

Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862

/jff

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 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-815
Petitioner	:	A.C. No. 15-14074-03658
v.	:	
	:	Martwick Underground Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes and Boyd, Henderson, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$378 to \$302 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(a) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$302 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862

Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes
& Boyd, 120 North Ingram Street, Suite A, Henderson,
KY 42420

\lh

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 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1260
Petitioner : A.C. No. 15-14074-03667
v. :
PEABODY COAL COMPANY, : Martwick Underground Mine
Respondent :

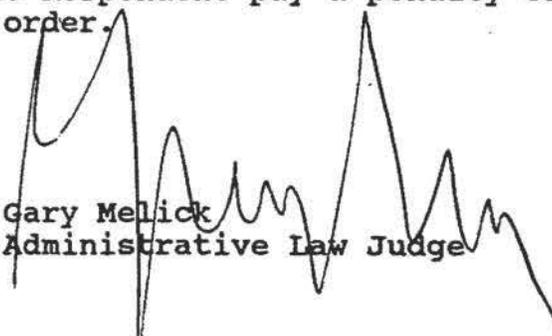
DECISION APPROVING SETTLEMENT

Appearances: Donna E. Sonner, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes
and Boyd, Henderson, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$2,000 to \$1,300 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(a) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$1,300 within 30 days of this order.


Gary Melick
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862

Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes
& Boyd, 120 North Ingram Street, Suite A, Henderson,
KY 42420

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 7 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-456
Petitioner, : A.C. No. 15-13331-03537
v. :
: Prep Plant & Loading
KY HARLAN COAL CO., INC., :
Respondent :

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
Rodney E. Buttermore, Jr., Esq., Buttermore,
Turner & Boggs, Harlan, Kentucky, for Respondent.

Before: Judge Fauver

This is a civil penalty case under § 105(d) of the Federal
Mine Safety and Health Act of 1977, 30 U.S.C. § et seq.

The case came on for hearing in Kingsport, Tennessee on
February 7, 1995.

The parties presented an oral motion to approve a settlement
agreement. Considering the presentations of counsel and the
documents submitted, I conclude that the settlement is consistent
with the purposes of § 110(i) of the Act.

ORDER

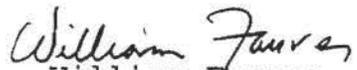
WHEREFORE IT IS ORDERED that:

1. The motion to approve the settlement agreement is
GRANTED.

2. Respondent shall pay the approved civil penalty of \$4,000 in six monthly payments as follows:

April	1, 1995	\$ 670
May	1, 1995	\$ 666
June	1, 1995	\$ 666
July	1, 1995	\$ 666
August	1, 1995	\$ 666
September	1, 1995	\$ 666

Provided: If Respondent fails to make any monthly payment when due, the total remaining balance will become due immediately and interest thereon shall accrue from such date until the full amount is paid. The rate of interest shall be the rate published by the Executive Secretary of the Commission.


William Fauver
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203
(Certified Mail)

Rodney E. Buttermore, Jr., Esq., Buttermore, Turner & Boggs, P.O. Box 935, Harlan, KY 40831-0935 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 7 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1318
Petitioner : A.C. No. 15-16482-03503QVW
v. :
: Browns Valley Mine
WINN TRANSPORTATION CORP., :
Respondent :

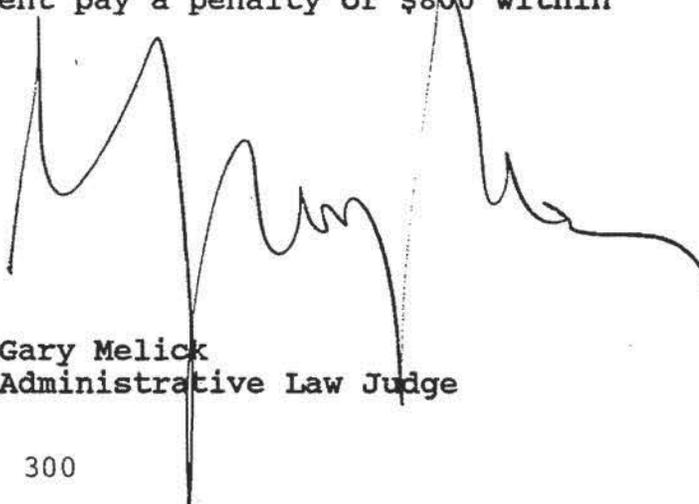
DECISION APPROVING SETTLEMENT

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee for
the Secretary of Labor;
Carl Boyd, Esq., Henderson, Kentucky for the
Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Respondent agreed to pay the proposed penalty of \$800. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$800 within 30 days of this order.



Gary Melick
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Dept. of
Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN
37215-2862

Carl Boyd, Esq., 120 N. Ingram Street, Henderson, KY 42430

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 7 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1319
Petitioner	:	A.C. No. 15-16482-03522
v.	:	
	:	Browns Valley Mine
WINN CONSTRUCTION COMPANY, INC.,	:	
Respondent	:	Docket No. KENT 95-62
	:	A.C. No. 15-17458-03504
	:	
	:	Maxwell Mine
	:	
	:	Docket No. KENT 95-63
	:	A.C. No. 15-17376-03505
	:	
	:	Free Silver Mine

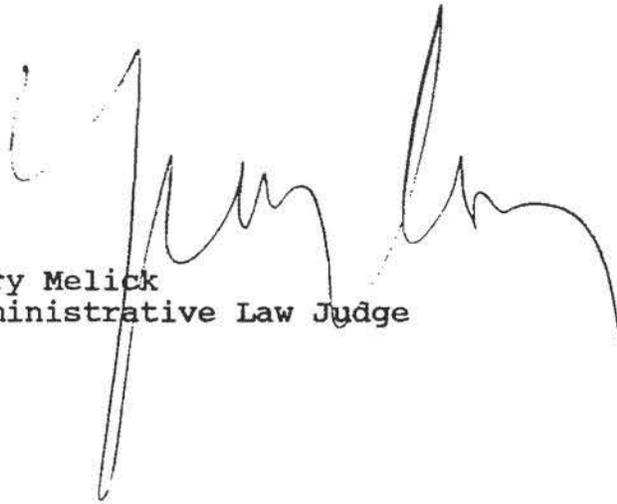
DECISION APPROVING SETTLEMENT

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee for
the Secretary of Labor;
Carl Boyd, Esq., Henderson, Kentucky for the
Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing Petitioner filed a motion to approve a settlement agreement and to dismiss the cases. A reduction in penalty from \$27,500 to \$9,700 was proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$9,700 within 30 days of this order.



Gary Melick
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862

Carl Boyd, Esq., 120 N. Ingram Street, Henderson, KY 42430

/jff

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 1995

JERRY SLONE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 94-1041-D
: BARB CD 94-08
HICO TRANSPORT, INC. AND :
JAY CRASE, : Pine Branch Coal
Respondents : Sales Prep Plant # 1

DEFAULT DECISION

A default judgment is hereby issued in favor of Complainant Jerry Slone, due to the failure of Respondents to file an answer to the complaint and to respond to show cause orders issued by Chief Administrative Law Judge Merlin and the undersigned.

Mr. Slone filed a complaint with the Mine Safety and Health Administration (MSHA) on or about November 22, 1993, alleging that he had been discharged by Respondents in retaliation for activities protected by the Federal Mine Safety and Health Act, in violation of section 105(c) of the Act, 30 U.S.C. § 815(c). On June 16, 1994, MSHA advised Complainant that it had concluded that a violation of section 105(c) had not occurred.

On July 20, 1994, Complainant commenced this action on his own by filing a complaint with the Commission. This action was filed pursuant to section 105(c)(3) of the Act which provides that if the Secretary of Labor determines that no violation of section 105(c) has occurred, the complainant shall have the right to file an action on his own behalf with the Commission.

The Commission's rules of procedure at 29 C.F.R. § 2700.43 require that within 30 days after the service of a discrimination complaint, the respondent shall file an answer responding to each allegation of the complaint. Respondents in the instant case have not responded to the July 20, 1994, complaint.

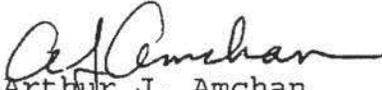
On November 7, 1994, Commission Chief Administrative Law Judge Paul Merlin issued an Order To Respondent To Show Cause. In that order Respondents were ordered to file an answer within 30 days or show good reason, in writing, for their failure to do so. A Domestic Return Receipt form (PS Form 3811, or "green card") indicates that the show cause order was received by Respondent Jay Crase at his address in Hallie, Kentucky, on November 15, 1994. It appears that the show cause order may not have been served on Hunter McDonald III, who at one time was HICO Transport's Registered Agent for Service of Process, in Nashville, Tennessee.

On January 11, 1995, this matter was assigned to the undersigned for "appropriate proceedings." I issued another show cause order on January 13, 1995, essentially allowing Respondents another four weeks, until February 10, 1995, to comply with the November 7, 1994 show cause order. I specifically advised Respondents that failure to comply with my order would result in the entry of a default decision in favor of Complainant.

On February 10, 1995, I received a letter from one Bruce L. Washburn stating that he had been forward a copy of my January 13, 1995 order by Mr. Hunter McDonald, who was once, but apparently is no longer, associated with HICO Transport, Inc. Mr. Washburn's letter indicates that he had discussed the January 13 order with Mr. Crase, the owner of HICO Transport.

As the Commission did not have a return receipt from Mr. Crase for the January 13 order, the undersigned called him on February 22, 1995, to advise him that he must immediately file a substantive written response to the complaint, with a copy to Mr. Slone's counsel to avoid a default decision.

Since Mr. Crase has received actual notice of both the November 1994 show cause order and the January 13, 1995 show cause order and has not filed a timely response, I find him in default and enter judgment in favor of the Complainant.


Arthur J. Amchan
Administrative Law Judge

Distribution:

HICO Transport, Inc., c/o Bruce Washburn, c/o Hunter McDonald III, 1102 17th Avenue South, Suite 401, Nashville, TN 37212
(Certified Mail)

Jay Crase, HC 63, Box 1580, Hallie KY 41821 (Certified Mail)

Tony Opegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc., 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

/lh

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 1995

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 94-631-M
Petitioner : A.C. No. 11-02742-05518A
v. :
 : Lacon Plant
EDWARD SCHUMACHER, Employed by :
MIDWEST MATERIAL CORPORATION, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Lisa A. Gray, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for the Petitioner;
Thomas G. Harvel, Esq., Westervelt, Johnson,
Nicoll and Keller, Peoria, Illinois, for
Respondent.

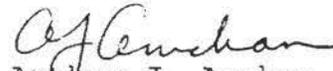
Before: Judge Amchan

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* At hearing, the parties moved to approve a settlement agreement and to dismiss the case. The terms of the settlement are that the penalty is reduced from \$9,500 to \$1,500. The penalty is payable in 10 equal installments beginning within 30 days. The entire penalty is due if payment of any of the installments is not made.

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is **GRANTED** and Respondent shall pay the approved penalty as provided in the settlement agreement. Upon such payment this case is **DISMISSED**.



Arthur J. Amchan
Administrative Law Judge

Distribution:

Lisa A. Gray, Esq., Office of the Solicitor,
U.S. Department of Labor, 8th Floor, 230 S. Dearborn St.,
Chicago, IL 60604

Thomas G. Harvel, Esq., Westervelt, Johnson, Nicoll
& Keller, 14th Floor, First Financial Plaza,
411 Hamilton Blvd., Peoria, IL 61602-1114

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 9 1995

CARL STOECKER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. CENT 94-200-D
: MSHA Case No. DENV CD 94-11
NORTH WESTERN RESOURCES :
COMPANY, : Jewett Mine
Respondent :

DECISION

Appearances: Carl Stoecker pro se, Groesbeck, Texas,
for the complainant;
Frank Parker, Esq., Meier & Parker, L.C.,
Bedford, Texas, for the respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on July 12, 1994, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act) by the complainant, Carl Stoecker, against the respondent, North Western Resources Company.¹ Stoecker alleges that his March 9, 1994, discharge was motivated by his protected safety related activities that occurred on November 12, 1993, February 22, 1994, and March 2, 1994. The respondent maintains Stoecker was terminated for misconduct associated with his repeated harassment of a fellow employee.

¹ Stoecker's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on March 21, 1994, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Stoecker's complaint was investigated by the Mine Safety and Health Administration (MSHA). On June 14, 1994, MSHA advised Stoecker that its investigation disclosed no section 105(c) violations. On July 12, 1994, Stoecker filed his discrimination complaint with this Commission which is the subject of this proceeding.

This case was heard on November 29 through December 1, 1994, in Waco, Texas. At trial, the respondent stipulated that it is a mine operator subject to the jurisdiction of the Mine Act. The parties called a total of 23 witnesses. In support of his complaint Stoecker testified in his own behalf. In addition, Stoecker called a former employee of the respondent as well as eleven current employees. The respondent's direct case consisted of testimony by ten employees, seven of whom are management personnel. The parties posthearing briefs are of record.

The complainant asserts his discharge was motivated by three protected safety related incidents: (1) his November 12, 1993, inquiry into the qualifications of substitute crusher facilities operator Brian Hughes; (2) his February 22, 1994, expression of concern regarding the physical incapacity of fellow employee Marty Pringle to perform moderate to heavy lifting; and (3) his March 2, 1994, tool room conversation with Arlan Moravec concerning the recent formation of the company's "I" Team safety committee.

The respondent argues that safety complaints played no part in Stoecker's discharge. Rather, the respondent maintains Stoecker was discharged after March 2 and March 4, 1994, incidents of severe harassment of fellow employee Arlan Moravec. The latter incident involved a high speed chase and curbing of Moravec's vehicle only hours after Stoecker had been placed on suspension with pay (Decision Making Leave) for previously harassing Moravec.

The issues in this proceeding are whether any of the actions relied upon by Stoecker were protected under the act, and, if so, whether Stoecker's March 9, 1994, discharge was, in part, motivated by any protected act. If Stoecker prevails in showing that his termination was influenced by protected activity, the remaining issue is whether the respondent can affirmatively defend by showing that Stoecker's unprotected acts alone provided an independent basis for his discharge. For the reasons discussed below, the evidence reflects the November 12, 1993, and February 22, 1994, actions of Stoecker were protected by the Act. However, the respondent has met its burden of establishing that it would have terminated Stoecker for his unprotected misconduct alone without regard to any protected activity.

Preliminary Findings of Fact

The respondent, Northwestern Resources Company, is owned by Montana Power, a publicly traded company listed on the New York Stock Exchange. Montana Power is a public utility serving the State of Montana and surrounding states with electricity and gas. The respondent has approximately 425 employees at its open pit mine in Jewett, Texas, which provides lignite coal to an adjacent power generating plant operated by Houston Light and Power Company.

Carl Stoecker was employed by the respondent from February 1, 1988, until his discharge on March 9, 1994. At the time of his discharge, he was an Oiler at the Lignite Handling Facility (crusher), a position he held since September 20, 1993. Stoecker worked the day shift from 7:00 a.m. to 7:00 p.m. William Posey, Crusher Oiler Supervisor, was Stoecker's supervisor for the last several years of Stoecker's employment, including at the time of his discharge. Posey reported to Superintendent John Allred.

The respondent does annual performance reviews of all employees. Posey evaluated Stoecker and discussed his appraisals with him. Stoecker's performance met or exceeded company standards. However, Stoecker had an acknowledged problem with loud, assertive and overbearing behavior that adversely affected his ability to interact with fellow employees. For example, at trial Stoecker acknowledged, although minimized, his problem by explaining that "not everybody is Henry Kissinger." (Tr. 101, 247). Stoecker also characterized himself as being "naturally loud", doing everything "in a strong way", and using his hands in a way that could be construed as "an intimidating factor." (Tr. 242, 247). Stoecker's own witnesses described him as "an intimidating person"; "high strung"; "disruptive"; "crawling up management's leg"; "overzealous"; "outspoken"; and "definitely not low-key". (Tr. 115-16, 191, 193, 238, 330).

Stoecker's problem dealing with people was noted in his evaluations. For example, for the review period ending July 1990, Stoecker was advised by Posey that he needed improvement in the area of his sensitivity to others. In response to this evaluation, Stoecker conceded that he was working on improvement in his communication skills. (Resp. Ex. 3). Subsequent evaluations noted a continuing problem with periods of improvement. (Resp. Ex. 4-6).

In the year preceding his discharge, Stoecker openly criticized many company benefits. He expressed doubts about the

company life insurance policy questioning whether it would pay in the event of an employee's death; he criticized the company 401K deferred savings plan; he was critical of the company's pension plan; and he questioned the company overtime and promotion policies. (Tr. 583-588).

Respondent witness Tool Room Keeper Arlan Moravec testified there were company morale problems in 1993 in that employees feared the reporting of accidents could adversely impact upon their eligibility for wage increases. (Tr. 742-44). Vice President and General Manager Carroll Embry testified that he conducted a meeting in February 1993 with company personnel about cost containment including a wage freeze and the elimination of discretionary overtime. Embry stated Stoecker interrupted the meeting by voicing objections. Embry characterized Stoecker's behavior at the meeting as an "outburst." (Tr. 652-53). Stoecker apologized to Embry immediately after the meeting. (Tr. 674-675). However, the seriousness of Stoecker's misbehavior caused the respondent to prohibit Stoecker from attending future meetings on the subject. (Tr. 922).

Embry opined there was a high level of anxiety and "a terrible amount of union organizing activity at the mine in 1993." (Tr. 655-56). Beginning in May 1993 Stoecker developed an interest in unionization and became the Chairman of the International Brotherhood of Electrical Workers organizing effort at the Jewett Mine. (Tr. 799-802, 911-912, 924). Posey and Superintendent John Allred testified Stoecker campaigned for the union when he should have been working. (Tr. 800-01, 925-926). Allred received reports from fellow employees that Stoecker was spreading dissention by saying negative things about the company. (Tr. 812-13). Allred stated that "[he] got the impression that [Stoecker] had kind of self-appointed himself to be the job steward for everybody...[trying] to turn everything negative..." in order to stir up trouble and contention. (Tr. 824). The union organizing efforts ultimately failed.

The November 12, 1994, Brian Hughes Incident

On November 12, 1994, Stoecker became upset when he learned from Day Shift Supervisor Bill Dygert that Brian Hughes was assigned to cover the 7:00 p.m. to 7:00 a.m. night shift of Craig Oates as Lignite Facilities Handling Operator (crusher operator). The crusher operator has access to the control panel that energizes the crusher dump and the conveyor belts that ultimately transport the lignite to the utility power generating plant. (Tr. 73-76). Oates, the regular shift crusher operator, testified that he had trained Hughes for two or three shifts prior to November 12, 1993. (Tr. 212). Oates also indicated

that he felt Hughes was task trained in that he was qualified to be a substitute for one shift. Oates stated he would not have taken the vacation day if he felt Hughes was not capable. (Tr. 212, 215).

William Gist, the facilities operator on the day shift testified that Hughes was capable of filling in at the crusher. Gist felt Hughes would be in no danger if the crusher automatically shut down as long as Hughes called maintenance as he was instructed instead of attempting to fix anything himself. (Tr. 71-72). Similarly, shift supervisor Greg Ivey indicated Hughes was instructed to stay in the crusher control room and to call maintenance in the event of any mechanical or electrical problems. (Tr. 699). In fact, even Stoecker conceded that Hughes could not have injured himself or others if he followed instructions by staying in the control room and calling maintenance in the event of trouble. (Tr. 553-60).

Stoecker was upset about Hughes' operation of the crusher because a few days earlier Stoecker had asked Posey about a promotion from Operator IV to Operator III and was told there would be no pay raise until he (Stoecker) was capable of operating the crusher. Stoecker then asked Gist how Hughes could be qualified to operate the crusher after one shift of training if Posey thinks he (Stoecker) is not qualified after more than six months of relevant training and experience.

Stoecker then called Posey at home. Stoecker asked Posey "...how they could put Brian Hughes operating the crusher when he was not qualified?" Stoecker stated Posey told him he was not aware of the problem and that Posey suggested Stoecker talk to night shift supervisor Greg Ivey. (Tr. 465-466). Posey characterized Stoecker's behavior during the phone call as "incoherent", "loud", "hollering" and "fairly mad". Posey stated Stoecker made no mention that his complaint was safety related and Posey assumed Stoecker was upset because he had not had an opportunity to run the crusher. (Tr. 932-33). Posey told Stoecker he would check into it when he returned to work. (Tr. 933).

Stoecker then went to the ready room and spoke to oncoming shift supervisor Ivey. Ivey testified Stoecker was angry at first but calmed down quickly. Ivey indicated Stoecker thought that he should have been given the opportunity instead of Hughes. Stoecker asked Ivey for the MSHA phone number. Ivey told him Safety Supervisor Dave Medick had it. (Tr. 696-697).

Stoecker called Medick at home. Stoecker said he didn't think Hughes was qualified to run the crusher from a safety

standpoint and that he (Stoecker) had been trying to get some time on the crusher for advancement purposes. Although the precise nature of Stoecker's safety concerns are unclear, Stoecker testified that there were dangers associated with the conveyors if they were not properly locked out in the event of a shutdown. (Tr. 29-30). Medick stated Stoecker was "very anxious about it and so was I." (Tr. 677-78). Medick called Ivey and was assured that Hughes was qualified to fill in and that precautions had been taken to prevent any hazard. (Tr. 679). Stoecker called Medick later that evening at which time Medick assured him Hughes could operate the crusher. Medick described Stoecker as being "comfortable with the solution" although "Stoecker was still concerned about his hours [on the crusher] that he was not getting in." (Tr. 680).

Supervisor Posey and Superintendent Allred investigated this matter. They were determined to put an end to Stoecker's abrasive and confrontational style. They decided to make an impression on him by getting his attention by putting him on Positive Discipline with a written warning. Allred, Posey and Stoecker met in Allred's office on November 18, 1993. Stoecker secretly recorded the meeting. A transcript of the meeting was admitted at trial without objection as Complainant's Exhibit 2. The thrust of the conversation was that Stoecker was being disciplined for disruptive behavior that undermined the company's goals and disturbed others during working time. Allred stated that the November 12, 1993, incident "put the icing on the cake." (Comp. Ex. 2). A written reminder was issued to Stoecker by Posey placing him on Positive Discipline for causing contention and unrest in the work force. Stoecker was requested to modify his behavior to alter his confrontational style so as to prevent the intimidation of others. (Resp. Ex. 1).

The February 22, 1994, Marty Pringle Incident

Upon reporting for work at approximately 6:10 a.m. on February 22, 1994, Posey advised Stoecker that he, Marty Pringle and Larry Bosworth were assigned to perform the bias test. The bias test involves filling 35 gallon containers with random samples of lignite and lowering the containers to the lower floor where they are crushed and tested for B.T.U. quality. (Tr. 38-39, 488). The sample containers vary in weight between 40 to 100 pounds. (Tr. 279-283).

Upon Pringle's arrival, Stoecker advised him that he, Stoecker and Bosworth were scheduled to work at the crusher for the bias test. Pringle, who is normally a heavy equipment operator, told Stoecker that he did not think he could do the lifting associated with the bias test because he had just

returned to work a few days earlier after hemorrhoid surgery. Consistent with Pringle's demeanor at trial, Allred agreed that Pringle is a non-assertive, non-aggressive individual. (Tr. 824).

Stoecker related Pringle's concerns to Posey who said he would check with supervisor Gary Cooper. Posey also spoke to Allred. (tr. 814-816). Posey characterized Stoecker's conversation about Pringle as confrontational. (Tr. 1003). Allred described the conversation with Stoecker as a little aggressive, explaining "... I know Carl and I know how his nature is." (Tr. 825). Stoecker's witness Don Williams described the conversation with Posey and Allred as arguing in front of other employees and trying to tell management what to do. (Tr. 164-65). Posey discussed the matter with Cooper who assigned Waylen Levels to replace Pringle at the bias test. However, Levels, not knowing he was replacing Pringle for medical reasons, became upset. Thereafter, Pringle testified that Cooper insisted that Pringle perform the bias test by asking Pringle if "[he] liked working here." (Tr. 255). Pringle testified he performed the bias test to save his job because he was afraid Mr. Cooper "was fixing to take me to the gate." (Tr. 258).

The March 2, 1994, Tool Room Incident With Moravec

Arlan Moravec has been employed by the respondent for nine years and holds the position of Tool Room Keeper. Moravec is a disabled, physically small person who is recovering from kidney transplant surgery performed in June 1992. He also has difficulty walking due to hip problems that are related to his medication for his kidney condition. (Tr. 772). Moravec is a sensitive, good natured person who tries to make others happy by avoiding conflict. (Tr. 1006-07). His demeanor during his testimony demonstrated he is an anxious, timid individual who is easily confused. (Tr. 370-372, 385, 737-38). However, he is a competent maintenance mechanic and an asset to the company. (Tr. 875). Arlan Moravec has a good relationship with his fellow employees who like to joke with him and who affectionately refer to him as "Big A" because of his small size. (Tr. 961).

As noted above, the Safety "I" Team was formed in January 1994. The "I" Team consisted of four hourly and three management personnel that volunteered to form a committee to address safety related issues at the Jewett Mine. (Resp. Ex. 8). Posey, Stoecker's supervisor, was a management member of the Team. Moravec was enthusiastic about the concept and he was proud to be a Team member. (Tr. 1008-09). On the morning of March 2, 1994, Moravec was assigned to conduct a staff meeting, attended by Stoecker, to explain the function of the Team. Moravec explained

that the "I" Team sat as a committee in order to receive employee suggestions about safety and communicate them to management for possible implementation.

Shortly after Moravec finished the meeting, Stoecker went to the tool room to reportedly get a hacksaw blade. Stoecker asked Moravec about the "I" Team. Moravec explained that employees bring problems or suggestions to the committee where they are discussed and presented to management. Moravec testified Stoecker stated "...what damn good does it do to go towards the management and they don't do anything. They're going to do what they want to do." (Tr. 746). Stoecker repeatedly asked, 'what if the "I" Team brings a problem to management and they do nothing about it?' Each time Moravec replied that if management is not responsive, the committee will meet again and resubmit the suggestion to management. Stoecker was not satisfied with Moravec's answer and Moravec testified that Stoecker repeated the same question "over and over and over." (Tr. 747).

The conversation was witnessed by several other employees including Mark Smith, Chuck Lenox, David Flowers, Alan Savage, Mike Adams, Bruce Szymanski and Bo Nelson, all of whom are hourly employees. Stoecker called Smith, Lenox and Flowers who all testified that Stoecker asked the same question two or three times and who all opined that they did not think Moravec was upset, although Smith admitted Moravec was easily excitable. (Tr. 371). Significantly, there is no evidence that either Smith, Lenox or Flowers has ever spoken to Moravec about the incident to determine whether he was in fact upset. (Tr. 365).

Savage and Adams were called by the respondent. They testified Moravec was upset and uncomfortable. (Tr. 724-25, 728). Adams stated the incident took 20 to 30 minutes and that Moravec "was shook" by the ordeal. (Tr. 728-29). Putting this question to rest, Moravec testified, "I wasn't getting anywhere and I was getting...I was getting pretty excited, I was getting hot." (Tr. 747). Moravec described the conversation as "loud". (Tr. 749-50).

Maintenance Supervisor Ronald Carmichael entered the tool room after hearing loud voices and the employees scattered. Carmichael stated Moravec looked stressed in that he was shaking and his face was red. Carmichael noted Stoecker's face was also red. Carmichael heard Stoecker tell Moravec the "I" Team was "just another bunch of bullshit." (Tr. 731-32). Carmichael reported the incident to Supervisor Larry Hardy who in turn reported it to Allred and Posey. (Tr. 818). Posey couldn't believe that Stoecker would get involved in a confrontation with someone like Moravec. (Tr. 961).

Allred and Posey decided Posey and Employee Relations Supervisor Bob Jenkinnes should investigate. Posey and Jenkinnes interviewed Moravec on March 2, 1994. Posey found Moravec to be pretty upset with his voice trembling. Moravec repeated that Stoecker kept asking him the same question and wouldn't leave him alone. (Tr. 962). Posey concluded that Stoecker was out of control and that the November 18, 1993, Positive Discipline written reminder was ineffective. Posey and Allred decided that nothing less than Decision Making Leave (DML) would get Stoecker's attention. DML is paid leave providing time for the offender to consider his actions and to submit a written proposal for improvement. (Tr. 963).

On March 4, 1994, Posey and Allred called Stoecker to the crusher control room to inform him that he was being placed on DML. Stoecker secretly recorded the March 4 conversation which was transcribed and admitted in evidence without objection. (Comp. Ex. 2). Posey and Allred urged Stoecker to recognize his problems in dealing with fellow workers. They advised him not to be so overbearing and negative and to seek to contribute to a positive working environment. Posey and Allred repeatedly told Stoecker they were not trying to get rid of him. In fact, Posey stated:

...I don't have any other, any other, a (sic) recourse but to, but to let you think about it for a while Carl. So I'm going to extend this written to a DML, and a year from now we're going to work on this, and we're going to go ahead and continue to work on this thing. And I want you to keep quiet about what's going on. I want you to stay [to] yourself and to do your job. And we'll go at it like that. (Comp. Ex 2).

The memo from Posey to Stoecker placing him on DML reminded Stoecker of his November 18, 1993, written reminder and requested Stoecker to address in his written plan for improvement ways in which Stoecker would:

- (1) refrain from being disruptive in his conduct toward co-workers during working hours;
- (2) refrain from making comments to co-workers that would cause contention and unrest;
- (3) cease interrogating co-workers; and
- (4) cease getting in other people's faces with his opinions. (Resp. Ex. 2).

Stoecker was to report back to work with his written commitment on March 10, 1994. The meeting placing Stoecker on DML ended at approximately 2:00 p.m. on March 4, 1994.

The March 4, 1994, Chase and Curbing of Moravec

Stoecker left the mine site at approximately 2:00 p.m. on March 4, 1994, after being placed on DML. He drove to the nearby town of Jewett for a sandwich and returned to the mine entrance to await Moravec whose workday ended at 2:30 p.m. When Moravec's vehicle left the mine, Stoecker followed in his vehicle, a large crew cab truck with dark windows. Moravec was not familiar with Stoecker's truck and did not know who was following him. Stoecker rapidly caught up to Moravec on Highway 39.

Stoecker followed Moravec onto Farm Road 80, a deserted road with hills and curves. At times the vehicles reached speeds of 70 miles per hour. Stoecker flashed his headlights but Moravec was too frightened to pull over. Moravec's fear intensified and he wished he could get out of this farm area to an area where there were people. He was concerned that he could not defend himself because his anti-rejection drugs impaired his hips and his ability to run.

Moravec thought about leading the person following him to his brother-in-law's house which was located just past the town of Donie. As Moravec approached the town of Donie, where Highway 164 intersects with Farm Road 80, Moravec thought "I need to get to people, and I knew never to drive to my own home if somebody was after me." (Tr. 763). In Donie, Moravec hit traffic which caused him to slow down. As Moravec attempted to turn left, Stoecker's truck cut Moravec off forcing him to stop in the Donie State Bank parking lot. Moravec kept his doors and windows locked and his car running in case he needed to get away quickly. Although Moravec thought it could be Stoecker, he was not sure until Stoecker exited his truck and approached Moravec's passenger side window.

As Stoecker approached, Moravec testified, "I didn't know what to expect. You know, I've seen people where you think people are nice, but can explode at the last minute. I really didn't know what to think, but as Carl came around, he held his cool." (Tr. 764-65). Once again, Stoecker secretly taped the conversation with Moravec. (Comp. Ex. 2). Moravec stated Stoecker asked him if he (Stoecker) upset him the other day in the tool room. Moravec replied, "yeah, Carl, you did."

Moravec was so upset that he called his brother-in-law Dean Gatzemeier who is an engineer at the Jewett Mine. Then Moravec, who had never previously been to Posey's home, went to see Posey. Posey stated Moravec arrived trembling. Moravec related his encounter with Stoecker earlier that day at the Donie State Bank. Gatzemeier called Allred and criticized Allred and

Posey for identifying Moravec in the DML meeting. Gatzemeier told Allred "you guys put Arlan in a heck of a fix....you put his safety in jeopardy." (Tr. 831). Allred promised Gatzemeier he would call Moravec. Allred called Posey to inform him about the incident and was told that Moravec was at Posey's home. Allred apologized to Moravec. (Tr. 830-33, 968-71).

Allred, Posey and Jenkinnes decided the chase and curb incident left no other recourse other than recommending termination. The decision to discharge Stoecker was affirmed by Vice President and General Manager Embry. On March 9, 1994, Stoecker was called in to the personnel office. In the presence of Allred, Posey and Jenkinnes, he was discharged for violations of the company's policy prohibiting harassment. (Tr. 895-96). Stoecker was told his termination was for continued harassment of fellow employees and no specific reference was made to the chase and curbing incident to spare Moravec from further abuse. (Tr. 842-44, 973-79, 1009-10).

Disposition of Issues

Further Findings and Conclusions

Discriminatory Discharge

The guiding principles governing whether Stoecker is entitled to the statutory protection provided by section 105(c) of the Act are well settled. Stoecker, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Stoecker must establish that his November 12, 1993, February 22, 1994 and/or March 2, 1994, actions constituted protected activity, and, that the adverse action complained of, in this case his March 9, 1994, discharge, was motivated, in part, by protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

The respondent, Northwestern Resources Company, may rebut a *prima facie* case by demonstrating either that no protected activity occurred or that Stoecker's discharge was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the respondent cannot rebut the *prima facie* case in this manner, it may nevertheless affirmatively defend against the *prima facie* case by establishing that it was also motivated by

Stoecker's unprotected activity and that it would have discharged Stoecker for the unprotected activity alone. 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The respondent has the burden of proving an affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). However, the ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 817-18.

Protected Activity

It is axiomatic that a miner has an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. 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); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). A complaining miner does not have an obligation to demonstrate that the condition complained of contributes to an immediate hazard if, as in this case, the complaint does not involve a work refusal. Secretary o.b.o. Ronny Boswell v. National Cement Company, 16 FMSHRC 1595, 1599 (August 1994).

Communication of potential health or safety hazards and responses thereto are the means by which the Act's purposes are achieved. Once a reasonable good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). An operator must address a miner's concern in a way that reasonably quells the miner's fears. Gilbert v. FMSHRC, 866 F. 2d 1433, 1441 (D.C. Cir. 1989). In summary, a miner's willingness to express safety and health related complaints should be encouraged rather than inhibited. Such protected complaints may not be the motivation for adverse action against the complainant by mine management personnel.

A. The November 12, 1993, Complaint Concerning Hughes

The Commission has noted that in order for a complaint to be protected, the complaining miner must have a "good faith, reasonable belief in a hazardous condition" and that a showing of good faith requires an "honest belief that a hazard exists." Thus, the complainant is not required to prove that an actual hazard existed. He must only show that his complaint was reasonable. See Secretary o.b.o. Clayton Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2211 (November 1994), and cases cited therein.

In the current case, it is clear that Stoecker's November 12, 1993, inquiry concerning the qualifications of Brian Hughes to run the crusher on an interim one shift basis was protected under the Act. While I am not unmindful that Stoecker's primary concern was his self interest in promotional opportunities, the respondent concedes that Hughes was a novice crusher operator. Both Safety Supervisor Medick and Shift Supervisor Ivey testified that Stoecker's complaint justified further inquiry on their parts to ensure that Hughes had been properly instructed on how to avoid danger to himself or others in the event of an unforeseen emergency. Although Stoecker's complaint was in large part motivated by his desire for advancement, such desire does not taint the reasonable safety related nature of his November 12, 1993, complaint.

The November 12 Hughes incident precipitated the November 18, 1993, Positive Discipline written reminder. While the written reminder may also have addressed Stoecker's past misbehavior, the respondent's assertion that Stoecker's November 18, 1993, written reminder was not in any way related to his contemporaneous Hughes complaint is unpersuasive. Therefore, it is apparent that Stoecker's November 18, 1993, Positive Discipline was based, in part, on his November 12, 1993, protected complaint. However, the adverse action for which Stoecker seeks relief is his March 9, 1994, discharge rather than his November 18, 1993, Positive Discipline. Thus, the dispositive issue is what role, if any, did the Positive Discipline play in Stoecker's termination.

B. The February 22, 1994, Complaint Concerning Pringle

The testimony of Marty Pringle reflects that he had a sincere and legitimate concern about his capacity to withstand the rigors of the bias test given his recent hemorrhoid surgery. This concern was recognized by Waylen Levels when he testified that he would have volunteered to replace Pringle at the bias test if he had known of Pringle's condition.

Allred conceded Pringle is a non-aggressive, non-assertive individual. Therefore, it is not surprising that Pringle was reluctant to communicate his incapacity to management personnel. As noted above, the provisions of section 105(c) of the Act are intended to encourage operators to quell the fears of miner's when they raise health related concerns. Management's implicit threat to Pringle concerning 'whether Pringle liked to work here,' is precisely the reaction the Mine Act seeks to dissuade. Even counsel for the respondent conceded that Stoecker had not "done anything horribly wrong" although it was just another incident of Stoecker's tendency to meddle in other people's business.

Consequently, it is obvious that Stoecker's complaint regarding Pringle's medical condition was reasonable under the circumstances and protected under the Act. The respondent maintains that this incident had nothing to do with Stoecker's discharge. However, Stoecker relies on Allred's reference to the Pringle matter in his March 4 Decision Making Leave meeting as evidence that this incident also motivated his discharge.

C. The March 2, 1994, Tool Room Incident

Stoecker maintains that his March 2, 1994, actions in the tool room constitute protected activity because he was discussing the "I" Team safety procedures with fellow employee Arlan Moravec. I disagree. The question repeatedly asked by Stoecker had nothing to do with safety procedures, was rhetorical in nature and was not asked in good faith. Moreover, Stoecker's behavior must be viewed in the context of his documented and acknowledged problems involving his difficulties in relating to others. Stoecker's shortcomings in his dealings with people was best described by Stoecker when he stated, "I am not Henry Kissinger." (Tr. 53). Stoecker's admitted lack of diplomacy could not have been focused on a more vulnerable victim than Arlan Moravec.

Teasing, harassing and intimidating are not activities protected by the Act. Such activities cannot be legitimized by a transparent attempt to mask them in "a question about safety procedures". An operator has an unfettered right to ensure that its workers are not antagonized by fellow employees. Stoecker's insistence that he did not upset Moravec in the tool room on March 2, 1994, is unsupported by the reality of Moravec's testimony. Moravec was a compelling witness who told a regrettable story. His testimony is entitled to great weight. Accordingly, I can construe nothing in Stoecker's conversation with Moravec that even remotely resembles protected activity.

Finally, even Stoecker does not allege his March 4, 1994, chase and forced interrogation of Arlan Moravec in the parking lot of the Donie State Bank was protected activity. (Tr. 998-999, 1011-14). While presumably unintended, Stoecker's actions terrorized Moravec. Obviously, such conduct provides a reasonable basis for severe disciplinary sanctions.

Ultimate Findings and Conclusions

As discussed above, the November 12, 1993, complaint concerning Hughes and the February 22, 1994, complaint about Pringle's incapacity are protected acts. Since the November 12, 1993, complaint was immediately followed by Positive Discipline and the February 22, 1994, complaint was noted in the March 4, 1994, DML meeting, Stoecker has presented a *prima facie* case that the adverse action he complains of, *i.e.*, his March 9, 1994, discharge, was motivated, at least in small part, by these protected acts.

However, the relief provisions of section 105(c) of the Act, which include back pay and reinstatement, are not available to a complaining miner if his non-protected activity is so egregious as to provide an independent basis for the adverse action complained of. Such circumstances constitute an affirmative defense to a miner's discrimination complaint. Under such circumstances, a miner cannot insulate himself from the consequences of his own misconduct, which alone warrants dismissal, simply because he has engaged in past protected activity.

The Commission has noted that an operator may affirmatively defend by proving that it would have disciplined a miner for unprotected activity alone by showing prior consistent discipline for similar infractions, the miner's unsatisfactory work record, prior warnings to the miner, and rules or practices prohibiting the conduct at issue. See Lonnie Ross and Charles Gilbert v. Shamrock Coal Company, Inc., 15 FMSHRC 972, 975 (June 1993) citing Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982). In this matter, a significant contributing cause of Stoecker's discharge was his harassment of Moravec in the tool room on March 2, 1994. The proximate cause of termination was Stoecker's terrorization of Moravec during his chase and interrogation only two days later on March 4, 1994. This conduct constitutes a blatant violation of the respondent's policy prohibiting harassment.

With respect to a history of unsatisfactory conduct, it is noteworthy that virtually every witness supported the

respondent's contention that Stoecker was frequently combative and confrontational in his dealings with management and co-workers. The evaluations of record as well as the November 18, 1993, Positive Discipline as it relates to Stoecker's confrontational style are convincing evidence of prior warnings about his behavioral problem.

Moreover, despite Stoecker's past behavior, Stoecker's secret tape of the March 4, 1994, DML meeting establishes that Allred and Posey had no intention of firing Stoecker until the chase incident occurred later that day. In fact, during the meeting Posey encouraged Stoecker and stated he was willing to work with Stoecker over the next twelve months in improving his sensitivity to the feelings of others. Similarly, Allred's incidental reference to the Pringle matter as evidence of Stoecker's aggressive nature did not alter Allred's expressed willingness to retain Stoecker's services.

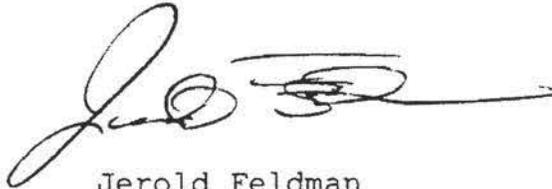
However, inexplicably, less than one hour after being placed on DML for harassing Moravec in the tool room, Stoecker was on the chase and at it again in the Donie State Bank parking lot. This conduct demonstrated that Stoecker was incapable of change, and, alone, provided a reasonable and justifiable basis for his discharge.

Consequently, the respondent has met its burden of establishing, by the preponderance of the probative evidence of record, that although Stoecker had engaged in past protected acts, his March 9, 1994, discharge was also motivated by Stoecker's unprotected activities, and, that these activities alone warranted his termination. Therefore, the respondent has established an affirmative defense to Stoecker's assertion that he was the victim of a discriminatory discharge.

As a final note, this Commission's jurisdiction is limited to ensuring that miners' rights under the Act are protected. In this regard, the Commission has stated its function is not to pass on the wisdom or fairness of the asserted justifications for a particular business decision, but rather to determine if such justifications are credible, and, if so, whether they would have motivated the operator as claimed. Bradley v. Belva, 4 FMSHRC at 993. Here, it is clear the respondent's reliance on harassment as an independent justification for Stoecker's discharge, particularly after the last act of harassment occurred shortly after Stoecker was placed on Decision Making Leave for harassment, is credible and not pretextual in nature. Whether or not Stoecker's discharge was also motivated by his union organizing activities goes beyond the scope of this proceeding. Accordingly, Stoecker's complaint must be dismissed.

ORDER

Stoecker's participation in unprotected activity on March 2 and March 4, 1994, provided a justifiable and independent basis for his March 9, 1994, discharge. Therefore, the discrimination complaint filed by Carl Stoecker against the Northwestern Resources Company **IS HEREBY DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

Mr. Carl Stoecker, 504 Park Crest Circle, Groesbeck, Tx 76642

Frank Parker, Esq., Meier & Parker, L.C., P.O. Box 210484,
Bedford, TX 76095

/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3577/FAX (303) 844-5268

MAR 9 1995

ENERGY WEST MINING COMPANY, : CONTEST PROCEEDING
Contestant :
 :
v. : Docket No. WEST 92-819-R
 : Citation 3851235; 9/2/92
 :
SECRETARY OF LABOR, : Cottonwood Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine I.D. 42-01944
Respondent :
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-168
Petitioner : A.C. 42-01944-03613
 :
v. :
 : Cottonwood Mine
ENERGY WEST MINING COMPANY, :
Respondent :

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring,
Washington, D.C. for Energy West Mining Company;
Robert A. Cohen, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Secretary of Labor; Greg Hawthorne, Esq.,
United Mine Workers of America, Washington, D.C.,
for intervenor, United Mine Workers of America.

Before: Judge Manning

These cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act") following a remand from the Commission. 16 FMSHRC 1414 (July 1994). The Commission reversed and remanded the decision of former Administrative Law Judge Michael A. Lasher, Jr. on the basis that he improperly granted the Secretary of Labor's motion for summary decision. *Id.* The Commission concluded that summary decision was improper because "central facts were disputed." *Id.* at 1419.

A hearing was held on November 30, 1994, in Salt Lake City, Utah. The parties presented testimony and documentary evidence, and submitted post-hearing briefs.

I. FINDINGS OF FACT

On September 2, 1992, Fred Marietti, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Energy West Mining Company ("Energy West") a citation alleging a violation of 30 C.F.R. § 75.326¹ at its Cottonwood Mine. The citation, as modified, states as follows:

The petition for modification, Docket No. 86-MSA-3, was not being complied with in the 9th left two entry panel. The belt was in the No. 2 entry. The longwall is being set up for pillar retreat. 9th left is the headgate entries. There were three diesel Isuzu trucks that were not approved under 30 C.F.R. Part 36. This is required on page 41 ¶(c)(4).

(Ex. G-1). On the citation, the inspector stated that the alleged violation was not significant and substantial and was caused by Energy West's moderate negligence. Energy West contested this citation and the Secretary proposed a penalty of \$50.00.

A. Background

The Cottonwood Mine is a deep coal mine with a coal seam that is between 700 feet and 2,100 feet beneath the surface. (Tr. 157). The mine's depth creates ground control problems, including face and pillar bouncing, pillar bursts and roof control problems. Id. Energy West extracts the coal using the longwall method. It develops entries around a large block of coal using continuous mining machines, sets up the longwall equipment at the inby end of the block of coal, and then extracts this block with the longwall equipment by retreating in an outby direction. A block of coal typically is between 4,000 to 5,000 feet in length and 700 to 750 feet in width. (Tr. 164). The longwall equipment includes a large sheering machine that cuts the coal, shields that support the roof at the face, and a conveyor system that transports the coal out of the section. The coal face, which is about 700 feet wide, is along the inby side of the rectangular coal block. The block of coal is extracted over a period of between 3 and 12 months with the longwall equipment. Id.

¹ The cited safety standard provided, in pertinent part, that "the entries used as intake and return air courses shall be separated from belt haulage entries..." This safety standard was superseded by 30 C.F.R. § 75.350, effective November 16, 1992. For purposes of this proceeding, the two standards are identical and I refer to the old standard in this decision.

A minimum of three entries are required to be developed along each side of the block of coal when a conveyor belt is used to remove the coal. An MSHA safety standard provides, in part, that "entries used as intake and return air courses shall be separated from belt haulage entries." 30 C.F.R. § 75.326.² These entries provide separate air courses for intake and return ventilation, safe access to the working face through the intake entry, and a separate route for the coal conveyer belt.

Because the depth of the overburden was causing ground control problems at the Cottonwood Mine, Energy West filed a petition for modification with MSHA pursuant to section 101(c) of the Mine Act, 30 U.S.C. § 811(c), seeking permission to develop two rather than three entries along the sides of each block of coal.³ The petition was required because Energy West planned on using a belt to remove the coal and the belt entry would also have to be used for intake or return air, thereby violating the safety standard. The petition was granted by the Assistant Secretary for Mine Safety and Health on July 14, 1989, following administrative litigation before the Department of Labor. (Ex. G-7). The Assistant Secretary's Decision and Order ("D&O") granting the petition contains a number of terms and conditions not contained in Energy West's petition. As discussed below, one of these conditions is the subject of this proceeding.

Two-entry mining in longwall sections has been a subject of considerable discussion at MSHA and a task force was formed to study it. In 1985, the MSHA task force issued its report entitled Two-Entry Longwall Mining Systems - A Technical Evaluation. (Ex. G-6). As a result of their study, the task force reached the following conclusion:

After a through analysis of technical data, review of available "bump" and roof fall records, extensive review of in-mine conditions, and deliberations among all Task Force members, the Task Force concluded that the 2-entry technique for developing longwall panels can be a justifiable mining procedure. The Task Force, however, recognizes that emergency evacuation is limited when using

² See note 1, supra.

³ Since August 23, 1985, the date the petition was filed, the Cottonwood Mine has been operated by Emery Mining Corporation ("Emery"), Utah Power and Light ("UP&L"), and Energy West. Emery operated the mine until 1986 for the owner, UP&L. In 1990, UP&L merged with Pacific Corp. Energy West is a subsidiary of Pacific Corp. (Tr. 152-3). In this decision, I refer to the operator as Energy West without regard to the corporate identity.

this technique and, therefore, recommends that it be permitted only after the safeguards contained in this report have been considered.

Id. at 2-3. The task force reached this conclusion because technical and historical data establish that the "2-entry technique, under adverse geologic conditions, has reduced the occurrence of pressure 'bumps,' roof falls, and other ground control problems during mining operations." Id. at 11.

Safeguard No. 6 in the task force report states: "All diesel-powered equipment, operated on any longwall development or longwall panel where both the intake and alternate escapeways are ventilated with the same continuous split of air, be approved under the provisions of 30 C.F.R. Part 36 and be provided with a fire-suppression system." Id. at 58. The report concludes that because diesel equipment creates additional fire hazards not present with electrical equipment, the use of diesels is "too hazardous for use in areas of a mine with limited escape routes." Id. Accordingly, the report recommends that only diesel equipment approved under Part 36 be permitted because "such equipment has been designed to reduce the likelihood of a machine fire." Id.⁴

The Assistant Secretary's D&O accepted Safeguard No. 6, as recommended by the task force. (Ex. G-7 at 34, 41). Under the heading "Requirements Applicable to Both Development and Retreat Mining Systems," the D&O provides, at paragraph III(c)(4):

No later than two years from the date of this order, and pursuant to a schedule developed by the petitioner and approved by the District Manager, all diesel-powered equipment operated on any two-entry longwall development or two-entry longwall panel shall be equipment approved under 30 C.F.R. Part 36.

Id. at 41. Paragraph III(c)(5) of the D&O states that such diesel equipment "operated on any longwall development or long-

⁴ Part 36, of 30 C.F.R. sets forth "requirements for mobile diesel-powered transportation equipment to procure their approval and certification as permissible for use in gassy noncoal mines..." 30 C.F.R. § 36.1. There are no similar procedures for obtaining the approval and certification of permissible diesel transportation equipment in coal mines. Apparently, MSHA uses these noncoal mine certification procedures to certify permissible diesel transportation equipment in coal mines where such certification is deemed necessary. (Tr. 41).

wall panel shall be provided with a fire suppression system." Id.⁵

In explaining this provision, the Assistant Secretary stated:

As noted earlier, one of the ... recommendations of the MSHA Task Force on longwall mining was that only diesel equipment approved under 30 C.F.R. Part 36 and equipped with a fire suppression system be used on two-entry panels. The evidence before me establishes that this recommendation should be imposed as a requirement in this case.

Id. at 41 n. 16 (citations omitted).

B. The two-entry longwall mining process

Under the petition for modification, as granted, Energy West develops two headgate entries along one side of the block of coal. Tailgate entries are usually present on the other side from mining the adjacent block of coal. As the two headgate entries are advanced, one entry is used as the air course for intake ventilation, and the other entry is used for belt haulage and return air. (Ex. C-4). After the entries are developed, and the longwall mining equipment has been set up, longwall retreat mining begins. As the longwall retreats, one of the headgate entries is used as the primary air course for intake air and the other entry is used for belt haulage and as a secondary intake air course on the same split of air. Id. The tailgate entries are used for return air. In general terms, return air is air that has ventilated the last working place. 30 C.F.R. § 75.301.

During the time that the longwall equipment is being set up, after the headgate entries have been developed but before longwall retreat mining begins, there is no return air. (Tr. 38). The circulating air does not ventilate a working place. (See, 30 C.F.R. §§ 75.2 and 75.301). The ventilation system is modified during the longwall installation period in preparation for retreat mining.

C. The citation

Inspector Marietti issued the citation on September 2 and no coal production had taken place at the panel since August 18. The two headgate entries (9th Left) had been completed with continuous mining machines on August 18. (Ex. C-8, C-9). The

⁵ The trucks cited by MSHA in this case were equipped with fire suppression systems.

tailgate entries had been previously developed. Miners were installing the longwall equipment in the "setup" entries that connect the headgate and tailgate entries along the inby (face) side of the block of coal. (See Ex. J-1). These activities are summarized in Ex. C-8. The belt, which had been used when the headgate entries were advanced, was being modified so that it could be used with the longwall equipment on retreat. The belt structure was still present, but the belt had been cut, sections of the belt removed, and splices were being completed. These activities are summarized in Ex. C-9. (See generally Tr. 244-50). The belt was not trained and ready for use in conjunction with the longwall until September 17. (Ex. C-8). Longwall retreat mining commenced on September 18.

Inspector Marietti issued the citation because he observed three nonpermissible trucks in one of the headgate entries. He believes that the D&O allows only permissible diesel trucks in the longwall panel from the start of longwall panel development until longwall retreat mining is completed. At the time the citation was issued air was moving in an inby direction in the headgate entry containing the trucks and was moving inby at a slower rate in the entry containing the belt conveyor system. This intake air was a single split and the air in the belt entry was mixing with air in the intake entry containing the trucks. (Tr. 223). The air was exiting the panel through one of the tailgate entries and the bleeders. Additional air was entering the panel through two of the tailgate entries.⁶

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary and UMWA⁷

The Secretary argues that Energy West cannot accept the broad benefits of the D&O while limiting its applicability to those times when coal is being extracted. The Assistant Secretary made clear in his D&O that he could consider safety factors that do not directly relate to the purpose of the standard being modified. By limiting the petition's terms to those periods when coal is being extracted, Energy West ignores safety hazards that are present at other times during longwall mining cycle. The D&O does not include any language limiting its application to production periods. Many activities were occurring in the headgate and setup entries between August 18 and September 18, and Condition III(c)(4) should protect miners performing those tasks. Finally, the Secretary maintains that correspondence between MSHA and

⁶ On this particular panel, there were three tailgate entries.

⁷ The United Mine Workers of America did not file a brief but stated in a letter that it "concur[s] with" the Secretary's brief.

Energy West establish that Energy West recognized before the citation was issued that the D&O required it to use permissible diesel equipment during the longwall installation period.⁸

B. Energy West

Energy West argues that because a functioning coal conveyer belt was not present at the time the citation was issued, there was no "belt haulage entry," as that term is used in 30 C.F.R. § 75.326. Accordingly, section 75.326 did not and could not apply at that time. Because section 75.326 did not apply, it follows a *fortiori* that neither the petition for modification nor the D&O applied. Therefore, Condition III(c)(4) of the D&O does not pertain to longwall installation and the citation is invalid. It maintains that the petition cannot apply to longwall installation, as a matter of law, because there is nothing to modify.

Energy West maintains that at no time during the protracted modification proceedings before the Department of Labor did anyone suggest that the petition would cover longwall installation. It emphasizes that neither the task force report nor the D&O discuss longwall installation. As discussed in more detail below, it argues that the specific language of the D&O, including Condition III(c)(4), supports its position that longwall installation was not included.

Finally, Energy West argues that Condition III(c)(4) was included because of the dangers inherent when miners are working in an area ventilated by a single split of air with limited escape routes. It points out that at the time the citation was issued, 9 Left was ventilated by two separate spits of air and that there were five escape routes. It maintains that the trucks did not present a fire hazard.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Energy West makes several compelling arguments that Condition III(c)(4) should not apply during longwall installation. I find, however, that Energy West's factual assumptions, as described below, do not support its legal arguments.

⁸ The Secretary also argues that the conclusions of former Administrative Law Judge Lasher are still valid. He states that "nothing has changed [since] Judge Lasher originally weighed the evidence." S. Br. 5. Judge Lasher, however, did not "weigh the evidence" because he granted the Secretary's motion for summary decision. I have not considered Judge Lasher's analysis or conclusions in reaching my decision in this case.

Energy West's reasoning in this case is dependent on its contention that the Assistant Secretary's D&O is not applicable to the process of installing the longwall equipment and modifying the belt ("longwall installation"). It bases this argument on two underlying factual assumptions. First, it maintains that a belt haulage entry does not exist during longwall installation because the miners are modifying the belt and its structure at that time for use with the longwall equipment and the belt is, therefore, inoperable. Second, Energy West contends that the language in the D&O, including the language in Condition III(c)-(4), excludes longwall installation. I find that the evidence does not support Energy West's position.

It is undisputed that the one of the two entries in 9 Left contained the belt structure, rollers, and other equipment necessary for the operation of the belt, designated as the B entry on Ex. J-1. It is also not disputed that the belt was not in use on the date of the inspection and could not be used because it was being modified for use with the longwall equipment. Splices were being vulcanized, rollers added and other changes made. (Tr. 244-50). Energy West argues that the term "belt haulage entry" in section 75.326 "does not refer to an entry in which no belt haulage occurs." (E.W. Br. 4). On this basis, it maintains that because there was no belt haulage entry on September 2, section 75.326 would not have applied and, consequently, the D&O did not apply.

In spite of the fact that the belt was not in use and could not have been used on September 2, 1992, I find that the entry containing the belt and belt structure was a belt haulage entry on that date, as that term is used in section 75.326. That entry was a belt haulage entry during the development of the longwall panel. The entry was a belt haulage entry when the longwall was mining coal after September 17. I do not believe that this entry ceased being a belt haulage entry during the 30-day period that the belt and its structure were being modified for longwall retreat mining. I find that the term "belt haulage" refers to a belt conveyer system, and a belt haulage entry is an entry that contains a belt haulage system.⁹ The entry in question contained a belt haulage system and, therefore, was a belt haulage entry.¹⁰

⁹ The term "haulage" refers to a track haulage system or a belt conveyer system. See, Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms, at 530 (1968).

¹⁰ In support of its position, Energy West points to the testimony of Inspector Marietti that section 75.326 did not apply at the time. (E.W. Br. 9; Tr. 39). I interpret the inspector's testimony to mean that the safety standard did not apply to the Cottonwood Mine at all because it had been superseded by the D&O.

If a longwall panel is put on inactive status after the headgate entries are developed, the entry containing the belt conveyer system would, perhaps, no longer be deemed a "belt haulage entry." Under the facts of this case, however, Energy West was proceeding directly through the mining cycle in order to start retreat mining. The fact that longwall installation is a complex process that takes 30 days, as opposed to a shift or two, does not change this fact.¹¹

Energy West also argues that the language of the D&O precludes the application of Condition III(c)(4) to the period of longwall installation. I disagree. I believe that the language of the D&O makes clear that the Assistant Secretary intended that the terms of Condition III(c)(4) apply during the entire mining cycle, from the time that development of a new longwall panel commences until retreat mining has been completed. There is no language in the D&O that excludes the longwall installation process from the requirements of the condition or any other provisions of the D&O. In its brief, Energy West lists a number of conditions under paragraph III that it believes demonstrates that the longwall installation process was excluded. (E.W. Br. 13-14). Some of these provisions, by their very nature, may be inapplicable during longwall installation because there is no working place or working section. Condition III(c)(4), however, does not limit its application to periods when there is a working place or working section.

More importantly, I believe that the language of the D&O supports the Secretary's position. Condition III(c)(4) is included under the heading: "Requirements Applicable to Both Development and Retreat Mining Systems." Two of the Secretary's witnesses testified that longwall installation is part of longwall development. Robert Ferriter, chief of the ground support division of MSHA's Denver Safety and Health Technology Center, was Chairman of the MSHA task force. He testified that during the task force's deliberations they discussed the longwall installation phase and considered it to be "part of the development of the longwall panel." (Tr. 57). He testified that the task force recommendation concerning permissible diesel equipment applies to the entire mining cycle and that there is no "time-out

(See also Tr. 18). This interpretation is consistent with the testimony of MSHA witness Davis (Tr. 86, 106).

¹¹ Energy West states that it has used shuttle cars for haulage in two entry longwall panels and argues that such a system would not violate the safety standard. (E.W. Br. 4 n.3). I agree that such a haulage system would not have violated the safety standard and would not violate the D&O because a belt haulage entry would not exist. This argument, however, does not support its position in this case.

period." (Tr. 59). Allyn Davis, Chief of MSHA's Division of Coal Mine Safety, testified that the Assistant Secretary "intended ... that [the permissibility requirement] apply throughout the use of the two-entry system..." (Tr. 85). He reached this conclusion based on the language of the D&O and the fact that he believes that the hazards associated with using diesel trucks continue to exist while the longwall equipment is being moved in and set up. Id. I credit this testimony and find that longwall installation is part of "longwall development," as that term is used in the D&O.

Condition III(c)(4) provides that "all diesel-powered equipment operated on any two-entry longwall development or longwall panel shall be equipment approved under 30 C.F.R. Part 36." Given my finding that longwall installation is a part of longwall development, I find that the condition applied at the time the citation was issued. There is no dispute that the diesel trucks in question did not meet these requirements.

Energy West is correct in stating that the panel was ventilated by two separate splits of intake air and that there were more than two escape routes out of the panel. As Energy West states, the primary reason that the condition was included in the D&O is because the number of escape routes is limited in two-entry mining. During longwall installation more escape routes are available than when the headgate entries or the longwall panel are being mined. (Tr. 46, 97-98). Nevertheless, I find that the record establishes that nonpermissible diesel trucks present a hazard in the longwall panel even under these circumstances. (Tr. 33, 85). The hazard is the risk of fire caused by nonpermissible diesel equipment. The trucks' catalytic converters, the presence of diesel fuel and the risk that adequate escapeways will not be available create hazards to miners in the panel. (Tr. 26, 33, 85). There would be more escape routes available in the event of an emergency if the headgate and tailgate entry sets were comprised of three entries each. In an emergency one or more of the escape routes could be blocked. I find, however, that the safety hazards are considerably less during longwall installation than at other times. (Tr. 57-58, 75-76, 97-98).

Finally, Energy West states that Condition III(c)(4) was not proposed in its petition for modification and was not included in the proposed decision and order of the Administrator but was "imposed on Energy West *sua sponte* by the Assistant Secretary." (E.W. Br. 5). Energy West contends that the Secretary's unreasonable interpretation of Condition III(c)(4) has likewise been imposed on it without any prior notice. In a letter to David Lauriski of Energy West, dated March 23, 1987, John W. Barton, MSHA District Manager, made it clear that MSHA considers longwall installation to be a part of development mining. (Ex. G-2). Although this letter was in reference to interim relief granted

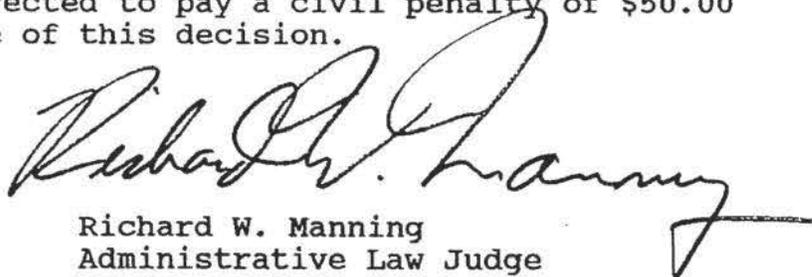
by MSHA under a petition for modification at Energy West's Deer Creek Mine, the principles are the same. Thus, Energy West cannot claim that it did not know that MSHA considered longwall installation to be a part of longwall development and that MSHA might apply Condition III(c)(4) during that period. (See also Tr. 20, 226).

I recognize that Energy West has been unable to find the equipment necessary to make the Isuzu trucks permissible or find other small permissible diesel powered vehicles. I also recognize that these trucks have served as an important means of transportation for men and materials in and out of longwall panels during installation. Energy West believes that switching to battery-powered vehicles or requiring miners to walk in and out of the panel would result in a diminution of safety. (Ex. C-7). I do not have the jurisdiction to consider this issue.

Taking into consideration the criteria of section 110(i) of the Act, 30 U.S.C. § 820(i), I find that a civil penalty of \$50.00 is appropriate. I find that the violation did not create a serious safety hazard because coal was not being extracted, there were more than two escape routes out of the panel, and the risk of fire was low. I also find that the violation was not significant and substantial because there was not a reasonable likelihood that the hazard will result in the injury. I agree with the inspector's determination that the violation was the result of Energy West's moderate negligence.

IV. ORDER

Accordingly, Citation No. 3851235 is **AFFIRMED** and Energy West Mining Company is directed to pay a civil penalty of \$50.00 within 30 days of the date of this decision.


Richard W. Manning
Administrative Law Judge

Distribution:

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Boulevard, Arlington, VA 22203
(Certified Mail)

Timothy Biddle, Esq., CROWELL & MORING, 1001 Pennsylvania Avenue,
NW, Washington, DC 20004-2595 (Certified Mail)

Greg Hawthorne, Esq., United Mine Workers of America, 900 - 15th
Street, NW, Washington, DC 20005 (Certified Mail)

rwm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 10 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1208
Petitioner : A. C. No. 15-15637-03560 S
v. :
: No. 1 Mine
BROKEN HILL MINING COMPANY, :
Respondent :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1209
Petitioner : A. C. No. 15-15637-03559 M
v. :
: No. 1 Mine
DONALD KIDD, employed by :
BROKEN HILL MINING COMPANY, :
INCORPORATED, :
Respondent :

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for Petitioner;
Hobart W. Anderson, President, Broken Hill
Mining Co., Inc., Sidney, Kentucky, *Pro Se*, for
Respondents

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Broken Hill Mining Co., Inc. and Donald Kidd, an employee of Broken Hill, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. The petition against the company alleges a violation of the Secretary's

mandatory health and safety standards and seeks a penalty of \$2,500.00. The petition against Mr. Kidd alleges a violation of Section 317(c) of the Act, 30 U.S.C. § 877(c), and seeks a penalty of \$250.00. For the reasons set forth below, I modify and affirm the citation against the company and assess a penalty of \$1,000.00 and I vacate the citation against Mr. Kidd and dismiss the petition.

The cases were heard on January 18, 1995, in St. Albans, West Virginia. MSHA Inspectors Buster Stewart and Gary Gibson and MSHA Coal Mine Safety and Health Specialist Cheryl S. McGill testified for the Secretary. Donald Kidd and Charles R. Lavender, Jr. testified on behalf of Broken Hill Mining.

FACTUAL SETTING

The facts in this case are undisputed. On May 19, 1995, MSHA Inspectors Stewart, Gibson and Jimmy Brown arrived at the Broken Hill Mine No. 1 to conduct a spot inspection for smoking materials. After directing the mine employee on the surface not to announce their presence to the people in the mine, Stewart and Gibson went into the mine. On arriving at the working section, the inspectors had the mine superintendent assemble all of the miners and conduct a search for smoking materials.

When that was completed, those miners who had lunch buckets were directed to get them. Inspector Stewart accompanied Donald Kidd to the scoop Kidd operated to retrieve Kidd's lunch bucket. Kidd opened the lunch bucket in the presence of Stewart and Gibson. Inside were some keys, an ear spray, a half filled bottle of Coca Cola, some headache pills, some yellow napkins from Happy Mart and a yellow Cricket lighter.

As a result, Inspector Stewart issued Citation No. 4012941 to the company for a violation of Section 75.1702, 30 C.F.R. § 75.1702, of the Secretary's Regulations. (Pet. Ex. 1.) The citation was subsequently modified on May 25, (Pet. Ex. 2), June 2, (Pet. Ex. 3), and September 1, 1994, (Pet. Ex. 4). As modified, it stated that:

The operator's search program approved May 16, 1991, is inadequate because Donald Kidd, the scoop operator, was allowed to carry a yellow Scripto disposable cigarette [lighter] underground. A search of the employee's lunch bucket by the mine supt. revealed the cigarette lighter in the lunch bucket. The search was conducted in the No. 5 entry.

Citation No. 4227560 was issued to Donald Kidd. It alleged a violation of Section 317(c) of the Act, and stated: "A yellow Scripto disposable butane cigarette lighter was observed in the lunch bucket of Donald Kidd a scoop operator on the 001-0 Section. The lunch bucket was opened by Mr. Kidd in my presence and later by Mine Supt. R. B. Hughes in No. 5 entry." (Pet. Ex. 7.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 317(c) of the Act and Section 75.1702 of the Regulations are identical and provide, in pertinent part, that: "No person shall smoke, carry smoking materials, matches, or lighters underground The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches or lighters." With respect to individual miners, the Act also provides in Section 110(g), 30 U.S.C. § 820(g), that: "Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation."

Donald Kidd

Turning first to the violation concerning Donald Kidd, I conclude that the evidence does not establish that he willfully violated the mandatory safety standard. While there are no Commission decisions defining the term "willfully," *Black's Law Dictionary* 1599 (6th ed. 1990) defines "willful" as "[p]roceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or

involuntary." There is no evidence in this record to show that Kidd intentionally, knowingly or voluntarily carried a lighter into the mine or to rebut his claim that he accidentally took the lighter into the mine.

Mr. Kidd testified concerning the incident as follows:

And that particular day, when it was time to go to work, I had a bottle of Swim Ear, not nasal spray; it was Swim Ear - it's for the ears, and it's basically the same thing. Just a bottle of stuff - a screwdriver, ink pen and keys and a bottle of -- well, it wasn't Excedrin. It was an off-brand medicine for headaches.

The cigarettes, as he said, was outside in my truck, which I told them where they were inside [the mine], after they found the lighter -- or after I showed them the lighter. And the cigarettes . . .

But it inadvertently got in the bucket.

(Tr. 178.)

Q. Did you know that lighter was in that bucket?

A. No.

(Tr. 179.)

I put my Swim Ear and my screwdriver and my keys and my medicine in the bucket. And I took the coffee jug in the office and I put the bucket on the scoop and took the coffee jug in the office, I filled it up. That was the first and only time I was in the bucket that day.

. . . .

The lighter, I do not recall ever putting the lighter in the bucket, period. To my knowledge, as I assumed and everybody does, I put the lighter with the cigarettes in the truck bed or in the seat of my truck. They found the cigarettes in the seat of my truck but no lighter.

So when I put the other stuff in my pocket, then the lighter had to be, you know, just put in there [the bucket].

. . . .

Yeah, at some point that morning I had to put the lighter in there [the bucket]. No one else did.

(Tr. 192-93.)

Inspector Stewart testified with regard to finding the lighter: "Well, Mr. Kidd told me that morning, told me when we found the lighter, that he just got all of his material out of his pockets and put it in his lunch bucket." (Tr. 59.) He further stated: "But just as I've testified, there's a good possibility that when he got his stuff out, that he didn't know that lighter was in his bucket." (Tr. 67.) Finally, he related that Mr. Kidd acted surprised when he saw the lighter in his lunch bucket. (Tr. 107.)

Concerning this violation, Inspector Gibson stated: "Well, in this situation here, at the time this occurred, I really don't think that Mr. Kidd -- I mean, the way he acted when the lighter was found and things, he acted like he was really sincere, that he didn't know that it was there." (Tr. 118.)

It is Mr. Kidd's contention that the lighter somehow got in his lunch bucket when he emptied his pockets before entering the mine, placing his cigarettes in his truck and everything else in the lunch bucket. He maintains that he did not have occasion to open the lunch bucket, which apparently had no lunch in it anyway, until asked to do so by the inspectors. Therefore, he asserts that he did not "willfully" take the lighter into the mine. This scenario is not implausible on its face.

Against this, the Secretary has offered only the finding of the lighter and speculation that Mr. Kidd either had cigarettes secreted somewhere else in the mine or planned to go out of the mine with the lighter to smoke the cigarettes in his truck. This does not stand up to scrutiny. In the first place, the inspectors corroborate Kidd by agreeing that he looked surprised when the lighter was discovered. In the second place, if Kidd

were going to go to the trouble of secreting his cigarettes in the mine, it seems logical that he would also have secreted his lighter. Similarly, if he was going to go out of the mine to smoke a cigarette, why keep his lighter in the mine.

Based on the evidence of record, I conclude that Mr. Kidd did not willfully violate the Act. Consequently, I will vacate the citation and dismiss the civil penalty petition.

Broken Hill Mining Company

I reach a different conclusion on the company's violation. The Act imposes strict liability on mine operators for violation of the mandatory standards regardless of fault. *Western Fuels-Utah v. Fed. Mine Safety & Health*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (September 1991); *Republic Steel Corporation*, 1 FMSHRC 5, 9-10 (April 1979). Therefore, "[i]f smoking materials are found underground, there is a violation of § 75.1702 and the operator is liable without regard to fault." *Mingo Logan Coal Co.*, 17 FMSHRC ____ (Judge Fauver, February 1995). Accordingly, I conclude that Broken Hill violated the regulation.

The citation alleges that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out criteria for determining whether a violation is S&S. See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574

(July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The dangers of mine explosions are well known as are the propensities of an open flame in a mine for causing explosions. One has only to consider the recent Southmountain Coal Inc. and the AA&G Elmo No. 5 explosions and resulting fatalities, alluded to by Ms. McGill and believed to have been caused by smoking materials in the mine, to recognize the seriousness of this violation. Consequently, applying the *Mathies* criteria to this case, I conclude that this violation was "significant and substantial."

The citation also alleges that Broken Hill was highly negligent in permitting this violation to occur and that the violation resulted from the company's "unwarrantable failure" to comply with the regulation. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [Emery] at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The evidence in this case does not support findings of high negligence or "unwarrantable failure" on Broken Hill's part. Broken Hill had in effect an underground search program required by Section 75.1702 which had been approved by MSHA. The program provided that searches would be conducted once a week at irregular intervals and that apparently was done. (Resp. Ex. A.) There is no evidence that these searches were conducted with indifference or incompletely. Furthermore, Broken Hill's policy

that anyone caught taking smoking materials underground would be terminated indicates that it did not take its responsibilities in this area lightly. Finally, having found that the violation in this case was not willful, it cannot be inferred from the violation that the company's program was ineffectual.

Accordingly, I conclude that this violation was not the result of an "unwarrantable failure" by Broken Hill and that the company was no more than moderately negligent in this instance. The citation will be modified from a 104(d)(1) citation, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a).

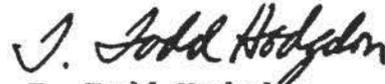
CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of \$2,500.00 for this violation. Section 110(i) of the Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining an appropriate civil penalty. In connection with these criteria, I find that Broken Hill has a lower than average history of previous violations, with no evidence of previous smoking violations; that the No. 1 mine is a small mine and Broken Hill a small operator; and that the company demonstrated good faith in abating the violation. (Pet. Exs. 5 and 6.) Broken Hill made no claim at the hearing that the penalty proposed by the Secretary was inappropriate to its size or that the penalty would adversely affect its ability to remain in business. Finally, while I am reducing the level of negligence, as I indicated earlier in the decision this is a serious violation. Taking all of this into consideration, I conclude that a penalty of \$1,000.00 is appropriate in this case.

ORDER

Citation No. 4227560 in Docket No. KENT 94-1209 is **VACATED** and the civil penalty petition is **DISMISSED**. Citation No. 4012941 in Docket No. KENT 94-1208 is **MODIFIED** from a Section 104(d)(1) to a Section 104(a) citation by deleting the "significant and substantial" designation and reducing the level of negligence to "moderate." The citation is **AFFIRMED** as modified.

Broken Hill Mining Company, Inc. is **ORDERED** to pay a civil penalty of \$1,000.00 within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203
(Certified Mail)

Hobart Anderson, President, Broken Hill Mining Co., Inc., P.O. Box 356, Sidney, KY 41101 (Certified Mail)

Donald Kidd, Broken Hill Mining Co., Inc., P.O. Box 1360, Ashland, KY 41101 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 17 1995

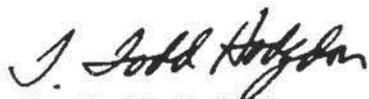
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1208
Petitioner : A. C. No. 15-15637-03560 S
v. :
: No. 1 Mine
BROKEN HILL MINING COMPANY, :
INC., :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1209
Petitioner : A. C. No. 15-15637-03559 M
v. :
: No. 1 Mine
DONALD KIDD, Employed by :
BROKEN HILL MINING COMPANY :
INC., :
Respondent :

ORDER CORRECTING DECISION

The first paragraph in the Order section of the March 10, 1995, Decision in the above captioned cases incorrectly states that "[citation No. 4012941 in Docket No. KENT 94-1208 is **MODIFIED** from a Section 104(d)(1) to a Section 104(a) citation by deleting the 'significant and substantial' designation" It should read "by deleting the 'unwarrantable failure' designation."

Accordingly, it is **ORDERED**, pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c), that the first paragraph of the Order section on page 8 of the Decision is **CORRECTED** to read as follows:

Citation No. 4227560 in Docket No. KENT 94-1209 is **VACATED** and the Civil Penalty petition **DISMISSED**. Citation No. 4012941 in Docket No. KENT 94-1208 is **MODIFIED** from a Section 104(d)(1) to a Section 104(a) citation by deleting the "unwarrantable failure" designation and reducing the level of negligence to "moderate." The citation is **AFFIRMED** as modified.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

Hobart Anderson, President, Broken Hill Mining Company, Inc., P. O. Box 356, Sidney, KY 41101 (Certified Mail)

Donald Kidd, Broken Hill Mining Company, Inc., P. O. Box 1360, Ashland, KY 41101 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 13 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 94-80
Petitioner : A.C. No. 46-08122-03502 NFZ
v. :
 : Mine: Murphy No. 1 Prep Plant
FIELDING HYDROSEEDING, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Amchan

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* The Secretary of Labor has filed a motion to approve settlement agreement. The terms of the settlement are that the total proposed penalties are reduced from \$6,000 to \$5,000. Petitioner represents that Respondent has agreed to pay this amount in an installment payment plan specified in the settlement agreement.

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalties in accordance with the terms of the settlement agreement. Upon such payment this case is DISMISSED.



Arthur J. Amchan
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Blvd., Suite 516,
Arlington, VA 22203

M. Timothy Koontz, Esq., 242 East Second Ave.,
P.O. Box 2180, Williamson, WV 25661

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

MAR 14 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 93-182
Petitioner	:	A.C. No. 48-00086-03526
	:	
v.	:	Kemmerer
	:	
PITTSBURG & MIDWAY COAL MINING	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ray D. Gardner, Esq., Englewood, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charges the Respondent, the operator of Kemmerer Mine, with three violations of mine safety standards.

The operator filed a timely answer contesting each of the alleged violations and the amount of the proposed penalties. The issues raised at the hearing were whether the operator violated the safety standard as alleged in the citations and, if so, whether or not each of the violations was significant and substantial and the appropriate penalty for each violation.

STIPULATIONS

The Secretary of Labor and the Respondent at the hearing entered into the record the following stipulations:

1. Respondent is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Kemmerer Mine, MSHA I.D. No. 48-00086.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect Respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Respondent is a large mine operator with 17,520,572 tons of production in 1992.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 3243029

This citation charges the operator with the violation of 30 C.F.R. § 77.1104 which provides as follows:

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

The citation reads as follows:

Combustible material[,] hydraulic oil and coal dust was allowed to accumulate on the hydraulic unit of the car pusher located at

the Elkol tipple. The material created a fire hazard.

It is undisputed that combustible materials including coal dust and hydraulic oil were allowed to accumulate on the hydraulic pump which drives the pump of the rail car mover located at the Elkol tipple. The inspector testified that the depth or thickness of the accumulated combustible material varied from 1/16 of an inch to 1/2 inch and covered the entire hydraulic unit. Evidence was presented that miners had been observed smoking in the tipple area and that there were electric lights and conduits in the area.

On the basis of the evidence presented I concluded that combustible materials were allowed to accumulate where they "can" create a fire hazard. The violation of the safety standard in question was established.

The citation designates the violation S&S. A violation is S&S if, based on 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 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial ..., 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.

6 FMSHRC at 3-4. See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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) (emphasis in original).

The Secretary has the burden of proof. On evaluating the evidence presented by each party, I find the preponderance of the evidence does not establish the third element of the Mathies for-

mula. Accordingly, I delete the S&S designation. The citation as modified is affirmed.

The operator was negligent in allowing the combustible material to accumulate on the hydraulic pump. On consideration of this and all other factors set forth in § 110(i) of the Act including Respondent's prompt good faith abatement of the violation, I find a penalty of \$100 is appropriate.

Citation No. 3243027

This citation alleges 104(a) S&S violation of 30 C.F.R. § 77.1600(c) which provides as follows:

(c) Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers.

The subject haul road is used to haul material from the gravel pit and to haul gravel from the storage area to other parts of the mine where gravel was used to repair roads and as a cover to help prevent slippage of vehicles on ice. Scrapers used the road in question to haul gravel to various locations. All mine equipment on occasion used the road, including garbage trucks and gravel trucks. The vehicles using the road varied in width from 11 to approximately 24 feet. It is undisputed the road in question was 35 feet wide, was "C" shaped and had a gradual grade.

The inspector was concerned that since there were no warning signs, two vehicles entering the "C" shaped curve in the road from opposite directions might collide upon entering the curve at the same time. There could be inadequate side clearance depending, of course, on the width of the vehicles involved. Under these facts I find that a caution sign was needed to insure the safety of the workers.

It was Respondent's position that except for haul trucks and coal shovels, all the equipment could safely pass in opposite directions. Respondent presented evidence that coal shovels are such large machines that during the few instances they use the road, Respondent excludes all other equipment. Evidence was also presented that when haul trucks are using the road, Respondent restricted travel to a unilateral traffic pattern.

Everything considered, I agree with Respondent's assertion that the likelihood of an accident is too remote to support a "significant and substantial finding". The preponderance of the

evidence does not establish the third factor of the Mathies formula. The citation is modified to delete the S&S designation and as so modified is affirmed.

The violation was timely abated by posting a caution sign. On consideration of the statutory criteria in § 110(i) of the Act, I find a civil penalty of \$100 is appropriate for this violation.

Citation No. 3243026

This citation charges Respondent with the violation of 30 C.F.R. § 77.400 subsection (a) which provides as follows:

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

It is well settled that in order to establish a prima facie case of a violation of § 77.400(a), Secretary must prove: (1) that cited machine part is one specifically listed in the standard or is "similar" to those listed; (2) that the part was not guarded; and (3) that unguarded part "may be contacted by persons" and "may cause injury to persons."

With respect to item (1) that the cited machine part must be one specifically listed in the standard or similar to those specifically listed, I find on review and evaluation of the evidence presented in this case that the preponderance of the credible probative evidence presented fails to establish that the return belt rollers (idlers) in question are "similar" to the machine parts that are specifically listed in subsection (a) of the safety standard.

I credit the testimony of Mr. Dovey, Respondent's safety and training manager, who testified that the bottom rollers in question are not similar to head pulleys, takeup pulleys or tail pulleys because the bottom rollers in question are not driving mechanisms for the belt line. Mr. Dovey testified that all the bottom rollers in question do is let the belt roll across the top of these rollers. They do not apply power or pressure to the belt line. For this reason I believe they are significantly dissimilar from the machine parts listed in the safety standard.

The drawing entered into evidence by Petitioner as Exhibit G-3 depicts a "bend pulley" which unlike a bottom roller, is designed to "apply pressure to the belt line" and "to keep tension on [the] belt." (Tr. 164). Although bend pulleys are not expressly listed in 30 C.F.R. § 77.400(a) they are similar to

"take-up" pulleys which are listed since they both apply pressure to the belt line. It is undisputed that both the take-up pulleys, the bend pulleys in this case were well guarded. (Ex. 4-A).

Subsection (c) of 30 C.F.R. § 77.400 specifically spells out the requirements for guarding components of conveyor systems. That subsection specifically covers guards at conveyor-drive, conveyor head, and conveyor tail-pulley and makes no reference or mention of "similar" machine parts of the conveyor system. In the present case it is undisputed that the tail pulley, head pulley, takeup pulley and the bend pulleys of the conveyor system in question were all properly and adequately guarded.

In Rochester & Pittsburgh Coal Company 10 FMSHRC 1576 (November 1988) the inspector issued a citation alleging a violation of an identically worded standard, 30 C.F.R. § 75.1722(a). The inspector issued the citation because of his concern the miner might be caught between an unguarded bottom roller and the moving conveyor belt. Judge Melick vacated the citation stating the moving belt was not a "similar" exposed moving machine part of the safety standard. The Secretary appealed the decision on other grounds. The Commission in its decision on reconsideration noted and left undisturbed the Administrative Law Judge's finding and decision vacating the citation because the machine part was not similar. Rochester & Pittsburgh Coal Company 11 FMSHRC 2159 at 2161 (November 1989).

In Secretary of Labor v. Mathies Coal Co., 5 FMSHRC 300 (1983), the Commission observed that this regulatory standard applies to the specific machine parts listed and to other exposed moving machine parts similar to those listed. The Commission quoted the definition of the word "similar" as "1) having characteristics in common; very much alike... 2) alike in substance or essentials..." citing Webster's Third New International Dictionary at p. 2120 (unabridged 1971).

Although the return rollers in question have the common characteristic of motion it is not "very much alike", or "alike in substance or essentials" nor is it similar in function.

In the Mathies supra the Commission reversed the judge and at page 301 stated:

On review, the Secretary argues that the purpose of section 75.1722(a) ¹ is to "protect miners from injury caused by moving machinery," and that the elevator cage is

¹ The wording of Section 75.1722(a) and 77.400(a) are identical.

subject to the standard "because it is an 'exposed, moving machine part which may be contacted by persons and which may cause injury.'" Sec. br. at 5. He (Solicitor) like the judge, interprets the standard to cover not only the listed machine parts but all machine parts that are exposed and moving. Sec. br. at 5-6. We disagree. We find that such an interpretation ignores the grammar of the standard and makes the list of items covered surplusage.

A standard must give an operator fair warning of the conduct it prohibits or requires and should provide "a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." The Commission in Mathies supra quoted the observation of the Fifth Circuit in a case arising under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1976) as follows:

The [Secretary] contend[s] that the regulation should be liberally construed to give broad coverage because of the intent of Congress to provide safe and healthful working conditions for employees. An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents

If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.... We recognize that OSHA was enacted by Congress for the purpose stated by [the Secretary]. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.

Diamond Roofing Co. v. OSHRC & Secretary of Labor, 528 F.2d 645, 649 (1976) (citations omitted). Accord, Phelps Dodge Corp. v.

FMSHRC & Secretary of Labor, 681 F2d 1189,
1193 (9th Cir. 1982).

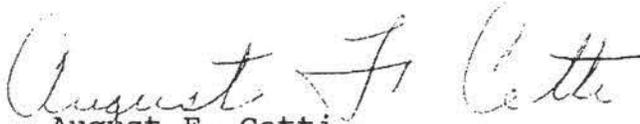
The FMSHRC then stated:

As we have previously acknowledged, "Many standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances'". Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982), quoting Kerr-McGee Corp. 3 FMSHRC 2496, 2497 (November 1981). However, even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard. Alabama By-Products Corp., supra; U.S. Steel Corp., FMSHRC Docket No. KENT 81-136 (January 27, 1983).

I find that the standard in question under facts in this case does not give the operator fair warning that guarding of the bottom rollers in question is required and for this reason the citation is vacated.

ORDER

Citation Nos. 3243029 and 3243027 are **AFFIRMED** as modified, Citation No. 3243026 is **VACATED**. Pittsburgh & Midway Coal Mining Company shall pay a civil penalty of \$200 for the violations alleged in Citation Nos. 3243029 and 3243027 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Ray D. Gardner, Esq., John W. Paul, Esq., PITTSBURG & MIDWAY COAL MINING CO., 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991 (Certified Mail)

sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 14 1995

RICHARD E. GAWTHROP, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 94-286-D
: MSHA Case No. MORG CD 94-02
TRIPLETT BROTHERS EXCAVATING, :
Respondent : Grant Town Power Plant

DECISION

Appearances: Richard E. Gawthrop, pro se, Rivesville,
West Virginia, and, Thomas G. Dyer, Esq.,
Clarksburg, West Virginia, on the Proposed
Order for Relief, for the Complainant;
Charles E. Anderson, Esq., Fairmont,
West Virginia, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on June 7, 1994, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(3), by the complainant, Richard E. Gawthrop, against the respondent, Triplett Brothers Excavating, Inc. This matter was heard on October 13, 1994, in Morgantown, West Virginia. On January 23, 1995, a decision on liability was released wherein it was determined that Gawthrop's January 11, 1994, discharge was discriminatorily motivated in violation of section 105(c) of the Act. 17 FMSHRC 64.

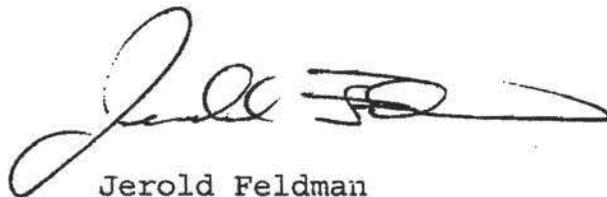
With regard to damages, the parties were ordered to confer for the purpose of stipulating the appropriate incidental damages and back pay, plus interest, less deductions for unemployment and earnings from other employment. The parties were also ordered to

stipulate to economic reinstatement if the complainant declined reemployment by the respondent. The parties were ordered to file a Proposed Order for Relief if they were able to stipulate to the appropriate relief in this matter. 17 FMSHRC at 76-77.

A joint Proposed Order for Relief was filed on March 6, 1995. The terms of the parties' proposal are that Gawthrop will accept \$10,000 as economic reinstatement in lieu of actual reinstatement. The parties stipulated that Gawthrop's back pay plus interest, compounded from his January 11, 1994, discharge to the present time, less deductions for unemployment and other earnings, amounts to \$9,086. Finally, the parties stipulated to incidental damages of \$2,914 related to additional transportation costs associated with his reemployment as well as other economic losses. Consequently, the parties proposed a total of \$22,000 as the appropriate relief in this case. Payment of \$22,000 was made to Gawthrop by the respondent on February 27, 1995.

ORDER

In view of the parties' stipulations, the Proposed Order for Relief **IS GRANTED** establishing the \$22,000 payment to Gawthrop as the appropriate relief under section 105(c) of the Act. **IT IS ORDERED** that all records pertaining to Gawthrop's January 11, 1994, discharge be expunged. This decision and the January 23, 1995, decision on liability constitute the final disposition in this proceeding.



Jerold Feldman
Administrative Law Judge

Distribution:

Mr. Richard E. Gawthrop, Route 1, Box 253-A, Rivesville, WV 26588
(Certified Mail)

—
Thomas G. Dyer, Esq., P.O. Box 1716, Clarksburg, WV 26301
(Certified Mail)

Charles E. Anderson, Esq., 200 Adams Street, Fairmont, WV 26554
(Certified Mail)

/rb

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 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 93-241
Petitioner : A.C. No. 12-02033-03593
v. :
: Buck Creek Mine
BUCK CREEK COAL COMPANY, INC., :
Respondent :

DECISION ON REMAND

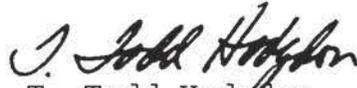
Before: Judge Hodgdon

On January 20, 1995, the Commission issued a decision in this case reversing my conclusion that Buck Creek's violation of Section 75.360(a), 30 C.F.R. § 75.360(a), was not "significant and substantial." *Buck Creek Coal Company, Inc.*, 17 FMSHRC 8 (January 1995). The case was remanded to me "for reassessment of a civil penalty consistent with [the Commission's] opinion." *Id.* at 17.

In view of the Commission's determination that this violation was "significant and substantial," I find that it involved a high degree of gravity. Taking into consideration the other criteria set out in Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), which are discussed in my prior decision, *Buck Creek Coal Company, Inc.*, 16 FMSHRC 133, 140 (1994), along with the increase in gravity, I conclude that a penalty of \$5,500.00 is appropriate for this violation.

ORDER

Accordingly, Buck Creek Coal Company, Inc. is **ORDERED** to pay a civil penalty of \$5,500.00 for its violation of the mandatory safety standards within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604
(Certified Mail)

Patrick A. Shoulders, Esq., Ziemer, Stayman, Weitzel & Shoulders, P.O. Box 916, Evansville, IN 47706 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 16 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE AND SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-521
Petitioner : A.C. No. 15-16454-03552
: :
v. : Henderson Mine No. 1
: :
GREEN COAL COMPANY, INC., : Docket No. KENT 94-1249
Respondent : A.C. No. 15-01982-03537
: :
: K-9 Mine

DECISION

Appearances: Arthur J. Parks, Litigation Representative, Mine Safety and Health Administration, Madisonville, Kentucky, in Docket No. KENT 94-521, Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, in Docket No. KENT 94-1249, for the Petitioner; James E. Curtis, Safety Director, Green Coal Company, Owensboro, Kentucky, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petitions in these single citation docket cases sought to impose a total civil penalty of \$559 for the alleged violations of the cited mandatory safety standards.

These matters were called for hearing on February 22, 1995, in Owensboro, Kentucky. At the commencement of the hearing, the parties informed me that they had reached a settlement.

Litigation Representative Arthur J. Parks presented the settlement terms for the Secretary in Docket No. KENT 94-521. This proceeding concerns a proposed civil penalty of \$431 for Citation No. 4056530 that cited an alleged significant and substantial violation of the mandatory safety standard in section 77.512, 30 C.F.R. § 77.512. This standard requires cover plates on electric equipment to be kept in place at all times. The citation was issued because of an open door on a 60-amp circuit breaker box at the de-watering pump motor starter cabinet. The parties agreed to \$125 as a reduced penalty in satisfaction of this citation.

Donna E. Sonner presented the settlement terms in Docket No. KENT 94-1249. This docket proceeding involves Citation No. 4067042 issued for an alleged violation of section 72.620, 30 C.F.R. § 72.620, which requires the use of effective dust control measures when drilling at surface mines. The respondent was cited for failure to control coal dust because of malfunctioning flaps on the highwall drill. The parties agreed to a reduction in penalty from \$128 to \$50.

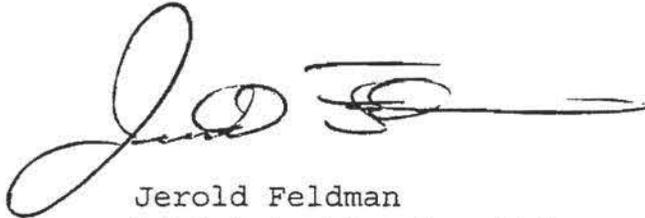
The reduction in penalty in these proceedings is based upon the respondent's size and financial difficulties. In this regard, the Secretary stipulated that the respondent be a medium size operator. The respondent's Safety Director, James E. Curtis, testified that the company has recently ceased operation at one mine site resulting in the layoff of 80 people, and, that employment has been reduced from 148 to 120 at its other mine site.

While a reduction in penalty in these proceedings from \$559 to \$175 will not materially impact on the respondent's ability to pay the penalty or affect its ability to remain in business, I am not inclined to interfere with the parties' agreement. Consequently, I conclude that the proffered agreement should be approved in that it is not inconsistent with the pertinent settlement criteria in Section 110(i) of the Act, 30 U.S.C. § 820(i).

ORDER

In view of the above, the parties' motion to approve settlement **IS GRANTED**. Accordingly, **IT IS ORDERED** that the

respondent pay a total civil penalty of \$175 in satisfaction of the two citations in issue in these matters. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of the \$175 payment, Docket Nos. KENT 94-521 and KENT 94-1249 **ARE DISMISSED.**

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

Arthur J. Parks, Litigation Representative, Mine Safety and Health Administration, 100 YMCA Drive, Madisonville, KY 42431
(Certified Mail)

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

James E. Curtis, Safety Director, Green Coal Company, P.O. Box 841, Owensboro, KY 40962 (Certified Mail)

/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 17 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1001
Petitioner : A.C. No. 15-13920-03846
v. :
 : Docket No. KENT 94-1002
COSTAIN COAL, INC., : A.C. No. 15-13920-03849
Respondent :
 : Docket No. KENT 94-1056
 : A.C. No. 15-13920-03848
 :
 : Mine: Wheatcroft

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky,
for Respondent.

Before: Judge Amchan

At the outset of the hearing on January 4, 1995, the outstanding civil penalty petitions in Docket Nos. KENT 94-1001 and KENT 94-1056 were settled in their entirety. In Docket No. KENT 94-1001, Respondent agreed to pay the \$50 penalties proposed for Citation Nos. 4067084 and 3862290. A settlement of two other items in this docket was previously approved by the undersigned.

In Docket No. KENT 94-1056, Respondent agreed to pay the \$288 penalty proposed for Citation No. 3859202. With regard to the other item in the docket, Citation No. 4067314, the parties agreed to modify the citation to a non-significant

and substantial violation and that Respondent would pay a \$50 penalty, rather than the \$235 originally proposed¹.

The settlement of one of the contested penalties in Docket No. KENT 94-1002 has been previously approved by the undersigned. Remaining in the petition is Citation No. 3859192, with a proposed civil penalty of \$4,600, which was originally issued as a section 104(d)(2) order on February 3, 1994. This citation was modified to allege a non-significant and substantial violation. The Secretary has withdrawn its allegation that the violation was due to Respondent's "unwarrantable failure" to comply with the Act (Tr. 34). The issues before the undersigned are whether a violation occurred, and if so, the degree of Respondent's negligence and the civil penalty to be assessed.

Citation No. 3859192: Coal and Coal Dust
Accumulations in the longwall belt entry

In early January, 1994, MSHA representative Donald Milburn began inspecting the 11-C conveyor belt at Respondent's Wheatcroft Mine in western Kentucky (Tr. 18-19). This belt transports as much as 6,000 tons of coal per shift from Wheatcroft's longwall mining unit and operates 24 hours a day (Tr. 20). In reviewing Respondent's examination records for the period of December 28, 1993 through January 11, 1994, Milburn noticed that Respondent was having a recurring problem with coal spillage on the belt, particularly between crosscuts 2 - 4, where the entry went downhill and then uphill following the coal seam (this area is referred to as "the swag") (Tr. 19).

On January 11, Inspector Milburn found isolated piles of coal and coal dust, marginally adequate rock dusting and numerous broken rollers on the conveyor in the 11-C belt entry (Tr. 21-22). He discussed these conditions with Respondent's supervisory personnel and told them that they needed to pay closer attention to the recurring coal spillage problem (Tr. 23-24).

¹The terms of the settlement of Docket No. KENT 94-1056 are not accurately reflected in the transcript (Tr. 6). The terms of the settlement herein are taken from the undersigned's trial notes and have been confirmed with counsel.

During January, 1994, Milburn also cited Respondent for a violation of 30 C.F.R. § 75.1725 on the 11-C belt entry. This citation was issued because he found three broken top rollers and 30 broken bottom rollers on the conveyor belt (Tr. 25). Some of these broken rollers were turning in isolated piles of coal dust.²

MSHA Inspector Troy Davis issued Respondent another citation for coal and coal dust accumulations on the 11-C beltline on January 31, 1994 (Exh. R-3). He found accumulations of between 7 to 15 inches between crosscuts 2 and 4, the area of the swag, or hill, in the beltline (Tr. 82).

Milburn returned to the 11-C beltline entry on February 2, 1994, to determine whether Respondent had corrected the conditions cited by Davis (Tr. 27-28). He determined that the accumulations had been cleaned up on January 31 and February 1, but he found that coal spillage of up to 15 inches had reoccurred in the same area (Tr. 28-29, Exh. R-3, page 2, Exh. R-4). Milburn therefore issued Respondent another citation.

On February 3, 1994, Milburn issued Order No. 3859192, which is at issue in this proceeding. The order, now amended to a section 104(a) citation, alleges a violation of 30 C.F.R. § 75.400 in that coal dust and loose coal up to four inches in depth had accumulated on previously rockdusted areas between crosscut 8 and crosscut 19 in the 11-C belt entry (Exh. P-1)³.

The area covered by Citation No. 3859192 began about 360 feet inby the swag area at crosscut 4 and extended approximately 1,000 feet in the direction of the longwall

²Milburn's testimony as to when he issued this citation is somewhat confusing (Tr. 23-26). It is unclear whether it was issued on January 13, or January 31. I find that it was issued sometime in the month of January.

³The standard requires that loose coal, coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials be cleaned up and that they not be permitted to accumulate in active workings, or on electrical equipment, therein.

face (Tr. 18, 51-52). At hearing, Milburn described the coal and coal dust spillage between crosscuts 8 and 19 as being between 0 to 4 inches in depth (Tr. 52-53).

Inspector Milburn concedes that some spillage is normal on a high volume conveyor belt such as belt 11-C (Tr. 60). He was equivocal as to whether the spillage he found on February 3 was greater than what one would expect to find on a longwall belt (Tr. 61-63).

The Secretary contends that Respondent was highly negligent because of the constant recurrences of coal spillage on the 11-C beltline (Tr. 58). Inspector Milburn also noted that on February 3, 1994, only one miner was assigned to shoveling coal spillage on this belt and opined that this is insufficient (Tr. 67).

Respondent's contentions

Respondent denies that any violation of section 75.400 existed on February 3, 1994, and argues that, even if it did, a characterization of high negligence is unwarranted. First of all, I find, as stated by miner Arden Gentry, that the accumulations found by Inspector Milburn were not present at the end of the day shift on February 2, 1994, the day prior to the instant alleged violation (Tr. 96-97).

Due to the imprecision of Milburn's testimony about the amount of coal dust present in the cited area, I credit the testimony of Respondent's maintenance foreman, Daniel Menser⁴, that a light film of rock dust and coal dust was on the floor of the 11-C belt entry between crosscuts 8 and 19 on the morning of February 3, 1994, except for the unspecified number of locations at which Milburn measured four inches of coal dust (Tr. 107-114).

⁴Menser's last name is incorrectly spelled "Mense" in the transcript.

The Secretary failed to establish a violation of §75.400

In Old Ben Coal Company, 1 FMSHRC 1954 (December 1979), the Commission held that the existence of any accumulation of combustible materials establishes a violation of 30 C.F.R. § 75.400. However, whether coal spillage constitutes an accumulation under the standard depends on the size and amount of the spillage. Indeed, the Commission noted that "the Secretary does not contend that the merest deposit of combustible material constitutes a violation of the standard." 1 FMSHRC 1954, at 1958 and n. 8.

Subsequently, the Commission has held that an "accumulation" exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source is present. Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The inspector's judgment in this regard is reviewed to determine whether a reasonably prudent person familiar with the industry and purposes of the regulation, would have recognized the cited conditions as hazardous. Utah Power and Light Co., 12 FMSHRC 965, 968 (May 1990).

I find that the Secretary's evidence is insufficient to establish that the spillage between crosscuts 8 and 19 on February 3, 1994, was an "accumulation" within the meaning of the standard. In this regard, the undersigned asked Inspector Milburn whether the spillage he observed on February 3 was unusual compared to what he would normally expect to find on a conveyor belt of that size and volume. He answered as follows:

I don't know how I can really answer that, Your Honor, because he [Respondent's counsel] pointed out a belt record book a few minutes ago that some days there was no spillage on the belt, so to say it is a common occurrence they have some spillage every day, I couldn't honestly make that statement. He has already pointed out some of the record books that there was no spillage on this belt, so I can't really say that it was a non-occurrence to have a spillage on this belt every day, so it is out of the ordinary. It is abnormal. (Tr. 61-62)

When asked again by Respondent's counsel whether the spillage he saw was more than normal, Milburn responded, "I would characterize it as that" (Tr. 62). I interpret the inspector's responses as indicating that he regards any amount of coal spillage to violate § 75.400. I conclude, on the basis of the Old Ben decisions cited above, that he is incorrect to do so.

The question remains, regardless of what I deem to be Inspector Milburn's erroneous interpretation of the law, whether the record establishes that the spillage cited was of sufficient size and amount to constitute an accumulation under the standard. The inspector did not describe the size and amount of spillage he saw on February 3, other than to state that at some places he measured a depth of 4 inches (Tr. 16-18, 52-55). There is nothing in the record that indicates the extent of four-inch piles of spillage or the duration of their existence.

Inspector Milburn's testimony indicates that he issued the instant citation largely because he had found coal spillage on a recurring basis on the 11-C belt, rather than because the size and amount of coal spillage on February 3 was sufficient to constitute an "accumulation" (Tr. 33-34).

On the other hand, maintenance foreman Menser, described the cited coal spillage as a little film of dust (Tr. 113-14). The record, as a whole, is insufficient to establish that a reasonably prudent person would have regarded the cited coal spillage as likely to propagate a fire or explosion. I therefore find that the Secretary has not established that the cited spillage constituted an accumulation of combustible materials within the meaning of the standard and I vacate the citation and proposed penalty.

Even Assuming that the record establishes a violation,
the Secretary has not established high negligence on
the part of Respondent

Given the possibility that this decision may be reviewed and that the Commission could take a different view of whether a violation was established, I deem it appropriate to address the issue of Respondent's negligence to avoid an unnecessary

delay in the ultimate disposition of this case. Respondent was experiencing recurring coal spillage on the 11-C belt in the month prior to the instant inspection. However, most of these spillages occurred in the swag area between crosscut 2 and 4, not in the area covered by the instant citation.

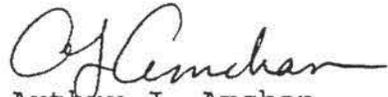
Respondent's evidence indicates that the recurring coal spillage problems between crosscuts 2 and 4 were caused by water flowing backwards on the belt in the swag when the amount of coal mined at the longwall was less than its maximum capacity (Tr. 117-18). Nothing in this record indicates any want of care on the part of Respondent in preventing coal spillage on the 11-C belt. Although Inspector Milburn suggested that Respondent should have had additional personnel shoveling coal spillage on the 11-C belt, there is no evidence that indicates that it was highly negligent in not doing so.

Assuming that this record does establish a violation of § 75.400 by virtue of the fact that Inspector Milburn measured coal spillage of up to four inches at some points along the 11-C belt, I would find that the violation was due to the ordinary negligence of Respondent. I would assess a \$100 penalty pursuant to the criteria set forth in section 110(i) of the Act. The violation was modified to non-significant and substantial, thus its gravity could not have been high. There is no dispute that Respondent quickly abated the citation (Tr. 32, 69-70). Although Respondent had received several section 75.400 citations on the 11-C belt just prior to the instant citation, the lack of convincing evidence as to how Respondent could have prevented these spillages persuades me that a higher penalty is not warranted for Costain's prior history.

ORDER

I conclude that the terms of the settlements in Docket Nos. KENT 94-1001 and KENT 94-1056 are consistent with the criteria in section 110(i) of the Act. Wherefore, the motion for approval of the settlement terms is **GRANTED**. Respondent shall pay the agreed upon amounts within 30 days of this decision.

Citation No. 3859192 in Docket No. KENT 94-1002 and the penalty proposed therefor are hereby **VACATED**.



Arthur J. Amchan
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Rd.,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Carl B. Boyd, Jr., Esq., 120 N. Ingram St., Suite A,
Henderson, KY 42420 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

MAR 20 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 94-74-M
Petitioner : A.C. No. 04-04420-05504
 :
v. : Docket No. WEST 94-75-M
 : A.C. No. 04-04420-05505
JOHN CULLEN ROCK CRUSHING :
AND GRAVEL, : Grant Pit
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John Cullen, owner, John Cullen Rock Crushing &
Gravel, Pueblo, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against John Cullen Rock Crushing and Gravel ("Cullen"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege 27 violations of the Secretary's safety standards. For the reasons set forth below, I vacate three citations, modify other citations, and assess penalties in the amount of \$912.00.

A hearing was held in these cases on January 19 and 20, 1995, in Pueblo, Colorado. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

At all pertinent times the Grant Pit, owned and operated by Cullen, was a small sand and gravel pit located in Pueblo County, Colorado. It employed about three to five miners. On July 21, 1992, MSHA Inspector Lyle Marti¹ inspected the mine and found a number of violations of the Secretary's safety standards. When Inspector Marti returned to the mine the following day to contin-

¹ Inspector Marti's name is incorrectly spelled in the transcript.

ue the inspection, Mr. John Cullen confronted him in a manner that he considered to be threatening and he discontinued the inspection.² Three other MSHA inspectors continued the inspection on July 28, 1992.

Cullen maintains that the mine was not operating on the dates of the inspection. I find that the evidence establishes that the mine was in operation in July 1992 for purposes of the Mine Act. While it appears that Cullen was having difficulty keeping its cone crusher running, Cullen was operating the mining equipment and processing material on July 21, 1992. I base this finding on the testimony of Inspector Marti and photographs that show the pit in operation. (Ex. G-13). Cullen may not have been operating at full production in July but, at a minimum, it was running the equipment and processing material to troubleshoot the problems it was having with the crusher. In addition, it is undisputed that miners were working at the mine on July 28 in an attempt to repair the cone crusher. Although the portable generator providing power to the pit had not been started on that date, miners were present doing repair work on the mining equipment.

Cullen also maintains that MSHA did not have jurisdiction over that part of its operation which the parties referred to as the experimental silica-free plant ("silica plant"). Within the area of the Grant Pit, Cullen had set up a plant to reclaim mill scale to make sandblasting grit. (Tr. 10, 76, 201). Cullen brought in slag material, screened and processed it, and bagged the material at the silica plant. *Id.* The silica plant was located in the pit adjacent to the crushing and screening plant for the sand and gravel mine. The equipment used at the silica plant was similar to that used at the sand and gravel plant. The same employees operated both plants.

I find that MSHA had jurisdiction over the silica plant because it was located at the mine³ and was operated by the same

² A citation issued by Inspector Marti alleging a violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a), for Cullen's refusal to allow the inspection to continue was affirmed by Administrative Law Judge August Cetti. John Cullen Rock Crushing and Gravel, 16 FMSHRC 909 (April 1994).

³ In relevant part, section 3(h)(1) of the Mine Act defines a mine to include "an area of land from which minerals are extracted ..., and ... lands, ... structures, facilities, equipment, machines, tools, or other property ..., used in, or to be used in, the work of milling of such minerals, or the work of preparing ... minerals" 30 U.S.C. § 802(h)(1). The legislative history of the Mine Act indicates that this definition is to be interpreted expansively. S. Rep. No. 181, 95th Cong., 1st

employees using the same kind of equipment. As Mr. Cullen put it, "We are a one-horse operation." (Tr. 126). Mining equipment, such as conveyors, screening devices, and electric motors, were used at both facilities. The testimony indicated that parts and supplies used at one facility could and would have been used at the other facility. The miners that operated the crushing and screening plant also operated the silica plant and were exposed to the hazards presented by that plant. Given the integrated nature of the operation, I find that the MSHA had jurisdiction over all of the facilities at the Grant Pit. See, W.J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994).

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. I find that Cullen was issued eight citations in the 24 months preceding the inspection in this case. (Ex. G-1). I also find that Cullen was a very small operator, it employed between three and five miners. Cullen no longer operates the Grant Pit and Cullen has sold most of the mining and crushing equipment. Cullen contends that MSHA is, in large measure, responsible for running it out of the sand and gravel business. Nevertheless, I find that the civil penalties assessed in this decision would not have affected its ability to continue in business. The conditions cited in the citations were not corrected by Cullen. Instead, the citations were terminated by MSHA because the Grant Pit is no longer operating and the mining equipment has been removed from the site. The Secretary has not alleged that Cullen failed to timely abate the citations.

A. Electrical Citations

1. Citation No. 3470641 alleges that the continuity of the equipment grounding conductors and resistance of the grounding rod had not been tested at the silica plant and the results recorded, in violation of 30 C.F.R. § 56.12028. Power at the mine is supplied by a generator mounted on a trailer. The safety standard provides, in part, that continuity and resistance of grounding systems shall be tested at the time of installation and annually thereafter. Inspector Jake DeHerrera testified that this test had never been performed or recorded. (Tr. 205-06). Mr. Cullen testified that the silica plant had only been there a month and that an independent electrician had come to the plant and checked the grounding system. (Tr. 293). The inspector indicated that the electrician, Mike Simpson, was not sure how to test the continuity and resistance of grounding systems. (Tr. 281). (Mr. Simpson was at the mine on the day of Inspector

Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

DeHerrera's inspection.) Mr. Cullen stated that he is not an electrician and that Cullen should not be held responsible for electrical problems because it relied on an independent electrician and MSHA inspectors to set up the electrical system.

Based on the evidence, I find that the Secretary has established a violation. The Mine Act is a strict liability statute, and the mine operator is legally responsible for violations that occur at its mine. I agree with the inspector that the violation was not significant and substantial ("S&S"). I also find that Cullen's negligence was low, given that the silica plant had just been installed. A penalty of \$20.00 is appropriate.

2. Citation No. 3470642 alleges that three electrical conductors between the cone crusher's starter box and another electrical box were not protected from mechanical damage, in violation of section 56.12004. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." Inspector DeHerrera testified that the conductors were not protected by an outer jacket and were subject to damage by vibration or contact with other metal objects. (Tr. 206-11; Ex. G-14). He stated that the primary hazard created is an electric shock if the insulation was damaged and the metal conductors contacted and energized the electrical boxes or other metal surfaces. *Id.* He also stated that if a miner came into contact with energized metal surfaces he could be fatally injured. *Id.* Mr. Cullen testified that the cited electrical conductors were used for running pumps and that there was no electricity entering the electrical boxes at the time of the inspection. (Tr. 294-96). He stated that the electrical boxes were not being used and that Cullen was not planning on using them. (Tr. 296).

Based on this evidence, I find that the Secretary has established a violation. The fact that the electrical boxes were not being used at the time is not a defense. Assuming continuing mining operations, the conductors could have been used in the future and created a hazard. The inspector determined that the violation was S&S. I find that the evidence does not establish "a reasonable likelihood that the hazard contributed to will result in an injury." Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Given the location and length of the conductors, I find that it was unlikely that the insulation would be damaged or that metal surfaces would become energized as a result. I further find that the violation was the result of Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

3. Citation No. 3470643 alleges that the 200 amp fuses protecting the cable supplying power to the cone crusher were inadequate to protect the circuit, in violation of section 56.12001. The safety standard provides that "[c]ircuits shall be protected against excessive overload by fuses or circuit breakers of the

correct type or capacity." Inspector DeHerrera testified that the cable should have been protected by a 70 amp fuse. (Tr. 211-16). The inspector testified that the cable may remain energized and start a fire or energize electrical equipment in the event of a short circuit. Id. He further stated that such an event is reasonably likely and that it is reasonably likely that an injury would be fatal. (Tr. 214). Mr. Cullen testified that the magnetic starters in the circuit contained three "heaters" (overcurrent devices) that adequately protected against a short circuit or a problem with a motor. (Tr. 296). The inspector agreed that the overcurrent devices were present, but stated that they are designed to protect equipment and are time delayed. (Tr. 270). He said the overcurrent devices would "take quite a bit longer" to break the circuit than an "instantaneous fuse." Id. Cullen also defends its electrical system on the basis that former MSHA Inspector Barr had inspected the installation years earlier and found it to be in compliance with MSHA safety standards. With respect to all of the electrical citations, Mr. Cullen stated that "if someone had told me ... that [the fuses] needed to be changed, believe me, I'd change it, because electricity is one damn dangerous thing." (Tr. 289).

Based on this evidence, I find that the Secretary has established a violation. Although the circuit was protected with overcurrent devices to prevent motors from burning out, the fuses were inadequate to instantaneously open the circuit in the event of a short. That is, the fuses were not of the correct capacity. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 214). Given that the circuit was protected by overcurrent devices, which provides some level of protection, I might not ordinarily find this violation to be S&S. As the inspector noted, however, the electrical system at the Grant Pit had a significant other grounding and fusing problems. (Tr. 215). Taken together these created a very hazardous situation. Accordingly, I credit Inspector DeHerrera's testimony and find the violation to be S&S. Mr. Cullen's testimony that he relied on former Inspector Barr's determination that the circuit complied with MSHA standards is not very persuasive. By Mr. Cullen's own account, Mr. Barr has not inspected the mine for ten years and it was unreasonable for Cullen to rely on those previous inspections. I appreciate that it is difficult for a mine operator to comply with a safety standard that is subject to different interpretations by different inspectors. In this instance, however, that is not the case. Accordingly, I find that the violation was caused by Cullen's moderate negligence. A penalty of \$80.00 is appropriate.

4. Citation No. 3470644 alleges that the fuses protecting the cable supplying power to the south belt motor were inadequate to protect the circuit, in violation of section 56.12001.

Inspector DeHerrera testified that the circuit should have been protected with 20 amp fuses rather than the two 30 amp and one 45 amp fuses that was present. (Tr. 216-18). He testified that a fire and shock hazard was present. Id. As with the previous citation, Cullen maintains that the circuit was adequately protected by overcurrent devices (heaters). (Tr. 296-98). The inspector did not deny that heaters were present. (Tr. 271-72).

Based on this evidence, I find that the Secretary has established a violation, for the reasons set forth with respect to Citation No. 3470644. The Secretary has not alleged that the violation was S&S. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

5. Citation No. 3470645 alleges that fuses protecting the circuits for the feeder motor, under cone motor, under screen motor, under jaw motor, crossover motor and screen motor were inadequate, in violation of section 56.12001. Each of these circuits were protected by 200 amp fuses through starter boxes. Inspector DeHerrera testified that these circuits should have been protected by 20 and 30 amp fuses. (Tr. 218-22). He stated that the conditions created a fire and shock hazard. Id. As before, Cullen maintains that the circuit was adequately protected by heaters. (Tr. 298-99).

Based on this evidence, I find that the Secretary has established a violation, for the reasons set forth with respect to Citation No. 3470644. The Secretary has not alleged that the violation was S&S. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

6. Citation No. 3470646 alleges that grounding was inadequate at the crushing and screening plant because the majority of the circuits were fused at 200 amps and the grounding conductors were attached to starter boxes, in violation of section 56.12025. The safety standard provides, in part, that metal parts enclosing electrical circuits shall be grounded or provided with equivalent protection. Inspector DeHerrera testified that the standard was violated because the grounding conductor was not capable of carrying fault current back to the source, the generator. (Tr. 223-29) As a consequence, he stated that in the event of a fault, metal surfaces of "a lot" of equipment could become energized. (Tr. 223). He further stated that Cullen's outside electrician, who was present during the inspection, generally agreed with the electrical problems cited by the inspector. (Tr. 255). The inspector determined that this violation was S&S because of the seriousness of the violation and because it could lead to a fatality. (Tr. 226). Mr Cullen testified that he thought the grounding system was adequate based on what his outside electrician and former Inspector Barr had told him. (Tr. 299-300).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that crushing and screen plant was not adequately grounded. I also find that the Secretary has established that the violation was S&S and that Cullen's negligence was moderate. A penalty of \$80.00 is appropriate.

7. Citation No. 3470647 alleges that the conductors supplying power to the crushing and screening plant were laying on the ground and were not protected against mechanical damage, in violation of section 56.12004. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." Inspector DeHerrera testified that power conductors were on the ground in a roadway and were not protected from mechanical damage from vehicles. (Tr. 229-32; Ex. G-15). Vehicles were in the area and the inspector observed that the conductors were damaged. Id. Mr. Cullen testified that these conductors are usually protected by railroad ties, but that these ties were being used for another purpose at the time. (Tr. 300-01).

Based on this evidence, I find that the Secretary has established a violation. The Secretary did not allege that the violation was S&S. I find that the violation was obvious and that Cullen's negligence was greater than moderate. A penalty of \$50.00 is appropriate.

8. Citation No. 3470648 alleges that a hand-held disk grinder was not equipped with ground protection because the grounding prong on the plug was missing, in violation of section 56.12025. The safety standard provides that metal enclosures shall be grounded or provided with equivalent protection. Inspector DeHerrera testified that the round grounding prong on the plug was missing and that this condition created shock hazard. (Tr. 233-36; Ex. G-16). He stated that miners have been killed in situations where a short circuit in a small hand tool energized the metal surfaces. Id. Mr. Cullen testified that the disk grinder was plugged into a portable generator and that a ground fault interrupter ("GFI") was attached to the generator. (Tr. 301-02; 311-313). The inspector indicated that a GFI would be equivalent protection. (Tr. 282). A GFI is a device that breaks a circuit in the event of a fault; plugs in newer home bathrooms are equipped with such devices. (Tr. 301).

Based on this evidence, I find that the Secretary has established a violation. Although the GFI provided protection at that location, miners could have used the disk grinder at other locations at the mine where a GFI was not present. (Tr. 313). At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 236-37). Because the grinder was used in

a location that was protected by a GFI, I find that the evidence does not establish "a reasonable likelihood that the hazard contributed to will result in an injury." A penalty of \$30.00 is appropriate.

9. Citation No. 3470649 alleges that the power cable entering the motor housing of the stacker conveyor at the silica plant was not bushed, in violation of section 56.12008. The safety standard provides, in part, that "[c]ables shall enter frames of motors, splice boxes, and electrical compartments only through proper fittings." Inspector DeHerrera testified that the cable had been "pulled away from the splice box and the protection was not there for the [inner] conductors." (Tr. 238). As a consequence, the insulation on the conductors could be damaged by the rough edges of the opening or fitting of the splice box and a fault could result, creating a shock hazard. (Tr. 237-39). Mr. Cullen testified that he bought many of the motors used and that they did not always have a proper fitting on them. (Tr. 302-03). He stated that he tried to tighten the cables down as best as he could. Id. He also stated that the silica plant was a temporary, experimental operation and that MSHA should not have inspected it because it had nothing to do with the mine. Id.

Based on this evidence, I find that the Secretary has established a violation. As set forth above, I find that MSHA did have authority to inspect the silica plant. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence. A penalty of \$20.00 is appropriate.

10. Citation No. 3470650 alleges that the power cable entering the motor housing of a water pump at the pond near the silica plant was not bushed, in violation of section 56.12008. Inspector DeHerrera testified that the hazards associated with this alleged violation is the same as the previous violation. (Tr. 239-41; Exs. G-3, G-19). Mr. Cullen testified that he did not think that the pump was "hooked up" and that the inspector should not have been at the silica plant. (Tr. 303-05).

Based on this evidence, I find that the Secretary has established a violation. As set forth above, I find that MSHA did have authority to inspect the silica plant. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence. A penalty of \$20.00 is appropriate.

11. Citation No. 3470654 alleges that the cover plate for the secondary screen motor junction box at the silica plant was not in place, exposing wires and connections, in violation of section 56.12032. The safety standard provides that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repair.

Inspector DeHerrera testified that because the cover was missing, moisture could enter the junction box and possibly cause a short circuit, creating a shock hazard. (Tr. 250-53; G-18). Mr Cullen testified that he buys used motors and that often the covers are missing and he has to fabricate one. (Tr. 308-09). He stated that he does not think that the motor was ever used in that condition. Id.

Based on this evidence, I find that the Secretary has established a violation. As set forth above, I find that MSHA did have authority to inspect the silica plant. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence and was not serious. A penalty of \$10.00 is appropriate.

12. Citation No. 4119016 alleges that the cover plate on the junction box at the drive motor for a specified conveyor at the crusher was missing, exposing wires to moisture, in violation of section 56.12032. Inspector Gary Grimes testified that the exposed wires created possible shock and fire hazards. (Tr. 34-37; Ex. G-6). Mr. Cullen testified that power to the drive motor had been disconnected at the junction box. (Tr. 101-04). That is, power had been disconnected by removing the cover plate and removing the wires supplying power to the junction box. Id. The power was disconnected because the miners were moving the equipment to repair the cone crusher. Id. I credit the testimony of Mr. Cullen in this regard, which is supported by Exhibit G-6. It appears that the wires supplying power to the motor had been removed. Accordingly, it is appropriate that this citation be vacated.

13. Citation No. 4121086 alleges that the metal enclosure for the generator supplying power to the mine was not grounded, in violation of section 56.12025. The safety standard provides that all metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. Inspector Marti testified that metal parts of the generator were not grounded to the earth, presenting an electric shock hazard.⁴ (Tr. 141-44, 162-63; Ex. G-11). Mr. Cullen testified that the generator was properly grounded with a grounding rod, but that Inspector Marti just did not see it because it was underneath the generator trailer. (Tr. 183-85). He also testified that Inspector DeHerrera told him on July 28, 1992, that the generator was grounded, but the grounding rod was not long enough. Id. Inspector DeHerrera testified that he did not see a grounding rod and told Mr. Cullen what kind of rod would be required. (Tr. 204).

⁴ Ms. Barbara Renowden, an MSHA Conference & Litigation Representative, examined Inspector Marti for the Secretary and cross-examined Mr. Cullen with respect to all of the citations issued by Inspector Marti.

Based on this evidence, I find that the Secretary has established a violation. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's moderate negligence and was serious. A penalty of \$50.00 is appropriate.

B. Guarding Citations

1. Citation No. 3470652 alleges that the drive belts and pulleys on the boom truck air compressor were not guarded, in violation of section 56.14107(a). The safety standard provides in part, that moving machine parts shall be guarded to protect persons from contacting pulleys, flywheels and similar moving parts that can cause injury. Inspector DeHerrera testified that the pinch point of pulley and belt was about four feet above the ground and was at the back of the truck where miners could come in contact with it. (Tr. 243-47, 283-84, 286; Ex. G-17). He stated the someone could get their hand caught in the rotating parts or the pinch points. Id. Mr. Cullen testified that the compressor is in the same condition as when he bought it and that the moving parts are protected by location between the compressor motor and the air tank. (Tr. 306-07). He also stated that no miner has been injured since he as purchased it about six years before the citation was issued. Id.

Based on this evidence, I find that the Secretary has established a violation. I do not agree that the location of the pulley provided any significant degree of protection. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 247). I agree and find that this violation was significant and substantial. Specifically, I find that the Secretary established a reasonable likelihood that the hazard contributed to will result in a serious injury. The evidence establishes that miners worked around the truck, taking and returning supplies kept there, and were exposed to the hazards of the moving parts. I find that the violation was caused by Cullen's moderate negligence and was serious. A penalty of \$80.00 is appropriate.

2. Citation No 3470653 alleges that a hand-held disk grinder was not equipped with a disk guard, in violation of section 56.14107(a). Section 56.14107(a) states:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and

similar moving parts that can cause injury.

Inspector DeHerrera testified that the disk grinder did not have a guard and that a miner could become injured if the disk wheel disintegrates or comes in contact with the rotating disk. (Tr. 247-50; Ex. G-16). He stated that Cullen violated that part of the regulation that covers "similar moving parts." (Tr. 249). Mr. Cullen testified that there was usually a shield for the grinder but the miners must have taken it off to use the grinder on the cone crusher. (Tr. 307-08).

I find that the Secretary has not established a violation of the safety standard because the rotating disk on the small hand-grinder is not similar to gears, sprockets, chains, pulleys or the other parts listed in the standard. The rotating disk on the electric hand tool is used to grind and smooth metal surfaces and does not have characteristics in common with pulleys, gears, sprockets, flywheels, fan blades or the other moving parts. Mathies Coal Co., 5 FMSHRC 300, 302 (March 1983); Rochester & Pittsburgh Coal Co., 10 FMSHRC 1576, 1580 (November 1988) (ALJ). Although the disk moves in a circular manner, it does not share other characteristics with the moving parts specified in the standard. While safety standards must often be broadly written to cover a wide range of circumstances, they cannot be applied in a manner that fails to inform a reasonably prudent person that the condition at issue was in violation of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). I find that a reasonably prudent person would not realize that the cited standard applied to the disk grinder. Accordingly, it is appropriate that this citation be vacated.

3. Citation No. 4119014 alleges that the guard for the drive belts and pulley for the jaw crusher had been partially cut away exposing miners to moving machine parts, in violation of section 56.14112(a)(2). The safety standard provides that guards shall be constructed and maintained to "not create a hazard by their use." Inspector Grimes testified that the guard that was present had been partially cut exposing the flywheel, pulley drive, and belts. (Tr. 25-27; Ex. G-4). He stated that a person slipping or falling could get caught in the pulley drive and lose an arm or a hand. (Tr. 26). Mr. Cullen stated that the holes in the guard have been there since he purchased the crusher and that the holes are so high off the ground that it would be very difficult to get your hand in it. (Tr. 94-96). He stated that he owned the crusher for about nine years. (Tr. 118-120).

Based on this evidence, I find that the Secretary has established a violation. I find that the holes cut into the guard created a hazard. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to

S&S based on the inspector's testimony. (Tr. 28). I agree with the inspector's original determination and find that this violation was not S&S. Although a discrete safety hazard was created by the violation, the Secretary did not establish that there was a reasonable likelihood that the hazard contributed to will result in an injury. Specifically, I find that the holes were small and difficult to reach, even if someone were to slip and fall. That is, I find that the chance of someone getting his hands or fingers in the unguarded area to be remote, at best. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

4. Citation No. 4119015 alleges that the guard on the tail pulley for the No. 2 conveyor was not securely in place, in violation of section 56.14112(b). The safety standard provides, in part, that guards shall be securely in place while machinery is being operated. Inspector Grimes testified that the guard was inadequate because it did not cover all the moving machine parts and was not firmly attached to the structure. (Tr. 28-34; Ex. G-5). He stated that someone could come into contact with the moving tail pulley while cleaning up spilled material around the belt. Id. Mr. Cullen testified that the only moving part was the tail pulley and the only way to contact it would be to do so on purpose. (Tr. 98-101, 120-22). He testified that miners shovel away spilled material from the bottom and that they would not be exposed to the moving pulley. Id. He stated that other MSHA inspectors have observed the guard and have not found it to be in violation of the safety standard. (Tr. 100).

Based on this evidence, I find that the Secretary has established a violation. I find that the guard did not adequately protect the tail pulley from contact by miners. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 32). Whether this violation is S&S is a close call. I find that the Secretary established by a preponderance of the evidence that there was a reasonable likelihood that the hazard contributed to would result in an injury and that such injury could be of a reasonably serious nature. The evidence establishes that miners worked around the area, occasionally cleaned out loose material while the belt was operating, and greased a fitting. I find that the violation was caused by Cullen's moderate negligence and was serious. A penalty of \$50.00 is appropriate.

5. Citation No. 4119017 alleges that the back of the self cleaning tail pulley beneath the Telesmith crusher was not guarded, in violation of section 56.14107(a). Inspector Grimes testified that the tail pulley was about two feet above the ground and that it was possible for a miner to come in contact with it if he slipped and fell while cleaning up loose material under the belt. (Tr. 37-40; Ex. G-7). He stated that there was

at least one guard on the side. (Tr. 39). Mr Cullen testified that the guard had been taken off to clean material from the area. (Tr. 104-05).

Based on this evidence, I find that the Secretary has established a violation. I find that tail pulley was not adequately guarded. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 40). I agree with the inspector's original determination and find that this violation was not S&S. Although a discrete safety hazard was created by the violation, the Secretary did not establish that there was a reasonable likelihood that the hazard contributed to will result in an injury. I find that it was unlikely that a miner would come in contact with the tail pulley, even if he were to slip and fall, given its location and the fact that there was at least one guard on the side. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

6. Citation No. 4119018 alleges that the bottom drive pulley and belts on the Telesmith crusher were not properly guarded, in violation of section 56.14107(a). Inspector Grimes testified that the existing guard did not extend far enough down to prevent miners from coming in contact with the pulley. (Tr. 40-44; Ex. G-8). He stated that a miner could slip on loose material and touch the pulley or accidentally put his hand on the pulley while performing maintenance. Id. The pulley was about four feet above the ground. (Tr. 42). Mr. Cullen testified that the guard had been removed a few days before to work on the crusher. (Tr. 105-08). He stated that the cone (Telesmith) crusher had become jammed with material and the guard was taken off so that miners could manually shake the pulley back and forth to get the material loose. Id.

Based on this evidence, I find that the Secretary has established a violation. I find that pulley was not adequately guarded. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 44). I agree with the inspector's original determination and find that this violation was not S&S. Although a discrete safety hazard was created by the violation, the Secretary did not establish that there was a reasonable likelihood that the hazard contributed to will result in an injury. I find that it was unlikely that a miner would come in contact with the pulley, even if he were to slip and fall. I have taken into consideration the fact that the cone crusher was under repair and I credit Mr. Cullen's testimony that part of the guard had been removed in an attempt to dislodge the material that was

jammed in the crusher. Thus, the hazard had not existed for a long time. The crusher was never used again because it had to be rebuilt. (Tr. 108). I find that the violation was caused by Cullen's low negligence. A penalty of \$20.00 is appropriate.

7. Citation No. 4119019 alleges that the tail pulley beneath the pioneer shaker screen was not properly guarded, in violation of section 56.14107(a). Inspector Grimes testified that the cited tail pulley was not guarded and that miners could come in contact with it while cleaning loose material from the area. (Tr. 44-49; Ex. G-9). He stated that if someone contacted the moving tail pulley, he could lose a limb or be killed. (Tr. 48). Mr Cullen testified that a guard was present, but that when Cullen moved the cone crusher for repair, the guard was removed as well because it was built into the conveyor system. (Tr. 108-10, 116-18). He stated that once the cone crusher had been repaired, the guard would have been replaced when the equipment was put back into place. (Tr. 118-18). Inspector Marti, who had been at the mine on July 21, 1992, testified that the tail pulley was operating on that date and that a guard was not in place. (Tr. 133).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that tail pulley was not guarded and that the pulley had been operating while the guard was not in place. I also find that the Secretary has established that the violation was S&S and that Cullen's negligence was moderate. A penalty of \$50.00 is appropriate.

8. Citation No. 4119020 alleges that the head pulley guard on the conveyor belt underneath the pioneer screen was not securely in place, in violation of section 56.14112(b). Inspector Grimes testified that the head pulley was not guarded to prevent employees from contacting the moving part or being caught in the pinch point. (Tr. 49-52; Ex. G-10). He stated that a guard was there but that it had come loose. Id. He testified that a miner could trip and fall and accidentally come in contact with the pinch point. He also stated that miners would be in the area because a grease fitting was next to the pulley. Mr. Cullen testified that a person would have to stand on top of another conveyor to reach the moving parts cited by the inspector. (Tr. 110-11). He also stated that miners do not grease the pulley when it is in operation because it must be shut down to get on top of the conveyor to reach the grease fitting. Id.

Based on this evidence, I find that the Secretary has established a violation. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence and was not serious. A penalty of \$20.00 is appropriate.

C. Other Citations

1. Citation No. 3470651 alleges that three employees were installing a new mantle on the Telesmith cone crusher and were not wearing safety shoes, in violation of section 56.15003. The safety standard provides that suitable protective footwear should be worn in and around an area of a mine or plant where a hazard exists that could cause an injury to the feet. Inspector DeHerrera testified that the workers were wearing athletic shoes and that they were working with heavy tools and other equipment. (Tr. 241-43; Ex. G-16). He stated that if one of the men dropped a tool or the heavy mantle on their foot they could receive a permanently disabling injury. Id. Mr. Cullen testified that he tells his employees that they must wear hard-toed work boots, but they sometimes do not wear them. (Tr. 305-06).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that three miners were not wearing protective footwear in an area where their feet could be seriously injured. I also find that the Secretary has established that the violation was S&S and that Cullen's negligence was moderate. A penalty of \$50.00 is appropriate.

2. Citation No. 4119013 alleges that the ladder to the crusher deck did not extend to the ground, that a wooden block was under the ladder as the first step, and that an employee could fall. The citation alleges a violation of section 56-.11001, which provides that a safe means of access shall be provided to all working places. Inspector Grimes testified that a 12-inch by 12-inch block of wood was used as a "stepping stone" to reach the bottom of the ladder that is used to get onto the crusher deck. (Tr. 22-24). He stated that the wooden block was "unsecured on unstable ground." (Tr. 23). The ladder was not supported by the wooden block. Id. He stated that someone stepping on the block could twist it, fall and hit their head on the frame of the crusher deck. (Tr. 24). Mr. Cullen testified that the ladder was attached to the deck, was equipped with a handrail and the bottom step was usually closer to the ground. (Tr. 96-98). He further stated that at this location the block was put there as a bottom step.

Based on this evidence, I find that the Secretary did not establish that there was not a safe means of access to the crusher deck. A mine is not an office building with smooth, flat surfaces. I credit Mr. Cullen's testimony that the ladder was equipped with a handrail and I find that one could safely get up to the deck by stepping onto the block and then the ladder. There was no showing that the block was likely to flip over or that it created hidden hazard that could injure a miner. Accordingly, it is appropriate that this citation be vacated.

3. Citation No. 4121087 alleges that a handrail was not provided on the stair steps to the trailer for the generator or on the outer edges of the trailer, in violation of section 56.11002. The safety standard provides, in part, that elevated walkways, elevated ramps and stairways shall be provided with handrails. Inspector Marti testified that miners have to go onto the generator trailer to start, stop, and service the generator. (Tr. 144-48; Ex. G-12). He stated that cables coming out of the generator obstruct part of the walkway around the generator creating a tripping hazard. He testified that the bed of the trailer was about 42 inches above the ground and that a person could be seriously injured if he fell off. *Id.* Mr. Cullen testified that this trailer never had handrails, has never been cited for lack of handrails, and nobody has ever fallen off the trailer. (Tr. 186).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that handrails were not provided on the elevated walkway and the stairs. A falling hazard was presented. Although the hazard was not particularly great, I find that the Secretary has established that the violation was S&S. I find that Cullen's negligence was low. A penalty of \$40.00 is appropriate.

4. Citation No. 4121088 alleges that an access road at the mine was not bermed, blocked or posted against entry, in violation of section 56.9300(d). The citation states that a drop-off of about four to five feet existed on one side of the roadway for about 250 feet creating a rollover hazard. The safety standard provides, in part, that certain infrequently traveled roads need not be provided with berms or guardrails if the roadway is protected by locked gates, warning signs are posted and delineators are installed. Inspector Marti testified that the cited roadway was not a regularly traveled road, but that it was open to travel and presented a rollover hazard. (Tr. 148-53; Ex. G-13). He also stated that it was reasonably likely that a rollover would occur because the drop-off was close to the roadway. (Tr. 150-51). He testified that a very serious injury could occur in the event of a rollover. *Id.* He also stated that there were no warning signs or delineators and that the hazard would be greater if there was snow on the ground. (Tr. 152-53). Mr Cullen testified that nobody has any reason to go down the cited roadway because it is a dead end road that is never used and it does not provide access to any part of the mine. (Tr. 186-89).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that there was a drop-off close to this roadway that presented a hazard if traveled in bad weather. While the road was not often used, it was open and could have been used. Although the hazard was not particularly great, I find that the Secretary has established

that the violation was S&S. I find that Cullen's negligence was low. A penalty of \$40.00 is appropriate.

5. Citation No. 4121091 alleges that toilet facilities were not provided at the mine, in violation of section 56.20008. The standard requires toilet facilities that are compatible with the mining operation and are readily accessible. Inspector Marti testified that there were four persons employed at the mine and that mines of this size usually provide portable toilets. (Tr. 153-55). Mr. Cullen testified that their mining permit authorizes the employees to use the bathroom at a private residence that is nearby and that the employees go to a local convenience store several times a shift to buy sodas and use the facilities there. (Tr. 189-90).

Based on this evidence, I find that the Secretary has established a violation. The safety standard does not have an exemption for small mines and the facilities located off-property do not meet the requirements of the standard. I also find, however, that it was reasonable for the miners to use the facilities at the local convenience store. I find that the violation was not serious and was the result of Cullen's low negligence. A penalty of \$2.00 is appropriate.

6. Citation No. 4121092 alleges that the mine did not have any fire extinguishers or other acceptable means to fight fires in their early stages that could endanger a person, in violation of section 56.4200. The safety standard provides, at subsection (a)(1), that mines shall have onsite equipment for fighting fires in their early stages and describes, at subsection (b), the specific equipment requirements. Inspector Marti testified that fire extinguishers should be available to fight fires when they first start and he did not find any on the property. (Tr. 155-59). He stated that the lack of fire extinguishers created a hazard because it is a natural reaction of people to try to put out a small fire and, without the proper equipment, someone could become injured. Id. A person fighting a fire without the proper equipment could become overcome by smoke, or could catch their clothing on fire and be seriously injured. Id. Mr. Cullen testified that he has repeatedly told his employees to get away if a fire starts because none of Cullen's equipment is "worth risking your life over." (Tr. 190-93). He also stated that fire extinguishers were in the storage shed, in the fuel truck, and in the tool truck. Id. He stated that the storage shed was not locked and was about 500 yards from the plant. (Tr. 193-94). Inspector DeHerrera testified that he also looked for fire extinguishers, including in the fuel truck, and did not find any. (Tr. 203-04). He also stated that Mr. Cullen told him that there was nothing but junk in the storage shed and that it was locked. Id.

Based on this evidence, I find that the Secretary has established a violation. I credit the testimony of the inspectors and

safety by trying to extinguish a fire with unsuitable equipment. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, Ms. Renowden moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 158). I agree that the violation should be designated S&S because there was a reasonable likelihood that the hazard contributed to would result in an injury and the injury was reasonably likely to be serious. I find that the violation was serious and was the result of Cullen's moderate negligence. A penalty of \$50.00 is appropriate.

II. CIVIL PENALTY ASSESSMENTS

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties as discussed above:

<u>Citation Nos.</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
<u>WEST 94-74-M</u>		
4121086	56.12025	\$50.00
4121087	56.11002	40.00
4121088	56.9300(d)	40.00
4121091	56.20008	2.00
4121092	56.4200	50.00
3470641	56.12028	20.00
3470642	56.12004	30.00
3470643	56.12001	80.00
3470644	56.12001	30.00
3470645	56.12001	30.00
3470646	56.12025	80.00
3470647	56.12004	50.00
3470648	56.12025	30.00
3470649	56.12008	20.00
3470650	56.12008	20.00
3470651	56.15003	50.00
3470652	56.14107	80.00
3470653	56.14107	vacated
3470654	56.12032	10.00
4119013	56.11001	vacated

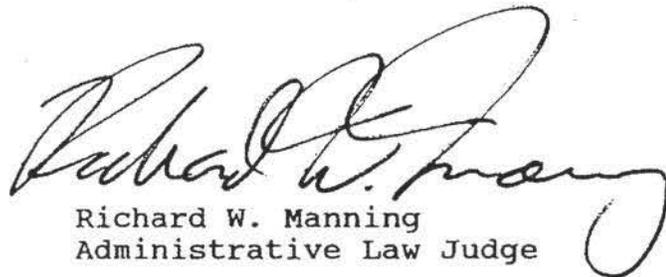
WEST 94-75-M

4119014	56.14112(a)(2)	\$30.00
4119015	56.14112(b)	50.00
4119016	56.12032	vacated
4119017	56.14107(a)	30.00
4119018	56.14107(a)	20.00
4119019	56.14107(a)	50.00
4119020	56.14112(b)	20.00

Total Penalty \$912.00

III. ORDER

Accordingly, Citation Nos. 3470653, 4119013 and 4119016 are **VACATED**, all of the other above-listed citations are **AFFIRMED** as modified, and Cullen Rock Crushing and Gravel is **ORDERED TO PAY** the Secretary of Labor the sum of \$912.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

John Cullen, JOHN CULLEN ROCK CRUSHING AND GRAVEL, 4356 Blueflax Drive, Pueblo, CO 81001-1124 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 20, 1995

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEVA 93-312
Petitioner : A. C. No. 46-06902-3602
:
v. :
:
Little John Mine
J A L COAL COMPANY, :
INCORPORATED, :
Respondent :

ORDER OF DEFAULT

Before: Judge Merlin

On April 22, 1994, the Commission issued an order remanding the above-captioned case to me to determine whether relief from default is warranted.

The operator had requested that the order of default entered in this case on April 22, 1994, be vacated and the matter set for further proceedings.

On April 25, 1994, I issued an order vacating the order of default and directing the operator to file an answer to the Secretary's penalty petition. The operator was also advised that this Commission is an independent agency wholly distinct and separate from the Secretary of Labor and MSHA. The file contains the return receipt showing that the operator received a copy of the April 25 order on May 3, 1994.

On August 1, 1994, an order to show cause was issued directing the operator to file an answer to the penalty petition or it would be held in default. The file contains the return receipt showing that the operator received a copy of the show cause order on August 6, 1994. The operator, however, has failed to comply with the order by either filing an answer or by showing cause why he did not do so. Numerous attempts to contact the operator have been unsuccessful.

In light of the foregoing, it is ORDERED that the operator be held in DEFAULT for the penalty amount of \$3,900 and that it PAY this sum immediately.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Caryl A. Casden, Esq., Office of the Solicitor, U. S. Department
of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Mr. John A. Laurita, President, J A L Coal Company, 130 Fayette
Street, Morgantown, WV 26505

/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 21 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1049
Petitioner : A.C. No. 15-17291-03512S
v. :
 : Mine: #1
EBENEZER COAL COMPANY, INC., :
Respondent :

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird &
Jones, P.S.C., Pikeville, Kentucky, for
Respondent.

Before: Judge Amchan

MSHA'S smoking sweep and the instant citation

Respondent's No. 1 Mine in eastern Kentucky was one of 175 mines inspected on May 19, 1994, as part of an MSHA "smoking sweep." This "sweep" was initiated as part of MSHA'S response to two recent fatal mine explosions which the agency attributes to underground smoking. It involved the simultaneous inspection of mines in Kentucky, West Virginia and Virginia to determine whether miners were taking smoking materials underground in violation of MSHA's regulations at 30 C.F.R. § 1702 and the Federal Mine Safety and Health Act, 30 U.S.C. § 877(c). Another objective of the sweep was to determine whether mine operators were adequately implementing their approved smoking search programs pursuant to the regulation.

At Respondent's No. 1 Mine, MSHA Inspector Danny Bryant discovered an unopened pack of cigarettes underground in a plastic grocery bag, which was being used as a lunch container by miner Daniel King (Tr. 49-51). King asserted that he was unaware of the presence of the cigarettes and that his wife (or girl friend) had placed them in the bag without his knowledge (Tr. 50, 57).

Bryant issued Respondent Citation No. 3376644 pursuant to section 104(a) of the Act. The citation alleged a "significant and substantial" violation of 30 C.F.R. § 75.1702. Bryant characterized Ebenezer Coal's negligence as "moderate." He also concluded that an injury was reasonably likely to result from the violation and that such injury was likely to result in lost workdays or restricted duty (Exh. P-1).

After review by MSHA's national office, the citation was modified to allege a section 104(d)(1) order, rather than a citation. Respondent's negligence was recharacterized as "high," rather than "moderate." The likelihood of injury was recharacterized as "highly likely," the likely injury was modified to "fatal," and the number of employees affected was changed from one to ten (Tr. 40, Exh. P-2). The penalty for the modified order was specially assessed and a \$2,500 civil penalty was proposed.

Respondent concedes that a violation occurred and that it was "significant and substantial" and due to moderate negligence. It takes issue with the characterization of high negligence, the conclusion that injury was "highly likely," and the amount of the proposed penalty (Tr. 79-80).

Respondent's smoking search program prior to the citation

Prior to the instant citation/order, Respondent was conducting smoking searches pursuant to a program approved by MSHA's Pikeville, Kentucky District Office on December 29, 1992 (Exh. P-7). That program required that all employees were to be searched at the mine portal immediately before going underground for smoking materials, matches, or lighters. The searches were to be conducted at least once a week at irregular intervals. Written records were required to be made

of the searches and additional searches were to be made if there was any indication weekly searches were inadequate¹.

Prior to May 19, 1994, searches were normally performed by foreman Michael Richards. On occasions when he was observed, Mr. Richards patted the miners down and searched their pockets (Tr. 56). He was also observed searching for smoking materials on mining equipment and in employees' lunch buckets left on mining equipment (Tr. 56). Smoking searches were also occasionally made by superintendent John Paul Biliter (Tr. 67). There is no indication in the record that any smoking materials were ever found underground at Respondent's mine prior to May 19, 1994 (Tr. 67, 70).

There is also no indication that Respondent did not follow its approved smoking search plan. The Secretary has suggested that the searches were performed at sufficiently regular intervals that employees might have been able to anticipate them (Tr. 60-62). Close examination of Exhibit R-1 indicates that the searches could have been more irregularly spaced, but does not provide a basis for concluding that Respondent was "highly negligent."

In the five months between December 13, 1993 and May 19, 1994, Respondent conducted 26 smoking searches. Eight were performed on a Monday, four on Tuesdays, two on Wednesdays, two on Thursdays, and ten on Fridays. From April 1, 1994 through May 13, 1994, there was a smoking search every Friday, except April 29. During that period there were only two searches conducted on days other than Fridays. Searches were conducted on April 11, 1994, a Monday, and April 28, a Thursday.

From this record, I conclude that miners could have had less reason to anticipate a search on days other than Fridays than they should have had. On the other hand, since May 19 was a Thursday, and a search had been made on Thursday, April 28, 1994, any miner taking smoking materials underground on May 19, could not be sure that he would not be searched. In conclusion,

¹A few days after receiving the instant citation/order, Respondent began searching its miners for smoking materials daily (Tr. 55).

insufficient randomness in Respondent's smoking searches may support a finding of moderate negligence, but not "high" negligence.

The modifications of the instant citation/order were made without regard to the adequacy or inadequacy of Respondent's smoking search plan or its implementation (Tr. 31, 41). The modifications were made on the theory that if a miner carried smoking materials underground, the mine operator must have been highly negligent (Tr. 20, 23, 30-33, 40, 44-45). I am unable to draw the same inference.

There are several alternative explanations for the discovery of smoking materials in Mr. King's lunch bag. One explanation is the one advanced by the Secretary, that Mr. King knew he would not be searched on May 19, and only the unanticipated presence of MSHA proved his assumptions in that regard incorrect. Another is the explanation that Mr. King gave to the inspectors, that unbeknownst to him his wife (girl friend) placed the cigarettes in his lunch bag (Tr. 50, 57). A third explanation is that Mr. King was simply foolhardy in taking smoking materials underground since a search on Thursday, May 19, was just as likely as the one performed on Thursday, April 28. I conclude that all three explanations are equally plausible.

In summary, I find the record supports a finding of moderate negligence, rather than high negligence. Further, I find that while it was reasonably likely that Mr. King would smoke underground and contribute to an occupational injury, it was not "highly likely" as asserted by the Secretary (Tr. 12-16).

It is certainly possible for smokers to refrain from smoking for an entire workshift, even if they have a pack of cigarettes in their possession. Moreover, Mr. King, as a scoop operator, could have smoked during his shift on the surface (Tr. 57-59). On the other hand, he may well have not resisted the temptation to smoke underground, just as other miners have not done so (Tr. 19).

Citation No. 3376644 is affirmed as a "significant and substantial" violation of section 104(a) of the Act. I find that it was due to the moderate negligence of Respondent and

that it was reasonably likely to result in fatal injuries (Tr. 19).

Assessment of Civil Penalty

Considering the six penalty criteria in section 110(i) of the Act, I assess a \$250 civil penalty for this violation. Respondent operates a relatively small mine which produces approximately 100,000 tons of coal annually (Tr. 58). There is no indication that a penalty even of the magnitude of the \$2,500 proposal would jeopardize Ebenezer's ability to stay in business.

Good faith in quickly abating the violation was demonstrated by Respondent's implementation of daily smoking searches on May 24, 1994 (Tr. 55, Exh. R-1, p. 6). Respondent had no prior history of related violations and its prior record of MSHA violations generally (Exh. P-8) does not affect my assessment in any manner.

Given the moderate negligence and the gravity of the violation, I deem \$250 an appropriate penalty. Although, Respondent followed its MSHA-approved search plan, more randomness in its searches may have provided additional incentive to miners to make certain that they did not have smoking materials with them when they went underground. Similarly, although having a pack of cigarettes does not necessarily mean one will smoke, it makes it much more likely that smoking will occur than if one does not have cigarettes.

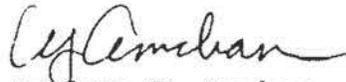
Congress, in prohibiting the possession of any smoking materials underground when enacting the 1969 Coal Act clearly deemed the presence of any such materials to create a potential for a catastrophic explosion. Thus, even an unopened pack of cigarettes underground is a serious hazard.

In assessing a \$250 penalty, I deem this case distinguishable from Mingo Logan Coal Company, Docket No. WEVA 94-247 (Judge Fauver, February 2, 1995). In that case a large operator did not pat down its miners, but simply relied on their representations that they did not have any smoking materials in their possession. Moreover, Mingo Logan was on notice that its smoking search

program may have been inadequate since it had found smoking materials underground on at least one prior occasion (slip op. at page 6). A penalty of the \$1,900 magnitude assessed by Judge Fauver is not appropriate in the instant case.

ORDER

Citation No. 3376644 is affirmed as a violation of section 104(a) of the Act. A \$250 civil penalty is assessed. The penalty shall be paid within 30 days of this decision.



Arthur J. Amchan
Administrative Law Judge

Distribution:

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

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones,
P.S.C., 415 Second St., P.O. Box 351, Pikeville,
KY 41502-0351 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 21 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-528
Petitioner : A.C. No. 15-17272-03512
v. :
SEXTET MINING CORPORATION, : Docket No. KENT 94-992
Respondent : A.C. No. 15-17272-03515
: West Hopkins No. 11 Mine

DECISION

Appearances: Anne T. Knauff, Esq., and Susan E. Foster, Esq.,
Office of the Solicitor, U.S. Department of
Labor, Nashville, Tennessee, for the Petitioner;
Flem Gordon, Esq., Gordon & Gordon, P.S.C.,
Madisonville, Kentucky for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," charging Sextet Mining Corporation (Sextet) with four violations of mandatory standards and seeking civil penalties of \$17,000 for those violations. The issue before me is whether Sextet violated the standards as charged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Order No. 3547919, issued pursuant to Section 104(d)(1) of the Act,¹ alleges a "significant and substantial" violation of

¹ Section 104(d)(1) reads as follows:

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

the standard at 30 C.F.R. § 75.517 and charges as follows:

The trailing cable supply[sic] power (300 VDC) to the 10 S/C shuttle car company number CA 10 being operated on the A1 Unit MMU ID001 had heat damage to approximately 30 feet of cable with 70 places that the outer jacket and inner insulation was damaged exposing the bare phase conductors. Three other damaged places were found with bare exposed conductors in the remaining cable.

The cited standard, 30 C.F.R. § 75.517, provides in relevant part that "power wires and cables . . . shall be insulated adequately and fully protected."

Ted Smith, a field office supervisor for the Mine Safety and Health Administration (MSHA) who has 24 years experience in the mining industry and as a coal mine inspector, was conducting a routine health and safety inspection at the West Hopkins No. 11 Mine on October 9, 1993, when he issued the subject order. According to Inspector Smith, the cited 300 volt DC cable was being used to provide power to the shuttle car. The shuttle car had been used to transport coal from the face to the loading point and, when cited, was located near the feeder. The shuttle car was not then being used, however, since production had been halted under a "Section 103(k)" order. The cable was connected to the power center and to the shuttle car at the time it was cited and no warnings had been posted regarding the damaged cable.

Smith described the trailing cable as oblong shaped, two inches wide, 3/4 inch thick and 550-600 feet long. It consisted

Footnote 1 Continued

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

of an outer jacket with two phase wires inside protected by additional insulation. As the shuttle car travels to the face, some two to five crosscuts away, the cable ordinarily trails behind the shuttle car on a spool. Thus the cable would ordinarily be spooled-off when the shuttle car is operating at the face.

The outer insulation along the cited 30 feet was "very brittle" and "inflexible" according to Smith and cracks were observed in the cable every five inches as it was reeled in. It was cracked down to the bare phase wires and the cracks were up to 1/4 inch wide. According to Smith, the inner insulation was also cracked and the bare conductive wires could be seen inside. There were actually 70 locations with this damage observed along the 30-foot section of cable. Smith concluded that this damage was caused by excess heat.

Smith also cited three areas on the trailing cable with cut and abrasion damage. At these locations the conductors were also exposed with the copper phase wires observed with a cap lamp. On the basis of the above evidence, it is clear that the violation has been proven as charged and, indeed, Respondent acknowledges the violation.

Smith also opined that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

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

See also Austin Power Co. v. Secretary 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

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 (1984), and

also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Since the violation is undisputed, it is clear that the shuttle car had been operating with this seriously damaged power cable. It may reasonably be inferred that it would also have been returned to service when production resumed. With 300 volts of direct current flowing through these cables there was clearly a discrete safety hazard.²

Inspector Smith also noted that the mine floor in the area in which the cable was being utilized was damp and would contribute to the leakage of power along the outer jacket of the cable and to persons nearby. Miners also handle the cable in the normal course of mining. There was also evidence that the defective cable could cause the frame of the shuttle car to become a shock hazard. As noted by the Secretary, there was ample power to cause heart fibrillation and serious injuries to a miner who would contact the defective cables or energized shuttle car. Under the circumstances and relying upon the credible testimony of Inspector Smith, I find that the violation was clearly "significant and substantial" and of high gravity.

In reaching this conclusion I have not disregarded the testimony of Sextet's Safety Director Glenn Lutz that every person on the section had been issued rubber gloves. However, the usage of such gloves and their insulating ability remains at issue. In addition, such gloves would not necessarily protect persons leaning against an energized shuttle car.

Smith further concluded that the violation was the result of the operator's "unwarrantable failure" and high negligence. "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987).

The Secretary seems to argue that since the heat damage to the cable was obvious and extensive, the condition had existed for a long period and should have been discovered and corrected. Smith also based his unwarrantability findings upon the fact that

² It is further noted that imminent danger withdrawal order No. 3547918, issued under Section 107(a) of the Act, was issued for the same conditions cited in the order at bar. That order has therefore become final and the assertions and the imminent danger findings therein may accordingly be accepted as true.

he had discussed with the mine superintendent and the chief electrician the previous May a number of similar defects in their trailing cables and about their cable maintenance program. The record also shows that Sextet committed 17 violations of the standard at issue within the two years preceding this violation. This evidence shows a serious disregard in the maintenance and/or replacement of its power cables. At a minimum this history and the specific prior warnings given by Inspector Smith placed Sextet on notice that greater care was needed with its power cables. Within this framework of credible expert evidence I conclude that, indeed, the violation was the result of aggravated negligence and "unwarrantable failure."

In reaching this conclusion I have not disregarded the testimony of Sextet witness and former coal mine inspector George Siri. Siri testified that he personally would have been unable to determine how long it would have taken for the amount of heat damage found on the cited cable. Given the credible expert testimony of Inspector Smith, however, I give this self-serving statement but little weight. I note, moreover, that even Siri agreed that the cited cable was compromised and should have been replaced. Siri also acknowledged that trailing cables are especially prone to heat damage on DC power and in particular where there is a significant amount of cable on the reel. He further agreed that when the cable loses flexibility and becomes brittle it should be replaced. I have also considered the testimony of Glenn Lutz that the entire trailing cable is visually examined during the weekly inspections. However, under the circumstances of this case, it may reasonably be inferred that such inspection had not been performed or had been performed negligently.

Order No. 3547914, also issued pursuant to Section 104(d)(1) of the Act, similarly charges a violation of the standard at 30 C.F.R. § 75.517 and alleges as follows:

The trailing cable supplying 300 VDC to the CA 2 10SC shuttle car being operated on the No. 1 Unit MMU ID001 had 7 places with damage to the inner and outer insulation with the power conductors bare and exposed.

Sextet also admits to this violation but maintains that the violation was neither "significant and substantial" nor the result of its "unwarrantable failure." According to Inspector Smith the cable cited in this order was connected to the cited shuttle car and the power center at the time of his inspection. There was no evidence that the car or cable had been tagged-out or that warnings were posted that the cable was defective. The damage to this cable was not the result of heat damage as in the previous violations, but rather from abrasions. Smith observed seven torn areas in the cable exposing both power conductors. Smith concluded that it was highly likely for

serious injuries to result from this damage for the reasons previously stated regarding the prior violation charged in Order No. 3547919.

Smith also concluded that the violation was the result of "unwarrantable failure" because the damage was "very obvious." According to Smith the areas had been scalped away and anyone on the section could see the damage. Smith acknowledged, however, that this damage could very well have occurred since the previous required weekly electrical examination. Even considering the prior history, without establishing the length of time the damage had existed, I have difficulty finding the requisite aggravated conduct or omission sufficient to support a finding of unwarrantability and high negligence. The order must accordingly be modified to a citation under Section 104(a) of the Act.

Citation No. 3856829, amended from an order issued pursuant to Section 104(d)(1) of the Act to a citation with reduced negligence under Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Accumulation of combustible materials consisting of coal dust and loose coal ranging in depth of 1/2 inch to 3 inches in depth had been allowed to accumulate in Entries 1 thru 9 and including No. 10 intake room entry on the 001-0 MMU. Starting approximately 180 feet outby the faces and continuing inby including the connecting crosscuts to the last open crosscut. Accumulations were measured with a wooden folden [sic] ruler.

The cited standard requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Sextet acknowledges this violation but maintains that it was not "significant and substantial." The factual allegations in the citation establishing a violation are, therefore, accepted as true. MSHA Coal Mine Inspector Donald Milburn described the cited coal dust as black in color and concluded, therefore, that it was combustible. According to Milburn it was 1/2 inch to 3 inches deep in all nine entries and there was no rock dust on the mine floor. Milburn opined that the accumulations resulted from the overloading of haulage cars and that it had taken three production shifts to accumulate to that extent. He based this conclusion on an estimate that mining had advanced 50 feet per shift and, with 180 feet of accumulations, it would, therefore, have taken about three shifts.

Milburn noted that there had been no mining because of a "Section 103(k)" withdrawal order that had been in effect since 5:00 p.m. two days before on October 7, 1993. Milburn further noted that there had been an MSHA inspection of the same area of the mine and that earlier inspection had taken place around 9:00 a.m. on October 7. The mine was not then cited for the accumulations Milburn found but Milburn concluded that there had been sufficient time from the 9:00 a.m. inspection until 5:00 p.m. that day, when the 103(k) order was issued, for the coal dust and loose coal to have accumulated as he found it on October 9, 1993.

Milburn concluded that the violation was the result of moderate negligence based upon his opinion that the condition had existed for several days before the "103(k)" order had been issued. This testimony is, however, inconsistent with Milburn's testimony that the same unit had been inspected by another MSHA inspector on the morning of October 7, 1993, and that no accumulations were cited at that time. I note, moreover, and credit the testimony of Glen Lutz, that MSHA Inspector Oglesby had entered the mine at 9:00 a.m. on October 7 and had remained until 1:30 p.m. to complete his inspection. Under the circumstances the accumulations discovered by Inspector Milburn would likely have been created between 1:30 p.m. on October 7 and 5:00 p.m. on October 7 when the Section 103(k) order was issued. Accordingly I find Sextet to be chargeable with lower negligence.

However, based upon the existence of combustible accumulations of coal dust and loose coal and considering the electrical violations cited on the same date in the same mining section there can be no doubt that this violation was "significant and substantial."

Citation No. 3856828, also amended from an order issued pursuant to Section 104(d)(1) of the Act to a citation with reduced negligence under Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.402 and charges as follows:

Rock dust has not been adequately applied to the mine roof, ribs and mine bottom on the 001-0 MMU starting approximately 180 feet outby the 1 thru 9 faces and including the No. 10 intake room entry and then continuing inby to 40 feet of faces and including connecting crosscuts. Three rock dust spot samples were collected to substantiate this violation.

The cited standard provides as follows:

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an

explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

30 C.F.R. § 75.403 sets forth the quantities of rock dust required in Section 75.402 and provides as follows:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum.

Inspector Milburn testified that although there was some rock dust on the roof and ribs in the cited area there was none on the mine floor which was black in color. According to Milburn, the black color indicated inadequate rock dusting and that it was combustible, i.e. it would support a fire or explosion. If it had been properly rock dusted, it would be gray or white. Milburn collected three rock dust samples in the intake air courses at least 50 feet outby the face following the band sampling procedure. Two of the three samples showed low incombustible content at 26 and 22 percent. Milburn also observed that the cited area was generally dry and that such dry conditions would aggravate the fire hazard.

Milburn opined that the operator "should have known" of the violation because of the vast area involved, i.e. all of the entries Nos. 1 through 9. I note, however, the testimony of former MSHA Inspector George Siri, who observed many of the entries cited on October 9, 1993. According to Siri, these areas were not problematic. In addition, as previously noted, MSHA Inspector Oglesby had inspected the same area until 1:30 p.m. on October 7, 1993, and found no violations. Moreover, from 5:30 p.m. on that date until the time of the inspection by Milburn, there had been no production. Under the circumstances I find lesser negligence for the violation.

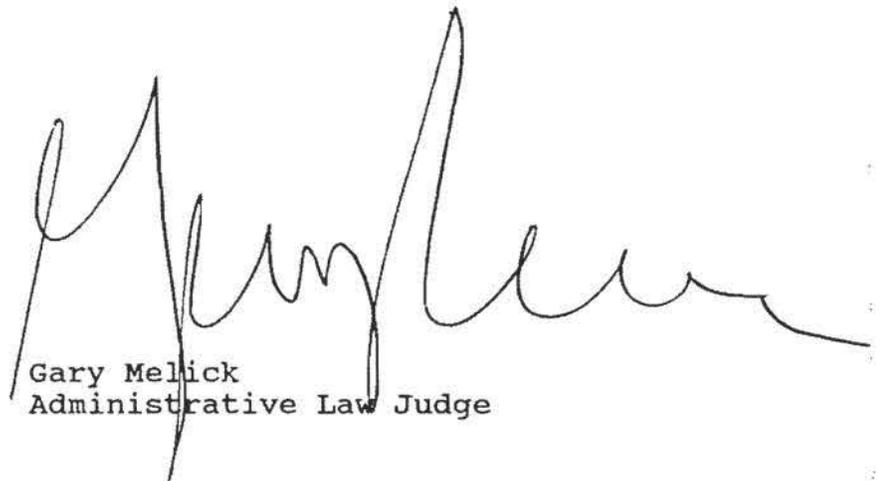
For the same reasons previously noted with respect to Citation No. 3856829, I find that this condition did, however, constitute a "significant and substantial" violation. The same hazards existed and were reasonably likely to cause serious injuries.

Considering the criteria under Section 110(i) of the Act I find that the following civil penalties are appropriate:

Order No. 3547919	\$8,500
Citation No. 3547914	\$500
Citation No. 3856829	\$500
Citation No. 3856828	\$500

ORDER

Order No. 3547914 is hereby modified to a Citation under Section 104(a) of the Act and is **AFFIRMED** as modified. Order No. 3547919 and Citation Nos. 3856829 and 3856828 are **AFFIRMED** and Sextet Mining Corporation is hereby directed to pay civil penalties totalling \$10,000 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

Anne T. Knauff, Esq., Susan E. Foster, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Flem Gordon, Esq., Gordon & Gordon, P.S.C., 1822 North Main Street, P.O. Box 1305, Madisonville, KY 42431-1305 (Certified Mail)

/jff

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 21 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-994
Petitioner : A.C. No. 15-05423-03501 Q7G
v. :
: Manalapan No. 1 Mine
B & S TRUCKING COMPANY, :
Respondent :

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Susan C. Lawson, Esq., Harlan, Kentucky,
for Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of 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. Section 801, *et. seq.*, the "Act," charging B & S Trucking Company (B & S) with one violation of the mandatory standard at 30 C.F.R. § 77.405(b) and seeking a civil penalty of \$1,800 for that violation. The issue before me is whether B & S violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at issue, No. 4242292, alleges a "significant and substantial" violation of 30 C.F.R. § 77.405(b) and charges as relevant herein that "the operator of the No. 11 Mack Truck was observed working under the unsupported raised bed of this coal truck." The cited standard provides that "[n]o work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

Jim Langley, a coal mine inspector and accident investigator for the Mine Safety and Health Administration (MSHA) testified that he was conducting an inspection at the Manalapan Mining Company (Manalapan) No. 1 Mine on October 17, 1993, when he observed from the mine office about 110 feet away, a truck driver

pass beneath the raised bed of a coal truck in the process of fueling that truck. It was a 20 to 30 ton 10 wheel Mack diesel and its bed was raised fully extended to four to eight feet. The truck driver was working for B & S, which hauls coal for Manalapan.

Langley maintains that he was only 100 feet away from the truck at the time of this observation and had an unobstructed view. He first observed the driver fueling the left side tank then pass beneath the raised truck bed to fuel the other side. Langley noted that the driver first passed the fuel hose across then walked beneath the unsecured bed. According to Langley either a bed pin or crib blocks could have been used to secure the raised bed safely and within compliance of the cited standard but neither was used. Within the framework of this credible testimony by the experienced and disinterested witness, Inspector Langley, I conclude that the violation existed as charged.

Inspector Langley also maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Based on his knowledge of prior fatalities resulting from falling unsupported truck beds, Langley concluded that it was highly likely for such a fatality to occur in this case. According to Langley there was no way to determine from an external examination of the hydraulic system whether the safety check valve was indeed functioning or was about to fail and apparently no mechanical examination was performed on the truck at issue in this case to determine whether or not the safety check valve was functioning. Within the above framework of credible evidence I agree that indeed the violation was "significant and substantial." In this regard it is noted that Manalapan Mining Company Safety Director Darrell Cohelia agreed that if the violation had happened as alleged then it was indeed a "significant and substantial" violation.

The Secretary also maintains that the violation was the result of high operator negligence. His analysis in this regard was set forth in his post-hearing brief as follows:

The operator had to have known, and ignored the fact, that the design of the gas pumps at the No. 1 mine encouraged drivers to engage in the violative practice committed by Mr. Brock. The pumps were designed in a manner which prevented the drivers from conveniently and expeditiously refueling the tanks on each side of the truck. Specifically, the pumps were situated so that a driver had to pull alongside the pumps to refuel his truck. However, with the truck in that position, the hose was not long enough to reach the tanks on both sides of the truck. Accordingly, in order to fuel the second tank, the driver was required to turn the truck around. However, as a more expedient alternative, the driver could raise the bed of the truck, throw the hose across the frame, and then either step over the frame under the raised bed or walk around the truck. Human nature being what it is, the operator must have realized that its drivers, like Mr. Brock, were stepping or leaning across the frame of the truck under the raised bed. This would not pose any danger so long as the driver used the bed pins to block the raised bed into position. Here, however, power lines above the pumps prevented the drivers from fully extending the bed of the truck and, thus, the driver could not use the bed pins to block the raised bed into position.

That the operator recognized the hazards posed by this situation is suggested by the fact that the pumps at the other mine sites were designed differently. Specifically, they were designed so that the driver could pull nose first up to the tanks. When designed in this manner, the gas hose was long enough to reach the gas tanks on both sides of the truck without having to move the truck or raise the bed.

There are three major problems with the Secretary's argument. First, there is insufficient evidence to establish that the independent haulage contractor B&S had any authority regarding the location and arrangement of the fuel pumps at issue. The pumps were apparently under the control of a separate corporate entity, Manalapan Mining Company. Second, even if B&S had authorized the location of the pumps it is undisputed that the haulage truck drivers could nevertheless have fueled both their tanks from that configuration in compliance with the law. Third, finding negligence retroactively by reliance upon subsequent remedial measures i.e. by realigning the fuel pumps into a position facilitating the safe fueling of haulage trucks, is contrary to public policy and the objectives of the Act to encourage mine operators to optimize safety. See also Rule 407, Federal Rules of Evidence.

There is, moreover, no evidence of any prior violations or similar practices at this or any other mine location and indeed it is the undisputed testimony that the regular truck drivers customarily filled the driver's side fuel tanks on one pass and, upon returning, filled the other side tank -- a non-violative practice. I have also considered the evidence that B & S employees had been provided required safety training, including specific warnings against working under unsecured raised truck beds. Even the truck driver at issue in this case, Charles Brock, acknowledged having such training and admitted that he knew working beneath raised unsecured truck beds was improper. Under the circumstances, I find B & S chargeable with but little negligence.

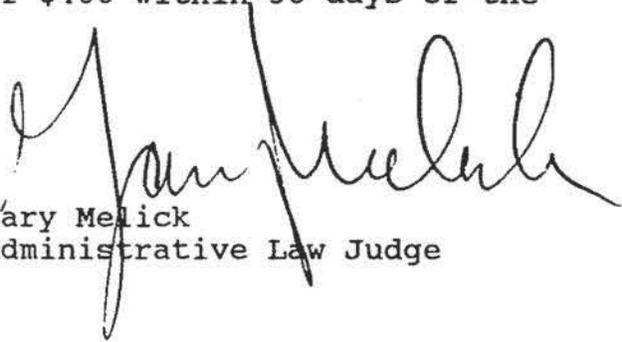
In reaching my conclusions in this case, I have not disregarded the testimony of truck driver Charles Brock that he worked beneath the raised truck bed only while passing the hose across the truck frame and that he did not actually climb across the truck frame itself. I nevertheless find the disinterested and credible testimony of Inspector Langley that he actually observed Brock crossing the truck frame beneath its raised bed, to be entitled the greater weight. Langley had an unobstructed view of Brock from a distance of only about 100 feet. I also note Brock's self-interest in avoiding possible discipline from his employer for having violated known rules of safe conduct.

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

ORDER

Citation No. 4242292 is **AFFIRMED** as a "significant and substantial" citation and B & S Trucking Company is hereby

directed to pay a civil penalty of \$400 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

Susan E. Foster, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Susan C. Lawson, Esq., Buttermore, Turner, Lawson &
Boggs, P.S.C., 111 S. First Street, P.O. Box 935, Harlan, KY
40831 (Certified Mail)

/jff

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 21 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE AND SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 93-382-D
ON BEHALF OF : MSHA Case No. Pitt CD 93-01
JAMES P. LAMONT, :
Complainant : Tanoma Mine
v. :
Respondent : SOL No. 3950131
TANOMA MINING COMPANY, :
Respondent :
:

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

This discrimination complaint was filed on June 9, 1993, by the Secretary on behalf of James P. Lamont pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The subject complaint arises out of an allegation by Lamont that he was illegally discriminated against on September 15, 1992, when he received a disciplinary letter after reporting four accidents in the previous year. The disciplinary letter was issued in conjunction with the respondent's newly implemented accident reduction program. On July 13, 1993, the Secretary filed an amended complaint seeking, in addition to the remedies sought on behalf of Lamont, to assess a civil penalty of \$3,000 against the respondent.

This matter was stayed on August 5, 1993, pending the outcome of the Commission's decision in Swift v. Consolidation Coal Company, 16 FMSHRC 201 (February 1994). Following the Commission's decision in Swift, on November 25, 1994, I lifted the stay and set this case for hearing on December 29, 1994. The case was continued without date after counsel for the Secretary advised that the parties had reached settlement. A joint motion to approve settlement was filed on February 27, 1995.

For the purposes of settlement, the respondent has agreed: to rescind its accident reduction program; to expunge any references to the disciplinary letter in issue from Lamont's personnel records; and to ensure that Lamont will not be discriminated against in the future. With respect to the proposed civil penalty, the respondent has agreed to pay a reduced civil penalty of \$500.

The parties' settlement terms provide that the terms of resolution are for settlement purposes only. The parties do not admit liability in this matter and the parties agree that nothing herein shall bind the parties in the event of future litigation concerning issues that are similar to this case.

Under the circumstances herein, the parties' joint motion to approve settlement **IS GRANTED**. The respondent shall pay a civil penalty of \$500 within 30 days of the date of this decision. Upon timely receipt of payment and satisfaction of the settlement terms, the discrimination complaint filed on behalf of James P. Lamont **IS DISMISSED** with prejudice.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

Theresa C. Timlin, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Joseph A. Yuhas, Esq., 1809 Chestnut Avenue, P.O. Box 25, Barnesboro, PA 15714

/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 22 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 93-262
Petitioner	:	A. C. No. 40-02804-03608
v.	:	
	:	Docket No. SE 93-263
JEN, INC.,	:	A. C. No. 40-02804-03607
Respondent	:	
	:	Docket No. SE 93-288
	:	A. C. No. 40-02804-03610
	:	
	:	Docket No. SE 93-313
	:	A. C. No. 40-02804-03609
	:	
	:	Docket No. SE 93-329
	:	A. C. No. 40-02804-03611
	:	
	:	Docket No. SE 93-330
	:	A. C. No. 40-02804-03612
	:	
	:	Docket No. SE 93-331
	:	A. C. No. 40-02804-03613
	:	
	:	Docket No. SE 93-332
	:	A. C. No. 40-02804-03614
	:	
	:	Docket No. SE 93-346
	:	A. C. No. 40-02804-03615
	:	
	:	Mine No. 39

ORDER OF DEFAULT

On June 1 and June 28, 1993, the Secretary of Labor (Secretary) filed petitions for the assessment of civil penalties against JEN, Incorporated (JEN) in the above captioned cases. On August 20 and September 15, 1993, orders to show cause were

issued by Judge Merlin directing the operator, JEN, to file its answers to these penalty petitions or show cause why it should not be held in default. The files contain the return receipts showing that JEN received these orders on August 23 and September 20, 1993. No answers were filed.

On March 8, 1994, Judge Merlin issued yet another order to show cause, allowing JEN a further opportunity to file answers in the captioned cases or show cause why it should not be held in default. No answers were filed by JEN nor did it file any response to the March 8, 1994 order. The file contains the return receipt showing that JEN received the March 8 order on March 12, 1994.

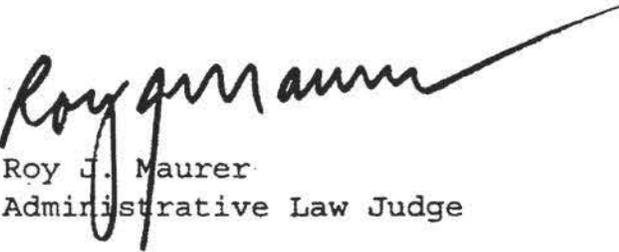
In light of the foregoing, on May 9, 1994, Judge Merlin issued an order of default in the captioned cases and ordered the assessed civil penalties paid immediately.

There the matter stood until October 7, 1994, when the Commission received a letter from JEN's president, Mr. James Nunley, in which he requested relief from the default order, for no particular reason that I am able to discern.

Nevertheless, the Commission on December 19, 1994, "in the interest of justice," reopened these proceedings and remanded the matter to Judge Merlin for assignment to a judge, who should in turn determine whether final relief from default is warranted.

On January 12, 1995, the undersigned issued an order to JEN wherein JEN was "ordered to show cause within 30 days why final relief from default is warranted." I specifically warned that "[i]f it is unable to do so, another default order will issue against JEN for the total amount of the assessed civil penalties, as before." The file contains the return receipt showing that JEN received the January 12 order on January 17, 1995. There has been no response to date.

Accordingly, it is **ORDERED** that the operator be held in **DEFAULT** in the captioned cases and it is further **ORDERED** that the operator pay the total assessed civil penalties in these cases, i.e., \$37,832, immediately.



Roy J. Maurer
Administrative Law Judge

Distribution:

Donna Sonner, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B201, Nashville, TN 37215 (Certified Mail)

Mr. James E. Nunley, President, JEN, Inc., P. O. Box 328, Whitwell, TN 37397 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 23 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 94-247
Petitioner : A.C. No. 36-04999-03549
v. :
 : Mine: Leslie Tipple
POWER OPERATING COMPANY, :
Respondent : Docket No. PENN 94-201
 : A.C. No. 36-02713-03599
 :
 : Docket No. PENN 94-210
 : A.C. No. 36-02713-03598
 :
 : Docket No. PENN 94-271
 : A.C. No. 36-02713-03602
 :
 : Mine: Frenchtown

DECISION

Appearances: Theresa C. Timlin, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner;
James J. Sullivan, Jr., Esq., Kathryn A. Kelly,
Esq., Pepper, Hamilton & Scheetz, Wilmington,
Delaware, and
Michael T. Farrell, Esq., Stradley, Ronon,
Stevens & Young, Philadelphia, Pennsylvania,
for Respondent.

Before: Judge Amchan

The seven citations/orders and proposed penalties in these cases arise from MSHA inspections of Respondent's mining facilities in central Pennsylvania in the fall of 1993. The Frenchtown surface coal mine, where the violation alleged in Docket No. PENN 94-201 occurred and the Leslie Tipple, where the violations alleged in Docket Nos. PENN 94-210, PENN 94-247 and PENN 94-271 occurred, are five to ten miles apart (Tr. II:

21-23). The Leslie Tipple includes the preparation plant and refuse area for the Frenchtown Mine (Tr. II: 22)¹.

Order No. 3710524: Cut in dump truck tire

On September 30, 1993, MSHA Inspector Lester Poorman began inspecting the Frenchtown surface coal mine at 8:30 a.m. (Tr. I: 50). Immediately upon his arrival at the pit, at which mining was in progress, Poorman noticed Caterpillar dump truck No. 130 suddenly leave the pit area and drive to the mine's tire storage area (Tr. I: 54). The inspector believed he saw a large cut on the truck's right front tire (Tr. I: 55,57).

At the storage area, Poorman measured the cut and found it to be 38 inches long, 20 inches wide, and two to three inches deep (Tr. I: 55-56). It extended from the inside sidewall in a half-moonlike pattern to the portion of the tire touching the roadway (Tr. I: 55-57).

The inspector determined that the day-shift driver of truck No. 130 had completed an equipment report at the end of his shift the previous evening (6:00 p.m., September 29, 1993), which noted a bad cut in the right front tire (Tr. I: 58-59, 63)². However, the equipment report of the night-shift driver did not mention the cut in the tire (Tr. I: 63, 80-81, 111-112).

¹The assessment control numbers assigned the proposed penalties in these cases are not consistent with the mine identification numbers for the locations at which the alleged violations occurred.

²Poorman also testified that the driver told him that when he advised his foreman Robert Greenawalt of the cut, Greenawalt told him that if he was not satisfied with the condition of the truck, he could go home (Tr. I: 64-65). The import of this testimony is that the driver was forced to use the truck in its defective condition. I decline to find, solely on the inspector's hearsay testimony, that any such conversation occurred. Moreover, even if such conversation did occur, it is unclear when it took place (Tr. I: 67, 101-02). This leaves open the possibility that the condition of the tire was much less dangerous than when observed by Inspector Poorman.

As a result of his observations and an interview with the day-shift driver, Poorman issued Order No. 3710524, alleging a violation of section 104(d)(2) of the Act and 30 C.F.R. §77.404(a). The regulation requires that mobile and stationary equipment be maintained in safe operating condition and that unsafe equipment be removed from service immediately. MSHA subsequently proposed a \$5,000 civil penalty for this order.

Respondent's defense to the order

Truck No. 130 was sent to the tire storage area by Foreman Robert Greenawalt (Tr. I: 57, 94, 97) and the damaged tire was replaced prior to 11:30 a.m. (Order No. 3710524, block 18, Tr. 94-97). I credit Greenawalt's testimony that he sent the truck to tire storage area as soon as he was aware of the large cut on the right front tire (Tr. I: 97, 101-02).³

This, however, does not end the inquiry into the question of whether Respondent violated the cited regulation or whether it was negligent in doing so. The fact that Greenawalt was unaware of the defect in the tire until sometime on the morning of September 30 is the result, in part, of the procedures set up by Respondent for handling reports of defective equipment. I conclude, on the basis of the operator's report and Inspector Poorman's testimony, that the vehicle had not been in safe operating condition at least since the end of the day shift at 6:00 p.m. on September 29 (Tr. I: 109).

I conclude further that this vehicle had been used and had been available for use in an unsafe condition for a period of

³I allowed Greenawalt to testify over Petitioner's objection that Greenawalt was not listed in Respondent's pre-trial exchange. Since my notice of hearing required the parties to exchange witness lists only one week before hearing, I fail to see how Greenawalt's "surprise" appearance prejudiced Petitioner's trial preparation. Moreover, Inspector Poorman had been told by the driver during the inspection that Greenawalt had sent him to the tire storage area (Tr. I: 57). In the absence of any prejudice, I see no basis for excluding Greenawalt's testimony for Respondent's noncompliance with the directions in the Notice of Hearing, DeMarines v. KLM Royal Dutch Airlines, 580 F. 2d 1193, 1201-02 (3d Cir., 1978).

14 hours due to Respondent's procedures for handling defective equipment reports. Respondent contracted with Gem Industries for maintenance of its equipment (Tr. I: 105-06). Drivers' vehicle reports went to Gem Industries, not to Power Operating or its foremen (Tr. I: 100, 105-06).

Gem Industries reviewed the equipment reports and informed Respondent if any corrective action was warranted (Tr. I: 105-07). I conclude that Respondent cannot contract away its responsibility to immediately remove unsafe equipment from service. If the contract with Gem Industries failed to provide a mechanism for prompt corrective action with regard to the driver's September 29, 1993 report, Power Operating bares responsibility for this failure under the Federal Mine Safety and Health Act.

I credit the opinion of Inspector Poorman that continued use of the truck in the condition in which it was reported on September 29, and observed on September 30, was reasonably likely in the normal course of mining operations to result in a blow-out of the tire. Its condition made it reasonably likely that miners would be seriously injured by flying objects (Tr. I: 66-67), Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984); U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984).

On the other hand, I do not believe that the record supports a conclusion that Respondent's negligence was sufficiently "aggravated" to constitute an "unwarrantable failure" to comply with the regulation. I deem Respondent's negligence to be ordinary and affirm this violation as a "significant and substantial" violation of section 104(a) of the Act.

Considering the six penalty criteria in section 110(i) of the Act, particularly the gravity of the violation, the degree of negligence, and Respondent's immediate abatement of the violation, I assess a \$1,500 civil penalty. I believe a penalty of this magnitude is warranted by the fact that this truck was available for use in an unsafe condition for at least 14 hours after the defect was reported by the driver (Tr I: 69, 109-110).

Respondent's handling of refuse at the preparation plant: Order No. 3710451 (Docket No. PENN 94-210); Order Nos. 3710505 and 3710506 (Docket No. PENN 94-271); Order No. 3710674 and Citation No. 3710675 (Docket No. PENN 94-247)

Four of the violations in these dockets concern whether Respondent's procedures for handing refuse at its coal preparation plant comport with MSHA's regulations at 30 C.F.R. §77.215. More specifically, the issues are whether refuse was deposited and spread so as to minimize the flow of air through a refuse pile in conformance with §77.215(a), and whether the piles were compacted in two-foot layers as required by §77.215(h).

Order No. 3710451 (Docket No. PENN 94-210)

On October 13, 1993, MSHA Inspector Charles Lauver inspected the 005 refuse pit at Respondent's preparation plant (the Leslie Tipple). Lauver observed a large number of piles of refuse from the preparation plant that were between four to eight feet high. They were peaked in shape and overlapped at the base (Tr. I: 124, 173). These piles had not been spread or compacted. A bulldozer was pushing dirt on top of the piles of coal refuse⁴.

⁴This refuse is a mixture of rock, shale, dirt, clay and fine coal that is cleaned from the raw coal by washing at the preparation plant (Tr. I: 129, 157). It must be deposited in piles regulated by MSHA pursuant to §§77.214-77.215-4.

A major issue between MSHA and Respondent was the company's practice of stacking large amounts of refuse adjacent to the preparation plant prior to moving it to the refuse pile. Although there was considerable testimony regarding this practice, it appears to have little relevance to the violations alleged (Tr. I: 219-224). MSHA apparently believed that the alleged failure to compact the refuse in accordance with its interpretation of §77.215(h) was due to the large amount of refuse being hauled from the preparation plant to the refuse pile in October and November, 1993.

Because he determined that no effort was being made to spread and compact the refuse in two-foot layers, Lauver issued Order No. 3710451, alleging a violation of §77.215(h). That regulation states that, "After October 31, 1975 new refuse piles and additions to existing refuse piles, shall be constructed in compacted layers not exceeding two feet in thickness... ."

Power Operating's procedure for compacting refuse was to let it sit for a few days after being dumped at the refuse pile. Then it covered the refuse with soil, spread and compacted it (Tr. I: 152, 171). Respondent's witnesses testified that the refuse is up to 30 percent water when dumped and is too loose to support the weight of the machines that compact and spread it (Tr. I: 151-52, 171-72, 174). Not only is this testimony not controverted, it is essentially corroborated by Inspector Lauver and the Secretary's expert, John Fredland. Lauver testified:

Q. this material is generally so soft that a vehicle could sink into it if it were to drive on top of it?

A. Yes, sir. (Tr. I: 146-47).

Q. You said that this is a thick mud material that is soft enough for a vehicle to sink into it. Does it make a difference in your mind whether the vehicle is riding over a two or three-foot layer of material as opposed to a six-foot pile of material in terms of the likelihood of the vehicle to sink into it?

A In this case a bulldozer riding over a two or three-foot layer of material, the tracks are able to get purchase [traction] even if it begins to spin. ... When it gets thicker than that the machine will, what we call, belly out on the track. It will rest on the belly pan on the underpart of the machine and the tracks will be unable to get purchase and they'll sit there and spin. (Tr. I: 147-48).

Mr. Fredland agreed that a bulldozer would sink into a refuse pile with moisture content of 30 percent or even 25 percent (Tr. I: 200, 207).

Respondent argues that nothing in the cited regulation specifies a time period in which the refuse must be spread and compacted in two-foot layers. It contends further that by compacting the material in two-foot layers after letting it dry for two to three days it complies with the terms of §77.215(h). I reach the same conclusion.

Respondent also suggests that its procedures are consistent with the underlying rationale of the regulation which is to minimize air flowing through the refuse pile so as to prevent fire through spontaneous combustion (see Tr. I: 135-37, 194-95, 276-78). There is nothing in this record that persuades me that waiting several days before spreading and compacting the refuse created a possibility of spontaneous combustion in the newly deposited refuse (see Tr. I: 156).

There remains the issue of whether the Secretary proved its case through an expert witness, John Fredland. Mr. Fredland opined, based on testimony of Inspector Lauver and Respondent's witnesses, that it would not be possible for Respondent to achieve a two-foot layer, and that the refuse would end up in layers as thick as four feet (Tr. I: 187-89, 192-94, 202-03)⁵.

⁵I allowed Mr. Fredland to testify at the hearing despite Respondent's objections that his testimony should be excluded because the Secretary did not timely identify him as a witness by October 11, 1994, as required in the notice of hearing. Pursuant to my pretrial orders in this case, the parties were not required to exchange the names of witnesses until a week before the October 18, 1994 hearing. The Secretary did not identify Mr. Fredland as a witness until October 14.

There are four factors that should be considered in deciding whether to exclude testimony for failure to timely comply with pre-trial notice requirements: (1) the prejudice or surprise to the other party, (2) the ability of the other party to cure the prejudice or surprise, (3) the extent to which allowing the witness to testify would disrupt the orderly and efficient trial of the case, and (4) the bad faith or willfulness in failing to

Larry Kanour, Respondent's safety director, who saw the piles in question on October 13, 1993, testified that they "probably" were four to six feet in height (Tr. I: 173) and that from previous drilling in the refuse pile he knew that the company was able to compact the material into two-foot layers (Tr. I: 173). Given the state of the record I am not sufficiently persuaded by Fredland's testimony to conclude that the Secretary has met his burden of proving that Respondent did not compact the refuse material into two foot layers. I therefore vacate Order No. 3710451 and the corresponding \$1,800 proposed penalty.

Order Nos. 3710505 and 3710506 (Docket No. PENN 94-271)

On November 3, 1993, Inspector Lauver returned to the 005 Pit (Tr. I: 216). He observed two areas in which refuse had been dumped several days earlier without being spread and compacted (Tr. I: 217, 240, 246).

As the result of his observations, Lauver issued Order No. 3710505 alleging another "unwarrantable failure" to comply with §77.215(h) and Order No. 3710506, which alleged an "unwarrantable failure" to comply with 30 C.F.R. §77.1713(a). The latter regulation requires a examination of each surface

(Footnote. 5, continued)

comply with the pre-trial disclosure requirements, DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978)). Considering the above factors, I conclude that excluding Mr. Fredland's testimony would have been unwarranted.

I note that on June 9, 1994, Respondent served interrogatories on the Secretary requesting him, among other things to, "Identify all persons who possess knowledge or information relevant to the above-captioned matter." I do not interpret this interrogatory as asking for the identification of any expert witness that may be called to testify at trial. If I did interpret the interrogatory as covering the identity of potential expert witnesses, I may well have excluded Mr. Fredland's testimony. In part as the result of the instant proceeding, I have changed my prehearing orders to require the exchange of the names of potential witnesses, including experts, at an earlier stage in the pre-trial process.

installation of a coal mine at least once each shift. All hazardous conditions must be recorded and corrected. The gravamen of Order No. 3710506 was that a hazardous condition had existed for several days at the 005 Pit due to Respondent's failure to spread and compact the refuse cited in Order No. 3710505 and no record had been made of it.

Respondent readily admits that the procedures it followed at its 005 refuse pit were the same as when inspector Lauver visited it on October 13 (Tr I: 254-55). Power Operating dumped refuse in the left side of the pit at the beginning of each week, dumped in the center of the pit during the middle of the week, and in the right side of the pit at the end of the week (Tr. I: 256). The company has been following this procedure for at least 33 years (Tr. I: 268, 272-73).

In the middle of each week Respondent began to spread and compact refuse dumped at the beginning of the week, which by that time had dried significantly (Tr I: 256-257). Indeed, Inspector Lauver observed a bulldozer spreading and compacting material in an area of the pit separate from those covered by the order (Tr. I: 226, 252)⁶.

I vacate Order No. 3710505 for the same reason that I vacated Order No. 3710451. MSHA's regulations do not require that coal refuse be spread and compacted immediately upon being dumped at a refuse pile. Moreover, there is nothing in this record that would lead me to conclude that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would recognize that Respondent's procedure for spreading and compacting refuse violated §77.215, Ideal Cement Co., 12 FMSHRC 2409 (November 1990). Although fire from spontaneous combustion is a hazard at refuse sites, I am not persuaded that such a hazard exists as a result of an operator waiting several days for refuse to dry out before spreading and compacting it.

⁶Although Lauver's testimony suggests that the bulldozer was spreading and compacting refuse as it was dumped, Respondent's evidence indicates that it never spread and compacted refuse that had been through the wash plant until it had several days to dry out (Tr. I: 265-66).

Order No. 3710506 is vacated because its validity rests on Inspector Lauver's assumption that the failure to spread refuse as soon as it is dumped is a hazardous condition. Since I am not persuaded that Respondent's procedure for spreading and compacting refuse was hazardous, the company's failure to take "corrective" action or record the existence of the condition did not violate §77.1713(a).

Order No. 3710674/Citation No. 3710675 (Docket PENN 94-247)

On October 20, 1993, MSHA Inspector Joseph Colton was inspecting the areas leading to and surrounding Respondent's preparation plant (Exh. G6-A). At about mid-day he observed an area in which the +5 refuse material was deposited and saw what he believed was smoke coming from the refuse (Tr. II: 202-03, Exhs. G11-15, Order No. 3710674, block 8). The area from which the white substance was rising had a pungent odor similar to sulfur (Tr. II: 206-07).

The +5 refuse is material that is too large to go through the preparation plant and is separated from the coal and smaller refuse by a rotary breaker (Tr II: 203, 299). It consists of shale, siltstone, sandstone and some impure coal (Tr. II: 299-300). It felt hot to the touch of Colton's gloved hand (Tr. II: 204-06).

Colton issued imminent danger Order No. 3710674, pursuant to section 107(a) of the Act. Shortly thereafter he issued section 104(a) Citation No. 3710675 for the same condition, alleging that Respondent violated §77.215(a), which requires that refuse deposited on a pile be spread in layers and be compacted in a manner so as to minimize the flow of air through the pile. MSHA proposed a \$3,000 civil penalty for this citation/order.

At Inspector Colton's suggestion, the +5 material was moved to an empty area near the preparation plant where it was spread and compacted (Tr. II: 210, 272-73). Respondent's normal procedure for handling +5 refuse is to deposit it on the ground by the preparation plant for three to four days and then process it a second time in order to recover residual coal (Tr. II: 290-92). It is then hauled to the 005 refuse pit where it is spread and compacted (Tr. II: 317-18).

I vacate Citation No. 3710675 and the penalty proposed therefor because §77.215(a) does not specify a time period in which such refuse must be spread in layers and compacted. I also conclude that a reasonably prudent person familiar with the mining industry and the purposes of the standard would not necessarily conclude, on the basis on the instant record, that Respondent's normal procedures for handling +5 refuse violated the regulation.

In so finding, I credit the testimony of Respondent's witness, John Foreman, over that of Inspector Colton in concluding that the white gaseous substance observed by Colton was water vapor, rather than smoke, and the +5 refuse was not on fire (Tr. II: 295-303).⁷ Inspector Colton believed that miners were reasonably likely to incur permanently disabling injuries due to exposure to noxious gases emitted from the smoking +5 refuse pile (Tr. II: 221-22, Citation No. 3710674, block 10).

Inspector Colton is a high school graduate and has been trained as an electrical specialist by MSHA (Tr. II: 32-36). Mr. Foreman has a college degree in geological science and is a consultant who permits, constructs and manages refuse piles

⁷I allowed Mr. Foreman and several other witnesses to testify over the objections of the Secretary's counsel. These witnesses were not identified by Respondent in the prehearing exchange. I reiterate my conclusion that exclusion of such witnesses was not warranted, see discussion at pages 6-7, n.5, herein. This is particularly true in view of the fact that I offered both sides the opportunity to reconvene the hearing at a site agreeable to the parties to take additional testimony in order to cure whatever prejudice either of them may have suffered from "surprise" witnesses or exhibits (Tr. II: 308-311). Neither party has availed themselves of this offer.

I acknowledge that, while the Secretary's "surprise" witness and exhibits have little bearing on the outcome of this case, Mr. Foreman's expert testimony is an important factor in my resolution of Citation No. 3710675. It is his testimony that persuades me that no hazard was presented to miners by Respondent's procedures for handling +5 refuse.

(Tr. II: 295-299). I conclude that Mr. Foreman is better qualified to render an opinion of the nature of the emissions from the +5 refuse pile than is Inspector Colton. Therefore, I find that this record fails to establish that exposure to the vapor from the +5 refuse exposed miners to a hazard.

Order No. 3710673: Unsafe haulage roads

Upon his arrival at the Leslie Tipple on October 20, 1993, Inspector Colton started to drive up a hill on the road leading to the raw coal storage area (Tr. II: 40-43, Exh. G6-A, road "A"). At the base he noticed that the truck in front of him was having difficulty negotiating the hill. It was moving very slowly and its wheels were spinning (Tr. II: 42).

October 20 was the fifth straight day that it had rained at the Tipple and the mud on the road was approximately 18 inches deep (Tr. II: 46, 143-44, Exh. 21). Colton saw another truck coming down the hill which was travelling in short jerky movements, which indicated to the inspector that the driver was trying to avoid a skid to the center of the road (Tr. II: 43). One of the drivers told Colton that he had observed another truck slide sideways on the hill earlier that morning (Tr. II: 49-50).

Colton drove to the scale house at the preparation plant to inform plant manager John Soltis that he was issuing a withdrawal order pursuant to section 104(d)(1) of the Act so as to require Respondent to remove the accumulated mud from the roadway (Tr II: 51). As he was talking to Soltis, a front-end loader drove by the scale house and entered an area where it travelled through five feet of water (Tr. II: 51-52, Exh. G-6A, area "E").

The inspector issued 104(d)(1) Order No. 3710673 for both these conditions. The order alleges a failure to comply with 30 C.F.R. §77.1608(a). The standard requires that dumping locations and haulage roads be reasonably free of water, debris and spillage.

Colton was particularly concerned about the possibility of a collision between two trucks on the haulage road, at a point where it intersected with another road (Tr. II: 90-91). At the other cited location he was concerned that a vehicle driver using

a fueling station adjacent to the scale house could drown in the water impounded by +5 refuse (Tr. II: 70, 91-92, 116-17, 147, 151-54, Exhs. G7-9).

Respondent concedes that it was having trouble keeping the haulage road free of mud, but suggests it was doing the best it could. It had scraped the mud from the road with a front-end loader earlier that morning (Tr. II: 160). Power Operating claims that the area in which water was allowed to accumulate south of the scalehouse was not accessible to its vehicles. It contends that all drivers had been told not to enter the area (Tr. II: 163, 166-67, 177-78, 192-93).

I affirm this alleged violation as a "significant and substantial" violation of §77.1608(a) with regard to both areas and assess a \$1,250 civil penalty. The Secretary has not established that the violations in either area were the result of Respondent's "unwarrantable failure" to comply with the regulation.

I credit Inspector's Colton's testimony and find the haulage road was not "reasonably free" of water and debris and was in extremely dangerous condition. Respondent recognized that the wet conditions of the preceding days had made the road dangerous and took some steps to eliminate the hazard by pushing the mud to the bottom of the road (Tr. II: 190). However, given the conditions observed by Colton, the company obviously did not scrape the road often enough.

Respondent had knowledge of the propensity for this road to become dangerously muddy. Thus, it was incumbent upon Respondent to assure that hazardous conditions did not recur before letting vehicles use the road. Since it failed to do this, I find its conduct negligent, although not sufficiently aggravated to sustain a characterization of "unwarrantable failure."

Given the conditions observed by Inspector Colton, I find, however, that an accident resulting in serious injury was reasonably likely and that these conditions were due to some considerable degree of negligence on the part of Respondent. I conclude that the gravity of the violation and Power Operating's negligence in allowing it to occur warrant a \$1,250 penalty.

I also credit Inspector Colton's testimony that he observed a front-end loader travelling through the impounded water in the +5 refuse area. Further, I credit his testimony that vehicle drivers using the fueling pump near the scalehouse were endangered by this accumulation of water.

While I credit Respondent's testimony that it took steps to prevent access to the accumulated water, I conclude that these steps were insufficient, as evidenced by the direct observations of Inspector Colton. Since Power Operating management realized the potential hazard posed by the impounded water, I conclude that it was obligated to take more concerted measures to preclude miners from entering this area. The record does not establish that Power Operating took measures that would have assured that all miners would stay out of impounded water.

Given the action taken by Respondent to warn its employees, I conclude that its conduct does not rise to the level of aggravated conduct, but was sufficiently negligent to warrant the imposition of the \$1,250 penalty assessed for the violations in both areas. The precautions taken by Power Operating to prevent access to this area indicate its awareness that entry into the impounded water area was reasonably likely to result in serious injury.

Order No. 3710704; Accumulation of combustible material in the old bucket shop

On October 26, 1993, Mr. Colton inspected the old bucket shop at Respondent's preparation plant (Tr. II: 224). At the north end of the shop is a door used by Respondent to bring a front-end loader partially inside the building for lubrication. Three 275-gallon drums of lubricant and several smaller drums were positioned by the door. There were oil soaked rags, wooden containers, wooden pallets, grease and other combustible materials around these drums of lubricant (Tr. II: 225-228).

Fluorescent lights, electrical sockets and an air compressor were also in this area. Inspector Colton believed the conditions posed a fire hazard and therefore issued Order No. 3710704, pursuant to section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. §77.1104. That standard prohibits the accumulation of combustible materials, lubricants and grease where such substances can create a fire hazard.

While I credit Inspector Colton's opinion that these conditions at the north end of the bucket shop created a fire hazard, I conclude that the Secretary has not proven that a fire resulting in serious injury was reasonably likely. The record also does not establish that Respondent was highly negligent in allowing this condition to exist. I therefore affirm this violation as a "non-significant and substantial" violation of section 104(a) of the Act. Applying the six criteria in section 110(i) of the Act, I assess a \$400 civil penalty.

Respondent had applied some oil-dry, a substance which soaks up grease and oil, in front of the tanks and drums. While it should have cleaned up the area better, I deem its failure to do so constitutes a moderate degree of negligence.

I also conclude that the violation was not nearly as serious as assumed by the inspector. Mr. Colton was concerned that a spark caused by a fault in an electrical circuit could cause a fire (Tr. II: 234). The record, however, does not establish that such a spark was reasonably likely to occur, or that it was reasonably likely to cause a fire (Tr. II: 262-70, 287-93).

The inspector also based his opinion of the likelihood of fire on an assumption that hot vehicle exhausts would enter the bucket shop (Tr. II: 234). However, I credit the testimony of Assistant Plant Manager Gary Crago that the only vehicle entering the north end of the bucket shop is a front-end loader (Tr. II: 292). I further credit his testimony that this vehicle enters the shop only half-way with the exhaust (the hottest surface on the vehicle) outside of the building (Tr. II: 289).

ORDER

Citation No. 3710524 is affirmed as a significant and substantial violation of section 104(a) of the Act and a \$1,500 civil penalty is assessed.

Citation No. 3710673 is affirmed as a significant and substantial violation of section 104(a) of the Act and a \$1,250 civil penalty is assessed.

Citation No. 3710704 is affirmed as a non-significant and substantial violation of section 104(a) and a \$400 civil penalty is assessed.

Order Nos. 3710451, 3710505, 3710506 and Citation No. 3710675 and the corresponding proposed penalties are vacated.

The assessed civil penalties in this matter shall be paid within 30 days of this order.



Arthur J. Amchan
Administrative Law Judge

Distribution:

Theresa C. Timlin, Esq., Office of the Solicitor,
U.S. Department of Labor, 14480 Gateway Building,
3535 Market St., Philadelphia, PA 19104 (Certified Mail)

James J. Sullivan, Jr., Esq., Kathryn A. Kelly, Esq.,
Pepper, Hamilton & Scheetz, P.O. Box 1709, 1201 Market
Street, Suite 1401, Wilmington, DE 19899-1709 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

March 27, 1995

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
on behalf of KEITH D. JAMES, : Docket No. WEST 95-151-D
Applicant :
v. : Cordero Mine
CORDERO MINING COMPANY, : 48-00992
Respondent :

DECISION APPROVING TEMPORARY REINSTATEMENT
and
ORDER OF DISMISSAL

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Applicant;
Charles W. Newcom, Esq., Sherman & Howard,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

I

This Discrimination Proceeding concerns an Application for Temporary Reinstatement. It was filed on January 20, 1995, by the Secretary of Labor on behalf of Keith D. James. The action was brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., Supp. 1, 1977, 30 U.S.C. § 815(c)(2) and Commission Rule 45, 29 C.F.R. § 2700.45.

Within 10 days following receipt of the Secretary's application to temporary reinstatement Respondent objected to the application and requested a hearing.

The parties declined an immediate hearing, requesting instead that the matter be heard on March 22-24, 1995, in Gillette, Wyoming at the same time as the regular discrimination hearing on the merits for permanent reinstatement and other remedies as set forth by the Secretary in Docket No. WEST 95-226-D.

II

Undisputed Facts

1. Respondent Cordero Mining Co. supervises, operates, and controls mining activities at the Cordero Mine (MSHA I.D. No. 49-00992) located in Campbell County, Wyoming, and is therefore an "operator" as defined by Section 3(d) of the Act.

2. The products of the Cordero Mine enter and affect interstate commerce.

3. At all times relevant to this proceeding Keith D. James was employed by Respondent as an equipment operator and therefore was a "miner" as defined in Section 3(g) of the Act.

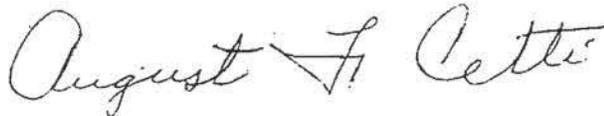
4. On or about October 6, 1994, Respondent terminated the employment of Keith D. James

5. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

6. The presiding Administrative Law Judge has jurisdiction in this matter.

III

The hearing was held in Gillette, Wyoming on March 22 and 23 of 1995. At the hearing the parties advised the Judge on the record that the parties had mutually agreed to a voluntary economic temporary reinstatement beginning February 27, 1995 and continuing thereafter pending the decision in Docket No. WEST 95-226-D which the parties are now briefing. The parties requested the Judge's approval of their voluntary agreement. On review of the present record I approved the voluntary temporary reinstatement agreement. There being no further issues in Docket No. WEST 95-151-D said proceeding for temporary reinstatement is **DISMISSED.**



August F. Cetti
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Charles W. Newcom, Esq., SHERMAN & HOWARD, 633 17th Street, Suite 3000, Denver, CO 80202 (Certified Mail)

sh

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 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-275
Petitioner, : A.C. No. 15-16418-03549
v. :
DAY BRANCH COAL CO., INC., : Docket No. KENT 94-921
Respondent : A.C. No. 15-16418-03557
: Docket No. KENT 94-388
: A.C. No. 15-16418-03551
:
: No. 9 Mine
:
: Docket No. KENT 94-276
: A.C. No. 15-16927-03543
:
: Docket No. KENT 94-389
: A.C. No. 15-16927-03547
:
: Docket No. KENT 94-390
: A.C. No. 15-16927-03548
:
: No. 10 Mine

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
Walter M. Jones, Jr., Esq., Wyatt, Tarrant &
Combs, Louisville, Kentucky, for Respondent.

Before: Judge Fauver

These civil penalty cases were brought by the Secretary of
Labor for alleged violations of safety and health standards under
§ 105(d) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. § 801 et seq.

Respondent is a small to medium sized operator. The cases involve 40 alleged violations, 28 of which were the subject of special assessments. The total proposed penalties are \$94,939.

Respondent concedes the violations, but contends the penalties should be only nominal because the proposed penalties would adversely affect Respondent's ability to continue in business. No other defenses are raised.

Ms. Betty Cassim, the office manager and bookkeeper of Respondent, testified that Respondent is owned by Mr. Bobby Joe Hensley, the president of the corporation, who also owns other corporations, such as Bob and Tom Coal Company. Respondent has been operating at a loss for several years. Respondent and another corporation owned by Mr. Hensley have outstanding debts to vendors in the amount of \$250,000 with more than half of this amount owed by Respondent. Recently, a United States District Attorney filed a collection suit against Respondent for over \$500,000 in final civil penalties and interest due under the Mine Act. Ms. Cassim stated that Respondent is unable to pay the amounts involved in that case.

Mr. James Laws also testified on behalf of the Respondent. Mr. Laws is a tax consultant who has worked for Mr. Hensley for approximately 15 years. He stated that Respondent had entered into an agreement with the Internal Revenue Service for installment payments of back taxes over \$138,000, but IRS has recently informed him that it intends to void the agreement for nonpayment and to seize Respondent's assets and shut down its operations. Mr. Laws stated that no litigation was expected by Respondent to prevent this action by the IRS.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Section 110(i) of the Act provides six criteria to be considered in assessing civil penalties:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charges, whether the operator was negligent, the effect on the operator's ability to

continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

The effect of a penalty on the operator's ability to continue in business is not dispositive, but is one factor to consider. The Act does not state that mine operators who are operating at a loss are exempt from civil penalties or should receive only nominal penalties.

Respondent has a long history of serious, repeated mine safety and health violations and has regularly failed to pay about 80 percent of the final civil penalties assessed against it under the Mine Act.¹ This conduct plainly jeopardizes its employees while disadvantaging competitors who pay final civil penalties due under the Act.

The instant cases involve numerous charges of high negligence, unwarrantable failures to comply with the Act and high gravity in exposing Respondent's employees to serious hazards. Respondent has not contested the charges.

The record shows numerous liabilities incurred by Respondent with no apparent intention of paying them. These total well over \$1 million in unpaid federal taxes, accounts due to banks, suppliers and manufacturers, and civil penalties for mine safety and health violations.

Thus, Respondent is a frequent, serious violator of mine safety and health standards that seeks an exemption from civil penalties (or to be assessed only nominal penalties) because of financial hardship. On this record, I find that it would be

¹ Under § 105(a) of the Act, proposed civil penalties that are not contested by the operator, and penalties adjudicated before the Commission, become final orders of the Commission. These are not subject to review by any court or agency. I find that failure of the operator to comply with such orders is an adverse factor in assessing the operator's "history of previous violations" under § 110(i) of the Act.

contrary to the public interest and to the safety of Respondent's employees, to allow Respondent to violate mine safety and health standards with only nominal civil penalties.

Respondent's business conduct in failing to meet its financial obligations, including federal income taxes, bank loans, accounts payable, and civil penalties for serious mine safety and health violations, may cause it to go out of business. However, this result is not prohibited by § 110(i) of the Act.

In balancing all the criteria in § 110(i), I find that the proposed civil penalties in these cases should not be reduced.

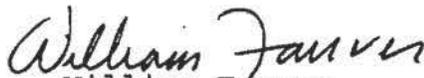
CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.
2. Respondent violated the safety and health standards as alleged in the 40 citations and orders involved in these cases.
3. The proposed penalties are found to be appropriate for the violations involved. Accordingly, Respondent is assessed civil penalties of \$94,939.

ORDER

WHEREFORE IT IS ORDERED that:

1. The 40 citations and orders involved in these proceedings are each AFFIRMED.
2. Respondent shall pay civil penalties of \$94,939 within 30 days from the date of this Decision. Provided: the Secretary may agree to a schedule of installment payments with accrued interest if the Secretary determines that such schedule is appropriate and in the public interest.


William Fauver
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department
of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Walter M. Jones, Esq., Wyatt, Tarrant & Combs,
2600 Citizens Plaza, Louisville, KY 40202 (Certified Mail)

/lt

systematic search for smokers' articles of all persons entering the mine . . . at least weekly at irregular intervals (emphasis added)." Thus, the issue for resolution is whether the operator's periodic random searches of personnel for smoking materials both above and below ground violates this provision. Alternatively stated, the question is whether the terms of the approved smoking control plan noted above mandate that the operator perform all random periodic searches aboveground.

MSHA approved the smoking control plan in accordance with section 75.1702. This mandatory standard, which incorporates the provisions of section 317(c) of the Act, 30 U.S.C. § 877(c), provides:

No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosive magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters. (Emphasis added).

The parties filed cross-motions for summary decision on February 27, 1995. On March 7, 1995, I issued an Order scheduling the parties' motions for oral argument on March 10, 1995, at the Commission's Office of Administrative Law Judges in Falls Church, Virginia. Oral argument was scheduled on short notice with the agreement of the parties to accommodate counsel for the Secretary who had already traveled to Falls Church, Virginia, from Nashville, Tennessee, on another matter.

The Order requested the parties to address the following questions:

1. Whether the language of section 317(c) of the Mine Act, section 75.1702 of the regulations, and the provisions of the approved smoking control plan, is ambiguous with regard to the required location of the search, and, if so, how this ambiguity should be resolved.
2. Whether the primary purpose of the approved smoking control plan is detection or deterrence of violations of the mandatory safety standard in section 75.1702 which prohibits the carrying of smoking materials, matches, or lighters underground.
3. The method of the contestant's searches with regard to procedure, frequency and randomness, and whether such searches were effective or perfunctory in nature.

4. Whether permitting underground searches for smoking materials under an approved smoking control plan would render the smoking control plan unenforceable by MSHA thereby undermining its effectiveness.

STATEMENT OF FACTS

Prior to the June 1994 issuance of the citation in question, Whitaker's smoking control plan was in effect for more than seven years. Throughout this period Whitaker conducted its weekly smoking control searches in random locations. These searches were conducted both underground and on the surface. Whitaker recorded the date and location of each search in the Mine's weekly smoking material examination book. MSHA inspectors reviewed the examination book during this period. Therefore, MSHA inspectors were aware underground searches were being conducted. However, MSHA never previously cited Whitaker for violation of its smoking control plan.

The weekly systematic searches are searches of all personnel on a given shift. Whitaker's smoking control plan also requires "spot-check searches" of individuals to ensure compliance with section 75.1702. However, the "spot-check searches" of individuals are not substitutes for the systematic searches in issue as systematic searches are performed on all miners on a given shift. The plan also requires "no smoking" signs to be prominently displayed at all mine entrances. Whitaker has a strict policy prohibiting the carrying of smoking materials underground and considers such conduct to be a dischargeable offense. (Resp. Ex. 1). Prior to the issuance of Citation No. 42443171, Whitaker was never cited for a violation of section 75.1702. (Joint Ex. 1, Stipulation 13).

Whitaker's EAS No. 1 Mine is accessible through three separate portals, allowing miners to repeatedly enter, leave, and reenter the mine during a given shift. Whitaker implemented its systematic searches under the smoking control plan to best address the logistical difficulties presented by the mine's three portals. Whitaker believed weekly searches in random locations, including underground, was the best method to assure that smoking materials were not carried underground. The parties stipulated that Whitaker's searches consist of pat-downs and searches of personal articles such as lunch pails. (Tr. 17).

On June 2, 1994, MSHA Inspector Franklin Mayhew issued Citation No. 4243171 alleging a violation of Whitaker's smoking control plan approved by MSHA pursuant to section 75.1702. The citation stated:

The operator's approved . . . smoking program, which requires [at paragraph] no. 2 . . . [that] a systematic search for smoking articles of all persons entering the mine shall be conducted at least weekly at irregular intervals, was not being complied with in that the record of the weekly examinations for smoking materials showed [that] the men were searched inside the mine

[during] the week[s] of May 23, May 16, May 9, May 2 and . . . April 25, 1994[,] and did not show the men being searched on the surface. (Emphasis added).

While Inspector Mayhew's citation gives the impression that the systematic searches were conducted exclusively underground for from April 25 through May 23, 1994, in fact, many searches were conducted on the surface during this period. (Joint Ex. 2). For example, during the week of April 25, 1994, four searches were conducted underground and ten searches were performed on the surface.¹ (Joint Ex. 2, p. 2). One underground search cited by MSHA occurred in the elevator immediately after the miners had entered the mine.

FURTHER FINDINGS AND CONCLUSIONS

At the outset it is significant that this case involves an alleged violation of an approved smoking control plan rather than a mandatory safety standard. Pursuant to section 101 of the Act, 30 U.S.C. § 811, mandatory safety standards are promulgated through the rulemaking process and apply to all similarly situated mine operators. However, often such general industry standards are ineffective when applied to circumstances that are unique to a particular mine. Consequently, Congress provided for MSHA to require mine operators to adopt comprehensive plans tailored to each mine that address specific areas of health and safety such as roof control, ventilation or smoking control. 30 U.S.C. §§ 862(a), 863(a) and 877(c). These plans must be submitted to the MSHA District Manager for approval. While MSHA may consider conditions that are common to many mines in considering a proposed plan, MSHA is prohibited from imposing general rules applicable to all mines in the plan approval process. See Peabody Coal Company, 15 FMSHRC 381, 386 (March 1993) citing UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989); Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); Zeigler Coal Co. v. Kleppe, 536 F.2d, 398, 406-07 (D.C. Cir. 1976).

Thus, Congress has mandated, through the provisions of section 317(c) of the Act, that the Secretary "insure" compliance with the prohibition of carrying smoking materials while underground through the flexibility of an "operator instituted" individualized smoking control plan rather than through explicit mandatory search procedures applicable to all mines. However, the provisions of individualized plans sometimes result in disagreements in interpretation. Therefore, the Commission, in Jim Walter Resources, Inc., 9 FMSHRC 903 (May 1987) developed the legal framework for resolving disputes involving mine specific plans. The Commission stated that the Secretary bears the burden

¹ Although the plan only requires a minimum of one systematic search of all personnel each week, searching miners during different shifts, as well as crews at different locations, results in numerous searches each week.

of proving that a cited condition or practice violates an approved plan provision. The Commission further stated that a violation cannot be established when "the disputed language of the plan provision is ambiguous" and the Secretary cannot "dispel the ambiguity." *Id.* at 906-07.

A threshold question, therefore, is whether the operative provision in the smoking control plan requiring searches of "all persons entering the mine" is ambiguous. Webster's Third New International Dictionary, 1986 Edition (Webster's), defines "entering" as "to go or come into a material place, to make a physical entrance." Webster's defines "ambiguity" as "intellectual uncertainty; the condition of admitting of two or more meanings, of being understood in more than one way."

I am unconvinced by the Secretary's assertion that there is no ambiguity if his interpretation is reasonable even if there are other reasonable interpretations. (Tr. 28). A plan provision is ambiguous if it is amenable to two or more reasonable interpretations. The Secretary asserts that the search of "all persons entering the mine" must be construed to mean a search on the surface before entering the mine. On the other hand, Whitaker argues that this language can be interpreted as permitting searches before or after entering the mine. Disposition of the ambiguity question depends on whether the parties' interpretations are harmonious with the intended purpose of the plan. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984).

Here, the word "entering" must be interpreted in the context of the intended goal of section 75.1702 and the stated purpose of the operator instituted smoking control plan that is to "insure" that persons entering the mine do not "carry smoking materials" underground. In addition, the contextual meaning of "entering" must be viewed with the recognition that the plan only requires weekly searches of "all persons entering the mine." Therefore, the provision in question does not mandate daily searches before entrance and is not intended to make certain, through the act of searching, that smoking materials are not brought underground.

At best, the term "entering" is problematical as the act of entering is not accomplished until one crosses the threshold of the underground mine. This lack of clarity is highlighted by the Secretary's assertion that searches on the elevator before miners reach the underground level constitute a violation of the "entering the mine" provision. (Tr. 56). Moreover, if the term "entering" assumes searches conducted on the surface at the beginning of a shift, it is inconsistent with the plan language that the searches occur "at irregular intervals." (52-53, 56-57).

While "entering the mine" can be reasonably interpreted to mean before entering the mine, it is helpful to apply the reasonably prudent person test set forth by the Commission in Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990), to determine if this is the only reasonable interpretation. Under the Ideal test, to ascertain

whether the language of a standard is open to an alternate interpretation advanced by an operator, the Commission considers whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the requirement of the standard. The primary prohibition in section 75.1702 is the "carrying" of smoking materials underground. Thus, the situs of the violation is underground in that an individual violates section 75.1702 when he possesses smoking material underground even if he did not transport the material into the mine.

For example, smoking materials given to an individual underground, or, acquired by an individual from a supply of cigarettes previously smuggled into the mine, constitute violations of section 75.1702 although the individual acquired the smoking material after entering the underground mine. The Secretary's insistence on surface searches of all persons at least one day each week will not prevent miners from bringing smoking materials underground on non-search days. The Secretary agreed smoking materials could easily be smuggled into a mine on any day other than the weekly examination day. (Tr. 72). The Secretary also conceded surface searches at the mine entrance could not detect violations associated with the acquisition of smoking material after mine entry or upon reentry. (Tr. 73-76). It follows, as the Secretary also acknowledged, that underground searches of all personnel may be of greater value than surface searches in some instances. (Tr. 77).

As a general proposition, if searches were mandated on a daily basis, I would agree that underground searches would be self-defeating. Thus, it is important to identify whether the plan's primary purpose is detection or deterrence. Although the Secretary maintains the primary purpose of the systematic search is detection, the plan only requires weekly searches at irregular intervals. (Tr. 61). Moreover, the spot-checks of individuals sanctioned under the plan are not substitutes for the systematic search of "all persons" which is the subject provision in this matter. It is obvious, therefore, that a plan only requiring searches of all miners entering the mine 20 percent of the time (one search every five shifts assuming a five day work week) is not primarily intended for detection. By analogy, how effective would an airport detection program be if passengers were only required to pass through metal detectors one day each week? (Tr. 61-62). Rather, Whitaker's smoking control plan primarily relies upon the deterrent effect of surprise to encourage compliance.

Given the purpose of section 75.1702, the deterrent effect of the plan, and, the mine specific nature of the plan approval process, a mine operator should be afforded reasonable discretion to devise an effective method of irregular periodic searches that take into account the unique design or circumstances at its mine site. In the current case, Whitaker asserts that its three portal entries render exclusive surface searches ineffective since miners have access to come and go freely at all three portals. The Secretary has not argued that there are any material unresolved issues of fact with respect to Whitaker's assertion that the mine's three portal design renders exclusive surface searches ineffective.

Consequently, Whitaker's implementation of its plan to include systematic searches underground is a reasonable interpretation of the plan's language.

Moreover, the Secretary does not contend that Whitaker's implementation of its smoking control plan is perfunctory in nature or otherwise ineffective. (Tr. 96). In fact, the Secretary has stipulated there is no history of section 75.1702 violations at Whitaker's mine site since MSHA's approval of its smoking control plan in February 1987. Consistent with Whitaker's apparent effective implementation of its smoking control plan, the Secretary is only seeking to impose a \$50 civil penalty in this matter.

Although the Secretary is not estopped from his current interpretation of the plan's provisions, it is significant that there is no evidence of consistent enforcement in that Whitaker has not previously been cited despite its continuing practice of performing underground searches which were prominently documented in its smoking examination records. See Jim Walter Resources, 9 FMSHRC at 907. In addition, at oral argument, the Secretary failed to present any credible arguments to support his contention that permitting a combination of surface and underground searches would be unenforceable, as such searches are irregular and unscheduled regardless of where conducted. (Tr. 81-82).

Finally, it is significant that Whitaker is not the only operator that has interpreted its smoking plan as permitting underground searches. Judge Morris recently addressed the identical issue in C.W. Mining Company, 17 FMSHRC 175 (February 1995). There, the operator occasionally conducted searches in the kitchen area, the first place miners went when entering the underground area. The operator believed occasional kitchen checks would discourage miners from hiding smoker's articles on the mantrip and removing them when they exited the mantrip at the kitchen. Although Judge Morris concluded the kitchen searches did not satisfy the plan provision of searching miners "entering" the mine, Judge Morris did conclude the "[e]xaminations for such [smoking] articles at such places as the kitchen are laudable." He, therefore, assessed a nominal civil penalty of \$10 for this infraction. Id. at 183-84.

While Judge Morris found a technical violation of the mandatory standard in section 75.1702, he did not specifically consider the operator's kitchen searches within the parameters of the approved smoking plan process and purposes. The mine specific plan approval process must encourage operators to conduct systematic searches that are appropriate to the conditions of their mines. The mine operator is in the best position to know how to address unique security problems at its mine. If an operator's interpretation and application of its smoking control plan is "laudable," it follows that such interpretation is reasonable. If the implementation of a smoking control plan is based on a reasonable interpretation of the plan's provisions, there is no violation of section 75.1702. Therefore, while I differ with Judge Morris in result, I concur with him in principle.

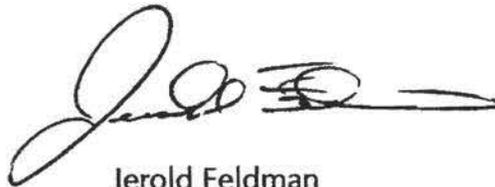
In summary, MSHA's attempt to impose standard smoking control provisions mandating only (1) aboveground systematic searches, (2) occurring on random days weekly, (3) at the beginning of a shift, and, (4) before miners enter the mine, on all underground mine operators, despite the conditions or practices in a particular mine, is contrary to the mine specific plan process. Moreover, this approach is contrary to the express provisions of section 317(c) of the Act, and, section 75.1702 of the regulations, which require the adoption of a plan instituted by the operator rather than mandatory search standards as the method for ensuring compliance.

Consequently, the Secretary has failed to carry his burden of establishing, by the preponderance of the evidence, that Whitaker's combined underground and surface searches are contrary to its obligation to search "all persons entering the mine," given its multi-portal entries and the deterrent nature of the searches. Rather, Whitaker's combined surface and underground searches are a reasonable interpretation and implementation of its smoking control plan that seeks to insure compliance with section 75.1702. This standard prohibits miners entering the mine from carrying smoking materials while underground. Accordingly, Whitaker is entitled to summary decision as a matter of law.

As a final note, this decision should not be construed as trivializing the smoking materials search function. MSHA is free to cite operators who perform smoking inspections that are perfunctory in nature, inappropriate to the specific mine conditions, or otherwise ineffective. However, in the current case, Whitaker's underground searches are not perfunctory, inappropriate in view of its three portal configuration, or, ineffective.

ORDER

In view of the above, I conclude that there are no outstanding issues of material fact that require a hearing in this matter. The Secretary's Motion for Summary Decision **IS DENIED**. Whitaker Coal Company's Motion for Summary Decision **IS GRANTED**. Consequently, Whitaker's contest of Citation No. 4243171 **IS GRANTED** and this citation **IS HEREBY VACATED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Thomas A. Stock, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595 (Certified Mail)

Brian W. Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 30 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 94-569
Petitioner : A.C. No. 40-03011-3563 S
v. :
S & H MINING, INC., : Mine No. 7
Respondent :

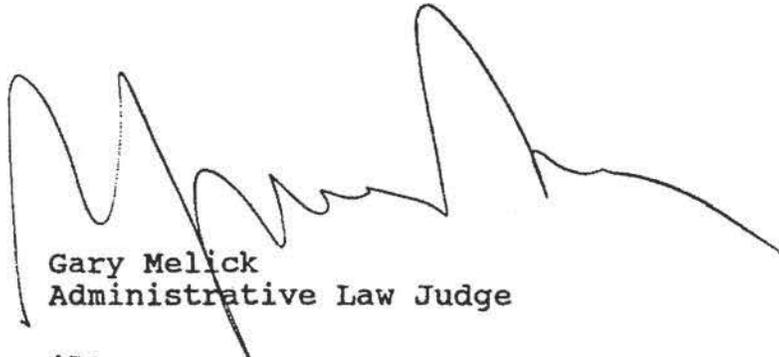
DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee for
the Petitioner;
Imogene A. King, Esq., Frantz, McConnell &
Seymour, Knoxville, Tennessee for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Following hearings the parties filed a joint motion to approve a settlement agreement and to dismiss the case. As a result of evidence adduced at hearings and a subsequent modification of the original citation, an increase in penalty from \$2,500 to \$4,000 has been proposed. I have considered the representations and documentation submitted in this case, including the evidence at hearings, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$4,000 within 30 days of this order.



Gary Melick
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Arlington, VA 22203

Imogene A. King, Esq., Frantz, McConnell & Seymour, P.O. Box 39,
Knoxville, TN 37901

/jlf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 30 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 94-570
Petitioner	:	A.C. No. 40-03011-3562 m
v.	:	
	:	Mine No. 7
GARY BYRGE, Employed by S & H	:	
MINING CO.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Petitioner;
Gary Byrge, Oliver Springs, Tennessee, pro se.

This case is before me upon a petition for assessment of civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing Petitioner filed a motion to approve a settlement agreement in which Respondent agreed to pay the proposed penalty of \$1,000 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the relevant criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED,** and it is **ORDERED** that Respondent pay a penalty of \$1,000 in 6 months installments as set forth in the agreement.

Gary Melick
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203

Imogene A. King, Esq., Frantz, McConnell & Seymour, P.O. Box 39, Knoxville, TN 37901

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 93-261
Petitioner	:	A.C. No. 12-02033-03596
v.	:	
	:	Docket No. LAKE 93-268
BUCK CREEK COAL INC.,	:	A.C. No. 12-02033-03597
Respondent	:	
	:	Docket No. LAKE 93-273
	:	A.C. No. 12-02033-03598
	:	
	:	Docket No. LAKE 93-278
	:	A.C. No. 12-02033-03599
	:	
	:	Docket No. LAKE 94-8
	:	A.C. No. 12-02033-03600
	:	
	:	Docket No. LAKE 94-13
	:	A.C. No. 12-02033-03601
	:	
	:	Docket No. LAKE 94-21
	:	A.C. No. 12-02033-03602
	:	
	:	Docket No. LAKE 94-41
	:	A.C. No. 12-02033-03603
	:	
	:	Docket No. LAKE 94-42
	:	A.C. No. 12-02033-03604
	:	
	:	Docket No. LAKE 94-50
	:	A.C. No. 12-02033-03605
	:	
	:	Docket No. LAKE 94-72
	:	A.C. No. 12-02033-03606
	:	
	:	Docket No. LAKE 94-73
	:	A.C. No. 12-02033-03607
	:	
	:	Docket No. LAKE 94-81
	:	A.C. No. 12-02033-03608
	:	
	:	Docket No. LAKE 94-89
	:	A.C. No. 12-02033-03610
	:	
	:	Docket No. LAKE 94-111
	:	A.C. No. 12-02033-03611

Docket No. LAKE 94-128	:	Docket No. LAKE 94-670
A.C. No. 12-02033-03614	:	A.C. No. 12-02033-03637
	:	
Docket No. LAKE 94-142	:	Docket No. LAKE 94-671
A.C. No. 12-02033-03615	:	A.C. No. 12-02033-03638
	:	
Docket No. LAKE 94-143	:	Docket No. LAKE 94-677
A.C. No. 12-02033-03616	:	A.C. No. 12-02033-03640
	:	
Docket No. LAKE 94-210	:	Docket No. LAKE 94-707
A.C. No. 12-02033-03620	:	A.C. No. 12-02033-03641
	:	
Docket No. LAKE 94-211	:	Docket No. LAKE 94-708
A.C. No. 12-02033-03621	:	A.C. No. 12-02033-03642
	:	
Docket No. LAKE 94-220	:	Docket No. LAKE 94-709
A.C. No. 12-02033-03622	:	A.C. No. 12-02033-03643
	:	
Docket No. LAKE 94-433	:	Docket No. LAKE 94-710
A.C. No. 12-02033-03623	:	A.C. No. 12-02033-03644
	:	
Docket No. LAKE 94-434	:	Docket No. LAKE 94-714
A.C. No. 12-02033-03624	:	A.C. No. 12-02033-03645
	:	
Docket No. LAKE 94-435	:	Docket No. LAKE 94-745
A.C. No. 12-02033-03625	:	A.C. No. 12-02033-03646
	:	
Docket No. LAKE 94-600	:	Docket No. LAKE 94-746
A.C. No. 12-02033-03626	:	A.C. No. 12-02033-03647
	:	
Docket No. LAKE 94-601	:	Docket No. LAKE 95-24
A.C. No. 12-02033-03627	:	A.C. No. 12-02033-03648
	:	
Docket No. LAKE 94-602	:	Docket No. LAKE 95-49
A.C. No. 12-02033-03629	:	A.C. No. 12-02033-03652
	:	
Docket No. LAKE 94-603	:	Docket No. LAKE 95-50
A.C. No. 12-02033-03630	:	A.C. No. 12-02033-03652
	:	
Docket No. LAKE 94-604	:	Docket No. LAKE 95-51
A.C. No. 12-02033-03631	:	A.C. No. 12-02033-03652
	:	
Docket No. LAKE 94-605	:	Docket No. LAKE 95-52
A.C. No. 12-02033-03632	:	A.C. No. 12-02033-03650
	:	
Docket No. LAKE 94-606	:	Docket No. LAKE 95-74
A.C. No. 12-02033-03633	:	A.C. No. 12-02033-03653
	:	
Docket No. LAKE 94-669	:	Docket No. LAKE 95-87
A.C. No. 12-02033-03636	:	A.C. No. 12-02033-03654

BUCK CREEK COAL INC.,
Contestant
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

: Docket No. LAKE 95-94
: A.C. No. 12-02033-03655
:
: Docket No. LAKE 95-111
: A.C. No. 12-02033-03656
:
: Docket No. LAKE 95-112
: A.C. No. 12-02033-03657
:
: Docket No. LAKE 95-154
: A.C. No. 12-02033-03658
:
: Docket No. LAKE 95-158
: A.C. No. 12-02033-03659
:
: Buck Creek Mine
:
: CONTEST PROCEEDINGS
:
: Docket Nos. LAKE 94-162-R,
: LAKE 94-253-R thru 94-394-R,
: LAKE 94-356-R thru 94-357-R,
: LAKE 94-370-R thru 94-394-R,
: LAKE 94-408-R thru 94-409-R,
: LAKE 94-410-R thru 94-425-R,
: LAKE 94-447-R thru 94-454-R
: LAKE 94-461-R thru 94-562-R,
: LAKE 94-569-R thru 94-597-R,
: LAKE 94-607-R thru 94-613-R,
: LAKE 94-618-R thru 94-629-R,
: LAKE 94-637-R thru 94-646-R,
: LAKE 94-660-R thru 94-667-R,
: LAKE 94-672-R thru 94-674-R,
: LAKE 94-681-R thru 94-691-R,
: LAKE 94-697-R thru 94-703-R,
: LAKE 94-717-R thru 94-744-R,
: LAKE 95- 1-R thru 95- 14-R,
: LAKE 95- 18-R thru 95- 22-R,
: LAKE 95- 26-R thru 95- 42-R,
: LAKE 95- 57-R thru 95- 73-R,
: LAKE 95- 75-R thru 95- 77-R,
: LAKE 95- 82-R,
: LAKE 95- 96-R thru 95-104-R,
: LAKE 95-115-R thru 95-118-R,
: LAKE 95-136-R thru 95-154-R,
: LAKE 95-158-R and 95-171-R.
:
: BUCK CREEK MINE
: Mine ID 12-02033

ORDER CONTINUING STAY

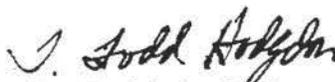
By an order dated September 8, 1994, all cases involving Buck Creek, before me or subsequently assigned to me, were stayed for 90 days or until such time as the United States Attorney for the Southern District of Indiana made a determination regarding the prosecution of Buck Creek Coal, Inc. and any of its officers, whichever occurred first. On December 7, 1994, the Secretary filed a motion requesting a 90 day extension of the stay.

An extension of the stay was granted on January 10, 1995, until a prehearing conference was held on February 9, 1995, to determine whether the stay should be continued. At the prehearing conference, the Secretary requested that the stay be continued for 90 days. The Secretary's counsel stated that at the end of 90 days the Secretary would be in a position to state specifically which dockets and citations were involved in the criminal proceedings, which were not, and whether the cases not involved could proceed to disposition. (Tr. 37-38.) Buck Creek opposes continuing the stay.

After weighing the interests of the parties, I conclude that the reasons for originally granting the stay still apply. Accordingly, it is **ORDERED** that the **STAY** in these cases is **CONTINUED** until May 16, 1995. The provisions concerning the lifting of the stay in individual cases set out in the September 8, 1994, order remain in effect.

It is **FURTHER ORDERED** that a status conference will be held on Tuesday, May 16, 1995, for the purpose of determining whether the stay should be continued beyond the conference; if so, under what conditions; whether it will include all docketed cases as well as future cases; and whether some cases can be separated from the rest and proceed to disposition without prejudice to either party. The conference will begin at 9:00 A.M. at the following location:

Hearing Room
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041



T. Todd Hodgdon
Administrative Law Judge
(703) 756-4570

Distribution:

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

Henry Chajet, Esq., Jackson & Kelly, 2401 Pennsylvania Avenue,
N.W., Suite 400, Washington, DC 20037 (Certified Mail)

/lbk

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 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1321
Petitioner : A. C. No. 15-14074-03669
v. :
: Martwick U. G. Mine
PEABODY COAL COMPANY, :
Respondent :

DECISION APPROVING PARTIAL SETTLEMENT
AND
STAY ORDER

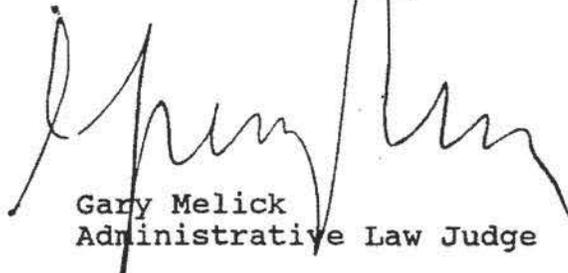
Appearances: Donna E. Sonner, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Carl B. Boyd, Jr., Esq., Meyer, Hutchinson,
Haynes & Boyd, Henderson, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At the hearing Petitioner filed a motion to approve a partial settlement agreement proposing as to Citation Nos. 3863265 and 3863054 a reduction in penalty from \$2,067 to \$1,867. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of partial settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of \$1,867 within 30 days of this decision.

Further proceedings as to Citation No. 3863055 are hereby **STAYED** pending further negotiations and testing by the Parties.


Gary Melick
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes & Boyd, 120 North Ingram Street, Suite A, Henderson, KY 41420 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

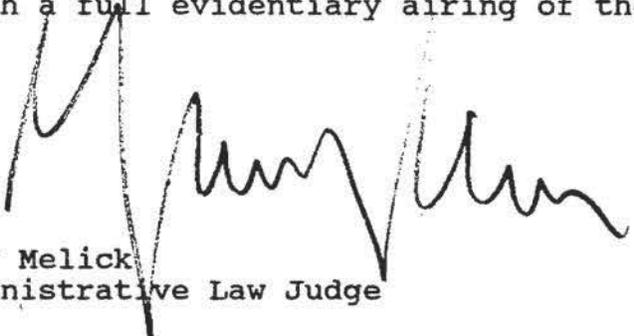
MAR 10 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1274-D
ON BEHALF OF CHARLES H.	:	
DIXON,	:	PIKE CD 94-16
Complainant	:	Mine ID 15-09571
	:	
v.	:	
	:	
PONTIKI COAL CORPORATION,	:	
Respondent	:	

AMENDED ORDER GRANTING PARTIAL DISMISSAL

At hearings held March 9, 1995, on the Respondent's Motions to Dismiss, evidence by way of an affidavit from Charles H. Dixon was admitted indicating that he may have been a "representative of miners" at some time prior to April 15, 1994. Accordingly that part of the interlocutory Order issued February 6, 1995, which held that Complainant Dixon had not become a "representative of miners" before April 15, 1994, is amended by deletion.

A determination as to when Mr. Dixon became a "representative of miners" (and the related determination of which alleged acts of discrimination may be considered) is, therefore, deferred until hearings on the merits or other appropriate proceedings at which a full evidentiary airing of the issue may be provided.


Gary Melick
Administrative Law Judge

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862

Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004-2595
/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 7, 1995

SOUTHERN MINERALS, INC., : CONTEST PROCEEDINGS
TRUE ENERGY COAL SALES, INC., :
FIRE CREEK, INC., : Docket Nos. WEVA 92-15-R
Contestants : through WEVA 92-116-R
v. :
 : Fire Creek No. 1 Mine
SECRETARY OF LABOR, : Mine ID 46-07512
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
Respondent :
 :
SECRETARY OF LABOR : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. WEVA 92-786
Petitioner : through WEVA 92-791
v. :
 : Fire Creek No. 1 Mine
SOUTHERN MINERALS, INC., :
TRUE ENERGY COAL SALES, INC., :
FIRE CREEK, INC., :
Respondents :

ORDER DENYING CROSS MOTIONS FOR SUMMARY DECISION
AND
NOTICE OF HEARING

These consolidated civil penalty and contest proceedings arise under section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. § 815. They involve 101 alleged violations of mandatory safety standards for underground coal mines for which aggregate civil penalties of \$576,681 have been proposed. They also involve 102 contests of citations and orders.

The cases arise out of a fatal explosion on January 16, 1991, at Fire Creek, Inc's (Fire Creek) No. 1 Mine. Following an investigation, the Secretary of Labor, through his Mine

Safety and Health Administration (MSHA), issued the contested citations and orders to Fire Creek, Southern Minerals, Inc. (Southern Minerals) and True Energy Coal Sales, Inc. (True Energy) (collectively, the Contestants). The Secretary contends that the three entities are liable jointly and severally as operators of the mine. Southern Minerals and True Energy respond that they are not operators within the meaning of the Mine Act and therefore should not have been cited for the alleged violations. Fire Creek does not dispute the Secretary's jurisdiction.

The proceedings were bifurcated so that the jurisdictional status of Southern Minerals and True Energy would be resolved prior to addressing the individual merits of the cases (See Notice of Bifurcated Hearing (September 30, 1994)).

Following extensive discovery, the Secretary, Southern Minerals and True Energy filed cross motions for summary decision on the jurisdictional issues. For the reasons that follow, the motions are **DENIED**.

Summary Decision

Under the Commission's rules, a motion for summary decision shall be granted only if the entire record shows, (1) no genuine issue as to any material fact, and (2) the moving party is entitled to summary decision as a matter of law (29 C.F.R. §2700.67).

The parties have not stipulated to undisputed facts. Rather, the Secretary has set forth 122 "findings of fact" in a memorandum in support of his motion (Sec. Mem.), and the Contestants have incorporated "material facts" into their motion (Conts. Mot.). By referencing the parties' factual assertions to the record, it is possible to glean a factual basis to rule upon the motions.

GENERAL FACTUAL BACKGROUND

Fire Creek's No. 1 Mine is an underground coal mine located in McDowell County, West Virginia. On September 3, 1991, following an investigation of the accident, MSHA issued the contested citations and orders, jointly naming the

Contestants as the operators of mine (Sec. Mem. 1-2; Conts. Mot. 3-4). The operators filed timely notices of contest and the Secretary filed the subject civil penalty petitions.

The Contestants are closely held corporations that share some common officers and directors. Fire Creek was organized in 1988 by D.L. "Jack" Bowling, Brenda Bowling (Jack Bowling's wife) and David Harold. The Bowlings and Harold were the corporation's only share holders. David Harold was president and director of Fire Creek and Ronda Harold (David Harold's wife) was secretary/treasurer. In July 1989, Ronald Lilly obtained 10 percent of the stock from Jack Bowling and Lilly became secretary/treasurer. Harold left Fire Creek in October 1990, and the corporation bought back his shares (Sec. Mem. 7-8, citing to Exh. K, Interrog. 3). Also, in October 1990, W. "Fred" St. John became president of Fire Creek. He and Jack Bowling served as directors (Sec. Mem. 8, citing to Exh. K, Interrog. 3)

Southern Minerals was organized in 1987 with Jack Bowling as the sole stock holder. In October 1989, stock was divided between Jack Bowling, his son, his daughter and St. John. Jack Bowling served as president and director, St. John served as vice president and director and Brenda Bowling acted as secretary/treasurer (Sec. Mem. 8, citing to Exh. 0).

True Energy was organized in 1986. At that time, Jack Bowling and his daughter and son were the corporation's shareholders. In October 1989, St. John acquired 20 percent of Jack Bowling's stock, leaving Jack Bowling with 60 percent. The other 20 percent continued to be owned by Bowling's daughter and son. Bowling served as president and director, St. John served as vice president and director, and Brenda Bowling served as secretary/treasurer (Sec. Mem. 8-9, citing to Exh. P).

Southern Minerals had no employees. In general, it held coal leases and subleases, contracted with others, including Fire Creek, to mine leased coal, and monitored coal production for royalty purposes. Southern Minerals bought the coal and sold it to True Energy. Fire Creek operated the No. 1 Mine pursuant to a contract with Southern Minerals.

Coal from the Fire Creek Mine was processed by an unrelated company pursuant to a contract with True Energy and True Energy sold the processed coal. True Energy also provided various administrative and technical services to Southern Minerals' contractors, including Fire Creek.

When Harold left Fire Creek in October 1990, Ward Bailey, an employee of Fire Creek, took over as mine manager. Bailey contacted MSHA officials after the explosion at the mine. Neither Bailey, nor any other Fire Creek officials, notified Southern Minerals or True Energy. Southern Minerals and True Energy were not represented at the meetings conducted by MSHA during the investigation of the explosion. Neither Southern Minerals nor True Energy received a citation or order from MSHA regarding any aspect of the operations at the mine until seven months after the explosion, when the contested citations were issued (Conts. Mot. 10-11). Fire Creek is out of business and may not be capable of paying any penalties for any violations found to have existed (Sec. Mem. 27).

Specific Facts Involving Relationship of Parties

Southern Minerals leased the mineral rights to the land on which the mine is located from Pocahontas Land Company (Pocahontas). Southern Minerals then contracted with Fire Creek. Southern Minerals paid Fire Creek a royalty payment based on the amount of coal produced at the mine. Southern Minerals also loaned funds to Fire Creek to purchase mining equipment. At times Fire Creek obtained advances from Southern Minerals to cover operating expenses, such as payroll and supplies. The funds were authorized by St. John, in his capacity as vice president of Southern Minerals. In general, advances were secured by future coal production.

Administrative services provided by True Energy to Fire Creek involved handling Fire Creek's business and financial records, i.e., maintaining payroll and personnel files, monitoring workers' compensation, medical insurance and other employee benefits, depositing semi-monthly cash receipts, maintaining accounts receivable files, maintaining accounts payable files, monitoring cash flow, drafting checks to pay vendor invoices on a semi-monthly basis, preparing required reports to regulatory agencies, and preparing

financial information for monthly financial statements and tax returns. There also came a time when Fire Creek's liability and other insurance was arranged and paid for by True Energy (Sec. Mem. 11-12, citing to Exh. K, Interrog. 29).

Technical services provided by True Energy to Fire Creek involved surveying, spad setting, map preparation and map certification. True Energy began surveying for Fire Creek in January 1990. At that time, True Energy hired two spad setters to work at the mine. Until July 1990, Fire Creek paid True Energy for the technical services (Sec. Mem. 12-13).

Also in January 1990, True Energy hired a person to prepare and certify maps for Fire Creek. According to the Secretary, the person was paid by True Energy (Sec. Mem. 12-14).

PARTIES' ARGUMENTS

The Secretary first argues that Fire Creek was responsible for the day-to-day operation and supervision of the mine. Therefore, Fire Creek was an operator (Sec. Mem. 32).

The Secretary next argues that Southern Minerals possessed the legal power to exercise control over numerous aspects of the mine's operations via its contract with Fire Creek. In addition, Southern Minerals exercised significant direct and indirect control over the mine via its control of engineering, finances, production and other matters. As such, Southern Minerals met the statutory definition of "operator" (Sec. Mem. 33, 35-39).

Finally, the Secretary argues that True Energy also exercised control over the mine. The control arose "via the common ownership and control [True Energy] shared with the mine's owner-operator, Southern Minerals, and the mine's contract operator, Fire Creek" (Sec. Mem. 43). Additionally, True Energy had control over "essential engineering matters," all financial matters, administration of payroll and personnel and occasionally over production, personnel and safety (*Id.* 44, 47, 48).

The Contestants counter that the problem with the Secretary's approach to jurisdiction is that Southern Minerals and True Energy were "passive" entities who did not exercise the type of control or supervision envisioned by the statute. In the Contestants' view, "control" refers to control of the mine, not to control of the company. Further, "operates" and "supervises" are words of action and "control" should be understood likewise to require active participation in mining (Conts' Mot. 22).

Such control is required because, under the Act's enforcement scheme, it makes sense for those who can prevent or abate violations to be responsible for them (Conts. Mot. 24-25). Thus, to be an "operator" within the meaning of section 3(d) of the Act, one must have both status as an "owner," "lessee" or "other person" and actively engage in "operat[ing]," "control[ling]" or "supervis[ing]" a mine (Id. 26). The Contestants assert that since the inception of the Act the Secretary enforced it against those who actually mined, or those whose activities were so closely allied with those who mined that the activities produce hazards of a distinctly mining-related character (Id. 29).

The Contestants also raise procedural challenges. They argue that the Secretary's citation of Southern Minerals and True Energy was such a clear departure from previous Secretarial practice, it required rulemaking and a reasoned explanation before implementation (Conts. Mot. 34-38, 38-40). Finally, they argue that the Secretary's interpretation of the statute was unconstitutionally vague. It was not implemented with fair warning to those who become the targets of enforcement, and the lack of standards or guidelines for enforcement deprived the Contestants of procedural due process (Id. 45, 49-52).

THE ACT

The meaning of the statutory definition of "operator" is central to the resolution of the motions. Once the meaning is understood, the question of whether undisputed material facts establish liability or whether they preclude such a finding may be sorted out.

Analysis of the definition begins where it must, with the words of the Act and with the assumption that the Act's drafters carefully chose the words to mean what they say. Analysis also is undertaken with the understanding that when the words and their grammatical structure are clear, it is not the province of administrative bodies and adjudicators to interpret the words to the contrary. They must avoid conclusions based on what they think Congress might have meant, but did not state.

Section 3(d) defines an "operator" as, "[a]ny owner, lessee, or other person who operates, controls, or supervises a ... mine or any independent contractor performing services or construction work at such mine (30 U.S.C. §802(d)).

The clause, "who operates, controls, or supervises a coal or other mine" describes or qualifies each noun in the preceding phrases "any owner, lessee, or other person" (See, Elliot Coal Mining Company, Inc. v. Director, Office of Workers' Compensation Program, 17 F.2d 616, 629-630 (3rd Cir. 1994)). The definition clearly requires "owners, lessees or other persons" to participate in and/or have authority over the operation, control or supervision of a mine. Accordingly, it is not correct to read the definition as to make owners or lessees operators in and of themselves. (I find it noteworthy in this regard that it was the definition of "mine," and not the definition of "operator" that Congress desired be given "the broadest possibl[e] interpretation" (S. Rep. 95-181, 95th Cong., 1st Sess., at 14, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess.; Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978)).

In addition to faithfully reflecting the statutory language, this interpretation supports and strengthens the purpose of the Act. Section 2(e) provides that the "operators" of the nation's mines have primary responsibility for preventing the existence of unsafe and unhealthful conditions (30 U.S.C. §801(e)). Throughout the Act, the entity charged with compliance is referred to simply as the "operator" (See, e.g. §814(a), §815(a), §820(a)). It makes no sense within this context to place liability on those who have not participated in creating the conditions in a mine or who have no actual authority over

and responsibility for those conditions. On the other hand, placing liability on an entity or entities who have participated or who have that authority provides a spur to compliance and to safer, more healthful working conditions.

Therefore, I agree with the Contestants that a purely "passive entity" would not meet the statutory definition of "operator" under the Act, provided the entity did not reserve to itself authority to control mining operations or to control the mine itself. In other words, in a contract mining situation, an entity that leased mineral rights and contracted with another entity to mine coal would subject itself to Mine Act liability if it made decisions with respect to how coal would be mined and how the mine would be staffed and run, or if it had the actual authority to make such decisions. It would not be enough, however, to simply establish the potential for control, for example, by establishing interlocking corporate relationships between parties and the normal business transactions attendant thereto.

In reaching this conclusion, I note that the legislative history of Titles I, II and III, unlike that of Title IV (the Black Lung provisions), contains no Congressional finding that operators were attempting to evade liability under the safety and health provisions of the Mine Act by manipulating corporate form and contractual relationships, and I cannot assume such a concern motivated the drafters of Titles I, II and III. Compair Elliot Coal Mining, 17 F.2d at 632.

Indeed, the words of the Act warrant an opposite assumption. When the Act was drafted, contractual arrangements between the owner or lessee of mineral rights and the on-site mine operator were common and they remain common today. The Act's initial legislators chose to condition an operator's status on its active participation (or, in my view, its authority to so participate) in the actual operation, control, or supervision of a mine. Congress has not chosen subsequently to amend that requirement. As the Contestants note, if Congress had intended to hold all owners or lessees of mineral rights liable, it could have simply stated that an "operator" includes both.

This brings the analysis back to where it began, to the words of the statute and to the requirements of Congress, as expressed in Section 3(d), that an owner, lessee, or other person operate, control, or supervise a mine. There is no inclusive statutory definition of the aspects of participation or authority necessary to make an entity a statutory operator. Nor has the Secretary engaged in rule-making to set forth the aspects. Lacking a statutory or regulatory definition and given the fact that the forms of operation, control, or supervision may vary from case to case, whether an entity meets section 3(d) of the Act must be resolved on a case-by-case basis.

In this regard, the Commission has provided guidance. In W-P Coal Company, the Commission gauged the owner-operator's involvement with its contract operator by looking to things such as involvement in the mine's engineering, financial, production, personnel and safety affairs in order to determine whether there was sufficient involvement for the Secretary to proceed against the owner-operator (16 FMSHRC 1407, 1411 (July 1994)). A similar approach is applicable here, with the proviso that involvement be viewed both in terms of actual participation and in terms of the authority to participate.

THE CONTESTANTS AS OPERATORS

FIRE CREEK

The parties agree that the actual day-to-day operation of the mine was conducted by Fire Creek, Inc. There is no dispute that Fire Creek was an operator within the meaning of the Act.

SOUTHERN MINERALS

Involvement in Engineering

The Secretary states, as fact, that when Harold was president of Fire Creek, Jack Bowling, in his capacity as president of Southern Minerals, met with Harold, Pocahontas personnel and others to work on the mining projection maps for the Fire Creek mine. Moreover, he states that Jack Bowling contributed to the development of mining projections for the mine and that he reviewed the mining projections before they

were submitted to MSHA or to the state. He also states that Southern Minerals approval was required for all mining plans, projections and maps of the mine.

In support of these statements, the Secretary cites to a September 9, 1988, engineering invoice (Sec. Mem., Exh. D) and to Harold's deposition (Id., Exh. R at 55). In the deposition, Harold states that although he mostly prepared Fire Creek's mining projections, they were reviewed by Bowling before they were submitted to MSHA and that Bowling had input into the projections (Id. 55-56).

The Secretary also points to the contract between Fire Creek and Southern Minerals, which states in part that "[Fire Creek] shall present to [Southern Minerals] each quarter a certified mine map of all mining operations conducted by [Fire Creek]" (Sec. Mem., Exh. W, Para. 5). The Secretary does not note fact that the contract also states, "[i]t is ... understood by the parties ... that [Southern Minerals] right to approve mining plans, projections and maps is expressly and solely for the purpose of coordinating the overall mining operations on [Southern Minerals] leasehold property and is not for the purpose of directing [Fire Creek's] overall or daily conduct of its mining operations. The direction and control of all mining rests solely with ... [Fire Creek]" (Id.).

The Secretary further states that Southern Minerals was responsible for obtaining state and federal permits necessary to initiate mining. The Secretary points out that the contract provides that "[Southern Minerals] shall obtain, in its name, the initial permits, and provide the bonding required to initiate mining activity; and [Fire Creek] shall be bound by the terms thereof Any modification to any permit shall be made ... only after having received [Southern Minerals] written permission" (Sec. Mem., Exh. W, Para. 3).

I cannot determine from the present record whether Southern Minerals' involvement in the engineering aspect of the mine was such as to constitute the control envisioned by the statute. The contract between Southern Minerals and Fire Creek clearly states that Southern Mineral's involvement with mine projections and maps was to coordinate its overall mining operations on leasehold property. If this was in fact

the purpose of Southern Mineral's involvement with mine projections and map preparation, it would not be an indicia of control over the mine.

Further, the fact that Jack Bowling and St. John, along with Harold and officials of Pocahontas, met with MSHA officials to discuss changes in MSHA policy affecting the mine's ventilation plan does not, without more, establish that Southern Minerals was exercising control over the mine. The full nature of the discussions is not revealed, nor are the proposed changes explained. I note, as well, St. John's statement in his deposition that his purpose at the meetings was to act as an intermediary between Pocahontas and Fire Creek and not to provide technical expertise on the mine's ventilation (Sec. Mem., Exh. Q 56-57).

In like manner, I cannot determine from the present record whether the fact that Southern Minerals obtained initial federal and state permits that allowed Fire Creek to initiate mining is an indication that it was acting as an operator of the mine. While I assume Fire Creek could not have operated without the permits, there may have been reasons relating solely to Southern Minerals status as lessor of mineral rights that required it to obtain the permits and to retain, in effect, a veto power over their modification.

Involvement in Finance

It is apparently true that Fire Creek obtained operating capital from Southern Minerals. The Secretary cites the deposition of David Harold, who agreed that Southern Minerals regularly advanced Fire Creek funds to buy equipment, purchase supplies and possibly to pay the miners (Sec. Mem. Exh. R, 64-65). Harold stated that Southern Minerals, in effect, paid the bills when Fire Creek could not cover expenses, that he knew this would be done and that he did not have to request the funds (Id. at 66). According to Southern Minerals own statements, advances between July 1-15, 1988 and October 19, 1990, totaled at least \$1,358,000 (Id., Exh. Q, Dep. Exh. 12). The Secretary also states that Harold discussed expenditures of more than \$5,000 with Jack Bowling (Sec. Mem., Exh. R, 13-17).

The advancement of funds to cover expenses might or might not be an indication of control over mining operations. The funds might have been provided solely to allow mining to proceed so that Southern Minerals could benefit from its contract. Certainly, the maximization of profit is not prohibited by the Act. In other words, it is not clear, on the basis of the record as it now exists, that Southern Minerals used its financial leverage to control how mining was done at the mine or to control the mine itself.

It is similarly not clear whether Harold's discussions with Bowling regarding expenditures of more than \$5,000 are proof that Bowling, and through Bowling, Southern Minerals, was trying to control how mining was done or to control the mine. More needs to be known about the discussions, i.e., their overall purpose, to what they referred and the context in which they occurred.

Involvement in Production

In his deposition, Harold stated that he had a daily telephone conversation with Bowling in that Bowling always called to get a report of the number of tons of coal mined the previous day (Sec. Mem., Exh. R 12-13). Harold stated that at times during the conversations Bowling would offer suggestions to problems Fire Creek was encountering in carrying out underground mining. However, Harold also stated that Bowling did not give specific directives in terms of what he did or did not want done (Id., Exh. R. 17-21).

In his deposition, Bowling agreed that he discussed production with Harold and that he went to the mine on occasion to check on production and to visit with Harold (Sec. Mem., Exh. S 6-7). According to Bowling, Harold had the reputation of being "one of the [best] -- if not the best -- coal miner[s] in southern West Virginia" and Bowling stated he "talked to [Harold] and listened to him, but [Harold] made all of the decisions" (Id. 8). Bowling also stated that he never told Harold that he wanted something done in a certain way (Id. 9-10). In addition, Bowling never went underground at the mine.

I cannot find this indicates such control of actual mining, or of the mine itself, so as to make Southern Minerals an operator. If the discussions of production included specific directives from Bowling on how and where to mine that would be one thing, but suggestions on such topics could have been nothing more than normal conversations between the on-site operator and the party for whom it contracted to mine. Obviously, Southern Minerals, which marketed all of the coal produced by Fire Creek, had a vital interest in the status of production. The present record raises unresolved questions of content and context.

Involvement in Employment

The Secretary states that Harold talked to Bowling about potential employees he was considering hiring in order to determine what kind of miners they would make and that he discussed with Bowling the possible termination of some employees. Harold, however, could not recall if Bowling ever had a say in a person being fired or terminated (Sec. Mem., Exh. R 9-11). Harold further stated that he did not discuss other personnel matters with Bowling unless it was "really something important" (Id. 11).

Again, I cannot determine if Bowling's involvement on behalf of Southern Mineral in Fire Creek's personnel matters was indicative of operator status. Was he trying to control who was hired and fired? Or, was he simply being asked for and possibly offering an opinion on whether someone he knew was a reliable worker or whether someone should be let go? In addition, what were the "really ... important" personnel matters Harold and Bowling discussed?

TRUE ENERGY

Involvement in Administrative Services

The Secretary states that True Energy provided Fire Creek with the various administrative services indicated above (Sec. Mem., Exh. K, Interrog. 29). The Secretary notes that Harold stated that Fire Creek met monthly with True Energy, Southern Minerals and the other companies mining under contract with

Southern Minerals to discuss the fee for the administrative services (Id., Exh. R 37) and that beginning August 1989, Fire Creek paid True Energy monthly fees for the administrative services (Sec. Mem., Exh. Q 30-31). The last such fee was paid in July 1990 (Id. 120-121).

The Secretary also states that True Energy recommended, procured and paid for liability insurance policies for Fire Creek and other contractor companies and developed recommendations for medical insurance coverage. The Secretary maintains that True Energy's insurance recommendations were always accepted by Fire Creek (Sec. Mem., Exh. Q 24-25, 27, 80, 85). Although St. John stated that the cost of the liability insurance was built into the administrative fee True Energy charged Fire Creek, there came a point after July 1990 when True Energy alone paid for the policies (Id. 85).

I can not find that True Energy's involvement in the administrative aspect of Fire Creek's business is necessarily indicative of True Energy's operator status. It is not unusual for a small to medium size operator to contract for administrative services. It would come as a great surprise for contractors to learn that by providing such services they were subjecting themselves to Mine Act liability for any and all violations arising at a on-site operator's mine.

While, I suppose, it is conceivable that the administrative services provided were used by True Energy to control how mining was carried out or how the mine was operated, I cannot conclude as much on the basis of the present record.

Involvement in Finance

The Secretary asserts that when St. John, as vice president of True Energy, determined that Fire Creek did not have sufficient funds to cover operating expenses, he advanced necessary funds from Southern Minerals account into Fire Creek's account. St. John described True Energy's situation as that of a contractor to Fire Creek. He stated that one of the things True Energy contracted to do was to advance funds secured by Fire Creek's coal production (Id. Exh. Q 101-103, 107).

It is possible that funding an on-site operator might be an indication of actual control over mining operations and over the mine itself, but it does not necessarily follow that such is always the case. In my opinion, there must be evidence that the money actually was used to compel Fire Creek to mine in a manner True Energy dictated or to run the mine as True Energy wanted it run. I can not determine on the basis of the present record if this in fact happened.

Involvement in Engineering

St. John stated in his deposition that from 1990 until January 1991, True Energy provided Fire Creek with surveying to align entries and with spad setting (Sec. Mem., Exh. Q, 33-34). Surveying was done at 5 to 10 day intervals and, according to Harold, True Energy hired engineering personnel to come to the mine twice a week on the average to set spads (Id., Exh. R 49).

Surveying and spad setting frequently are contracted-out by operators. In my opinion, surveying of sight lines and setting of spads does not, in and of itself, make the contractor an operator for all purposes. There must be evidence that the contractor was controlling or intending to control the actual mining operations at the mine itself. I do not find such evidence in the record as it exists to date.

Survey data was plotted on the mine maps (Sec Mem., Exh. K., Interrog. 33). After January 1, 1990, John E. Caffrey, a retired engineer who was on retainer to True Energy, certified these maps for Fire Creek (Id. Exh. Q 58-59). True Energy paid him to certify the maps of August 30, 1990 and October 5, 1990 (Id. 48). The maps were submitted to MSHA as part of the ventilation plan. St. John had no knowledge that anyone from True Energy or Southern Minerals reviewed the maps or the plan. (Id. 51).

As with surveying and spad setting, it is not unusual for an on-site operator to contract-out the certification and preparation of its maps. While it is conceivable that in providing this service a contractor could control the way an on-site operator actually conducted mining operations or controlled the mine itself, I do not find evidence of this

in the record as it exists to date. I cannot conclude that because True Energy provided this service to Fire Creek, it was an operator for all purposes under the Act.

RULING ON THE MOTIONS

Because I cannot find that the undisputed material facts establish Southern Minerals and True Energy exercised such control over mining or the mine itself so as to make either or both statutory operators, the Secretary's motion for partial summary decision is **DENIED**.

Conversely, because I also cannot find, on the basis of the present record, that the material facts establish that Southern Minerals and True Energy did not exercise such control over mining or the mine itself, the Contestants' motion also must be **DENIED**.

Therefore, a hearing on the issue of liability will be necessary. The burden of proof will be on the Secretary. He must establish by substantial evidence of record that Southern Minerals and/or True Energy exercised actual control over the mining operations at the mine, or over the mine itself, or had the power to exercise such control.

CONTESTANTS' OTHER ARGUMENTS

The Contestants argue that even if the Secretary properly cited Southern Minerals and True Energy, the Contestants are entitled to a dismissal of the proceedings because the citations represent a significant departure from past practice. According to the Contestants, rulemaking was required before the Secretary could act (Conts. Mot. 33-38). They further assert that, even if the Secretary could proceed without rulemaking, the cases must be dismissed because the Contestants relied on the Secretary's previous policy not to cite those with "no practical connection to mining operations" (*Id.* 42).

These arguments are rejected. The central question is whether the Contestants were operators as defined by the statute. If they were and, if upon inspection or investigation, the Secretary believed any mandatory health or safety standards had been violated, the Act required they be cited. The Secretary

certainly may proceed by adjudication to test the parameters of his statutory authority, as indeed he has done frequently in the past.

The Contestants point to no official policy enunciated by MSHA upon which they have relied to their detriment. Even were there such a policy, the consequence of their reliance arguably would not be violative of due process. Section 110 of the Act would mitigate significantly the consequences of such reliance by providing that monetary civil penalties arising from citations be ameliorated by the operators' lack of negligence (30 U.S.C. §820).

Finally, because of my conclusions regarding the meaning of section 3(d), I need not reach the Contestants other arguments (Conts. Mot. 43).

NOTICE OF HEARING

The parties are advised that these matters will be called for hearing in Princeton, West Virginia, at 8:30 a.m. on **May 2, 1995**. (A specific site will be designated later.) The issue of the Contestants liability will be decided on the basis of the present record and such additional and specific evidence as the parties shall present showing the Contestants control over the actual mining operations at the Fire Creek No. 1 Mine, over the mine itself, or the Contestants actual authority to exercise such control.

David F. Barbour

David F. Barbour
Administrative Law Judge
703-756-5232

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516,
Arlington, VA 22203 (Certified Mail)

Robert I. Cusick, Esq., Marco M. Rajkovich, Jr., Esq.,
Nyatt, Tarrant & Combs, 1700 Lexington Financial Circle,
Lexington, KY 40507 (Certified Mail)

David Burton, Esq., P. O. Box 5129, 1460 Main Street,
Princeton, WV 24740 (Certified Mail)

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 10, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 95-3-M
Petitioner : A.C. No. 44-06701-05506
v. :
 : Pit #1
MECHANICSVILLE CONCRETE INC., :
Respondent :

ORDER

On February 10, 1995, the Secretary filed a motion to preclude Mechanicsville, Concrete, Inc. (Respondent) from relitigating the issue of whether it and its mine, Pit No. 1, are subject to the jurisdiction of the Commission. The motion is based upon the principle of collateral estoppel.¹

On July 7, 1994, in Secretary v. Mechanicsville Concrete, Inc., 16 FMSHRC 1444 (July 1994), Respondent had raised the defense that it was not subject to MSHA jurisdiction. Judge Arthur Amchan ruled that the Respondent herein and its mines, Pit No. 1 and Branchville Plant, were subject to MSHA jurisdiction.

On August 16, 1994, the Commission denied the Respondent's petition for review of this ruling, but accepted the Respondent's petition for review of other issues, and directed sua sponte for review of other rulings contained in Judge Amchan's decision.

¹In its answer filed in this matter, Respondent asserted, inter-alia, that the Commission does not have jurisdiction over the Respondent or its mine, Pit No. 1, and that the Federal Mine Safety and Health Act of 1977 ("the Act") is unconstitutional as applied to this Respondent.

"Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." U.S v. Mendoza, 464 U.S. 154, 158 (1984), citing Montana v. U.S., 440 U.S. 147, 153 (1979). The rationale for this doctrine was set forth by the Supreme Court in Montana, supra, as follows: "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 440 U.S. at 153-154.

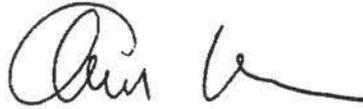
Respondent has already litigated before Judge Amchan the issue of the Act's jurisdiction over it and its mines. Respondent asserts that the mine at issue before Judge Amchan was close to the North Carolina border, whereas the case at bar "deals only with a mine in the geographic center of the state." However, Respondent, in the instant proceeding does not seek to litigate the issue of jurisdiction based upon a set of facts differing in essential part from those presented in the case before Judge Amchan. It is Respondent's position that "the Court can address the legal (sic.) of the continuing viability of Wickard without fact finding and testimony on the jurisdictional issues. . . . Because this case will not involve the relitigation of facts but simply the appropriateness of continuing to apply an unworkable constitutional precedent this is not the kind of case where collateral estoppel is appropriate."

Hence, since Judge Amchan made a decision regarding the jurisdiction of the Act over Respondent and its mines, Respondent is precluded from relitigating this issue before me.

The Secretary's Motion is granted .² IT IS ORDERED that Respondent be precluded from relitigating the issue of whether

²To the extent that Respondents' arguments are inconsistent with this decision, they are rejected for the reasons set forth above.

it is subject to the Act, and that Judge Amchan's decision in this issue is conclusive in the instant proceeding. IT IS FURTHER ORDERED that by March 23, 1995, the parties shall comply with all the terms of the Prehearing Order previously issued on January 23, 1995.



Avram Weisberger
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor,
U.S. Department of Labor, Suite 516, 4015 Wilson Blvd.,
Arlington, VA 22203 (Certified Mail)

Arthur Anthony Lovisi, Esq., Mechanicsville Concrete, Inc.,
33211 Lees Mill Road, Franklin, VA 23851 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-32
Petitioner : A. C. No. 15-16627-03562
: :
v. : No. 2 Darby
JERICOL MINING INCORPORATED, :
Respondent :

DECISION APPROVING PARTIAL SETTLEMENTS
DECISION DISAPPROVING PARTIAL SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements for the sixteen violations in this case. A reduction in the penalties from \$7,723 to \$5,994 is proposed.

The parties propose to settle fifteen of the violations, Citation Nos. 4240494, 4240495, 4470149, 4240496, 4240497, 4240498, 4240499, 4240500, 4482801, 4470154, 4470155, 4470156, 4470157, 4469837 and 4469839 in this case for the originally assessed penalties. I have reviewed these violations in light of the six criteria and determine that the proposed settlements are appropriate.

With respect to the remaining violation the parties propose a reduction in the penalty. Citation No. 4470153 was issued for a violation of 30 C.F.R. § 75.342(b)(2) because the methane monitor on the continuous mining machine was not visible to the person operating 20 to 25 feet behind the machine. According to the parties, the operator's witnesses would challenge the validity of the citation as well as the significant and substantial designation by asserting that the operator was granted a waiver which allowed it to make cuts that were 25 feet deep. At the time the waiver was considered by MSHA, inspectors came to the mine and recommended the waiver be granted and approved the placement of the monitor. The operator would testify that the monitor was in the same place on the miner when the citation was issued as when MSHA inspected the miner for the waiver. The operator would also present testimony that the miner operator could see the monitor from where he was operating the machine. Based on the operator's representations, the parties agree to reduce the penalty from \$1,779 to \$50.

The motion as presented for this violation cannot be approved. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The parties in the instant motion have merely stated the operator's positions with respect to the violation. There is no indication whether the Secretary agrees with the operator's assertions. Nowhere in the settlement motion is there any suggestion that the citation designated as significant and substantial be modified. The penalty amount of \$50 is usually reserved for non-significant and substantial, violations. Under the provisions of the Act, as set forth above, I can only approve a settlement justifiable under the six criteria of section 110(i), supra. Accordingly, the parties must explain why the proposed penalty should be reduced in light of the six criteria. For instance, if the facts indicate a lesser degree of gravity or negligence than first thought, the parties, and most especially, the Solicitor, must say so.

In light of the foregoing, it is ORDERED that the motion for approval of settlements for Citation Nos. 4240494, 4240495, 4470149, 4240496, 4240497, 4240498, 4240499, 4240500, 4482801, 4470154, 4470155, 4470156, 4470157, 4469837 and 4469839 be APPROVED.

It is further ORDERED that the motion for approval of settlement for Citation No. 4470153 be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit appropriate information to support their settlement motion for Citation No. 4470153. Otherwise, this case will be set for hearing.


Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Mr. Jim Baker, General Superintendent, Jericol Mining Inc., General Delivery, Holmes Mill, KY 40843

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-31
Petitioner	:	A. C. No. 15-16627-03561
v.	:	
	:	No. 2 Darby
JERICOL MINING INCORPORATED,	:	
Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENTS DECISION DISAPPROVING PARTIAL SETTLEMENTS ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements for the seven violations in this case. A reduction in the penalties from \$3,411 to \$2,830 is proposed.

The parties propose to settle five of the violations, Citation Nos. 4248716, 4248791, 4487200, 4487825, and 4487826 in this case for the originally assessed penalties. I have reviewed these violations in light of the six criteria and determine that these proposed settlements are appropriate.

With respect to the two remaining violations the parties propose reductions in the penalties.

Citation No. 4487169 was issued for a violation of 30 C.F.R. § 75.202(a) because coal brows were found hanging on the corners of pillars and were not bolted or taken down. The inspector also noted that the brows had been burned to the mine roof and were difficult, if not impossible, to pull down with a slate bar. According to the joint motion filed by the parties, the operator's witnesses would challenge the significant and substantial designation by asserting rock that has been burned to the roof is not generally regarded as loose but as solid stable rock. The operator would also present testimony that the roof conditions in the area were good. Based on the operator's representations, the parties agree to reduce the penalty from \$431 to \$50.

Citation No. 4248792 was issued for a violation of 30 C.F.R. § 75.203(a) because the method of mining had caused a pillar to be cut short of the required size for effective control of the roof and rib. The pillar measured 22 feet on the entry side and should have measured 50 feet. According to the parties, the operator would challenge the significant and substantial designation by presenting evidence that the roof conditions were very

good and that roof support had been installed in accordance with the roof control plan. In addition, the operator would testify that there were no miners working in the area. Based on the operator's representations, the parties agree to reduce the penalty from \$595 to \$395.

The motion as presented for these two violations cannot be approved. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The parties in the instant motion have merely stated the operator's positions with respect to the violations. There is no indication whether the Secretary agrees with the operator's assertions. Nowhere in the settlement motion is there any suggestion that Citation No. 4487169 designated as significant and substantial should be modified. The penalty amount of \$50 for this citation is usually reserved for only non-significant and substantial violations. Under the provisions of the Act, as set forth above, I can only approve a settlement justifiable under the six criteria of section 110(i), supra. Accordingly, the parties must explain why the proposed penalties should be reduced in light of the six criteria. For instance, if the facts indicate a lesser degree of gravity or negligence than first thought, the parties, and most especially, the Solicitor must say so.

In light of the foregoing, it is ORDERED that the motion for approval of settlements for Citation Nos. 4248716, 4248791, 4487200, 4487825, and 4487826 be APPROVED.

It is further ORDERED that the motion for approval of settlements for Citation Nos. 4487169 and 4248792 be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit appropriate information to support their settlement motion for Citation Nos. 4487169 and 4248792. Otherwise, this case will be set for hearing.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Mr. Jim Baker, General Superintendent, Jericol Mining Inc., General Delivery, Holmes Mill, KY 40843

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-64-M
Petitioner	:	A. C. No. 45-02518-05517
	:	
v.	:	Harbor Rock Portable
HARBOR ROCK, INCORPORATED,	:	
Respondent	:	

DECISION DISAPPROVING SETTLEMENT ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements for the two violations in this case. A reduction in the penalties from \$3,000 to \$959 is proposed.

Citation No. 4341585 was issued for a violation of Section 103(a) of the Mine Act, 30 U.S.C. § 813(a), because the operator's president and vice-president threatened the inspector and ordered him off mine property. The originally assessed penalty was \$1,000 and the proposed settlement is \$320.

Citation No. 4341658 was issued as a 104(d)(1) citation for a violation of 30 C.F.R. § 56.11012 because a railing, barrier or cover was not in place at the jaw crusher which was close to the access into the crusher control booth. The originally assessed penalty was \$2,000 and the proposed settlement is \$639.

The motion cannot be approved. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The parties in the instant motion have offered absolutely no explanation for the large reductions they recommend. Both

violations are egregious and serious and according to the parties themselves, negligence is high. The proposed penalty reductions are very substantial. To obtain a settlement of the type proposed, the parties must put forward persuasive arguments. I can only approve a settlement justifiable under the six criteria of section 110(i), supra. Accordingly, the parties must explain why the proposed penalties should be reduced in light of the six criteria or the case will go to hearing.

In light of the foregoing, it is ORDERED that the motion for approval of settlement be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit appropriate information to support their motion for settlement. Otherwise, this case will be set for further proceedings.



Paul Merlin
Chief Administrative Law Judge

Distribution:

William W. Kates, Esq., Office of the Solicitor, U. S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Mr. Tim Bond, Secretary, Harbor Rock Inc., Box 246, South Bend, WA 98586

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 31, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1274-D
ON BEHALF OF CHARLES H.	:	PIKE CD 94-16
DIXON,	:	
	:	
Complainant	:	
v.	:	Pontiki No. 2 Mine
	:	Mine ID 15-09571
PONTIKI COAL CORPORATION,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS ON REMAINING ISSUES

The Order Granting Partial Dismissal issued February 6, 1995, (amended on March 10, 1995), left certain issues to be resolved following limited evidentiary hearings. Hearings were thereafter held on March 9, 1995. For the reasons set forth herein, those issues are now resolved in favor of the complainant.

One of the issues remaining from Respondent's Motion to Dismiss was its claim that the Secretary's complaint in this case was untimely filed. It is undisputed that on April 26, 1994, Charles H. Dixon filed with the Mine Safety and Health Administration (MSHA) a complaint alleging discriminatory acts from around March 11, 1994, through April 15, 1994. This complaint was received by the Secretary on April 26, 1994. Accordingly, the 90 days within which the Secretary must notify the complainant of his determination whether a violation has occurred, expired on July 25, 1994. Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act."

It is further undisputed that the Secretary did not until September 2, 1994, file its complaint on behalf of Dixon with this Commission. Moreover, it was not until September 15, 1994, that the Secretary actually mailed to Dixon, with copies to Respondent, a copy of the Secretary's written determination that Dixon had been discriminated against and stating therein that a complaint had already been filed with the Commission on Dixon's behalf. Thus, the complaint in this case which was not filed with this Commission until September 2, 1994, was filed 129 days

after Dixon's initial complaint was received by the Secretary. Furthermore, the Secretary's written determination issued in accordance with Section 105(c)(3) of the Act on September 15, 1995, was issued some 142 days after the initial complaint was received by the Secretary.

It is apparently on the basis of these delays that the Respondent seeks dismissal for untimely filing. However, as the Respondent notes, this Commission restated in *Gilbert v. Sandy Fork Mining Company*, 9 FMSHRC 1317 (1987), rev'd on other grounds, 866 F2d 1433 (D.C. Cir 1989), that the 90 day deadline for completion of the Secretary's investigation and commencement of a miner's discrimination complaint is not jurisdictional. The Commission noted that this was the case because a "complainant should not be prejudiced because of the failure of the government to meet its time obligations".

In general, when dealing with late-filings of a few days or even a few months, the Commission has determined that the time limits in Sections 105(c)(2) and (3) are not jurisdictional and that the failure to meet them should not result in dismissal absent a showing of material legal prejudice. See, e.g., *Secretary on behalf of Hale v 4 - A Coal Company*, 8 FMSHRC 905, (June 1986).

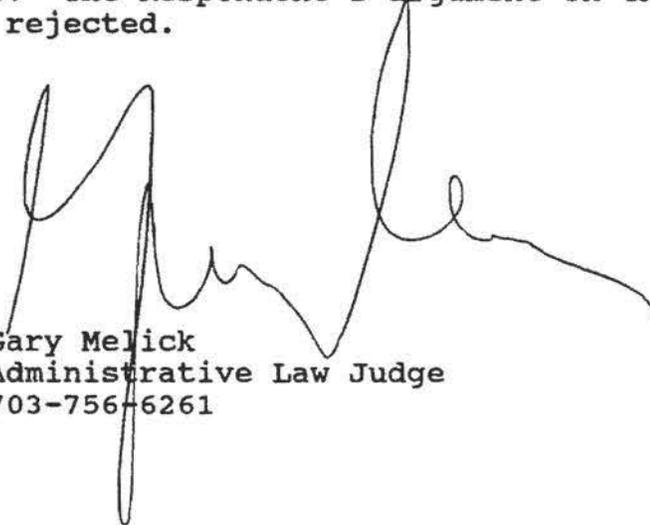
The delay in this case of only a few days is indeed quite limited and Respondent has failed to show any legal prejudice caused by the delay. In addition, I find, based on the affidavit of Associate Regional Solicitor, Ralph York, that there was some justification for the delay (Government Hearing Exhibit No. 1). Accordingly, I find no basis for dismissal because of untimely filing.

The next unresolved issue is Respondent's claim that Mr. Dixon's Certificate of Representation, received by Pontiki on April 15, 1994, was defective and not legally binding because it failed to comply with the Secretary's regulations at 30 C.F.R. § 40.3(a). The cited regulation specifically provides as follows:

Section 40.3(a) - The following information shall be filed by a representative of miners with the appropriate district manager, with copies to the operators of the affected mines. This information shall be kept current: (1) the name, address and telephone of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

The certification at issue in this case was submitted at hearing (Government Hearing Exhibit No. 3) and, contrary to Respondent's allegations, clearly sets forth the "title" or "position" of Mr. Dixon as "international representative". Furthermore, a telephone number is provided on the face of the certificate which purports to be that of Dixon. The regulation does not require the representative to provide a home telephone number as Respondent seems to suggest. Under the circumstances, Respondent's argument herein is clearly without merit.

Finally, Respondent has argued that the Secretary failed to comply with Commission Rule 44(a), 29 C.F.R. § 2700.44(a), in that the Secretary's amended complaint failed to include "a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in Section 110(i) of the Act". Whether or not the Secretary's amended complaint failed to comply with Commission Rule 44(a) is now moot however since the Secretary has, in fact, filed a second amended complaint meeting the requirements of the Rule. The Respondent's argument on this issue is, accordingly, also rejected.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004-2595

/jff